



LAWYERS' MANUAL ON PROFESSIONAL CONDUCT

VOL. 27, NO. 10 207-209

CURRENT REPORTS

MAY 11, 2011

Model Rules

Ethics 20/20 Group Says No Rules Needed To Address Concerns Over Law Firm Rankings

The ABA Commission on Ethics 20/20 concluded April 27 in a draft "informational report" that there is no pressing need to amend the Model Rules of Professional Conduct to address efforts by other organizations to rank law firms by quality, reputation, or other criteria.

The report suggests that the ABA ethics committee may want to consider issuing an opinion on lawyers' duty of confidentiality when participating with entities

that rate or rank firms. In addition, the commission said that if the ethics committee sees a need for further action, it could look at a rule comment that two states have adopted, as a source for fashioning guidance to add to the commentary to Model Rule 7.1, dealing with communications about a lawyer's services.

Five days later, the commission released for public comment its initial round of proposals (see box) for updating the Model Rules of Professional Conduct on three subjects: outsourcing, confidentiality issues arising from changes in technology, and "inbound" foreign lawyers, which the commissioners voted to circulate April 15-16. See 27 Law. Man. Prof. Conduct 256; 27 Law. Man. Prof. Conduct 259. The deadline for submitting comments on these proposals is July 15.

Ethics 20/20 Releases Proposals on Outsourcing, Technology, and Inbound Foreign Lawyers

The ABA Commission on Ethics 20/20 May 2 released its first round of proposals for updating the Model Rules of Professional Conduct in light of sweeping changes affecting the legal profession.

The proposals cover outsourcing, confidentiality-related ethics issues arising from lawyers' use of technology, and foreign lawyers working in the United States.

The proposals "are more evolutionary than revolutionary," Co-Chairs Jamie S. Gorelick and Michael Traynor said in an announcement posted on the commission's website. The commission finalized the proposals at a meeting in mid-April. See 27 Law. Man. Prof. Conduct 256; 27 Law. Man. Prof. Conduct 259.

■ **Outsourcing.** With regard to outsourcing, the commission proposes a new comment to Model Rule 1.1 that identifies factors for lawyers to consider when retaining lawyers outside the firm to as-

sist on a client's matter, along with new comments to Model Rule 5.3 that recommend factors to consider when using nonlawyers outside the firm, and a new sentence in Model Rule 5.5 to make clear that lawyers may not outsource services when doing so would facilitate unauthorized practice. The proposed comment to Rule 1.1 would indicate that ordinarily a client's informed consent should be obtained before outsourcing legal services in the matter.

■ **Confidentiality and Use of Technology.** To give lawyers more guidance about their confidentiality-related obligations when using technology, the commission is proposing changes to the rules on confidentiality (Model Rule 1.6) and respect for the rights of third persons (Model Rule 4.4), along with amended comments to the rules on screening (Model Rule 1.0(k)), and competence (Model Rule 1.1). The

new text in Rule 1.6 would require lawyers to take reasonable measures to protect a client's confidential information from inadvertent disclosure and unauthorized access.

■ **Inbound Foreign Lawyers.** In a set of three related reports and recommendations, the commission proposes to relax restrictions on foreign lawyers' ability to practice in U.S. jurisdictions. Under proposed changes to Model Rule 5.5, foreign lawyers would be allowed to work as in-house counsel and perform services that the lawyer is authorized to provide by federal or other law, and would be permitted to provide legal services on a temporary basis in specified circumstances. Corresponding changes are proposed for the ABA Model Rule for Registration of In-House Counsel, and the ABA Model Rule for Pro Hac Vice Admission.

The commission was launched in August 2009 to examine the ethical and regulatory impact of evolving technology and increasing globalization on legal practice. See 25 Law. Man. Prof. Conduct 418. It intends to release proposals on remaining issues no later than September 2011 with the goal of submitting final recommendations in May 2012 for consideration by the ABA House of Delegates at the bar group's annual meeting in August 2012.

Delegates Called for Probe. The draft report on law firm rankings details the commission's efforts during the past year along with its findings from that project.

The issue of law firm rankings was handed to the commission in February 2010 after the ABA House of Delegates adopted a resolution declaring that the ABA would "examine any efforts to publish . . . national, state, territorial and local rankings of law firms and law schools." That language was adopted in place of a resolution offered by the New York State Bar Association that would have had the ABA urge "lawyers and law firms to exercise caution in determining whether to provide information for the purpose of ranking law firms." See 26 Law. Man. Prof. Conduct 107.

The ABA directive followed an announcement that *Best Lawyers*, in collaboration with *U.S. News & World Report*, was planning to issue law firm rankings. The resulting "Best Law Firms" list (<http://bestlawfirms.usnews.com/>), which debuted last year, ranks firms nationally as well as by city, dividing them by practice groups and assigning each practice group to one of three tiers.

In an interview with BNA about the commission's draft report, A. Vincent Buzard said the New York State bar still believes that methodologies for ranking law firms need to be examined. "The fundamental problem is they are not going to make any attempt to determine whether law firms and law firm practice groups can be rated," Buzard said. He is a former NYSBA president and practices with Harris Beach in Rochester, N.Y.

Buzard said that when *Best Lawyers* and *U.S. News & World Report* first announced their plan to rank law firms, they were speaking of a numerical "1, 2, 3, 4" ranking order similar to the *U.S. News & World Report's* law school rankings; however, after the ABA study was announced they switched to a tiered ranking system.

Although that's a "step forward," Buzard said, "the use of tiers still can be greatly unfair to lawyers who are doing well and all of a sudden are found to be Tier 2 or Tier 3." Unless the underlying methodology is valid, it's unfair to lawyers and misleading to consumers, he said.

The commission's decision not to recommend any rule changes to address law firm rankings found support with Seattle-based online rating service Avvo.com.

"I think the Commission's draft report is thoughtful and reaches the right conclusion," Avvo General Counsel Joshua King told BNA in an e-mail. "As the Commission notes, there are strong First Amendment considerations when contemplating restricting attorney speech, even if it is advertising. That speech should not be curtailed, absent good reason and a showing of consumer harm. And as the Commission found, there's simply no consumer harm to be found with respect to attorney and law firm ratings," King stated.

What's Out There? At a public hearing in October, the commission heard from speakers appearing on behalf of three organizations that rank the quality of lawyers and law firms. See 26 Law. Man. Prof. Conduct 649.

In addition, the commission engaged in extensive outreach, asking bar associations, disciplinary counsel, and consumer groups about their experiences with law firm ratings and rankings. These inquiries provoked little feedback and uncovered scant evidence of any problem, the commission found.

Surveying the phenomenon, the commission found that lawyers and law firms are ranked or rated by hundreds of entities. On top of many rating and ranking entities with national reach, about 35 metropolitan areas have rankings or ratings, and state and region-wide publications in about 25 states issue views on top lawyers or firms.

A few entities rank law firms by numerical order, while others rank lawyers or firms by placing them in tiers or list them in directories according to various criteria. Consumer feedback websites seem to be emerging as a popular vehicle for differentiating lawyers, according to the commission's report.

The commission said a new Google feature may strongly spur lawyers to seek reviews from clients. Under Google's "local search" feature, lawyers may optimize searches of key phrases such as "Chicago divorce lawyer" by completing a Google "place page" and getting reviewed. The more reviews a lawyer has, the more likely the lawyer is to surface at the top of a search for lawyers in a geographic area.

According to the report, the commission consulted experts about the feasibility of commissioning a scientific evaluation of providers' methodologies, but found that the research would be prohibitively expensive and ultimately not useful. Even if a particular methodology were found statistically invalid, it would not necessarily be false or misleading, and results would quickly get out of date, the report notes.

"Rule 7.1 . . . is sufficient to govern a lawyer's participation with entities that rate or rank lawyers or law firms."

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The commission also expressed concern that if the ABA itself explored rankings, the bar group might be accused of selectively targeting or preferring particular entities, and that the results of a study could open the door for some providers to claim an "ABA seal of approval."

"[T]he ABA need not, at this time, undertake, support or contribute further resources to the study of this subject," the commission concluded.

Lawyers' Role in Ratings. With regard to the regulation of lawyers' involvement in being ranked and their use of rankings and ratings, the commission found that Model Rule 7.1, which prohibits lawyers from making false or misleading communications about their services, is up to the task, at least for now.

“Rule 7.1 . . . is sufficient to govern a lawyer’s participation with entities that rate or rank lawyers or law firms,” the report states.

Noting that Rule 7.1 has been the basis for several ethics opinions about the boundaries of a lawyer’s participation in a rating or ranking services, the commission said these opinions make clear that:

- the credential may not be based on payment;
- the lawyer cannot overstate the credential, such as claiming to be the best lawyer because of inclusion in the Best Lawyers directory; and
- details about the selection must be included, such as the name and date of the publication, date of selection, and field of practice.

The report summarizes ethics opinions on lawyers’ inclusion in and citation to “Best Lawyers” or “Super Lawyers” from eight states—Alaska, Arizona, Connecticut, Delaware, Iowa, Michigan, North Carolina, and Virginia—along with the controversial New Jersey ethics opinion on lawyer rankings, “Opinion 39,” that was ultimately vacated and replaced with a professional conduct rule in that jurisdiction. See 25 Law. Man. Prof. Conduct 628.

The report also mentions a South Carolina opinion dealing with the Avvo rating system, and relates that the District of Columbia bar has issued a notice stating that Avvo has obtained bar member information in violation of the bar’s restriction on use.

In addition, the report notes that three states—New Jersey, North Dakota, and New York—have adopted rules that specifically address a lawyer’s participation in ratings or ranking services. New Jersey and North Dakota have similar rules and identical comments on this issue; their comment states:

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney’s fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication

itself or by reference to a convenient, publicly available source.

The commission suggested that if future events make it necessary to address the subject of ratings or rankings in the Model Rules, the ABA Standing Committee on Ethics and Professional Responsibility could draw from the New Jersey/North Dakota comment in formulating a proposed amendment to the comments to Model Rule 7.1.

Moreover, the commission asked the ethics committee to consider issuing an opinion on the application of Model Rule 1.6 (confidentiality) to a lawyer’s participation with entities that rank or rate lawyers and law firms. The current rule does not allow lawyers to provide third parties with information about a client’s representation unless the lawyer obtains the client’s informed consent, the report observes.

Separate Treatment for Law School Rankings. The draft report recommends that any future consideration of ABA policy concerning lawyer/law firm ratings be dissociated from the subject of law school rankings. In making this suggestion, the commission pointed out that a single publisher—*U.S. News & World Report*—dominates the field of law school rankings, whereas there is no dominant entity for ratings and rankings of lawyers and law firms.

The report notes that the subject of law school rankings was examined in a July 2010 report by the ABA Section of Legal Education and Admissions to the Bar, which concluded that the magazine’s law school rankings may have several adverse effects.

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The commission’s draft report on law firm rankings can be accessed at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2011_informational_report_report_authcheckdam.pdf.

The commission’s announcement of its initial proposals, with links to text of the reports and recommended language, is posted at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.