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

The New Pennsylvania Rules of Professional Conduct

Pennsylvania Bar Institute
December 2004
© Laurel Terry (LTerry@psu.edu)
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

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
Chronology of Ethics Activity

- 1908: ABA “Canons of Legal Ethics”
  - 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

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
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)

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

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 Joint Committee Webpage has state status charts, with URL links, http://www.abanet.org/cpr/jclr/jclr_home.html
Prof. Terry’s “TOP 10” List of Changes to the Pennsylvania Rules of Professional Conduct

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).
**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).

![Fax Image]

**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

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
**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.

**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
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.

---

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
Change 1: Duty to Supervise

- Rule 5.1 now REQUIRES partners and supervisors to have \textit{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.

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.
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.

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.
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.

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.
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