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REGULATION OF LAWYERS

Statutes and Standards

Concise Edition **2008**

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Roy D. Simon

Wolters Kluwer
Law & Business

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Regulation of Lawyers: Statutes and Standards

Concise Edition 2008

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Dedications

Stephen Gillers dedicates this edition of the book to the memory of his mother Sylvia Gillers Wadler, who was born February 20, 1914, and died April 18, 2007, age 93. Sylvia didn't have much use for lawyers until her son became one and then an even greater appreciation when he married a lawyer. Nor did Sylvia need to think much about legal ethics. Like mothers everywhere, she intuitively knew right and wrong, good behavior and bad, so far as her children were concerned, which is what mostly mattered. And she had a powerful sanctioning system, usually implicit and summarized at the end of a description of a particular course of conduct that her children were expected to obey, or refrain from, with such words as "if you know what's good for you." We mostly did know. And it mostly was.

Roy Simon dedicates this edition of the book to the memory of the Honorable Robert R. Merhige, Jr. (1919-2005), an extraordinary federal judge in Richmond, Virginia, for whom Roy had the honor and privilege of clerking. Judge Merhige was perceptive, insightful, principled, courageous, and fair. He improved the law, the legal system, and the world around him. We miss him dearly.

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Introduction to the Regulation of Lawyers

This book contains rules regulating the behavior of lawyers and judges. These rules come from many sources: statutes, administrative regulations, rules of evidence and procedure, and, most prominently, ethical codes. These rules continue to grow and change at an accelerating pace, reflecting a steadily growing interest in the regulation of lawyers. This "concise edition" includes everything contained in our full edition except the ethics rules and related statutes from California, the District of Columbia, and New York.

What's New Since Our Last Edition?

This is the nineteenth edition of *Regulation of Lawyers: Statutes and Standards*. Like all of our previous editions, this has many new items and many updates to older materials. There are hundreds of changes since last year. We provide here an overview of the major changes that have occurred since our last edition, as well as a summary of some possible future changes that were under consideration when we went to press in September 2007.

NATIONAL DEVELOPMENTS

American Bar Association Developments

The American Bar Association is the largest professional organization in the world, with more than 400,000 members, and it devotes significant

resources to the study and improvement of the rules governing lawyers and judges. Several ABA developments have occurred during the past year.

ABA Model Rules of Professional Conduct: The ABA Model Rules of Professional Conduct have been amended only slightly since our last edition. At its February 2007 Mid-Year Meeting, the ABA House of Delegates added a new sentence at the end of Comment 14 to ABA Model Rule 5.5 to coincide with the adoption of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. (The text of Rule 5.5 was not amended.) The new language in the Comment to Rule 5.5 is underscored in our version of the Model Rules. The text of the ABA Model Court Rule (discussed below) is reprinted in the Related Materials following Rule 5.5.

Looking ahead, proposed amendments to Rule 3.8 have been circulating among various ABA committees and stand a good chance of adoption in 2008. The proposed amendments, which would impose certain post-conviction responsibilities on prosecutors, originated with a report by the New York City Bar's Committee on Professional Responsibility in 2005, and were refined by the New York State Bar's Committee on Standards of Attorney Conduct (COSAC), which is comprehensively reviewing the New York Code of Professional Responsibility. No official ABA draft was available when we went to press, but the COSAC draft on which it is modeled would add new paragraphs (g) and (h) to Rule, 3.8, providing that a prosecutor or other government lawyer in a criminal case:

> (g) when coming to know of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, shall
> (1) disclose that evidence to the convicted defendant and any appropriate court or authority; and
> (2) undertake such further inquiry or investigation as may be necessary to determine whether the conviction should be set aside;
> (h) when knowing of clear and convincing evidence establishing that a conviction was wrongful, shall take appropriate steps to have the prior conviction set aside.

When we went to press, the ABA Standing Committee on Ethics and Professional Responsibility was working on changes to the existing Comment to Rule 3.8 that would reflect the proposed amendments. The proposed amendments are likely to come before the ABA House of Delegates at its February 2008 Mid-Year Meeting.

ABA Model Code of Judicial Conduct: At its February 2007 Mid-Year Meeting, based on four years of intensive work by the ABA's Joint Commission to Evaluate the Code of Judicial Conduct, the ABA adopted a new Model Code of Judicial Conduct. The Chair of the Joint Commission was attorney Mark I. Harrison of Phoenix, and its Reporters were Professor

Charles Geyh of Indiana University School of Law and attorney W. William Hodes of Indianapolis, formerly a professor at Indiana University School of Law. No states have adopted the new Model Code of Judicial Conduct, but nineteen jurisdictions have already formed committees to review it (AZ, AR, CA, CO, DE, DC, HI, IN, KS, MD, MT, NH, NJ, ND, OH, OK, OR, TX, UT). For a chart showing state activity regarding the new Model Code, see *www.abanet.org/cpr/jclr/jud_status_chart.pdf.* (The chart is kept up to date by ABA Client Protection Counsel John Holtaway, jholtaway@staff.abanet.org.) The full text of the new ABA Model Code of Judicial Conduct and many valuable resources relating to judicial conduct generally and the legislative history of the new Model Code in particular are available at *www.abanet.org/judicialethics/home.html.*

ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster ("Katrina Rule"): At its February 2007 Mid-Year Meeting, the ABA House of Delegates adopted a new ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, often called the "Katrina Rule." The rule will permit lawyers licensed in states that have suffered a major disaster to carry on their practices temporarily (subject to certain conditions) in states that adopt the Model Court Rule, and will permit lawyers from other states to perform pro bono work in the state that has suffered the disaster and in states to which displaced persons have relocated if those states have adopted the rule. We reprint the Model Court Rule in the Related Materials following Rule 5.5 of the ABA Model Rules of Professional Conduct.

Federal Statutes, Rules, and Regulations

The regulation of lawyers is primarily a matter of state law, but various federal statutes, rules, regulations, and policies also reflect efforts to regulate lawyers. Several of these provisions have changed significantly since our last edition.

Federal Rules of Civil Procedure: Important amendments to the Federal Rules of Civil Procedure took effect as scheduled on December 1, 2006. The amendments relate to the inadvertent production of privileged information or work product during discovery, a recurring problem that is also addressed in ABA Model Rule 4.4(b). The main amendment added the following new subparagraph (5)(B) to Rule 26(b) of the Federal Rules of Civil Procedure:

> (B) *Information Produced.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is

> resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

A related amendment to Rule 16(b)(6) provides that a district court's scheduling order may include "any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production."

For more information about the amendments, see the Related Materials ABA Model Rule 4.4. For official updates, new proposals, and background information regarding the Federal Rules of Civil Procedure, visit the official web site of the U.S. Courts at *www.uscourts.gov* or contact John Rabiej, Chief of the Rules Committee Support Office, at (202) 502-2600.

Federal Rules of Evidence: In June 2007, the Standing Committee on Rules of Practice and Procedure voted to circulate for public comment a proposed new Rule 502 of the Federal Rules of Evidence, to be entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver." The June version included a paragraph to govern "selective waiver," but it was bracketed to indicate that the Standing Committee was not taking a position on the selective waiver language. In September 2007, the Judicial Conference voted to send a modified version of proposed Rule 502 — without the selective waiver provision — directly to Congress, bypassing the usual stop at the Supreme Court. We reprint proposed Rule 502 in our chapter on federal attorney-client privilege and work product materials.

The direct transmission of proposed Rule 502 to Congress recognizes that under 28 U.S.C. §2074(b), which was enacted in 1988, any "rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." This is the first time that §2074(b) has ever been invoked, because the Judicial Conference has not sent a proposed privilege rule to Congress since §2074(b) was enacted. Unlike other proposed rules of evidence, therefore, inaction by Congress will not result in automatic adoption of the rule. Rather, Rule 502 will not become law unless and until Congress affirmatively approves it, on its own schedule. Congress could enact Rule 502 next week, or next year, or never.

For updates on the Federal Rules of Evidence, visit the official web site of the United States court system at *www.uscourts.gov* and click on "Federal Rulemaking" on the left-hand menu.

DEVELOPMENTS IN THE STATES

Broad Trends: Over the past five years, many states have reviewed their ethics rules in light of the work of the Ethics 2000 Commission, the ABA Commission on Multijurisdictional Practice, and the 2003 amendments to

ABA Model Rules 1.6 and 1.13. Since our last edition went to press in September 2006, significantly amended ethics rules have taken effect in at least five separate jurisdictions — Rhode Island (effective April 15, 2007), Kansas, Missouri, and Wisconsin (all effective July 1, 2007), and Nevada (effective September 1, 2007). Four other states — Colorado, Connecticut, New Hampshire, and Oklahoma — have announced significantly modified Rules of Professional Conduct that will take effect on January 1, 2008.

Another broad trend is the adoption of ethics rules or court rules requiring lawyers to disclose whether they carry professional liability insurance. In August 2004, when few states required lawyers to disclose their malpractice insurance coverage, the ABA adopted a Model Court Rule on Insurance Disclosure. Today, at least nineteen states require some form of malpractice insurance disclosure, either on their bar registration statements or directly to clients, and at least five additional states are actively considering some form of legal malpractice disclosure rule. For more detailed information, see the entry entitled "Malpractice Insurance Disclosure Requirements" in our Related Materials following ABA Model Rule 1.8 below. For a state-by-state chart showing the status of rules and proposed rules governing disclosure of professional liability insurance coverage, see *www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.*

For a chart of state-by-state responses to the work of the Ethics 2000 Commission, visit *www.abanet.org/cpr/links.html.* For detailed information about developments in particular states, visit the web sites given after each state listed below, or find a link to individual state resources at *www.law.cornell.edu/ethics/listing.html,* or at *www.abanet.org/cpr/links.html*, or at *www.legalethics.com.* For now, here is some news about legal ethics developments that have come to our attention since our last edition went to press about a year ago.

Alabama (www.alabar.org): Effective September 19, 2006, Alabama quietly adopted a shortened version of ABA Model Rule 5.5. The amended rule provides, in essence, that an out-of-state lawyer does not engage in the unauthorized practice of law when the lawyer represents a client on a "temporary or incidental basis" in Alabama with respect to "transactional, counseling, or other nonlitigation services."

Arizona (www.azbar.org): Effective January 1, 2007, Arizona adopted Supreme Court Rule 32(c), which is modeled on the ABA Model Court Rule on Insurance Disclosure — see *www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf.*

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov): In June 2006, the California State Bar's Board Committee on Regulation, Admissions and Discipline Oversight circulated for public comment a proposed new Rule 3-410, entitled "Insurance Disclosure," that would require lawyers who are not covered by professional liability insurance to inform clients in writing of their lack of coverage. The Committee simultaneously circulated a proposed new court rule, Rule 950.6, which would require all lawyers to certify to the State Bar whether

they are covered by professional liability insurance and whether they represent clients. The public comment period ended on September 15, 2006 and the state Bar's Board of Governors was considering the comments.

Effective April 1, 2007, a revised notice of Client's Right to Arbitration form took effect. By statute, lawyers must send such a notice form to the client before filing a lawsuit against a client to collect unpaid attorney's fees and/or costs. The revised form advises clients of their right to request mandatory fee arbitration to resolve a pending attorney fee dispute.

In March 2007, the State Bar circulated for public comment proposed bar admission requirements for foreign-educated lawyers. Nothing in California's current bar admission rules addresses applicants educated outside the United States. The comment period expired on June 11, 2007.

Also circulating for public comment are proposed Rules Regulating Registration of Unaccredited, Correspondence and Distance Learning Law Schools in California. Current law requires unaccredited and correspondence law schools to register with the Committee of Bar Examiners if their students wish to receive credit for their law study for purposes of qualifying to take the California Bar Examination, but the registration requirements are minimal – they mainly require that the law schools be approved by the Bureau for Private Postsecondary and Vocational Education. In 2006, however, the California Legislature passed a statute that ends the Bureau's role in approving law schools and shifts the oversight and regulation of unaccredited and correspondence law schools to the Committee of Bar Examiners effective January 1, 2008. The proposed rules will help implement the new statutory mandate. The deadline for public comments was June 11, 2007.

The State Bar of California's Commission for the Revision of the Rules of Professional Conduct, which has been comprehensively reviewing California's unique rules since 2001, issued 27 draft rules in June 2006 and 5 more draft rules in July 2007. The Commission expects to release additional proposed rules for public comment periodically through 2008. The proposals use the numbering and format of the ABA Model Rules of Professional Conduct.

Connecticut (www.jud.ct.gov/PB.htm): Connecticut comprehensively amended its Rules of Professional Conduct effective January 1, 2007. The new rules are available in the official 2007 Connecticut Practice Book at the website of the Connecticut courts. In addition, effective January 1, 2008, Connecticut has adopted ABA Model Rules 5.5 and 8.5 nearly verbatim.

District of Columbia (www.dcbar.org): Effective February 1, 2007, the District of Columbia comprehensively amended its Rules of Professional Conduct. The changes were based on recommendations by the D.C. Bar's Rules of Professional Conduct Review Committee, chaired by Professor Leah Wortham of Catholic University School of Law.

Florida (www.flabar.org): Effective January 1, 2007 (as announced in a November 2, 2006 order), the Florida Supreme Court adopted extensive changes to its rules governing lawyer advertising, incorporating most of the

recommendations made by the Florida Bar's Advertising Task Force. But the court declined to amend Rule 4-7.6 (Computer-Accessed Communications) because the Bar's Special Committee on Website Advertising Rules was still studying Internet advertising issues. On March 30, 2007, the Florida Bar's Board of Governors approved a proposed version of Rule 4-7.6, which was pending before the Florida Supreme Court when we went to press.

Illinois (www.isba.org): Effective June 1, 2007, the Illinois Supreme Court amended Rule 1.15 to require lawyers and law firms to deposit nominal or short-term funds of clients or third parties in accounts at "eligible financial institutions." Eligible institutions "shall maintain IOLTA accounts that pay the highest interest rate or dividend available . . . to its non-IOLTA account customers when (they) meet or exceed the same minimum balance or other account eligibility guidelines." Illinois thus becomes the eleventh state to adopt a "comparability rule." Meanwhile, the Illinois Supreme Court is still considering comprehensive amendments to the Illinois Rules of Professional Conduct, which were unanimously recommended by the Illinois State Bar Association in June 2004.

Maine (www.mebaroverseers.org/ethicsweb/ethicsmain.html): Maine's Task Force on Ethics 2000, whose Reporter is Professor Lois Lupica of the University of Maine School of Law, issued a complete draft of comprehensive amendments to Maine's current ethics rules on November 6, 2006. The proposed rules conform to the structure of the ABA Model Rules and they conform to the language of the ABA Model Rules except where established Maine law and practice warrant divergence or variation. The Task Force is studying public comments (which were due by January 15, 2007) and anticipates submitting final recommendations to the Maine Supreme Judicial Court during 2007. In the meantime, Maine remains one of only three states (along with California and New York) that have not adopted the format and numbering system of the ABA Model Rules.

Michigan (www.michbar.org): The Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of Professional Conduct that were circulated by the court for public comment in July 2004. (The comment deadline expired in February 2005.) "Clean" and "redlined" versions of the proposed amendments are available at *www.michbar.org* (click on the home page on "admissions, ethics and regulation," then click on "Ethics Rules, Opinions and Resources," then scroll down to "Ethics Rules").

Missouri (www.mobar.org): On March 1, 2007, the Missouri Supreme Court approved comprehensive amendments to the Missouri Rules of Professional Conduct that took effect on July 1, 2007. The rules generally bring the Missouri rules into line with the ABA Model Rules, except that Missouri did not adopt the 2003 versions of Rule 1.6 or Rule 1.13.

New Jersey: When Rule 5.5 was adopted in 2004, the New Jersey Supreme Court said that three years later the Supreme Court would have its Professional Responsibility Rules Committee (PRRC) "undertake