

# **Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law**

## **Final Report January 9, 2015**

### **I. Introduction**

The Arizona Supreme Court established the Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law (“Committee”) by administrative order 2014-66 entered June 17, 2014. The Court created the Committee in recognition that the changing practice of law in the last decade poses new ethical questions that necessitate review of certain court Rules governing the practice of law. The Court tasked the Committee with examining and updating the current Rules to ensure that the public is protected and the Rules do not impose unnecessary barriers to the delivery of legal services. The Committee was also asked to consider making changes proposed by the American Bar Association’s Commission on Ethics 20/20.

The Committee met several times since July 2014; a list of the members is attached as Appendix 1. The Committee invited and received input from State Bar of Arizona sections and other stakeholders and established an email address for that purpose ([changingpracticeoflaw@azbar.org](mailto:changingpracticeoflaw@azbar.org)).

In developing its recommendations, the Committee considered a variety of different tools to address the implications of the modern practice of law, including educational and member services programs, advisory opinions, and Rule changes.

Contemporaneously with this report, the Committee has filed a petition seeking to amend several Rules and Rule comments. *See* Petition to Amend Rules 31, 34, 38, 39 and 42, Rules of the Supreme Court, No. R-\_\_\_\_\_ (“Petition”). When recommending a change in the conduct that is permitted or required, the Committee has recommended a change to the text of the applicable Rule or Rules. Many of the Committee’s recommendations, however, do not involve a proposal to change permitted or required conduct, but rather provide additional guidance to Arizona lawyers regarding how existing Rules apply in a contemporary practice context. In those instances, the Committee has recommended an explanatory comment, rather than a Rule text change.

This report does not repeat the Committee’s recommendations for Rule and Rule comment amendments but refers the Court to the pending Petition. Instead, this report sets forth additional recommendations that do not require a Rule change. It also identifies potential Rule changes that the Committee ultimately determined should not be adopted at this time.

## **II. Recommendations**

### **A. ABA 20/20 Proposals**

As set forth in the Petition, the Committee recommends adopting several ABA 20/20 proposals. The Committee has rejected others:

## **1. Reciprocity**

The Committee considered whether Arizona should eliminate the current restriction on admission by motion to those jurisdictions that offer admission on motion on a reciprocal basis. The Committee does not recommend that Arizona make changes to allow admission by motion for lawyers in non-reciprocal jurisdictions. Most significantly, eliminating reciprocity would diminish the protection of the public by permitting the admission by motion of lawyers from jurisdictions whose admissions standards are not as stringent as Arizona's. Eliminating reciprocity would benefit lawyers from non-reciprocal jurisdictions without any corresponding benefit to clients in non-reciprocal jurisdictions or to Arizona-licensed attorneys, who would still be barred from seeking admission by motion in those jurisdictions.

## **2. In-House Counsel Registration**

The 20/20 Commission proposed amendments to the Model Rule for Registration of In-House Counsel, the most significant of which is to allow lawyers admitted only in a foreign jurisdiction to register as in-house counsel but to impose restrictions on the legal services those lawyers could provide. The Committee does not recommend adoption of those amendments because Rule 38(h) already permits foreign lawyers to register as in-house counsel and does not restrict the legal services they can provide.

## **3. Choice of Law for Multijurisdictional Practice**

The 20/20 Commission proposed amendments to Comment [5] to Model Rule 8.5, which addresses choice-of-law provisions in disciplinary matters. Section 8.5(b)(2) states that for any conduct not involving a matter before a tribunal:

[T]he rules of the jurisdiction in which the lawyer's conduct occurred, or if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

The 20/20 amendments would add the following language to Comment [5]:

With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

The 20/20 Commission recommended this change to address the impact of globalization and increasing requests by clients to handle matters that implicate multiple jurisdictions, both within the United States and abroad.

The Committee notes that when Arizona originally adopted ER 8.5, it did not adopt the Model Rule's comments, including Comment [5]. The Committee concluded that there does not appear to be a compelling reason to adopt the 20/20 proposal, given that the language added to Model Rule Comment [5] simply includes optional conduct that "may be considered" by the disciplinary authority in determining a lawyer's reasonable belief. It therefore does not recommend that any change be made to the comments to ER 8.5.

#### **4. Other Proposals Regarding Foreign Lawyers**

The Committee reviewed various proposals included in the ABA report regarding the “Georgia Experience.” Some already have been adopted by Arizona (registration of foreign in-house lawyers and foreign legal consultants) or were considered by the Committee (pro hac vice admission). The Committee has considered the proposal regarding temporary transactional practice in its review of ER 5.5. The Committee does not recommend pursuing the proposal for full licensure of foreign lawyers because the ABA has not yet adopted a Model Rule on the subject, and there does not appear to be a compelling reason for Arizona to develop a rule change on its own, given the small number of foreign lawyers who currently seek to gain admission under the existing rules.

#### **B. Technology-Related Issues**

The Supreme Court recently approved amendments to ER 1.6 and its comments to expressly require a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to client information. In doing so, the Court specifically noted the associated technology-related issues. The Court has also approved amendments to the comments to ER 1.1 that make clear that the lawyer’s duty to maintain competency includes maintaining technological competency as necessitated by the lawyer’s practice. The proposed language is based on the ABA 20/20 recommendations and went into effect January 1, 2015. The Committee believes that the amended ERs thoroughly address these issues and raise lawyers’ awareness of data

security issues without tying the ERs or comments too specifically to current, ever-changing technology.

Lawyers increasingly use technological aids in their practice, ranging from storage of client information in a digital format to the transmission of data over the internet or through other electronic means. To fulfill their obligation to take reasonable measures to safeguard confidential client information, lawyers must keep up-to-date on the security of the technological tools they use in their practice, but these technological options change too rapidly for permissible uses to be prescribed by rule.

To address the need for training of lawyers and law firm staff regarding security of client data, the State Bar should assist lawyers in obtaining information and training regarding technology that may aid their practice and the security issues associated with that technology. This information and training could be provided as part of the Bar's existing voluntary Law Office Management Assistance Program (LOMAP), through Continuing Legal Education and Professionalism courses, and through ethics opinions or guidance given on the ethics hotline. Training for law firm staff regarding technology and the need to maintain reasonable security of client data would be particularly valuable. The Committee recommends that the Court confer with the State Bar on this issue.

### **C. ER 1.7. Conflicts of Interest: Current Clients**

The current version of ER 1.7 prohibits concurrent representation of clients if they are adverse to one another unless the requirements of ER 1.7(b) are met, even if the lawyer or law firm represents these clients on unrelated matters, and even if there is little to no

risk that a lawyer handling a matter for one adverse client will share confidential information with another lawyer representing the other adverse client on an unrelated matter. Some have questioned whether the current version of ER 1.7 places an unnecessary regulatory restriction on lawyers and firms that could be resolved by proper screening and waivers, if necessary.

The Committee considered whether to amend ER 1.7 to address situations in which large law firms are adverse to existing clients in unrelated matters. While it may be possible to protect clients by screening lawyers in different offices of a very large law firm who are working for and against the same client in unrelated matters without impairing either the quality of the representation or the relationship of loyalty and trust between lawyer and client, in smaller institutions it would be difficult or impossible to do so. The Committee was unable to find a way to draft a revised rule that drew a clear line between circumstances in which this conduct would be permissible without impairing other professional obligations, and circumstances in which it would not. Adopting a rule based on firm size is not the solution.

The Committee further notes that, under the current Rules, it is permissible for a law firm to both represent and be adverse to the same client, provided that all involved clients give informed consent. This option appears to adequately address concerns about undue regulatory restrictions without jeopardizing the integrity of the representation or the lawyer-client relationship.

This issue remains under active discussion at the national level and in other jurisdictions, including Canada. While the Committee sees no reason for Arizona to lead

a major change in practice for the reasons discussed above, it would be wise to monitor the development of this issue and further study it in the future once the experiences of other jurisdictions are available for examination.

#### **D. Nonlawyer Ownership of Law Firms**

The Committee considered the possibility of recommending changes to the Rules of Professional Conduct that would permit nonlawyer ownership or management of law firms. The restriction on nonlawyer ownership serves to protect clients by ensuring that law firms are controlled by persons who are subject to the ethical obligations of lawyers as reflected in the Rules of Professional Conduct and who can be disciplined for failure to follow those Rules. The Committee has recommended changes to the Rules of Professional Conduct to facilitate new forms of lawyer teams, including proposed changes to ER 1.5 that provide more flexibility for lawyers not in the same firm to share responsibility and fees in a matter, while ensuring that clients remain protected. *E.g.*, Petition at Section II(E)(1)(ER 1.5 Fees). The Committee did not believe that taking the additional step of permitting nonlawyers to own or manage law firms was necessary. In addition, the Committee understands that this issue is the subject of current study by the American Bar Association; the Committee therefore recommends awaiting the development of further information through that effort prior to making any change in Arizona Rules regarding nonlawyer ownership.

#### **E. Rule 38(d). Clinical Law Professors and Law Students**

The Committee discussed the possibility of amending Rule 38(d) to permit law students to provide volunteer legal services under the supervision of an Arizona licensed lawyer outside the law school clinic context. Such an amendment would benefit the public by increasing access to justice for those who cannot afford a lawyer. It would also benefit law students by providing additional practical training opportunities. Rule 38(d) should also be reviewed to ensure that each of its provisions are necessary and appropriate for current clinical practice. The Committee did not have sufficient information to make a recommendation regarding these issue. Therefore, the Committee recommends that the Supreme Court solicit input from the three law schools in Arizona about the wisdom of amending Rule 38(d) to permit law students to practice outside the law clinic context.

## **F. State Bar of Arizona’s Pending Petition**

### **1. ERs 1.11, 1.12, and 1.18**

The Committee was asked to provide recommendations on certain changes to the ethical rules proposed in the State Bar’s Petition to Amend ERs 1.10, 1.11, 1.12, and 1.18 and Comment [8] to ER 1.0 (“Petition No. R-13-0046” or “State Bar’s Petition”). The Committee supports some of those proposals, with modifications as set forth in the Petition at Sections II(E)(3)(b) and (c).

Among other things, Petition No. R-13-0046 proposes to modify ER 1.10 to expand the required information that must be supplied to an affected former client (or prospective client) in the event of screening. As reflected in the Petition, the Committee

concur in part with that aspect of Petition No. R-13-0046 but proposes more stringent notice requirements to provide greater protection to clients. The State Bar's Petition also recommends incorporating an identical notice provision into ERs 1.11, 1.12, and 1.18, which allows screening in the context of former government lawyers, former adjudicative officers and prospective clients.

The Committee does not believe that the more expansive notice requirements of ER 1.10, governing lateral screening in context of private practice, should be extended to ERs 1.11, 1.12 and 1.18, for two reasons. *First*, the notice provisions of Arizona's current ERs 1.11, 1.12 and 1.18 are identical to the corresponding ABA Model Rule provisions. Consistent with the Committee's proposal, the language of the ABA Model Rules governing private lateral moves is more restrictive than the applicable Rules governing government lawyers, adjudicative officers, and prospective clients. This reflects an underlying policy decision that the ethical Rules should facilitate the transition of government lawyers and adjudicative officers who desire to leave public service for private practice. Similarly, prospective clients are not accorded the same status under the ABA Model Rules as existing clients. *Second*, Arizona's current ERs governing government lawyers, adjudicative officers, and prospective clients have been in effect for some time and appear to have achieved the proper balance of client and lawyer interests. There is no demonstrated need to add more restrictive notice and screening requirements in these areas.

## **2. ER 1.0, Comment [8]**

The State Bar’s Petition made a corrective change to Comment [8] to ER 1.0 that should be adopted. The proposal adds a reference to ER 1.10 in the comment addressing screening, as follows: “This definition [of screening] applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.”

### **III. CONCLUSION**

The Committee has welcomed the opportunity to address these important issues affecting the modern-day and future practice of law in Arizona.

/s/  
Honorable Ann A. Scott Timmer, Chair  
Committee on the Review of Supreme  
Court Rules Governing Professional  
Conduct and the Practice of Law

## Appendix 1

### COMMITTEE ON THE REVIEW OF SUPREME COURT RULES GOVERNING PROFESSIONAL CONDUCT AND THE PRACTICE OF LAW

#### *Chair*

**Justice Ann A. Scott Timmer**  
Arizona Supreme Court

#### *Members*

**Mary Jo Foster**  
Office of the Arizona Attorney General

**Maret Vessella**  
Chief Bar Counsel, State Bar

**Kimberly A. Demarchi**  
Lewis Roca Rothgerber LLP

**Whitney Cunningham**  
Aspey Watkins & Diesel PLLC

**Leticia Marquez**  
Federal Public Defender – Tucson

**Jennifer Burns**  
Public Member

**Nancy A. Greenlee**  
Private Practice

**Jodi Knobel Feuerhelm**  
Perkins Coie LLP

**Honorable Samuel A. Thumma**  
Court of Appeals, Division I

**James J. Belanger**  
Coppersmith Brockelman PLC

**Geoffrey M. T. Sturr**  
Osborn Maledon PA

**Amelia C. Cramer**  
Arizona Prosecuting Attorneys  
Advisory Council

#### *Consultant*

**Patricia A. Sallen**  
State Bar of Arizona

#### *Staff*

**Lisa Panahi**  
State Bar of Arizona

**Patricia Seguin**  
State Bar of Arizona