

## 20/20 VISION

By  
Kent A. Gernander, Chair  
Lawyers Professional Responsibility Board

Reprinted from *Bench & Bar of Minnesota* (January 2010)

In August 2009 the American Bar Association initiated yet another “thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation,” this time “in the context of advances in technology and global legal practice developments.” A Commission on Ethics 20/20 is charged with this review. The commission has stated that the trends in technology and globalization raise “serious questions about whether existing ethical rules and regulatory structures adequately address the realities and challenges of 21st Century law practice.”[Ftn 1](#)

One assumes that such questions are not raised idly: the belief exists, it may be inferred, that existing ethical rules constrain adaptation of legal practice to advances in technology and globalization.

But existing rules and structures have not been without recent critical examination. The ABA Ethics 2000 (E2K) Commission undertook “a comprehensive evaluation of the Model Rules of Professional Conduct.” It considered, among other things, “new issues and questions raised by the influence that technological developments are having on the delivery of legal services,” and the “changing organization and structure of modern law practice.”[Ftn 2](#) The E2K Commission concluded that “fundamentally the Model Rules work”; its recommendations:

- a. retained the basic architecture of the Rules;
- b. maintained core values;
- c. did not propose radical changes or overhaul the Rules; and
- d. decided not to add best practice or professionalism concepts to the Rules.

The commission’s recommendations were largely approved by the ABA.

The ABA Commission on Multijurisdictional Practice (MJP), created in 2000, was charged to study “the application of current ethics and bar admission rules to the multijurisdictional practice of law,”

including “international issues related to multijurisdictional practice in the United States.”[Ftn 3](#) This commission recommended changes to Model Rules 5.5 and 8.5 to facilitate nonsystematic practice within a jurisdiction by lawyers admitted to practice in other jurisdictions.

The ABA Task Force on Corporate Responsibility, created in 2002, reviewed and recommended changes in Model Rules dealing with confidentiality and organizational clients.[Ftn 4](#)

The ABA Commission on Multidisciplinary Practice (MDP), appointed in 1998, was initially charged with examining the provision of legal services by accounting firms. After study, it recommended that lawyers be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services.[Ftn 5](#) This recommendation met with resistance and eventual rejection by the ABA House of Delegates, which adopted a resolution affirming the importance of retaining the core values of the profession, including loyalty, independence of judgment, confidentiality, and avoidance of conflicts.[Ftn 6](#)

Minnesota undertook a lengthy and careful analysis of each of the ABA recommendations, resulting in eventual adoption of substantial changes to the Rules of Professional Conduct.

### **Minnesota Reviews**

The Minnesota State Bar Association appointed a task force to examine MDP issues after the initial report of the ABA Commission.[Ftn 7](#) The task force recommended changes to Rules 1.10 and 5.4 that would have permitted lawyers to form entities to engage in multidisciplinary practice under limited circumstances. These recommendations were approved by the MSBA General Assembly after spirited debate, during which MSBA President Wood Foster Jr. observed: “If you haven’t changed your mind several times during this discussion, you haven’t been paying attention.” After the ABA rejected its commission’s recommendations, the MSBA petition was denied by the Minnesota Supreme Court.[Ftn 8](#)

The MSBA appointed another task force to review the ABA E2K recommendations, and its Rules of Professional Conduct Committee considered the recommendations of the MJP and Corporate Responsibility commissions. The work of these committees resulted in MSBA petitions to amend the Rules of Professional Conduct, which were largely granted by the Supreme Court.[Ftn 9](#) This resulted in “the most extensive amendments in the 20-year history of the Minnesota Rules of Professional Conduct ... codify[ing] two decades of developments in case law, bar opinion, and treatises dealing with attorney ethics.”[Ftn 10](#)

In light of these critical examinations, it is disingenuous to suggest that the first decade of this century has wrought changes making current ethics rules and regulatory structures inadequate. The 20/20 Commission cites known advances in technology (“the proliferation of personal computing, e-mail, ‘smart-phone’ technology, enhanced personal digital assistants, and the internet”), and it envisions “a potential new or second internet as well as technologies that cannot now be fully anticipated.” These developments have not been unnoticed by ethics regulators and commentators; they have been and will continue to be

considered in the context of current rules.

It is in the commission's discussion of globalization that the agenda becomes clearer. Explaining the impacts on lawyers' relationships, the commission observes that "U.S. lawyers and law firms are engaged in efforts to increase their access to the legal services markets of other countries, while lawyers from other countries are seeking increased access to the U.S. legal services market. This market-driven approach is reflected in several issues identified by the commission for its consideration. They include:

- Admission of U.S. lawyers to practice in other countries;
- Admission of foreign lawyers to practice in the United States;
- State-based national licensure of lawyers;
- Outsourcing legal work;
- Conflicts and confidentiality in international practice;
- Alternative business structures, including multidisciplinary practice and nonlawyer investment and management of law firms;
- Law firm regulation and discipline.

This is a revisitation of MDP and MJP, with a bias driven by the practitioners of "Big Law"—a term recognized by the commission and contrasted by it with "individual, quintessentially local practice (*e.g.*, criminal defense, wills, and matrimonial law)."

The issues raised by the commission will continue to be debated, as they should be. However, to paraphrase President Eisenhower's Farewell Address, "we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the ... [Big Law] Complex. The potential for the disastrous rise of misplaced power exists and will persist." The potential also exists for economic interests to overshadow professional values and client interests.

### **Reflections**

This month is a time of change in the composition of the Lawyers Board. Four board members have completed their terms of appointment: Lynn Hummel, who has been a panel chair; Mary Medved, who has been staff liaison and a member of the Executive Committee; Vince Thomas, who has been vice chair; and I. Judith Rush has been appointed to succeed me as chair. Judie is a St. Paul lawyer whose practice includes professional responsibility advice and representation. She teaches ethics at Hamline University School of Law, writes and lectures frequently on ethics topics, and has been a member and vice chair of the board. She is well-known and highly regarded in the legal community for a variety of bar activities, including leadership in Lawyers Concerned for Lawyers. Other new members are Steven Bolluyt, an Eagan police

sergeant, Christopher Cain, a Mankato assistant city attorney, and Kenneth Engel, a Minneapolis lawyer and 4th District Ethics Committee member.

I have completed 12 years of service on the board—six as chair—in addition to several years as a member and chair of the 3rd District Ethics Committee. I am grateful for these opportunities. Minnesota's discipline system works well,[Ftn 11](#) and participation is satisfying. Serious transgressions calling for public discipline remain relatively rare. Pleasures are derived from helping to formulate rules and opinions, educating lawyers and the public, and defining the limits of acceptable conduct in less-serious cases, in the company of others sincerely concerned for improving the conduct of lawyers and upholding the high standards of the profession.

I have had the pleasure of serving with five capable directors—Bill Wernz, Marcia Johnson, Ed Cleary, Ken Jorgensen, and Marty Cole—as well as many talented and dedicated staff lawyers and other staff. Greg Bistram and Chuck Lundberg preceded me as chair and were mentors and examples. Other board and committee members remain my friends. Justices of the supreme court have supported and encouraged the board, especially those who have been the court's recent liaisons to the board: Justices Paul Anderson, Russell Anderson, Helen Meyer, and Alan Page.

Recent years on the board have been eventful. We have seen substantial amendments to the Rules of Professional Conduct and Rules on Lawyers Professional Responsibility, many recommended by the board. The working of the lawyer discipline system was examined by a Supreme Court Advisory Committee chaired by Allen Saeks, with generally positive reviews of the rules, the director and staff, and the board. Committee recommendations are being implemented. The board has been a reluctant defendant in two lawsuits challenging provisions of the Code of Judicial Conduct (which the board is charged with enforcing as to nonincumbent judicial candidates): the first resulted in landmark rulings by the United States Supreme Court and the 8th Circuit Court of Appeals (and a significant award of attorney's fees paid by the board); the second is before the 8th Circuit after a district court ruling in favor of the defendants. The director's offices have been relocated and computer systems have been converted. A website has been established and improved. Public records have been made readily accessible, along with rules, forms, articles, and other resources. Two wage-and-travel freezes have been experienced, although the budget, supported by lawyer registration fees, remains in good shape with a substantial budgeted reserve for operating expenses.

### Notes

1 ABA Commission on Ethics 20/20 Preliminary Issues Outline, November 19, 2009, [www.abanet.org/ethics2020/outline.pdf](http://www.abanet.org/ethics2020/outline.pdf) (accessed 12/29/09).

2 Charlotte Stretch, *Overview of Ethics 2000 Commission and Report*, [www.abanet.org/cpr/e2k/e2k-ov\\_mar02.doc](http://www.abanet.org/cpr/e2k/e2k-ov_mar02.doc) (accessed 12/29/09).

3 American Bar Association, *Report of the Commission on Multijurisdictional Practice*, [www.abanet.org/cpr/mjp/final\\_mjp\\_rpt\\_6-5.pdf](http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf) (accessed 12/29/09).

4 Report of the American Bar Association Task Force on Corporate Responsibility, [www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) (accessed 12/29/09).

5 Commission On Multidisciplinary Practice Report to the House of Delegates, [www.abanet.org/cpr/mdp/mdpfinalrep2000.html](http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html) (accessed 12/29/09).

6 ABA House of Delegates Resolution 10F, [www.abanet.org/cpr/mdp/mdprecom10f.html](http://www.abanet.org/cpr/mdp/mdprecom10f.html) (accessed 12/29/09).

7 See Edward Cleary, "Multidisciplinary Practice: Minnesota Moves Forward," 57 *Bench & Bar* 8 (September 2000), p. 18 ff.

8 In the Matter of the Petition of the Minnesota State Bar Association to Amend the Minnesota Rules of Professional Conduct to Authorize Multidisciplinary Practice, Minn. Supreme Court Case No. C8-84-1650 (09/18/02).

9 Order Adopting Amendments to the Minnesota Rules of Professional Conduct, Effective October 1, 2005 (06/17/05), at [www.mncourts.gov/lprb/mrpc.html](http://www.mncourts.gov/lprb/mrpc.html) (accessed 12/29/09).

10 Kenneth L. Jorgensen and William J. Wernz, "New Directions in Professional Conduct: The Devil is in the Details," 62 *Bench & Bar* 8 (September 2005), p. 14 ff.

11 See Martin Cole, "Supreme Court Advisory Committee Report," 65 *Bench & Bar* 6 (July 2008); Kent Gernander and Charles Lundberg, "What Works Well and Why," 63 *Bench & Bar* 2 (February 2006).