SUBMITTED COMMITTEE REPORTS

As general policy, the Energy Bar Association does not take a position in published Committee Reports on substantive issues that are the subject of pending litigation.

REPORT OF THE ETHICS COMMITTEE*

I. INTRODUCTION

Over the past year, the American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Committee) has issued two formal opinions that are relevant to lawyers who work in the executive branch and the private sector. These opinions address forming partnerships with foreign lawyers and electronic recording of conversations without the knowledge of all participants.

In the past year the Federal Energy Regulatory Commission (FERC or Commission) issued an order addressing a potential conflict of interest by a law firm that brought a challenge to the terms of a license when it had previously represented the licensee's predecessor-in-interest in obtaining the license. Also in the past year, the Chairman of the FERC has issued an *Ethics Mandate* applicable to FERC employees to confirm the ethical rules under both the FERC's own regulations and those of the Office of Government Ethics' regulations.

While these opinions provide useful and important guidance to lawyers who encounter these problems, a lawyer should also consult the ethics rules and opinions in the jurisdiction(s) in which he or she is licensed to practice. In addition, lawyers should consult relevant statutes and regulations, particularly with respect to the legality of nonconsensual recording of conversations.

Finally, note that the District of Columbia (D.C.) Bar Board of Governors, has issued for public comment proposed modifications to the D.C. Rules of Professional Conduct on the issue of multidisciplinary practice. The comment period on the proposed modifications expired in January 2002.

A. ABA Formal Opinion 01-422: Electronic Recordings By Lawyers Without The Knowledge Of All Participants[1]

In addressing the issue of electronic recording of conversations without the knowledge of all participants, the ABA Committee revisited a topic that it had addressed twenty-seven years earlier. In Formal Opinion 337,[2] the ABA Committee concluded that with the possible exception of law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the knowledge of all participants. This *per se* prohibition, however, received mixed reviews from state and local bar committees. Many declined to adopt the prohibition. Commentators also questioned whether the ABA's *per se* rule survived adoption of the Model Rules of Professional Conduct in 1983.

In revisiting the issue, the ABA Committee noted three principal criticisms of Formal Opinion 337. First, the ABA's conclusion in 1974 that nonconsensual

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* The Committee gratefully acknowledges the assistance of Jacqueline Gerson Cooper, Esq. of Sidley Austin Brown & Wood in the preparation of this report.

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 422 (2001).

2. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974).

recording is inherently deceitful is not universally accepted today. Most states permit recording by consent of only one of the parties to the conversation. In addition, because electronic recording is a widespread practice by law enforcement officials and journalists, and the necessary technology is widely available, members of the public have diminished justifiable expectations that a conversation is not being recorded. Second, state bars increasingly recognized exceptions to the *per se* rule because they have identified circumstances in which requiring disclosure of the act of recording would defeat legitimate and desirable activities, such as documenting criminal activity or documenting conversations for the self-protection of the lawyer. Third, Formal Opinion 337 has been criticized as inconsistent with the Model Rules. Unlike the former Model Code, the Model Rules do not provide that lawyers should avoid even the "appearance of impropriety."[3] In addition, Model Rule 4.4 specifically addresses "respect for rights of third persons," forbidding "means that have no substantial purpose other than to embarrass, delay or burden a third person" and "methods of obtaining evidence that violate the legal rights of such a person."[4] Rule 4.4 suggests that nonconsensual recording is an ethical violation when it is illegal or designed to "embarrass, delay or burden" a third . . . person, but it does not support a blanket prohibition.

The ABA Committee concluded that Formal Opinion 337 should be withdrawn because the Model Rules do not categorically preclude nonconsensual recording of conversations. It then, however, identified two circumstances in which nonconsensual electronic recording of conversations is an ethical violation. The first is when the recording is in violation of state law. Although federal law currently permits recording of a conversation by the consent of only one party,[5] several states prohibit such recording without the consent of all parties (usually with exceptions for law enforcement). A lawyer who records a conversation in the practice of law in violation of a state statute "likely" violates Model Rule 8.4(c), which provides that it constitutes professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[6] In addition, recording for the purpose of obtaining evidence violates Model Rule 4.4's prohibition against using "methods of obtaining evidence that violate the legal rights of [a third] person."[7] Correspondingly, where consensual recording does not violate state law, such conduct does not violate the Model Rules. Second, the ABA Committee stated that it is unethical to record a conversation and then falsely state that the conversation is not being recorded. Such conduct violates Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person.[8]

The ABA Committee then noted that additional ethical considerations arise when a lawyer contemplates recording a conversation with a client without the

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3. MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101 (1983).
4. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2001).
5. 18 U.S.C. § 2511(2)(d) (2000).
6. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2001).
7. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2001).
8. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2001).

client's knowledge. Lawyers owe clients a duty of loyalty and are obligated to preserve the confidentiality of client communications. The ABA Committee was divided, however, on whether the Model Rules are violated by the nonconsensual recording of a conversation with a client. While the ABA Committee could not agree on whether such conduct is unethical, it unanimously agreed that such conduct is almost always inadvisable. The ABA Committee noted, for example, that if the recording were to fall into unfriendly hands, either through inadvertent disclosure or operation of law, the likely damage to the client would be much greater than if the same thing were to happen to the attorney's written notes. In addition, the client's trust and confidence in his attorney would no doubt be undermined if he were to find out that his conversation had been secretly recorded. The ABA Committee did note, however, that there are exceptional circumstances where the client forfeits the right to loyalty and confidentiality. For example, a lawyer has no obligation to keep confidential, plans by a client to commit a crime likely to result in imminent death or substantial bodily harm.

The ABA Committee stated that this opinion does not address the application of the Model Rules to certain investigative practices that often accompany nonconsensual recording of conversations, such as misrepresentations of identity or purpose in investigation of possible criminal activity, discriminatory practices or trademark infringement. The ABA Committee left for another day the question whether such deceitful but lawful conduct by lawyers, or by agents and investigators working for them, is unethical.

B. ABA Formal Opinion 01-423: Forming Partnerships With Foreign Lawyers[9]

As commerce and the practice of law have become more international in scope, United States lawyers and law firms have sought to affiliate with foreign lawyers in order to be able to provide advice to clients about the laws of foreign countries. In addition, foreign-based law firms are increasingly seeking to affiliate with United States lawyers or law firms so that they can provide advice to clients about United States law. Accordingly, the ABA Committee was asked to address whether the practice of United States lawyers forming partnerships with foreign lawyers violates Model Rule prohibitions against forming law partnerships with nonlawyers, against sharing fees with nonlawyers, and against engaging in or assisting others in the unauthorized practice of law.

The ABA Committee first concluded that forming partnerships with foreign lawyers (that is, persons who are not authorized to practice law by any United States jurisdiction but who are authorized to practice law by a foreign jurisdiction) is not prohibited by any Model Rule.[10] Indeed, the Model Rules do not specifically address the issue of affiliation between United States lawyers and foreign lawyers. Model Rule 5.4, however, prohibits *nonlawyers* from sharing in legal fees, being partners, or holding any other interest in an organization that practices law.[11] The question thus arises whether a foreign lawyer is a

9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 423 (2001).

10. The ABA Committee noted that the analysis in this opinion also applies to membership in limited liability companies and owning shares in professional associations.

11. Model Rule 5.4 provides:

"nonlawyer" for purposes of Rule 5.4.

The ABA Committee concluded that foreign lawyers should be considered lawyers rather than nonlawyers for purposes of Rule 5.4. The primary purpose of Rule 5.4 is to protect lawyers' independence in exercising professional judgment on behalf of clients, free from the influence of nonlawyers. Accordingly, lawyers, rather than nonlawyers, must own and control law practices because clients are thereby protected by the professional standards that govern lawyers. In the judgment of the ABA Committee, foreign lawyers provide these same protections to clients. Accordingly, foreign lawyers are not nonlawyers for purposes of Rule 5.4 and, therefore, Rule 5.4 does not prohibit United States lawyers from affiliating with foreign lawyers.

The ABA Committee also concluded that partnerships between United States lawyers and foreign lawyers are consistent with the Model Rules because the ABA has recognized the desirability of allowing foreign lawyers to assist clients in the United States with legal problems that involve foreign law. For example, the ABA has adopted a Model Rule for the Licensing of Legal Consultants providing that licensed foreign legal consultants may be partners in U.S. law firms.

While the ABA Committee concluded that the Model Rules permit partnerships between United States and foreign lawyers, it further concluded that the Model Rules require that the foreign lawyer be a member of a recognized legal profession in a foreign jurisdiction. United States lawyers must take reasonable steps to ensure that foreign lawyers with whom they affiliate are so qualified. The ABA Committee acknowledged that there is no specific definition of "legal profession" and that the determination is necessarily factual, requiring consideration of the foreign jurisdiction's legal structure and the nature of the services customarily performed by the foreign practitioner. However, the ABA Commit-

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(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.4 (1992).

tee stated that as a general matter, a person specially trained to provide advice on the laws of a foreign jurisdiction and to represent clients in its legal system, and who is licensed by the foreign jurisdiction to do so, qualifies as a member of a foreign legal profession. As examples, the ABA Committee noted that lawyers admitted to practice in Sweden, Japan, Great Britain, and other European Union countries generally satisfy these requirements. In addition, the ABA Committee noted that members of the professions of *avocat* (courtroom lawyer) and *conseil juridique* (transactional lawyer) in most civil law jurisdictions generally should be recognized as foreign lawyers, while members of the profession of *notario* or notary generally should not be so recognized because they do not perform legal functions. Finally, the ABA Committee cautioned that some countries may not have a recognized legal profession, in which case partnerships with professionals from that country are not ethically permissible under Rule 5.4 (although the foreign professionals can be utilized as paralegals so long as they are appropriately supervised).

The ABA Committee further cautioned that the ethical standards governing foreign lawyers may be different from those governing United States lawyers. In particular, the attorney-client privilege is more limited in some foreign jurisdictions. While these differences do not disqualify foreign lawyers from partnership with United States lawyers, United States lawyers have a duty to make sure that confidential client information and conflicts of interest are handled in accordance with the Model Rules.

C. Woodstone Lakes Development, L.L.C. v. Southern Energy NY-Gen, L.L.C.[12]

In this order, the FERC addressed a request by complainants, Woodstone Lakes Development and Woodstone Toronto Development, to amend a license for a hydroelectric project and to enforce compliance with certain license terms involving recreational opportunities at one of the project's reservoirs. The FERC also addressed a motion by the licensee (Southern Energy) to disqualify the complainant's law firm based on an alleged conflict of interest due to the law firm's prior representation of Southern Energy's predecessor-in-interest, Orange & Rockland. Specifically, the law firm had previously represented Orange & Rockland with respect to obtaining the initial project license in 1992, and had worked with Orange & Rockland personnel during the process. When Southern Energy later acquired the project pursuant to a license transfer, it retained Orange & Rockland personnel, who continue to operate the project.

In its motion to disqualify, Southern Energy asserted that the law firm had improperly switched sides by challenging the terms of a license that it had helped negotiate and secure, in violation of Commission Rule 2101(c),[13] which requires persons appearing before the Commission to conform to the ethical standards applicable to practitioners in federal courts. Southern Energy further asserted that the law firm's actions were in breach of its attorney-client relationship with Orange & Rockland and unfairly disadvantaged Southern Energy. Specifically, Southern Energy expressed concern that the law firm had used or

12. 95 F.E.R.C. ¶ 61,152 (2001).

13. 18 C.F.R. § 385.2101(c) (2001).

would use information obtained from the project's personnel to Southern Energy's detriment.

In response, the complainant asserted that the law firm's representation of Orange & Rockland in hydroelectric matters had ended in 1994 and that the attorneys principally involved in the licensing proceeding had left the firm before complainants retained the firm. The law firm also provided a sworn statement that none of the attorneys representing complainant had seen, or would have access to, any of the firm's files relating to its prior representation of Orange & Rockland.

The Commission analyzed the potential conflict under the District of Columbia Rules of Professional Conduct. The Commission noted that it was not bound by the D.C. Rules *per se*, but that it looked to the D.C. Rules as well as the ethical rules of other jurisdictions to determine whether a lawyer's conduct complies with Commission Rule 2101(c). In this case, Southern Energy had argued for application of the D.C. Rules and the law firm had not disputed their application.

Southern Energy argued that the law firm's conduct violated D.C. Rule 1.10,[14] which provides that the conflicts of former members of a firm are imputed to current members with respect to matters that are the same as, or substantially related to, those in which the formerly associated lawyer represented the client. The Commission disagreed, concluding that there was no conflict because the original licensing proceeding was not substantially related to the current dispute over compliance with recreation-related license requirements. The Commission reasoned that the establishment of license requirements is different from the issue of compliance with those requirements. It also noted that the current dispute is largely based on post-licensing information, and that there was no evidence that the law firm had used any confidential information obtained during its prior representation of Orange & Rockland.

The Commission, therefore, denied the motion to disqualify, concluding that the law firm's continued participation in the proceedings would not disadvantage Southern Energy.

D. FERC Ethics Mandate for FERC Employees

In September 2001, FERC Chairman Pat Wood issued an "Ethics Mandate" addressing the ethical conduct expected of FERC employees, including rules specifically stated in the FERC Regulations, as well as regulations from the Office of Government Ethics.[15] Among the provisions in the Mandate, FERC em-

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14. D.C. R. 1.10(c) provides:

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer during the association unless the matter is the same or substantially related to that in which the formerly associated lawyer represented the client during such former association.

DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT R. 1.10(c) (2001).

15. FEDERAL ENERGY REG. COMM'N, FERC Ethics Mandate, *available at* http://www.ferc.gov/legal/ethics/ethics2.htm (last visited Aug. 25, 2002).

ployees are not to disclose to or discuss with the public any non-public information (including draft orders, internal discussions, the nature or time of any proposed action, or the merits of a contested proceeding). In addition, employees are expressly precluded from working on any cases in which they have a financial interest, cannot own stock in any company that has FERC-related interests, and must file timely financial disclosure statements. There are also limits on the value of any gifts provided from persons, companies, or organizations that are regulated by, do business before or with, or whose interests are otherwise affected by the FERC, including reimbursement for official travel expenses without a prior determination by the Designated Agency Ethics Official.

E. D.C. Bar – Proposed Modifications to Rules of Professional Conduct on Issue of Multidisciplinary Practice

On October 23, 2001, the D.C. Bar Special Committee on Multidisciplinary Practice issued a Final Report, following two years of study on the issue of whether lawyers and nonlawyers should be permitted to work together and share fees.[16] In summary, the Special Committee unanimously concluded that collaboration between lawyers and nonlawyers could take place "without sacrificing the core values of the legal profession."[17] Based on its analysis, the Special Committee recommended that D.C. Rule of Professional Conduct 5.4 be amended "to permit lawyers to practice and share fees with non-lawyer professionals engaged with them in multidisciplinary practice."[18] In addition, the Special Committee proposed the amendment of Rule 1.7(b)(4):

> to alert lawyers that financial interests that may give rise to a conflict include a lawyer's financial interest in the non-legal practice of either a separate organization affiliated with the lawyer's law firm or the non-legal services provided by a multidisciplinary practice organization in which the lawyer is a participant.[19]

At its November 2001 meeting, the D.C. Bar Board of Governors authorized a sixty-day public comment period on the proposed modification to the D.C. Rules of Professional Conduct as proposed in that Final Report.[20] The comment period expired January 14, 2002.

COMMITTEE ON ETHICS
Nancy J. Skancke, Chair
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16. Report and Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice (Oct. 23, 2001), *reprinted in* THE WASH. LAWYER ONLINE (Jan. 2002) *available at* http://www.dcbar.org/washLaw/01_02/mdp.html [hereinafter D.C. Ethics Report].

17. Id.

18. D.C. Ethics Report, *supra* note 16.

19. Id.

20. D.C. Ethics Report, *supra* note 16.