

◀ *Pennsylvania's Rules of Professional Conduct, 2005* ▶

Thursday, December 9, 2004



Course Planners - Kevin M. French, John E. Iole
Faculty – Lawrence J. Fox, Michael L. Temin,
Laurel S. Terry, Thomas G. Wilkinson

1

The New Pennsylvania Rules of Professional Conduct

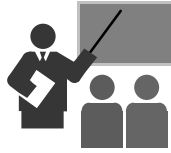
Pennsylvania Bar Institute

December 2004

© Laurel Terry (LTerry@psu.edu)

Permission to reproduce granted
provided this notice is included

2



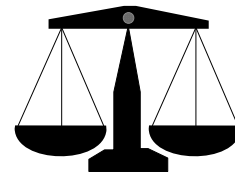
Summary of Talk

- Introduction – history of legal ethics rules
- The ABA Ethics 2000 Commission
- The New PA Rules of Professional Conduct
- Resources
- A “Top 10” List of PA Rule Changes

3

Regulation of US Lawyers

- State-based regulatory system
 - Confirmed in MJP Recommendation #1
- The ABA’s historic roles:
 - drafting model ethics rules
 - accreditation
- Disciplinary action is relatively rare
- But ethics rules sometimes are used in malpractice and disqualification cases



4

Chronology of Ethics Activity

- 1908: ABA “Canons of Legal Ethics”
- 1969: ABA “Model Code”
 - Almost universally followed (49 states)
- 1983: ABA “Model Rules”
 - 40 States adopted, but with wide variations
- 1986-1999: The ALI’s Restatement Project
- Ethics 2000: revises the ABA Model Rules
 - **Feb. 2002**: ABA adopts most Ethics 2000 rules
 - **Aug. 2002**: ABA adopts MJP rules 5.5 & 8.5
 - **Aug. 2003**: post-Enron fixes Rules 1.6 and 1.13

5

The Ethics 2000 Commission

- Created in 1997
- Chaired by Delaware Chief Justice Veasey
- Elaborate process
 - 8 public hearings
 - 25 committee meetings
 - Up to nine drafts of rules
- Extensive academic and lawyer participation

6

The Ethics 2000 Changes

- Goal:
 - Maximum review, but minimal revision
- What Types of Changes Occurred?
 - Significant policy changes
(e.g., confidentiality)
 - Changes that address new problems
(e.g., the Internet)
 - Changes to address drafting ambiguities
(e.g., a major reworking of the conflicts rule) 7

Implementation Efforts



- ABA Joint Committee on Lawyer Regulation
- Chaired by Delaware Justice Holland
- Conference of Chief Justices is pushing for uniformity as the default
- Committee webpage shows status

Ethics 2000 in Pennsylvania



- Role of the PBA Ethics Committee
- PA adopted rules in Aug. 04, effective 1/05
- PA followed most Ethics 2000 recommendations

9

Resources



- PA Disciplinary Board Website,
<http://www.padisciplinaryboard.org>
- PBA Pennsylvania Ethics Handbook
(a new edition is coming soon)
- PA RPC Rules Pamphlet is coming soon
- Ethics 2000 Changes & Reporters' Notes are on
the ABA CPR web, <http://www.abanet.org/cpr/ethics2k.html>
- ABA 5th Annotated Model Rules,
<http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5610171>
- ABA Joint Committee Webpage has state status
charts, with URL links,
http://www.abanet.org/cpr/jclr/jclr_home.html

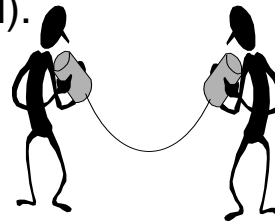
10

Prof. Terry's "TOP 10" List of Changes to the Pennsylvania Rules of Professional Conduct

11

Change Number 10

- Solicitation: The PA Rules retain the prohibition on in-person solicitation.
- The comment to Model Rule 7.3 now prohibits real-time Internet chat.
- BUT... a lawyer may now solicit other lawyers (in-house counsel).



12

Change Number 9

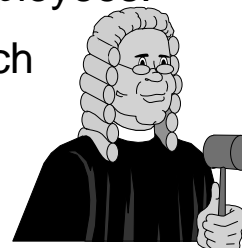
- Errant Fax: You have to tell the sender you got an errant fax; the new comment to Rule 4.4 does not say that there is anything wrong with using the information or reading it (it leaves this to substantive law).



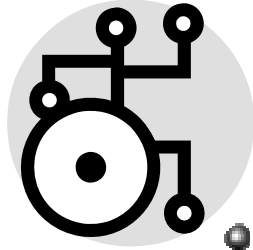
13

Change Number 8

- Rule 4.2's "No Contact" Provision: This rule now allows you to ask the court for permission to contact a represented person if you think it's important.
- The comment now states that consent is not needed to talk to former employees.
- This rule was the subject of much comment by the Conference of Chief Justices.



Change 7: Client With Diminished Capacity



- PA adopted the ABA version of Rule 1.14
- This rule provides much more guidance on dealing with impaired clients

15

Change 6: Third-Party Neutrals

- PA adopted Rule 2.4
- This new rule sets forth the obligations of lawyers acting as neutrals
- It requires disclosure that a lawyer is not representing the parties to the proceeding
- The rule cross-references the conflicts rules in Rule 1.12



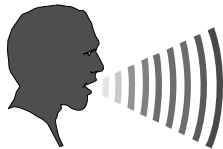
16

Change Number 5

- Sex with Clients: Model Rule 1.8(j) is a new “[no] sex with clients” rule. The comment explains how to apply this rule to corporate clients.



17



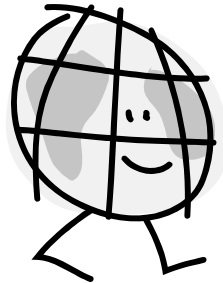
Change 4: Confidentiality Exceptions

- Disclosure allowed to prevent death or serious bodily harm (no criminal act needed)
- Added an exception to allow an attorney to seek advice about the ethics rules
- Retained PA’s financial fraud rule; post-Enron, the ABA rule is now similar

18

Change Number 3

- UPL: If you are a national expert, you can now travel all over without having to get admitted. Rule 5.5 also has safe harbors for corporate counsel and for litigation-related activities.



19

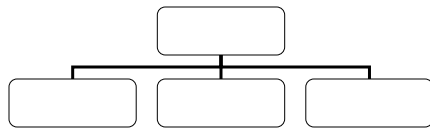
Change 2: Conflicts of Interest

- The structure of the rule is completely different (and more user-friendly)
- The substance is primarily the same
- Unlike the ABA, PA refused to require that conflict waivers be confirmed in writing.
- Beware: PA is one of 3 states (of 29) whose rule or proposal omits the written waiver requirement



20

Change 1: Duty to Supervise



- Rule 5.1 now **REQUIRES** partners and supervisors to have SYSTEMS in place to ensure ethical compliance
- Rule 5.1 also makes supervisor lawyers responsible for junior lawyers' ethics violations that a partner orders, ratifies or could have mitigated

21



Other Provisions of Interest

- New Rule 1.18 applies to “Prospective Clients” – this rule was recently approved by the Supreme Court - but located separately
- Added a “Terminology” Section
 - Definitions include: screened, informed consent, fraud, writing

22

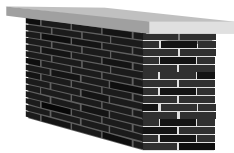
Non-Change Number 1

- Discipline: The Ethics 2000 Commission originally proposed a rule change to allow law firm discipline, but later withdrew this suggestion. PA did not adopt this idea, although NY and NJ make law firms subject to discipline.



23

Non-Change Number 2



- Screening: PA continued its rule that allows screening of conflicts in laterally-moving lawyers.
- The ABA Model Rule (and most states) continue to say that you cannot have such screens.

24

Non-Change Number 3

- **Fee Agreements:** PA Rule 1.5 still requires all fee agreements for new clients to be in writing.



- **The ABA Rule:** doesn't require a writing, but unlike PA, it requires communication about EXPENSES and the SCOPE OF ENGAGEMENT

25

Non-Change Number 4

- Post-Enron, the ABA revised Rule 1.13 regarding corporate counsel
- The ABA rule now makes reporting up presumptively mandatory
- PA has not adopted the new version of Rule 1.13

26



Conclusion

- Ethics 2000 included some significant changes
- There may be more uniformity now than there was with the 1983 MRPC
- Pennsylvania has adopted most of the Ethics 2000 changes