Jackson & Campbell, P.C.
1120 20th Street NW
South Tower, Suite 300
Washington, DC 20036
202.457.1600

Year One as an ABA Delegate | Washington Lawyer

1 Dec 2012

By Arthur D. Burger

Last year I was elected as one of six D.C. Bar delegates to the American Bar Association (ABA) House of Delegates after previously losing twice. A bit humiliating, but I had been warned that votes for this position often were reserved for luminaries from the biggest firms, and I was prepared to fold my tent if I lost a third time. I do have my dignity.

Why would anyone (anyone with a life, that is) pine for a seat at the ABA? I was interested in the ABA because of my practice in the area of legal ethics and professional responsibility, and the ABA s role in drafting the Model Rules of Professional Conduct and particularly the series of changes in the works by the ABA Commission on Ethics 20/20. The commission was launched in 2009 by former D.C. Bar president Carolyn B. Lamm when she served as ABA president. The mission was to assess what revisions should be made to the Model Rules in view of changes in the practice of law resulting from advances in technology and the increasing globalization of legal services. The last major review of the rules was finalized in 2002 upon completion of the work of the Ethics 2000 Commission.

Having tangled often with the wording of the ethics rules in my practice, and also as an adjunct professor and a former member of the D.C. Bar Legal Ethics Committee, I thought I could make a contribution. The ABA, of course, does numerous other worthy things as well, but for me, the ethics rules have been my main focus.

I had doubts about what the ABA might really be like on the inside. Might the ABA be just a big talk factory? Does it actually *do* anything?

After one year, here is my report: I am impressed and very pleasantly surprised at the seriousness of the effort, the quality of the work product, and the efficiency with which the work of such a large group is finalized at both the ABA Annual Meeting and Midyear Meeting. And, yes, I think I have been able to make a small contribution.

SEEKING A SIMPLE FIX

For years, one easily fixable omission in the Model Rules has struck me as silly and dysfunctional, a pet-peeve of

sorts. While Rule 1.0 (terminology) provides important and binding definitions of key words and phrases such as *firm*, *informed consent*, *screened*, and *tribunal*, there were no visual signals, such as by boldface type or italics, to notify a reader when such terms appear in the text of the rules. Various regulations and numerous contracts highlight such defined terms in some fashion to give notice, both that a word or phrase carries some potential ambiguity, and that the ambiguity is resolved by a definition.

With ethics rules, such definitions are particularly important because a lawyer s required or prohibited conduct in a particular situation can turn on the meanings ascribed. One quick example: Under the definition of *tribunal*, arbitration hearings and adjudicative hearings before administrative agencies are deemed to be included, and so the rules regarding a lawyer s treatment of evidence apply with equal measure to such hearings as they do to proceedings in court.

As an adjunct professor trying to explain the rules to law students, I would stop to note when defined terms were used and suggest that they highlight those words in their book.

Was this a huge problem? No. But it would be so simple to fix. So, from my perspective, here was a simple test: Would a formal resolution, preceded by a committee review and approvals at multiple levels, be required or could I cut through all that and simply present the problem to somebody who could fix it?

D.C. DELEGATION: A PLAN IN THE WORKS

A month or so before each ABA Annual Meeting or Midyear Meeting, the D.C. delegation meets with Marna S. Tucker, a senior partner at Feldesman Tucker Leifer & Fidell LLP, who, as our state chair, ably heads our delegation to review issues that are on the agenda.

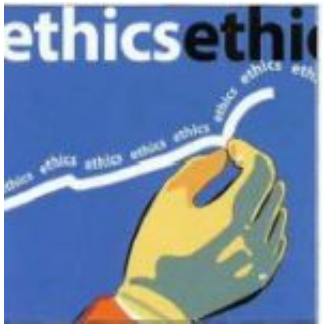
Upon arrival, I was surprised to learn that our delegation does not consist of just the six of us who were elected by the D.C. Bar, as well as the D.C. Bar president, but it also includes D.C. representatives from various ABA committees and other bar groups and officials.

At these pre session meetings, members of the delegation provide a summary of any resolutions they intend to support or oppose, followed by a discussion to explore whether or not a consensus can be reached among the group on a position or approach to take.

At my first meeting, I raised the idea (not on the agenda of proposed resolutions) of fixing the problem regarding defined terms. Marna suggested it might be accomplished simply by speaking with Jeanne Gray, director of the ABA Center for Professional Responsibility. I wondered whether it could really be that easy.

ABA 2012 MIDYEAR MEETING

At the ABA Midyear Meeting in New Orleans, new delegates attended an orientation luncheon at which the



procedures for speaking during House of Delegates sessions are explained. Much emphasis is placed on the use of the (apparently) famous salmon slips, whereby, to be recognized by the chair to speak, delegates first must fill out and submit salmon colored sheets, identifying which resolution a delegate wishes to speak on and whether he or she takes a pro or con position. The sheets must be handed to the ABA staff, who places them in the appropriate folder provided to the ABA House chair. The sponsors of resolutions speak first and can present closing statements as well. Proponents of a resolution are given 10 minutes to speak; most other speakers are limited to five.

In view of the potential bedlam if a less formal approach were used for meetings of this size nearly 500 lawyers the procedures make sense. Linda A. Klein of Atlanta, serving as House chair, carried a pitch- perfect balance between serious formality and occasional humor.

What is most striking about a House session is that the lion s share of vetting, drafting, and accommodating various perspectives is substantially completed in advance. Thus, by the time the formal session begins, the issues have been narrowed and the resulting floor debates are focused on discreet issues for which consensus among interested groups had not been reached. Some resolutions are placed on the consent calendar for a quick voice vote. For the remaining resolutions, the points of dispute are either narrowed around a specific proposed amendment or on a basic up-or-down question.

The result is that the sessions are efficient and business-like. Things move pretty quickly and stuff gets done. The atmosphere is not conducive to showboating or pontificating. As a result, there is time for unhurried debate on the few narrow issues that are in genuine dispute.

While at the meeting, I took the opportunity to meet with the ABA s Jeanne Gray to discuss with her the question of highlighting defined terms. To my relief, she assured me that such a matter of publication style could be made without the need for a House resolution, and she put me in touch with two lawyers on her staff, Art Garwin and Dennis Rendleman. These witty gentlemen quickly agreed that the use of defined terms should be noted in some fashion, and they set out to work on the issue.

ETHICS 20/20 COMMISSION PROPOSALS

The ABA Commission on Ethics 20/20 is comprised of distinguished lawyers and judges from around the country, including four from the District of Columbia. Among the D.C. members are three former D.C. Bar presidents:

20/20 Commission chair and WilmerHale LLP partner Jamie S. Gorelick, Sidley Austin LLP partner George W. Jones Jr., and White & Case LLP partner Carolyn B. Lamm, as well as Judge Kathryn A. Oberly of the D.C. Court of Appeals. Ellyn S. Rosen of the ABA Center for Professional Responsibility serves as commission counsel.

The commission is a serious and hardworking group. Commission members have taken on a series of controversial issues, and, travelling around the country, they make themselves available to input from a wide range of lawyers, judges, bar groups, members of the public, and experts. Most important, commission members listen; I learned that firsthand.

In anticipation of the ABA Annual Meeting in August 2012 in Chicago, I reviewed the commission s proposed amendments to several of the Model Rules, which are posted on the ABA s Web site.1 These proposals were the result of three years of study. One proposal that caught my attention involved a change to Rule 1.6 regarding confidentiality, which added an exception for communications with lawyers in another firm when a lawyer is considering joining that firm, and he or she needs to determine whether the move would create a conflict of interest.

I thought the proposed amendment was needed and important because lawyers frequently change firms. The clash between the twin duties of client confidentiality on the one hand and the need to consider possible conflicts of interest on the other has been murky. ABA Ethics Opinion 09-455 provided useful guidance, but it was based on extrapolating what the rules probably were intended to mean rather than what the rules explicitly stated. Therefore, this was a ripe situation for a clarifying amendment. The proposed amendment provided limits on the scope of permissible disclosures so that client consent would be required if the information either involved privileged communications or could prejudice a client. Thus, the amendment presented a sensible balance between the need to conduct conflict searches and a client s right of confidentiality.

In reviewing the proposed language, however, I thought the wording needed to be clarified. Specifically, I felt that to avoid confusion on the point, the text of the exception should explicitly state that it was directed only to disclosures to *other* firms, and was *not* changing the longstanding procedures for routine internal communications within a single firm for conflict screening. Indeed, internal firm disclosures for such a purpose, which take place at law firms nationwide on a daily basis, are recognized as permissible by the implied consent of clients and should not be conflated with this exception.

You may need to be an ethics guru to think this is important, but in my practice of representing law firms and lawyers, I see how lawyers search the wording of the ethics rules in a sincere effort to determine just what exactly is required and what is prohibited. I have always felt that the ethics establishment owes it to such well intentioned lawyers everywhere to make the ethical mandates as clear and unambiguous as possible. Busy practitioners who take the time and effort to consult a rule for guidance as to what to do, or to not do, ought to be able to get an answer and not a riddle.

I took up the commission s offer to propose new wording to this effect. Promptly I heard from Professor Andrew M. Perlman at Suffolk University Law School, who is chief reporter for the commission (a more important position than the title might imply). He and I exchanged a series of wonkish e mails. Eventually, I was invited to present my thoughts at a commission meeting held at WilmerHale LLP in Washington, D.C. Following that, I was contacted by George Jones, and we exchanged a series of further wonkish e mails and shared extended phone calls regarding the best wording.

George later told me that the commission agreed to use one of the phrases I suggested, and it was included in the commission s revised proposal.

ABA 2012 ANNUAL MEETING

Among the resolutions on the substantive agenda at the 2012 Annual Meeting in Chicago were the commission s proposed amendments to the Model Rules. The only amendment that received serious opposition was the change to Rule 1.6. The opposition argument was that client confidentiality was a core principle of the profession, and that it should not be eroded for the convenience of lawyers who decide to change firms. The battle lines on the policy issues were forming. This was starting to be fun!

Having worked on the proposed rule change and being strongly in support of the need for it, I offered to assist the commission in the floor debate on the rule. I was included on the team that would speak on the various rules, but I did not know if I would be kept in reserve or whether I would be sent into the game.

On the evening before the House of Delegates session, I learned that others would speak in presenting the resolutions for the various rule changes, and my name was among those held in reserve. It looked like I was being benched.

HAVING MY SAY

The day of the House of Delegates debate was a fluid one. In the afternoon word came that a motion to amend the commission s proposal on Rule 1.6 was submitted, which would add a requirement that clients be notified before any conflict screening information could be disclosed to a firm. Often, proposed amendments change the wording so as to clarify a point of concern without altering the basic thrust of the resolution. Such amendments serve to finalize a consensus and to facilitate, rather than impede, the adoption of a resolution. But this proposed amendment, regardless of how it may have been intended, was deemed incompatible with the commission s purpose. The main concern was that by requiring prior notice to clients, the proposed amendment would chill a lawyer s ability to begin discussions with one or more new firms for fear of creating premature controversies with their existing firm and the clients.

With this development, I received an e-mail from the delightfully irreverent floor manager, Barbara Mendel Mayden of Nashville, Tennessee, noting that my moments of repose are officially over and asking me and Roberta D. Liebenberg of Philadelphia to speak in opposition to this troublesome proposed amendment.

Roberta and I quickly put our heads together on our talking points, and I volunteered to speak first.

Even for someone who speaks in public fairly often, as I do, the podium at the House of Delegates can be a bit intimidating. There are about 500 delegates and other officials in the room, and the speaker s image is projected onto enormous floor-to-ceiling screens on each side of the front wall. The proceedings are recorded on C-SPAN-like television cameras. The nerve-racking part is waiting to be called to the podium.

Once my name was announced and I approached the podium, my case of nerves disappeared and I was able to focus on the merits of the issue. My five minutes went by in a flash, but I felt I had compressed what needed to be said in simple but strong terms that left no doubt as to the counterproductive nature of the proposed amendment, as I saw it, and the benefit of the commission s proposal as written. Roberta also spoke in opposition, followed by my colleague in legal ethics and ABA treasurer, Lucian Pera of Memphis, Tennessee. No one spoke to rebut our points; on a quick voice vote, the motion to amend the commission proposal was defeated. A few minutes later, also by voice vote, the commission s proposed changes to Rule 1.6 were approved. And with that, the rule now stands amended.

It was with great pride that evening that I was invited to a celebration among the commission and its speakers as we shared a champagne toast and had our picture taken.

PROBLEM SOLVED

While in Chicago, I ran into the ABA s Art Garwin and asked him what had become of the project to highlight defined terms in the rules. He just happened to have a copy of the newly published 2012 edition of the rules, and they included, at the end of the comments for each rule, a list of the words and phrases used in that rule, which were defined, together with a reference to the portion of Rule 1.0 in which each definition appeared.

Garwin advised that in looking at the format used by various states, this was the method used in Tennessee and they thought it was a good one. I heartily agreed.

BALL IN STATES COURT

A second set of commission proposals are scheduled to be heard at the ABA Midyear Meeting in February 2013 in Dallas, and I provided some input as to one of the new proposals.

The ABA Model Rules, of course, do not become binding in the District of Columbia or any state unless and until they are adopted by those jurisdictions. One exception is for various tribunals and agencies whose rules incorporate by reference the Model Rules as binding.

Some jurisdictions, the District of Columbia among them, have active processes to consider ABA amendments for adoption, and some states literally are decades behind. Indeed, in some states lawyers remain governed by the old ABA Model Code of Professional Responsibility, which was replaced in 1983 by the ABA Model Rules of Professional Conduct. There are even some states that continue to use the far older Canons of Professional Ethics, which was first promulgated in 1908 and was replaced with the Model Code of Professional Responsibility in 1969. In any event, over time, the ABA has had enormous influence in fashioning the ethical standards by which the profession is governed.

ONE YEAR TO GO

I have one more year to go before my term expires in August 2013 at the ABA Annual Meeting in San Francisco. I am glad I took the plunge and have been pleased to learn that there are extremely capable and serious people who invest enormous time and energy in keeping our profession up to date, and who remain willing to take a hard look at what needs changing.

D.C. Bar member Arthur D. Burger *serves as chair of the professional responsibility practice group at Jackson & Campbell, P.C. in Washington, D.C. He is serving a two-year term as a delegate to the American Bar Association.*

Notes

1 *See* ABA Commission on Ethics 20/20 Web site at http://bit.ly/gDHFwX