

# Amendments to Model Rules of Professional Conduct Approved by ABA

By Scott M. Karson

The 134th Annual Meeting of the American Bar Association was held August 2-7, 2012, in Chicago, Illinois. Lawyers from across the U.S. and numerous foreign jurisdictions attended one or more of the 1,496 events scheduled during the meeting, including 191 continuing legal education programs. As an example, Justice Ruth Bader Ginsburg of the United States Supreme Court participated in a program entitled, "Arias of Law: The Rule of Law at Work in Opera and the Supreme Court," which explored the parallels between two of her passions, opera and litigation. Another program featured best-selling author Scott Turow.

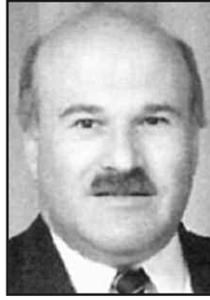
At the Opening Assembly of the Annual Meeting, held at Chicago's historic Symphony Center, ABA President William T. (Bill) Robinson III of Kentucky presented special citations to the Judge Advocate General of each U.S. military service. Interestingly, each of the five TJAGS is a member of the ABA. Moreover, ABA Executive Director Jack Rives is the former TJAG of the Air Force.

The Opening Assembly also featured remarks by United States Senator Lindsey Graham, a Republican from South Carolina. Senator Graham, who serves on the Senate Judiciary Committee, expressed concern over the politicization of the process of approving federal judges, and the resulting threat to judicial independence. Senator Graham observed, "I'm really worried about how we're doing confirmations. They're turning into political events. I'm a conservative and I'd like conservative judges on the federal bench." However,

Graham went on to say that if President Obama is re-elected in November, then "his nominees are entitled to be confirmed so long as they're qualified." Graham continued, "The question is: Are you qualified? It's stupid to pick on something you said in law school and pick on this or pick on that. I'm not worried about judicial activism. I'm worried about Senate activism."

The 560-member House of Delegates met on Monday, August 6, and Tuesday, August 7, 2012. Linda A. Klein of Georgia presided as Chair of the House. What was perhaps of greatest significance was the House's consideration of a series of six resolutions amending the black letter and commentary to the *ABA Model Rules of Professional Conduct*. These resolutions were sponsored by the ABA Commission on Ethics 20/20, a body appointed by then-ABA President Carolyn Lamm of the District of Columbia to revisit and – if appropriate – propose amendments to the Model Rules in light of globalization and technological advancements.

Before considering the resolutions addressing the Model Rules, the House considered Report 10A, which was sponsored by the Illinois State Bar Association. John E. Thies of Illinois moved Report 10A, which would have reaffirmed ABA policy, adopted in July 2000, that the sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession; and the law governing lawyers that prohibits



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lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised. Report 10A faces substantial opposition because it was widely viewed as an unseemly attempt to preempt the Commission on Ethics 20/20 from opining on non-lawyer ownership and the sharing of fees

with non-lawyers before the Commission had even made a proposal to amend the Model Rules with respect to those issues. The House approved a motion to postpone Report 10A indefinitely.

Then, on behalf of the Commission on Ethics 20/20, Co-Chairs Jamie S. Gorelick of the District of Columbia and Michael Traynor of California gave an overview of the six resolutions, denominated 105A-F.

First, the House approved, as amended, Revised Resolution 105A, which amends the black letter and Comments to Model Rules 1.0, 1.6 and 4.4, and the Comments to Model Rules 1.1 and 1.4 of the *ABA Model Rules of Professional Conduct* dated August 2012. It clarifies a lawyer's duty to take reasonable measures to protect the confidentiality of client information, including electronically stored information.

Second, the House approved Resolution 105B, which amends the black letter and Comments to Model Rules 1.18 and 7.3, and the Comments to Model Rules 7.1, 7.2 and 5.5 of the *ABA Model Rules of Professional Conduct* dated August 2012, to provide guidance regarding lawyers'

use of technology and client development, including when electronic communications give rise to a prospective client-lawyer relationship.

Third, the House approved Resolution 105C, which amends the Comments to Model Rules 1.1, 5.3 and 5.5 of the *ABA Model Rules of Professional Conduct* dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and non-lawyers outside the firm to work on client matters (*i.e.*, outsourcing).

Fourth, the House approved Resolution 105D, which adopts the *Model Rule on Practice Pending Admission*, and amends the black letter and Comment to Rule 5.5 of the *ABA Model Rules of Professional Conduct*, dated August 2012, to enable lawyers to practice in a new jurisdiction while the lawyer actively pursues admission through one of the procedures that the jurisdiction authorizes.

Fifth, the House approved Resolution 105E, which amends the *ABA Model Rule for Admission by Motion* dated August 2012, to allow lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows.

Finally, the House approved Revised Resolution 105F, which amends the black letter and Comments to Model Rule 1.6, and the Comments to Model Rule 1.17 of the *ABA Model Rules of Professional Conduct* dated August 2012, to provide guidance regarding the detection of conflicts of interest when lawyers move from one firm to another, firms merge or there is a sale of a law practice.

In addition to adopting the foregoing ethics resolutions, the House heard from

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ABA President Robinson. In his final remarks to the House as President, Robinson referred to one of the key initiatives of his presidency - underfunding of our state courts - Robinson repeated the now-familiar message of the ABA: "No Courts, No Justice, No Freedom." Robinson reported on the progress of the ABA's national advocacy campaign, including more than 50 articles and newspaper editorials, a new website, an educational video and a toolkit for state bar leaders. However, Robinson emphasized that still more needs to be done, as many states continue to decrease funding for their courts. For example, Robinson pointed to his home state, Kentucky, where the courts were closed statewide for the first time in modern history on the very day he addressed the House. Robinson noted that we would never consider shutting down the police department or a hospital emergency room one day a week for lack of budgetary support, and our courts should be no different. An independent and adequately funded court system is the key to our constitutional democracy and our freedom. Robinson announced that our work on this very important issue will continue under the leadership of incoming ABA President Laurel Bellows of Illinois with Mr. Robinson and former President Steve Zack of Florida serving as Co-Chairs of the Task Force on the Preservation of the Justice System for the coming ABA year.

The most moving moment of the meeting came when ABA President Robinson presented the ABA Medal, the Association's highest honor, to Morris S. Dees, Jr., the chief trial attorney and co-founder of the Southern Poverty Law Center, for his tremendous work in fighting racism and injustice. As President Robinson stated, "The presentation of the ABA Medal to Morris Seligman Dees Jr. represents our profound admiration for his personal courage and incomparable leadership as one of the greatest civil rights lawyers of our time." Among his many accomplishments, Mr. Dees obtained reversal of the death sentences in the Triboro Three case, and has successfully used civil lawsuits to secure judgments against racists and hate groups.

Accepting the award, Mr. Dees expressed his gratitude and thanked those who have helped with his work over the years. He told members of the House that his life as a trial lawyer has been enriched by the courage exhibited by his clients, as well as by judges and jurors. As an illustration of the lessons he has learned, he shared the story of a civil case he tried where his client, the plaintiff, when asked for forgiveness by a defendant, a young Ku Klux Klan member involved in the death of her son, stated that she had already forgiven him. According to Mr. Dees, his client's words of forgiveness showed love, understanding and mercy that were higher justice than the seven million dollar verdict returned in her favor by the jury.

Noting the continued hate, injustice, and anger in the United States, Mr. Dees praised the ABA for its commitment to the rule of law. He observed that although it had seemed "lonely" in the Deep South in the 1960's, receiving the ABA Medal erased that loneliness. In praising the work of the ABA on behalf of the rule of law, Dees quoted Martin Luther King Jr., saying, "You will not be satisfied 'until justice rolls down like water and righteousness like a mighty stream.'"

In what is known as the "Passing of the Gavel," ABA President Robinson introduced President-Elect Laurel G. Bellows of Illinois. The Association's Constitution provides that the President-Elect automatically becomes the President at the conclusion of the Annual Meeting. Therefore,

President-Elect Bellows assumed the presidency at the conclusion of the meeting.

In her remarks, Ms. Bellows promised to utilize the considerable expertise of the ABA to work towards ending the shameful horror of human trafficking in the United States. Approximately 100,000 U.S. citizens are forced into sex and labor for the profit of their captors, in addition to hundreds of thousands of people who are trafficked into our country. Ms. Bellows promised that the ABA will develop a uniform anti-trafficking law and train responders, police, prosecutors, and pro bono lawyers. Ms. Bellows also reported that the ABA will also focus on protecting our national security and the drain on our intellectual property from cyber attacks, continue to engage state legislators to fund our courts, work to retain the civil jury trial, promote workplace equity between men and women, and develop the best ways to teach our young lawyers how to practice law. We will also look inward to ensure the fiscal health of the Association and make sure that we are providing value to our members.

Chair Klein recognized John G. Levi of Illinois, Chairman of the Board of the Legal Services Corporation. Mr. Levi thanked the ABA for its partnership and urged delegates to continue to support the access to justice community. The Legal Services Corporation is the single largest funder of civil legal aid to support equal justice for all. Programs funded by the Legal Services Corporation deal with civil matters that go to the heart of the safety and security of clients. Even though an increasing number of citizens are eligible for civil legal assistance, the Legal Services Corporation's congressional appropriations have decreased significantly in recent years. With its limited resources, the Legal Services Corporation has built a network of websites that deliver a wealth of legal information, self help videos, and online forms. Yet increased technology and pro bono work is not enough. Levi stated that work must be done to educate the public about great risks to our democracy associated with the underfunding of civil legal assistance and state courts.

The House elected the following officers to the Association: James R. Silkenat of New York as President-Elect for 2012-2013 (in 2013, Mr. Silkenat will become the first ABA President from New York since Robert MacCrate held that office in 1987-88); and Robert M. Carlson of Montana as Chair of the House of Delegates for 2012-2014. The House also elected members of the ABA Board of Governors, including Kenneth G. Standard of New York (a former President of the New York State Bar Association) as the Governor from District 15.

In addition to the foregoing presentations, the House debated and voted on numerous other resolutions. Here are brief summaries of some of the more significant actions taken:

In the area of access to justice, the House approved Report 10B, sponsored by the State Bar of South Dakota, urging federal, state, territorial, tribal and local governments to support efforts to address the decline in the number of lawyers practicing in rural areas and to address access to justice issues for residents in rural America.

In the area of animal rights, the House approved Resolution 100, sponsored by the Tort Trial and Insurance Practice Section, urging legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog laws based on behavior and to repeal any breed discriminatory or breed specific provisions such as so called "pit bull" ordinances.

With respect to civil rights, the House approved Resolution 116, sponsored by

the Section of Individual Rights and Responsibilities, amending the 2008 ABA policy regarding racial and ethnic profiling to include religious profiling and characteristics indicative of religious affiliation.

The House approved Resolution 115, sponsored by the ABA Forum on Communications Law, urging legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

The House approved Revised Resolution 301, sponsored by the Section of Individual Rights and Responsibilities, urging Congress to strengthen tribal jurisdiction to address crimes of domestic violence, dating violence, sexual assault, stalking, and sex trafficking committed on tribal lands in the reauthorization of the Violence Against Women Act.

In the area of criminal justice, the House approved a number of resolutions sponsored by the ABA Criminal Justice Section: Revised Resolution 107A, urging governments to review child sexual abuse criminal statutes of limitations to determine whether extending the statute of limitations is warranted; Resolution 107C, urging defender organizations and criminal defense lawyers to address clients' inter-related criminal, civil and non-legal problems and urging funding for these purposes; and Revised Report 107D, urging Congress to amend 28 U.S.C. § 2254(d) to require a federal district court to review *de novo*, based on the record made in the federal court, claims of ineffective assistance of counsel by petitioners under sentence of death.

In the area of immigration, the House approved Resolution 102, sponsored by the ABA Commission on Immigration,

adopting the ABA *Civil Immigration Detention Standards*, dated August 2012, which govern the treatment of persons in the U.S. immigration detention system.

In the area of international law, the House approved Resolution 113, sponsored by the ABA Section of International Law, urging the Department of Homeland Security to create a Haitian Family Reunification Parole Program and immediately begin paroling into the United States already-approved Haitian beneficiaries of family-based visa petitions.

With regard to law and aging, the House approved Revised Resolution 106A, sponsored by the ABA Commission on Law and Aging, urging Congress to amend the Patient-Self Determination Act provisions of the Medicare and Medicaid law regarding advance care planning, and Resolution 106B, also sponsored by the Commission on Law and Aging, adopting the *Third National Guardianship Summit Standards and Recommendations*, dated August 2012, and urging courts and policy making bodies to implement them.

At the conclusion of the meeting of the House on Tuesday, August 7, Chair Klein introduced Robert M. Carlson of Montana as new Chair of the House of Delegates. Mr. Carlson thanked Ms. Klein for her distinguished service as Chair.

The meeting concluded with an invitation by the Texas delegation to the ABA Midyear Meeting to be held in Dallas in February 2013.

*Note: Scott Karson is a partner at Lamb & Barnosky, LLP in Melville. He concentrates his practice in municipal, commercial, land title and appellate litigation. He is a former President of the SCBA (2004-05) and currently serves as the association's delegate to the ABA House of Delegates.*