

LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS

2016 Edition

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LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS

2016 Edition

Includes ABA and California changes through 2013, a Rule-by-Rule Comparison of the California and Both Old and New ABA Model Rules, and the ABA and California Judicial Codes

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MATTHEW  BENDER

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LEGAL ETHICS: RULES, STATUTES AND COMPARISONS 2016 EDITION

Including separate sets of 2002–03 (as amended) and 1983 (as amended)
ABA Rules, a “red-lined” edition of the 2002–03 and 1983 rules together, a
Rule-by-Rule Comparison of the California Rules and both the 2002–03 and
1983 ABA Rules, and the ABA and California Judicial Codes

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INTRODUCTION and USE NOTE

In 2002, with the assistance of retired California State Bar Court judge Ellen R. Peck, we updated this Rules Book to account for the work of the ABA “Ethics 2000” Commission, which was charged with reviewing the American Bar Association’s Model Rules of Professional Conduct and making any necessary revisions. This volume incorporates not only all the changes to the Model Rules adopted by the ABA House of Delegates in August 2001 and February 2002 after its receipt of the “Ethics 2000” Commission’s report, but also all substantive changes made to the Model Rules since that time. Most recently, these changes include those proposed by the ABA’s “Ethics 20/20” Commission and approved by the House of Delegates in August 2012 and February 2013. We further describe that commission below. We have also included the changes made during that period to the California Rules of Professional Conduct and the selected sections of the California Business & Professions and Evidence Codes included in this book. Further, we have added sections that feature the ABA Model Court Rule on Insurance Disclosure, the ABA Model Rule for Admission by Motion, the ABA Model Rule on Practice Pending Admission, the California Rules of Court adopted to address multijurisdictional concerns, State Bar of California Resolutions concerning the delivery of pro bono and limited scope legal services, and the SEC Attorney Regulations promulgated pursuant to the Sarbanes-Oxley Act.

Beginning with the 2014 Edition, we included the **ABA Model Code of Judicial Conduct (2010)** and the **California Code of Judicial Ethics (2013)**. We continue to include those resources to further assist you in preparing your students for their careers as lawyers.

To summarize, this volume contains the following:

- The Model Rules adopted by the ABA House of Delegates in 2001-2002, as amended in February 2002, August 2003, February 2008, February 2009, August 2009, August 2012, and February 2013. We have designated these Rules the **2002 ABA Model Rules**. They are in Part I.
- The text of the original, now-superseded Model Rules that were adopted in 1983. We have termed these rules the **1983 ABA Model Rules**. These rules, still the basis of the governing disciplinary rules in a diminishing number of jurisdictions, are in the form last amended prior to the Ethics 2000 changes. They follow the 2002 rules in Part I.
- A “**red-lined**” or legislative style copy of the **2002 Rules** (as amended) showing the changes from the 1983 rules, so that the differences between the two sets of rules may be easily reviewed. This “red-line” version has been updated periodically as the Model Rules have been amended, the latest revisions reflecting the aforementioned 2013 amendments. They are also in Part I, and follow “clean” copies of the 2002 and 1983 rules.

- **The 2004 ABA Model Court Rule on Insurance Disclosure**, which can be found in Part I.
- **The 2012 ABA Model Rule for Admission by Motion**, which can be found in Part I.
- **The 2012 ABA Model Rule on Practice Pending Admission**, which can also be found in Part I.
- **The ABA Model Code of Professional Responsibility (1969)**, although no state remains a “Code state” (New York was the last such state, but effective April 1, 2009, became a “Model Rule” state.) Nevertheless, we have included the Model Code in Part II and contemplate doing so for the foreseeable future because of its usefulness in tracing the genesis of many of the Model Rules and also because important case law from former Code states refer to the Code sections.
- **A California - Model Rules Comparison** that compares the ABA Model Rules to the California Rules and includes a substantive comparison between the 1983 Model Rules and the 2002 Model Rules. In this way, the 1983 Rules, the 2002 Rules (where substantive changes were made) and the more recent changes to those rules (in 2003, 2008, 2009, 2012, and 2013) are compared to the California Rules and relevant California statutes. This can be found in Part III, together with a table cross-referencing the California standards to the Model Rules.
- **The California Rules of Professional Conduct**, originally adopted in 1989 and 1992 and periodically amended, together with selected provisions of the California State Bar Act from the **California Business & Professions Code**.¹ Both the rules and statutes are in Part IV, together with selected statutes from the California Evidence Code, and State Bar Resolutions on Pro Bono and Limited Scope Legal Services and Selected California Rules of Court Regarding Multijurisdictional Practice.
- **ABA Model Code of Judicial Conduct and California Code of Judicial Ethics**. We include the Judicial Codes of the ABA and California. Both Codes are in Part V.
- **SEC Final Standards of Professional Conduct** in Part VI.

¹ California, unique among states, has lawyer conduct standards that emanate from both the state legislative process and the state Supreme Court. The Rules of Professional Conduct are proposed and adopted by the State Bar of California and then approved by the California Supreme Court. The legislature, however, also has plenary power to regulate lawyers’ conduct, memorialized in the State Bar Act, codified at California Business & Professions Code §§ 6000 et seq. There is, however, no codified plan for the court and legislature to work in concert. As a result, as to those issues that are dealt with directly by legislation, including most significantly confidentiality, the court has historically been reluctant to intrude or impose itself on the legislative process, and has tended to leave modifications up to the legislature.

In particular, we hope the **Rules Comparison** will be of value both in comparing California standards to the ABA standards *and also* the 1983 ABA Rules to the 2002 ABA Rules. As we have with the “red-line” version of the 2002 Rules, we have updated the Rules Comparison periodically as there have been amendments to the Model Rules or the California Rules. However, it is important to note that our intent is not to provide an exhaustive comparison between the 1983 and 2002 versions. For a brief excellent comparison of the two sets of rules that not only discusses the substantive differences, but the reasons for the commission’s actions, see Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of “Ethics 2000,”* 15 GEO. J. LEGAL ETHICS 441 (2002). In addition, the Ethics 2000 Reporter’s Explanation of Changes for each Model Rule is available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html. A compilation of all of the Reporter’s Explanations of Changes can be found at: http://www.americanbar.org/content/dam/aba/migrated/cpr/e2k/10_85rem.pdf.

CHANGES SINCE 2002 TO THE MODEL RULES AND OTHER RULES AND REGULATIONS GOVERNING LAWYERS

Since the ABA's adoption of the 2002 Rules, there have been a number of changes not only to the Model Rules, but also to other rules and regulations governing lawyer conduct. We highlight significant changes below.

Changes to the Model Rules Since 2002.

2012-2013 Changes to the Model Rules proposed by the Ethics 20/20 Commission. The ABA Ethics 20/20 Commission was created in 2009 by then-ABA President Carolyn B. Lamm to engage in a thorough review of the Model Rules and the U.S. system of lawyer governance and regulation in light of technological advances and developments in the global practice of law. The Commission's web site can be found at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. The Commission completed its work in February 2013.

In August 2012 and again in February 2013, the Commission presented proposals to the ABA House of Delegates that were adopted with only minor revisions. All of the revisions have been included in this volume, not only in the 2002 Model Rules, but also in the redline version comparing the 2002 Model Rules to the 1983 Model Rules and in Part III, which contains the comparison of the Model Rules to the California Rules. Although detailed descriptions of the changes are included in that section, it is appropriate to highlight some of the changes here:

- *Rule 1.1 (Competence).* Two new comments, Comments [6] and [7], have been added to provide guidance concerning a lawyer's responsibilities with respect to outsourcing work to lawyers outside of the firm in which the lawyer works. Perhaps the most publicized Ethics 20/20 revision to the Rules is a clause added to Comment [8] (formerly numbered [6]), which states that to maintain the requisite knowledge and skill, a lawyer should stay current with changes in the law and its practice, "including the benefits and risks associated with relevant technology." Time will tell whether this provision will be viewed as imposing a duty on lawyers to stay current with technology changes or will be seen primarily as a recommended best practice.
- *Rule 1.4 (Communication).* In acknowledgement that clients and lawyers use a variety of technologies to communicate, a comment urging lawyers to return telephone calls now more broadly urges them to "promptly respond to or acknowledge client communications." Such communications include emails and would also appear to include texting and other similar communications.
- *Rule 1.6 (Confidentiality).* Two new sections have been added to the black letter of the rule. New paragraph (b)(7) creates an exception to permit disclosure of confidential information for the limited purpose

of clearing law firm conflicts of interest. New paragraph (c) to “make reasonable efforts” to avoid inadvertent or unauthorized disclosure of, or inappropriate access to, confidential client information. New comments have been added to elaborate on the duties imposed by these new sections.

- *Rule 1.18 (Duties to Prospective Clients)*. The definition of “prospective client” has been clarified and an important sentence has been added to Comment [2] to make clear that a person who communicates with a lawyer in order to disqualify the lawyer is not a “prospective client.”
- *Rule 4.4 (Respect for Rights of Third Persons)*. Rule 4.4(b) has been revised to expand its application not only to physical “documents” but also to “electronically stored information.” The comments to the Rule have similarly been expanded to provide more guidance to lawyers on handling electronic information.
- *Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance)*. The Comment to Rule 5.3 has been substantially revised and supplemented to address a lawyer’s responsibilities regarding work that is outsourced to nonlawyers.
- *Rule 5.5 (Unauthorized Practice of Law Multijurisdictional Practice of Law)*. Several revisions have been made to the Rule to conform it to the new Model Rule for Admission by Motion and the new Model Rule on Practice Pending Admission, which are also the work product of the Ethics 20/20 Commission. In addition, several more revisions were made to the rule that, if adopted by a state, would grant foreign lawyers the same kinds of privileges accorded domestic lawyers who work as in-house counsel and who are licensed in United States jurisdictions other than the jurisdiction in which they work.
- *Rules 7.1 (Communications Concerning a Lawyer’s Services), 7.2 (Advertising) and 7.3 (Solicitation of Clients)*. Each of these rules has undergone a number of revisions to address issues raised by the various technologies lawyers use to market their legal services. Of particular note is the inclusion of a definition for “solicitation” in new Comment [1] to Rule 7.3.
- *Rule 8.5 (Disciplinary Authority; Choice of Law)*. A comment revision provides that, in determining a lawyer’s reasonable belief as to controlling law under paragraph (b)(2), a choice of law agreement, i.e., a written agreement between client and lawyer that specifies a particular jurisdiction, may be considered if the agreement was obtained with the client’s informed consent, confirmed in the agreement.

There were also relatively minor revisions to the definition of “writing” in *Rule 1.0 (Terminology)* and to *Model Rule 1.17 (Sale of Law Practice)*. See Part III for details.

2009 Revisions to the Model Rules: Model Rule 1.10 (imputation and screening). The big news in 2009 was the ABA's adoption, in February and August of 2009, of amendments to Model Rule 1.10 that broadly permit non-consensual screening of lawyers who move from one *private* firm to another *private* firm. In effect, the Model Rule provision places private lawyers more or less on an equal footing with government lawyers, who are governed under MR 1.11, in their ability to be screened. The rule allows such screening even if the screened lawyer had a substantial and direct involvement in the former client's case, and even if the former and current clients' cases were "substantially related." The rule, in effect, changes the presumption that a laterally-moving lawyer would share confidential information with his or her new firm. As of this writing, only two jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut and Idaho. Nevertheless, there are 13 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington. In addition, another 14 jurisdictions permit screening in limited situations, i.e., the jurisdiction's provision permits screening only if a lawyer did not "substantially participate," or was not "substantially involved," did not have a "substantial role," did not have "primary responsibility," etc., in the former client's matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or "is not likely to be significant" (e.g., Minn.) Jurisdictions that permit screening in such limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

2008 Revisions to Model Rule 3.8. After 2003 no further amendments were made to the Model Rules until February 2008, when the House of Delegates adopted Model Rule 3.8, paragraphs (g) and (h). Based on provisions adopted by the New York State Bar Association in November 2007, MR 3.8(g) and (h) codify the duties of prosecutors when they learn of possible false convictions. Paragraph (g) sets forth a prosecutor's minimal duties when the prosecutor "knows of new, credible and material evidence" indicating a defendant was wrongfully convicted. Where the conviction took place in a prosecutor's jurisdiction, paragraph (h) requires the prosecutor "to remedy the conviction."

2003 Revisions to Model Rules 1.6 and 1.13. In August 2003, ABA Model Rules 1.6 (Confidentiality) and 1.13 (Organization as Client), among the most important, underwent material revision following the corporate responsibility debacles in the early part of this decade. Both rules were modified to increase the permissible scope of attorney whistleblowing.

2002 Revisions to Model Rules 5.5 and 8.5 (Multijurisdictional Practice). In August 2002, the ABA House of Delegates adopted substantial revisions to Model Rules 5.5 and 8.5 that the ABA's MJP Commission had recommended in order to address the issues presented by multijurisdictional practice.

The ABA Model Court Rule on Insurance Disclosure

In August 2004, the ABA House of Delegates adopted an important model court rule on malpractice insurance disclosure. This rule requires a lawyer licensed in the jurisdiction to certify on his or her annual registration form whether the lawyer has and intends to maintain professional liability insurance. This model rule can be found at the end of Part I. A total of 24 jurisdictions now have some form of regulation for insurance disclosures. As we note in our introduction to that rule, a number of jurisdictions require lawyers to disclose the fact they do not have malpractice insurance directly to their clients, while still others require attorney disclosure as part of the lawyers' annual dues registration. In 2009, the California Supreme Court adopted a rule of professional conduct, effective January 1, 2010, that requires lawyers to disclose to their clients the fact they do *not* have liability insurance. See Cal. R. Prof. C. 3-410 in Part IV below.

2005 and 2006 ABA Resolutions Concerning the Attorney-Client Privilege

In 2005, the ABA House of Delegates unanimously approved a resolution on the attorney-client privilege that “opposes policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine,” and “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.” The resolution grew out of the work of the ABA’s Task Force on Attorney-Client Privilege. This task force was formed in response to concerns that some government agencies have been routinely demanding that those subject to their regulatory oversight, particularly corporations, waive the privilege and work product protections in order to receive favorable treatment during criminal investigations and negotiations.

In 2006, the ABA House of Delegates again unanimously approved a resolution on the attorney-client privilege that opposes “policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine” and “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.”

2002 Sarbanes-Oxley Act & SEC Regulations

The 2002 Sarbanes-Oxley legislation required the SEC to create regulations addressing the duties of attorneys who are confronted by wrongdoing on the part of their “issuer client.” While the “Final Standards of Professional Conduct” eventually adopted by the SEC are limited to reporting duties in matters overseen by the SEC, the impact of these regulations has been far broader, and warrants their inclusion in this volume. We direct particular attention to

section 205.3, directly addressing reporting, and section 205.2, which contains the definitions used in the SEC standards. See Part VI.

Also of note is a provision in the SEC’s proposed draft that the SEC did not include in the Final Standards — the so-called “noisy withdrawal” requirement. That proposal would have required a lawyer to (1) withdraw from the representation if the “issuer client” did not take appropriate action to correct violations of the securities laws; (2) notify the SEC in writing that the lawyer’s withdrawal was based on “professional considerations”; and (3) affirmatively disavow any opinions, documents, etc. that the lawyer might have submitted and that the lawyer had discovered were materially misleading. This broad and rather controversial “noisy withdrawal” language still has not, as of this writing, been added to the SEC “Final Standards.”

Changes to the California Rules of Professional Conduct, California Rules of Court, and Business & Professions Code Since 2002

In 2004, Section 6068(e) of the California Business & Professions Code, California’s statutory duty of confidentiality, was amended to allow for the first time a California lawyer to disclose confidential information to prevent a criminal act reasonably likely to result in death or substantial bodily harm. Soon thereafter, California Rule of Professional Conduct 3-100, which tracks and elaborates upon the statutory exception, was approved by the California Supreme Court. (See footnote 1 above for a discussion of the dual role of legislature and court in drafting California ethics rules.) Both section 6068(e) and rule 3-100 became effective on July 1, 2004. We have described how rule 3-100 differs from Model Rule 1.6 in our California — Model Rules Comparison.

In 2004, the California Supreme Court also approved California Rules of Court 964-967 [subsequently renumbered Rules 9.45 to 9.48], addressing Multijurisdictional Practice (“MJP”). California’s approach to regulating MJP thus differs markedly from the ABA, which has addressed MJP in the Model Rules. These rules, together with several other rules of court that address MJP situations, as well as the rule regulating the conduct of certified law students, may be found in the section titled “Selected California Rules of Court Regarding Multijurisdictional Practice” in Part IV. Our California — Model Rules Comparison includes a comparison of the rules of court to ABA Model Rule 5.5.

In 2005, the California legislature reorganized and revised the California statute governing attorney work product, now found at Code Civ. Proc. § 2018.01 to 2018.08 (formerly Code Civ. Proc. § 2018). The revisions became effective on July 1, 2005.

In 2007, the California Supreme Court engaged in a major overhaul of the state’s Rules of Court. Effective January 1, 2007, the California Supreme Court implemented a major restructuring, reordering, and renumbering of over 1000 Rules of Court to make them clearer, better organized and easier to read. All of California’s rules concerning multijurisdictional practice (“MJP”) were given new numbers. We made those changes to those rules but kept the old numbers

in brackets for ease of reference. The Court Rules can be found at the end of Part IV.

In 2008, substantive amendments were made to Bus. & Prof. Code §§ 6211-6213, which govern IOLTA deposit accounts. In addition, a new subdivision (c) was added to Bus. & Prof. Code § 6155, which governs Internet attorney matching services.

In July 2009, the California Supreme Court approved two new rules of professional conduct, one rule that became effective immediately and a second rule that became operative on January 1, 2010. The first rule is California Rule 1-650, which is based on Model Rule 6.5, and is intended to facilitate private firm lawyers' participation in limited legal services programs. The second rule, which became operative on January 1, 2010, is the aforementioned rule 3-410, and requires lawyers to disclose to their clients the fact they do not have liability insurance. Both rules can be found in the California Rules of Professional Conduct, in Part IV.

In 2014, several new provisions of the California State Bar Act were enacted, most notably those included in Article 16, Bus. & Prof. Code §§ 6240 – 6242, which is intended to regulate lawyers who provide services under the proposed federal Immigration Reform Act. Although the Act has not yet been passed or signed into law, Article 16 sets forth provisions that will govern lawyer conduct in California once federal legislation becomes operative. By its terms, Article 16 will apply to both members of the California Bar and any other lawyer providing legal services under the Act in California. (Bus. & Prof. Code § 6241.) We have included Article 16 in this volume.

California is one of the few jurisdictions in which evidentiary privileges are governed by statute rather than common law. California courts can neither create new privileges nor add to or abrogate existing privileges. Since our last edition in 2014, important revisions to the California Evidence Code were enacted, including recognition of two new privileges: a human trafficking caseworker-victim privilege (Evid. Code §§ 1038 et seq.) and a lawyer referral service-client privilege (Evid. Code § 965 et seq.) We include the latter, together with the Evidence Code sections relevant to the lawyer-client privilege, in this volume.

FURTHER NOTES ON THE MATERIALS IN THIS BOOK:

Every state empaneled a committee or task force to review the Ethics 2000 Commission's recommended changes to the Model Rules. Forty-eight jurisdictions have now adopted new rules that incorporate post-Ethics 2000 revisions (Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia,

Wisconsin and Wyoming). Of particular note, five of those states represent the last of the Code states: Iowa, New York, Nebraska, Ohio and Oregon. Thus, there is no state that still uses the Model Code as its source of lawyer regulation. One state (Georgia) has a committee that is studying the Ethics 2000 changes. The Supreme Court of Texas submitted proposed Rules of Professional Conduct that incorporated Ethics 2000 revisions for a referendum by members of the Texas State Bar, who rejected the proposal. It is not clear when or if new rules might be submitted again for a vote, or if the Supreme Court might act to implement post-Ethics 2000 revisions despite the rejection by referendum. West Virginia's Office of Disciplinary Counsel has submitted proposed rules to the state's Supreme Court. No further information is available at this time.

Finally, in California, the only state whose rules are neither ABA Code- nor ABA Rules-based, in 2010 the State Bar adopted a set of rules that for the first time incorporated the style, format and numbering system of the Model Rules, and that in many respects follow the Model Rules' content. In 2013, the State Bar, in consultation with the California Supreme Court, began submitting proposed rules in a piecemeal fashion to the Court.

However, in September 2014, the Court ended that initial rules revision project and directed the State Bar to empanel a new Rules Commission to re-study and recommend revised California Rules of Professional Conduct. The Supreme Court stated that the second Commission was to "begin with the current [California Rules] and focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California's rules and those used by a preponderance of the states."²

Perhaps most important, the Supreme Court stated the overarching principle that should guide the second Commission's efforts:

"The second Commission should also be guided in its task by the principle that the [rules'] historical purpose is to regulate the professional conduct of members of the bar, and that as such, the proposed rules should remain a set of minimum disciplinary standards. While the second Commission may be guided by and refer to the American Bar Association's Model Rules of Professional Conduct when appropriate, it should avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments."³

The second Commission convened for the first time in early spring 2015. The deadline for submission of the revised rules to the Supreme Court is March 31, 2017. As we have done in the past with the first Commission, we will follow and report on the work of this second Commission.

² September 19, 2015 Letter from Frank McGuire, Court Administrator and Clerk to the Supreme Court, to Senator Joseph Dunn (Ret.), then-Executive Director of the State Bar of California.

³ *Id.*

Multijurisdictional practice (“MJP”) is here to stay. As set out in more detail in the introduction to California’s MJP rules, at the time of writing, 46 jurisdictions had adopted a rule either identical to, or similar to Model Rule 5.5, while the review committee in one jurisdiction has recommended the adoption of a form of the rule. The rule is under study in one other jurisdiction. The same is true for Rule 8.5, the other MJP-adopted Model Rule of Professional Conduct, with 46 jurisdictions having adopted some form of the rule, one recommending its adoption, and two having it under study.

While we expect further Model Rule adoptions to occur, two points should be noted. ***First***, two states continue to operate with rules based on the pre-Ethics 2000 Model Rules (Georgia and Texas). The ABA’s Center for Professional Responsibility Policy Implementation Committee provides updates on rules adoptions in the states at http://www.americanbar.org/groups/professional_responsibility/policy.html [last visited 9/6/2015].

Second, and perhaps more important, even those states that have adopted post-Ethics 2000 versions of the Model Rules have not adopted the Model Rules verbatim. We mention this so that users of this book will not use it in their practices without also consulting their own jurisdiction’s rules. Even Delaware, the only state we are aware of that has adopted the Model Rules nearly verbatim, has adopted at least two provisions that vary from the Model Rules. One is a rule that permits a lawyer to divide a fee with another lawyer even if the lawyer provides no legal services or does not assume responsibility for the matter (Del. Rule of Prof. Conduct 1.5(e)). Moreover, although Delaware’s rule on screening of private lawyers, Delaware Rule 1.10(c), broadly permits screening, it differs in significant respects from Model Rule 1.10(a)(2).

As might be expected, some of the former Code states have diverged significantly from the Model Rules, retaining provisions from their former codes. For example, Oregon rejected the 2003 changes to Model Rule 1.6, used its existing standards on lawyer mediators instead of adopting Model Rule 2.4, and kept a number of its other existing rules, including those addressing screening, sales of law practices, and covert activity. New York has also retained a great number of its former Code provisions in its new rules, and has not officially adopted the Model Rule comments. Divergence from the substance of the Model Rules, however, is not limited to former Code states. For example, both New Jersey and Pennsylvania, Model Rules states of long standing, continue to have rules that depart markedly from the Model Rules in many respects.

California’s Second Rules Revision Commission has embarked on its new project to study and recommend revisions to the current California Rules, as described above. Professor Kevin E. Mohr of Western State College of Law, who continues as co-author of this rules volume, remains in his capacity as the Consultant, or “reporter,” to the second California Rule Revision Commission, as he was to the first. As such, he is well-placed to update the California materials in this volume.

In future editions of this rules book, we will continue to provide updates and “keep score” as states adopt revisions to their rules, and we will attempt to identify any trends in lawyer regulation as they develop throughout our 50 states and the District of Columbia.

Richard Zitrin
Kevin E. Mohr
September 2015