

**ABA Model Rules and the Business Lawyer**  
From the Committee on Professional Responsibility,  
William Freivogel, Chair

## **I. History**

The Model Rules of Professional Conduct of the American Bar Association (“ABA”) (“Model Rules”) are what the name implies, a model for state rules governing lawyer conduct. The ABA adopted the first standard, the Canons of Professional Ethics, in 1908. In 1969 the ABA replaced the Canons with the Model Code of Professional Responsibility (“Model Code”). A vast majority state and federal jurisdictions adopted the Model Code. The ABA adopted the current Model Rules in 1983. Almost all jurisdictions have adopted a version of the Model Rules. Moreover, because the ABA significantly changed the Model Rules several years ago (see Part III following), most states have changed their rules or are in the process of doing so.

## **II. Adoption Procedure**

The ABA House of Delegates makes model Rule changes. The staff at the ABA Center for Professional Responsibility conducts much of the groundwork in developing rules and changes to them.

The states vary in how they adopt lawyer regulatory rules. In most cases the state’s highest court will adopt the rules and make changes to them based upon recommendations of bar associations and other groups.

Federal courts and agencies also have standards governing lawyer conduct. Typically, federal district courts adopt the rules of the state in which they sit. Federal agencies that have lawyer conduct codes include the Internal Revenue Service, the United States Patent and Trademark Office, and the Securities and Exchange Commission.

## **III. Recent Major Changes in the Model Rules**

In 1997 the ABA created the Commission on Evaluation of the Rules of Professional Conduct, sometimes referred to as the “Ethics 2000” Commission. The Commission revisited all the Model Rules, and made numerous recommendations for changes in, and additions to, the Rules and the Comments. The ABA House of Delegates adopted most of the recommendations at its meetings in 2001 and 2002.

In 2000 the ABA created the Commission on Multijurisdictional Practice. In 2002 the ABA House of Delegates, based upon the work of that Commission, adopted amendments to Rules 5.5 and 8.5.

In 2002, as a result of the Enron scandal, and similar other scandals, the ABA created the Task Force on Corporate Responsibility. As a result of the work of that Task Force the

ABA House of Delegates, in 2003, adopted changes to Rules 1.6 and 1.13, which are discussed below.

Many of the activities of the two Commissions and the Task Force were conducted in tandem. Because of that the following discussion will refer to the resulting adoptions of the ABA House of Delegates as “the 2001-2003 changes.” Many states are re-evaluating their ethics rules in light of the 2001-2003 changes.

## **IV. Rules of Particular Interest to Business Lawyers**

### **Rules Relating to Client Fraud**

The purpose of this brief discussion is to show the impact of the Model Rule 2001-2003 changes on crimes, frauds, and other corporate wrongdoing. For brevity we will refer to all of this as “fraud.”

*Assisting client fraud.* Frauds within corporations received a lot of attention in the Enron meltdown era. However, these phenomena are not new. And, they continue. The ethics rules play a role in the fraud context. Model Rule 1.2(d) states that a lawyer may not assist a client in the commission of a crime or fraud. All states have such a rule. Model Rule 1.16(a)(1) provides that a lawyer must withdraw from a representation if continuing would violate any ethics rule. Thus, if a lawyer’s conduct would assist a client in the commission of a crime or fraud, the lawyer must withdraw. All states have such a rule.

*Revealing client misconduct.* Model Rule 1.6 requires a lawyer to maintain client confidences. From 1983 until 2003, the Model Rule only allowed a lawyer to reveal client misconduct to others if the client threatened death or serious bodily injury to others. However, most states departed from the Model Rule and allowed lawyers to reveal client frauds if such activities threatened, or had accomplished, serious financial injury to others. In a few states’ versions of Model Rule 1.6, reporting client fraud was, and remains, mandatory. An often-overlooked rule is Model Rule 4.1(b), which provides as follows:

In the course of representing a client a lawyer shall not knowingly: . . . (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

To illustrate, assume a lawyer is in a negotiation and discovers that his client is lying about an important aspect of the deal. As we have seen, the lawyer cannot continue. He must withdraw. May or must the lawyer reveal the lie to the other side? In the minority of states that adopted the ABA version of Rule 1.6 the lawyer’s lips would be sealed by the rule. However, a majority of states adopted a version of Rule 1.6 that permitted the lawyer to reveal client fraud. Look at the quoted portion of Rule 4.1 and the phrase, “unless disclosure is prohibited by Rule 1.6.” In a majority of states, the lawyer is *not prohibited* from make the disclosure by Rule 1.6, and therefore, would be *required* to inform the other side of the lie under Rule 4.1(b). In 2003, as a result of the work of the

ABA Task Force on Corporate Responsibility, the ABA House of Delegates added provisions to Model Rule 1.6 in line with the majority approach to allow lawyers to reveal frauds about to be committed by clients and to rectify past frauds.

### **Conflicts of Interest**

The principal rule regarding conflicts is Model Rule 1.7. While the 2001-2003 changes amended its structure, they did not alter its substance. There were notable amendments to the Comment of particular interest to business lawyers.

*Corporate families.* New Comment [34] adopts the majority view that representation of one member of a corporate family does not necessarily mean that the lawyer represents all members of the family. Thus, a lawyer for a parent company might be able to sue a subsidiary. The circumstances of a particular representation may mean that the lawyer represents more than one member of the corporate family. Courts frequently look at the closeness of these corporate family members. For example, if both entities use the same law department and operate out of the same premises, a court might well hold they are one client for conflict purposes. Comment [34] provides that the lawyer and the corporate client can agree upon whom the lawyer represents.

*Waivers confirmed in writing.* The original version of Model Rule 1.7 had provisions for waiver of conflicts but no requirement that the waivers be in writing. Nevertheless, several states required that conflict waivers be in writing. In 2001, the ABA House of Delegates added a provision to Model Rule 1.7 that waivers be “confirmed in writing.” Comment [20] says that the writing can be *from* the client or can be a writing *to* the client confirming an oral conversation about the waiver. The writing must occur at the time of the waiver or within a “reasonable” time thereafter.

*Advance waivers.* Comment [22] adopts the majority view that a client can agree in advance that the lawyer may be adverse to the client on matters unrelated to the representation. As to unsophisticated clients, the waiver must be specific as to what types of conflicts are being waived. Where, however, the client is an “experienced user of legal services,” an open-ended waiver is more likely to succeed, especially if another lawyer advises the client on the waiver. In the corporate context, obviously, this could be an in-house lawyer.

*Lawyers changing firms and screening.* This is one of the few areas where the ABA House of Delegates, in 2001, rejected a recommendation of the Ethics 2000 Commission. Suppose a lawyer changes firms while there is litigation pending between her old firm and her new firm. Pre-2001, Rule 1.9(b) provided that if the lawyer comes to the new firm with confidences of the client of the old firm that are “material to the matter,” the new firm is disqualified. The new firm could avoid this result by getting a waiver from the client of the old firm. By implication, if the confidences are not “material” or the moving lawyer has no information whatever, there is no problem. Also by implication, the new law firm would not have to erect a screen shielding the new lawyer from those lawyers working on the case. Roughly 20% of the states had adopted their own screening

provisions for lawyers who moved and had information that *was* material. The Ethics 2000 Commission recommended a similar provision for the Model Rules, but it was rejected in 2001. Thus, current Rule 1.9(b) remains the same as before, and the new firm will have to get a waiver from the client of the old firm if the lawyer comes with “material” confidential information. At the February 2009 meeting, the ABA House of Delegates will consider a proposal to add a screening provision.

*Lawyers serving on boards of clients.* Pre-2001, Model Rule 1.7 had a comment (Comment [14]) on lawyers serving on boards. In 2001, the ABA House of Delegates added language to what is now Comment [35] that the lawyer should remind other board members about the fact that the attorney-client privilege might not apply to some communications, that the lawyer may have to recuse herself from voting on some issues, and that the lawyer and the lawyer’s firm might have to decline certain representations.

### **Duties to Prospective Client (“Beauty Contests”)**

The ABA House of Delegates in the 2001-2003 changes, added model Rule 1.18. It codifies the majority rule that a lawyer has the same duty of confidentiality to a prospective client as the lawyer does to an actual client. This is so even if the prospective client never becomes an actual client. Suppose in-house counsel conducts a “beauty contest” to identify a law firm to handle a major piece of litigation, interviews Law Firms A, B, and C, and picks Law Firm A. Later, Law Firm B shows up on the other side. Law Firm B could be conflicted out if it learned too much information from in-house counsel. For that reason, alert law firms are getting in-house counsel to agree that during such interviews in-house counsel will not disclose the company’s confidences and that the interview would not provide a basis for later disqualification if the interviewed firm shows up on the other side. In the event a lawyer does receive confidential information in an early interview, Rule 1.18(d)(2)(i) provides that the lawyer’s law firm *may not* be disqualified if the interviewed lawyer is screened from the matter.

### **Contacts with Current or Former Corporate Employees**

Rule 4.2 (“Communication with Person Represented by Counsel”) provides that a lawyer may not communicate with a represented party without the consent of the other party’s lawyer. The rule also governs the extent to which lawyers adverse to corporations could communicate with current or former corporate employees. However, because the rule and comments historically were not clear as to organizational constituents, the case law has evolved unevenly. In the 2001-2003 changes, the ABA House of Delegates, in Comment [7], clarified somewhat the ability of adverse lawyers to communicate with corporate constituents. As to former employees there is almost no limit. As to current employees, the lawyer may not communicate with certain supervisory personnel. Both in the case of former employees and current employees, the lawyer may not “use methods of obtaining evidence that violate the legal rights of the organization.” Thus, courts have held that lawyers may not ask current or former employees about the organization’s privileged communications to which those employees were privy. *See Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 868 N.E.2d 208, 210-11 (N.Y. 2007). The ABA Standing

Committee on Ethics and Professional Responsibility has recently held that an opposing lawyer may communicate with in-house counsel without the consent of outside counsel. ABA Ethics Op. 06-443.

### **Unauthorized Practice of Law**

Suppose an in-house lawyer is admitted in New York and has been transferred from New York to another state. Must that lawyer become admitted in the new state? The states' approach to this has been uneven. The American Law Institute's Restatement (Third) of the Law Governing Lawyers provides a comment that says the lawyer need not be admitted in the new states. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3, cmt. f. The ABA House of Delegates in its 2001-2003 changes to Model Rule 5.5 (specifically, the addition of (d)(1)) provided likewise.