By Martin Cole

ABA Ethics 20/20: First Results

At its annual convention this past August in Chicago, the American Bar Association (ABA) House of Delegates approved the first set of recommendations submitted by the Ethics 20/20 Commission.[1] The approved changes are relatively minor, certainly when compared to much of the hype that surrounded the commission's creation in 2009.

If you don't recall, the ABA established the Ethics 20/20 commission to review the ABA Model Rules of Professional Conduct in the context of advances in technology and global legal practice developments, including cross-border practice.[2] Regular periodic reviews of the Model Rules have been a task of ABA commissions since the 1970s, but rarely has such a commission been given such a narrow focus to their work. Following almost three years of study and submissions from interested individuals and groups, four recommendations for change were presented and approved without much opposition, while two more were approved despite some stated disagreement.

Lawyer Mobility

Perhaps the most controversial amendment is to Rule 1.6 (Confidentiality) of the Model Rules of Professional Conduct, which creates an additional exception to the confidentiality requirement that will allow disclosure of otherwise confidential information without client consent that is reasonably necessary "to detect and resolve conflicts of interest arising from the lawyer's change of employment ... if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." The drafters of the amendment indicate that it merely codifies what is in fact a necessary existing practice. Lawyer mobility and the concern over conflicts of interest is an important issue, especially for midsized to large law firms, whenever lateral hires are contemplated. The recent demise of several such law firms in Minnesota, and the resultant realignment of their partners and associates, also helps indicate why clarity on this point was considered necessary.

MARTIN COLE is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 25 years.

When lawyers join a new firm, the possibility of a disqualifying conflict of interest for the hiring firm is very real, since conflicts will be imputed to all members of the firm if a new hire has significant confidential information obtained at the first firm related to a matter in which the hiring firm also is involved.[3] Although some conflicts may be waivable and some subject to screening provisions, disastrous consequences also can occur if proper steps are not taken.[4]

To avoid such situations, firms must be able to inquire about clients being represented by a prospective hire and her firm, and the prospective hire must be able to make such disclosures so that the hiring firm can fairly evaluate whether there are any conflicts, or too many, or whether reasonable steps are available to avoid disqualifications. These considerations can multiply if several lawyers are being considered to be added as a group. Most everyone before the ABA House of Delegates seems to have agreed that disclosures of some such information must be made as part of the "vetting" process, and further to have recognized that such disclosures must be already happening, even if the rule has been unclear.

Indeed, Minnesota may be a rare state where such disclosures are already authorized more than just implicitly. Our Rule 1.6(b)(2) authorizes disclosure without client consent of information that is not protected by attorney-client privilege, that the client has not requested be held inviolate, and if the lawyer reasonably believes the disclosure would not be embarrassing or detrimental to the client. This section is not contained in the ABA Model Rule and may allow lateral hire disclosures.

The new Comment to the Model Rule 1.6 may be a still clearer statement of one's ability to make such disclosures, as it states,

> ... lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated.

The Comment also lists some situations where even this level of disclosure may be prohibited—confidential takeovers of companies, a potential divorce not yet disclosed to the spouse, etc.

Where disagreement ensued was over the issue of client consent. Is the consent of each client whose identity is to be disclosed (perhaps together with some indication of the nature of the representation) required before disclosure? And if so, does that also mean that any attorney considering departure from his present firm must inform the firm as part of the process of securing client consent? Several legal experts argued that consent is or should be required, despite the obvious career difficulties it could create for many lawyers, and the possible logistical nightmare for a high-volume practice. Others argued that disclosure without client consent is the current norm and in fact the better practical approach.

Ultimately, I believe that clients and the profession both benefit by not unduly hampering lawyer mobility. In any event, the motion to require client notification and consent failed, and the proposed amendment to Rule 1.6 was approved. Keep in mind, however, that the amendment is only to the Model Rule at this time. Just like any amendment to the ABA Model Rules, this one has no effect in Minnesota until it is adopted by our supreme court and incorporated into the Minnesota Rules of Professional Conduct (MRPC), an outcome which would only follow review by the MSBA, the Lawyers Board, and likely after a comment period.

The Other Proposals

The other adopted amendments deal primarily with the influence of technology and related changes to the profession. For example, the term "e-mail" in the definition section of the Model Rules is changed to "electronic communications," reflecting the advances in text messaging and website submissions that didn't exist when the Model Rules were first drafted. Keeping the rule language abreast of such changes is of course one of the very reasons the committee was created.

Other related changes, again frequently to a Comment to a Rule rather than the Rule text itself, include an amendment to Rule 4.4(b), which until now has set out a lawyer's duty if she received an inadvertently sent *document*. That term was amended to now say document "or electronically stored information." Perhaps not a significant change, but consistent with the committee's mission to make the rules relevant in light of technology, and perhaps to keep them relevant into the foreseeable future. Other areas of change include the Comment to Rule 1.1 (Competence), which adds that a competent lawyer should keep abreast of changes in the law and its practice, "including the benefits and risks associated with relevant technology." Another revision adds various electronic media to the Comments of Rule 7.2, setting out permitted forms of lawyer advertising.

What's next? The commission has begun circulating additional proposals for comment and likely submission to the ABA House of Delegates next year. In particular, revisions to Rule 5.5 on unauthorized practice and multijurisdictional practice will be followed closely by many national and international law firms. Two revisions, albeit to the Model Rules for Admission or Practice Pending Admission, were a part of the current adopted changes, generally recommending reduction in the length of practice a lawyer need have before being admitted on motion into another jurisdiction.

It seems as though the first round of revisions to come out of the ABA Ethics 20/20 Commission will have little impact here in Minnesota in the short-term future. Although the MSBA and Lawyers Board will no doubt review the proposals, it is unclear whether revisions will be recommended, especially since the court has not been inclined to amend unadopted Comments to the Minnesota Rules. ▲

Notes

The adopted changes can be found at *http://tinyurl.com/3op6tx3*.

[2] For a Minnesota background perspective, *see*, Gernander, "20/20 Vision," *Bench & Bar of Minnesota*, January 2010.

[3] Rules 1.9(b), 1.10(a) – (e), MRPC.

[4] For an example, *see*, *Lennartson v. Anoka-Hennepin Independent School District No. 11*, 662 N.W. 2d 125 (Minn. 2003).