Legal Ethics

Model Rule Change Recognizes Need for Conflicts Checks Before Lawyers Move, Law Firms Merge

A change to the ABA model rules recognizes the need to disclose limited client information for conflicts checks before law firms merge or lawyers move to new employment.

The ABA House of Delegates on Monday approved Resolution 105F, which amends Rule 1.6 of the ABA Model Rules of Professional Conduct regarding confidentiality of information.

The amendment says information may be revealed to detect conflicts if it would not compromise attorney-client privilege or otherwise prejudice the client. According to new commentary, the disclosure should not be made until substantive discussions have taken place on the new relationship. Any information disclosed should be used only to the extent necessary to detect and resolve conflicts, according to the comment.

Opponents said the model rule should require lawyers to get informed consent from clients before disclosing their information for conflicts checks. A proposed amendment to add that requirement was rejected by the ABA House, however.

Barbara Mendel Mayden of the ABA Board of Governors told the House it would be "unworkable" to require client consent. She said the changes to the model rule represent "a cautious, limited approach to a fact of life in modern law practice."

The ABA Commission on Ethics 20/20 recommended the change as part of its examination of how technology and globalization are spurring lawyer mobility.

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Model Ethics Rule Allows Lawyers to Practice in New State for Up to a Year, Pending Admission

Posted Aug 6, 2012 3:21 PM CDT
By Debra Cassens Weiss

Lawyers who move to a new state can practice there for up to a year while seeking admission under a new model ethics rule approved Monday by the ABA House of Delegates.

A comment to the rule explains why it is needed. “This rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice,” the comment states. “The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer’s clients without the benefit of their chosen counsel. This rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission.”

The new ABA Model Rule on Practice Pending Admission, set forth in Resolution 105D, allows lawyers to practice in the new jurisdiction if:

• They have an active license in another jurisdiction and they have been engaged in the active practice of law for three of the last five years.

• They are not disbarred, suspended or facing discipline.

• They did not fail the bar exam in the new jurisdiction.

• There were not previously denied admission in the new jurisdiction.

• They associate with a lawyer admitted to practice in the new jurisdiction.

The rule also outlines the procedures the lawyers must follow, including submitting an admissions application within 45 days. During the yearlong period, the lawyers may not represent themselves as being admitted to practice in the new jurisdiction. A court could extend the 365-day period for good cause.

Jequita Napoli of the National Conference of Bar Examiners spoke in opposition to the rule, calling it “a dramatic change in how we operate.” Napoli said the measure is actually a bar admissions rule, but it’s being couched as an ethics rule. “This is complicated,” she said. “There are bar discipline issues, there are regulatory considerations.”

But John Berry of the National Organization of Bar Counsel said the new model rule has protections that will protect legal consumers. Several states have similar rules, and they have not reported difficulties or problems, he said.

The new rule was proposed by the Commission on Ethics 20/20, appointed in 2009 to study the impact of technology and globalization on the legal profession.

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Changes to Model Ethics Rules Clarify Lawyers' Obligations When Using Outsourcing

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By Debra Cassens Weiss

The ABA House of Delegates addressed lawyers’ ethical duties when using outsourcing in changes to the ABA Model Rules of Professional Conduct approved Monday.

In Resolution 105C, the ABA Commission on Ethics 20/20 explains the changes and acknowledges the debate over outsourcing, which is being used with increasing frequency partly because of the demand for cost-effective legal services.

"The Commission understands that certain outsourcing is controversial in light of the current employment market for lawyers," the report says. The changes "are neither an endorsement nor a rejection of the practice of outsourcing. Rather, the proposals respond to the existence and continuing growth of these practices and are intended to clarify a lawyer’s obligations in this context."

The revisions change commentary but not the black letter model rules. They include:

- A new comment to Rule 1.1 on lawyer competence says a lawyer should ordinarily obtain informed consent from the client before retaining outside lawyers, and the lawyer should reasonably believe the outside services will contribute to the competent and ethical representation of the client. The reasonableness of the decision to retain the outside lawyers will depend on factors such as their education and experience, the nature of the services they will be performing, and the legal ethics rules in their jurisdictions, according to the comment.

- A new comment to Rule 5.3 on responsibilities regarding nonlawyer assistance says a lawyer may hire nonlawyers outside the law firm, but the lawyer must make reasonable efforts to ensure that the engagement is compatible with legal ethics obligations.

- A new comment to Rule 5.5 clarifies that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law.

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Online Marketing, Including Lead Generation, Is Addressed in Changes to ABA Ethics Rules

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By Debra Cassens Weiss

Online marketing tools for lawyers are addressed in revisions to the ABA Model Rules of Professional Conduct approved Monday by the ABA House of Delegates.

When do online discussions give rise to duties to prospective clients? May a lawyer generate leads through Groupon? What type of online communications are impermissible solicitations? The changes, outlined in Resolution 105R, are designed to provide additional guidance. They include:

• A change in wording to Model Rule 1.18 on duties to prospective clients is intended to make clear that the rule may apply even in the absence of an oral discussion. According to new commentary, duties may arise if a lawyer invites the prospective client to submit information about possible representation without sufficient warnings or cautionary statements.

• A comment to Rule 7.2 says lawyers may pay for “lead generation” services, including Internet-based client leads, as long as certain safeguards are followed. According to the comment, the lead generator should not vouch for the lawyer’s credentials or abilities, nor should it create the impression that it is making the referral without payment, or has determined the appropriate lawyer based on an analysis of the possible client’s legal problems. A report to the House of Delegates says the change is intended to address new marketing methods such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell’s Lawyers.com.

• Amendments to Rule 7.3 governing solicitation of clients clarify when a lawyer’s online communications are solicitations. According to new commentary, a lawyer’s communications constitute a solicitation when the lawyer offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific person.

The changes were proposed by the Commission on Ethics 20/20, appointed in 2009 to study the impact of technology and globalization on the legal profession.

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http://www.abajournal.com/news/article/online_marketing_including_lead_generation_is__
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Lawyers Have Duty to Stay Current on Technology's Risks and Benefits, New Model Ethics Comment Says

Posted Aug 6, 2012 2:46 PM CDT
By Debra Cassens Weiss

Updated: Lawyers can't be Luddites, according to changes to the model ethics rules approved Monday by the ABA House of Delegates.

Some of the changes approved by the House update the ABA Model Rules of Professional Conduct to acknowledge that information is stored digitally as well as in paper files, clients communicate electronically as well as by phone calls, and email isn't the only method of electronic communications.

But the technology-related amendments go further, requiring lawyers to keep current on more than just changes in the law. Lawyers also have a duty to keep abreast of the benefits and risks associated with technology, according to new commentary language added to Rule 1.1 on the duty to provide competent representation. Click here (PDF) to see all of the amendments added to all of the model rules at this year's annual meeting.

A different change explores lawyer's obligations when they receive metadata—information that is embedded in electronic documents. New commentary says lawyers who receive metadata have a duty to notify the sender if they know or reasonably know that the metadata was inadvertently sent. The language does not address the issue of whether lawyers can take a look at that metadata, however.

The proposed resolution outlining the changes, along with amendments to the resolution, are posted online. They were proposed by the ABA Commission on Ethics 20/20, which was appointed in 2009 to study the impact of technology and globalization on the legal profession.

The resolution is one of six changes to model ethics rules adopted by the House. Other changes:

• Deal with online marketing tools for lawyers. One change is intended to make clear that online discussions can create duties to prospective clients. A different change, a new comment, says lawyers can pay for online lead generation services, as long as certain safeguards are followed.

• Clarify lawyers' obligations when using outsourcing.

• Recognize the need to disclose limited client information for conflicts checks before law firms merge or lawyers move to new employment.

• Help mobile lawyers. A new ABA Model Rule on Practice Pending Admission generally allows lawyers who move to a new state to practice there for up to a year while seeking admission.

• Make it easier for young lawyers who move to a new state to gain admission without taking the bar exam. The rule change reduces the experience needed to obtain a license through admission by motion procedures.

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