

Administrative Determinations by the Supreme Court on the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions

April 14, 2016

The Special Committee on Attorney Ethics and Admissions (Special Ethics Committee), chaired by former Chief Justice James R. Zazzali, reviewed recent American Bar Association (ABA) amendments to the Model Rules of Professional Conduct and standards for admission to practice law, including admission by motion. The ABA had formed a “Commission on Ethics 20/20” to consider these rules and standards “in light of advances in technology and global legal practice developments.” The ABA Commission examined issues relating to lawyer mobility; practice of out-of-state lawyers; practice of foreign (licensed outside the United States) lawyers in the United States; client confidentiality in a digital age; ethics issues arising from new forms of advertising; outsourcing of legal services; choice of law problems related to conflicts of interest; and other matters. The Special Ethics Committee conducted an extensive review of the ABA proposals and considered the comments of members of the New Jersey legal community. It issued its Report and Recommendations to the Court on May 12, 2015.

The Supreme Court then sought and considered additional comment from the New Jersey legal community on the recommendations of the Special Committee. After thorough deliberation, the Supreme Court hereby issues its Administrative Determinations, approving many recommendations of the Special Committee but modifying some and declining to adopt others.

Special Committee Recommendations and Supreme Court Determinations

1. Admission by Motion

Currently, applicants for admission to the New Jersey bar must hold a juris doctor degree from an ABA-accredited law school; demonstrate fitness and character to practice law (by being reviewed and so certified by the Committee on Character); attain a qualifying score on the Multi-State Professional Responsibility Examination or pass an approved law school ethics course; and pass the New Jersey multi-state bar examination. R. 1:24-2; R. 1:25; R. 1:27-1(a). Admission by motion would remove only the requirement that lawyers take and pass the bar examination in New Jersey, provided the applicants have practiced law for five of the last seven years in another jurisdiction and satisfy certain other criteria.

The Special Ethics Committee was deeply and evenly divided on the issue of admission by motion. The group opposing admission by motion was concerned that a “loosening” of the admission requirements would lead to an influx of lawyers seeking to practice in New Jersey. New Jersey sits in a unique geographical position between the major metropolitan centers of New York City and Philadelphia. Significant numbers of lawyers from neighboring cities and states are likely to seek admission by motion. This group was alarmed about the lack of reliable

information on the number of potential new admittees and the effect a deluge of lawyers may have on the existing legal community, the judiciary's regulatory system, and the public. The opponents urged that the Court proceed prudently, slowly, and deliberately.

The group in favor of admission by motion stressed that the bar exam is an entry-level test, designed to explore applicants' knowledge of law in general and test applicants' ability to analyze facts and express general legal concepts in writing and in clear English. It does not test knowledge of New Jersey law. All applicants, whether by motion or by exam, would still need to be reviewed and certified by the Committee on Character. The proponents "could not identify a legitimate reason, grounded in the public interest, to support the contention that an out-of-state lawyer who already passed the entry-level examination in another state and has practiced elsewhere for at least five years must retake the examination."

The proponents recommended additional restrictions on admission by motion. Specifically, this group recommended that applicants would need to have previously passed a bar examination in another jurisdiction; that they be admitted in a jurisdiction that would extend a reciprocal license by motion to New Jersey lawyers; and that they complete a course on New Jersey ethics and professionalism as a condition precedent to admission.

After careful review, the Supreme Court decided to adopt admission by motion with the recommended additional restrictions. The Court has studied this proposal in various forms since 1983, when the Supreme Court Advisory Committee on Bar Admissions issued its report recommending admission by motion. The Ad Hoc Committee on Bar Admissions (Wallace Committee) similarly recommended admission by motion in its report issued in 2002. The time has come for New Jersey to join the vast majority of United States jurisdictions that offer admission by motion. The Court acknowledges the legitimate concern that its decision may have adverse consequences for some New Jersey lawyers, particularly given today's economic climate. It finds, however, that the current rule, requiring out-of-state lawyers to retake a multi-state bar exam that does not test New Jersey law, is a barrier to the practice of law in New Jersey that is not grounded in the public interest.

The Court is aware that modern practice of law requires lawyers to be more mobile. Just as out-of-state lawyers may need to follow clients, cases, or a family member to New Jersey, New Jersey lawyers may need to seek opportunities in other jurisdictions and would have a ready means to do so through reciprocal admission by motion. We may see an influx of lawyers from New York City or Philadelphia seeking admission by motion here but there will also be a number of New Jersey lawyers who would gain access to those metropolitan markets through reciprocal admission by motion.

Accordingly, the Court has decided to adopt admission by motion, with restrictions. Applicants for admission to the New Jersey bar by motion must hold a juris doctor degree from an ABA-accredited law school; demonstrate fitness and character to practice law (by being reviewed and so certified by the Committee on Character); attain a qualifying score on the Multi-State Professional Responsibility Examination or pass an approved law school ethics course; have practiced for five of the last seven years in another jurisdiction; have previously passed a bar examination in another jurisdiction; be admitted in a jurisdiction that would extend a

reciprocal license by motion to New Jersey lawyers; and complete a course on New Jersey ethics and professionalism as a condition precedent to admission.

2. Out-of-State Lawyers Practicing Pending Admission

The ABA proposed permitting out-of-state lawyers to practice in New Jersey for up to one year if they intend to apply for admission and associate with a New Jersey lawyer. The Special Committee did not recommend this rule, finding that the ABA proposal offered little benefit and presented significant risk to the public.

The Court decided not to adopt a rule permitting practice by out-of-state lawyers pending admission in New Jersey.

3. In-House Practice by Foreign Lawyers

The ABA proposed permitting foreign (licensed outside the United States) lawyers to provide legal advice on foreign law as in-house counsel. The ABA proposal further would permit foreign lawyers to advise their employer company on United States law if the foreign lawyer has consulted with a United States lawyer. The Special Committee recommended the portion of the rule permitting foreign lawyers to advise their employer on foreign law but rejected the proposal that a foreign lawyer should be permitted to advise the employer on United States law.

The Supreme Court decided to amend the Court Rules to permit foreign lawyers to practice law as in-house counsel to an employer company from an office in New Jersey, with the restriction that the foreign lawyer can only advise his or her employer on foreign law and not on United States law.

4. Pro Hac Vice Admission of Foreign Lawyers

The ABA proposed permitting foreign (licensed outside the United States) lawyers to be admitted pro hac vice in a proceeding with a New Jersey lawyer. The Special Committee recommended the rule, conditioned on additional requirements: the foreign lawyer cannot advise the client on United States law and local counsel must accompany the foreign lawyer for all court or related proceedings. Further, the pro hac vice motion must reflect that local counsel evaluated the foreign lawyer's credentials and certifies his or her satisfaction with them to the court.

The Supreme Court decided to amend the Court Rules to permit foreign lawyers to be admitted pro hac vice with the additional restrictions recommended by the Special Committee.

5. Rule of Professional Conduct 1.1 (Competence)

The ABA proposed that a comment to Rule of Professional Conduct 1.1 (Competence) be amended to require that lawyers “keep abreast of . . . benefits and risks associated with relevant technology” in order to “maintain requisite knowledge and skill.” The Special Committee declined to recommend this comment to our Rule of Professional Conduct 1.1 (Competence). It noted that the language of our Rule diverges from that of the Model Rule; our “competence” rule solely addresses “gross negligence” and “pattern of negligence” so commentary in our Rule on competence or proficiency with technology was not appropriate.

The Supreme Court decided not to adopt this comment to Rule of Professional Conduct 1.1 (Competence).

6. Rule of Professional Conduct 1.6 (Confidentiality)

The ABA proposed that lawyers be required to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” The Special Ethics Committee recommended an amendment and comment to Rule of Professional Conduct 1.6 (Confidentiality of Information) to address the lawyer’s duty to prevent inadvertent or unauthorized disclosure of information relating to representation of a client, and to take reasonable measures to protect data security.

The Supreme Court decided to adopt the proposed amendment and comment to Rule of Professional Conduct 1.6. After reviewing the Report and Recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents, the Court also decided to include, in this Rule, a reference to electronically stored information.

7. Rule of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants)

The ABA proposed that the title of Rule of Professional Conduct 5.3 be changed from “nonlawyer assistants” to “nonlawyer assistance” and address, in a comment, supervisory duties of lawyers when outsourcing legal work. The Special Committee supported revision to Rule of Professional Conduct 5.3 and the change in the title of the Rule to address duties pertaining to nonlawyer assistance both inside and outside the firm, including legal outsourcing.

The Supreme Court decided to adopt the proposed amendment to the title of the Rule and the comment.

8. Rule of Professional Conduct 1.0 (Terminology)

The ABA proposed that the definition of “writing” in Rule of Professional Conduct 1.0 be changed to include “electronic information” and also that a comment to the Rule address “screened” lawyers and their access to information. The Special Committee supported changing “email” in the Rule of Professional Conduct to “electronic communication.” It declined to recommend the adoption of the proposed official comment to this Rule regarding “screened” lawyers and access to information about the matter. Lawyers who are “screened” from a case should not access any information about the case; a comment to that effect was considered unnecessary.

The Supreme Court decided to adopt the proposed amendment to the Rule. It further decided to adopt compatible, additional language in this Rule and to add an official comment regarding metadata that was proposed by the Working Group on Ethical Issues Involving Metadata in Electronic Documents.

9. Rule of Professional Conduct 1.4 (Communications)

The ABA proposed that the language of Rule of Professional Conduct 1.4 be changed to replace a reference to “telephone calls” with “client communications.” The Special Ethics Committee did not recommend amending our Rule of Professional Conduct 1.4, as it already addresses that obligation in broader language (lawyers must “promptly comply with reasonable requests for information”).

The Supreme Court decided not to adopt the proposed amendment.

10. Rule of Professional Conduct 1.6 (Confidentiality)

The ABA proposed that the language of Rule of Professional Conduct 1.6 be changed to permit lawyers to make limited disclosures to detect and resolve conflicts of interest arising from the lawyer’s change of employment or changes in the composition or ownership of a firm. The ABA also proposed that related changes be made to Rule of Professional Conduct 1.17 regarding sale of a law firm. The Special Committee recommended that Rule of Professional Conduct 1.6 (Confidentiality of Information) be amended to include a paragraph permitting a lawyer to reveal client information to detect and resolve conflicts of interest arising from the lawyer’s change of employment, changes in the composition or ownership of a firm, or the sale of a firm, along with an official comment. It did not recommend changes to Rule of Professional Conduct 1.17, finding it unnecessary.

The Supreme Court decided to adopt the proposed amendment and comment.

11. Rule of Professional Conduct 4.4(b)

The ABA proposed that the language of Rule of Professional Conduct 4.4(b) be changed to specifically address receipt of electronic information (and metadata). The Special Committee recommended amending Rule of Professional Conduct 4.4(b) (Respect for Rights of Third Persons) to: (1) include “wrongfully obtained” information when that information reflects attorney-client privileged communications; (2) require lawyers to “delete” inadvertently sent or wrongfully obtained electronic information; (3) permit lawyers to retain an inadvertently sent or wrongfully obtained document in order to present it to a court; and (4) adding a comment stating that lawyers should not review metadata that has not been specifically requested.

The Court also considered the recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents Working Group and comments submitted by the United States Department of Justice and the New Jersey Office of the Attorney General. It decided to adopt a revised amendment to the Rule and comment to include provisions on metadata and to address concerns of law enforcement.

12. Rule of Professional Conduct 1.18 (Prospective Client)

The ABA proposed that the language of its comment to Rule of Professional Conduct 1.18 be changed from “discussion” with prospective clients to “communication” with them, and to define what a “consultation” with a client is for purposes of the Rule. The Special Committee recommended revising Rule of Professional Conduct 1.18 (Prospective Client) to address situations where a prospective client does not speak to a lawyer but merely sends documents, by changing the word “discussion” to “communication.” It further considered the situation when prospective clients consult with a lawyer in an attempt to disqualify that lawyer from representing the adverse party, and recommended that an official comment be added to the Rule providing: “A person who communicates with a lawyer to disqualify that lawyer is not considered a prospective client.”

The Supreme Court decided to adopt the proposed amendment and a revised comment.

13. Rules of Professional Conduct 7.1, 7.2, 7.3 (Advertising)

The ABA proposed various changes to the advertising Rules of Professional Conduct to permit lawyers to pay for “leads,” to permit “blasted” emails, and to remove references to “prospective clients” in the context of solicitation of business. The Special Committee did not recommend changes to our advertising rules (Rules of Professional Conduct 7.1, 7.2, and 7.3), which are broader than the Model Rules, and found it improvident to include an official comment to the advertising rules that is limited to “lead generation” issues.

The Supreme Court decided not to adopt the proposed amendments or comment.

14. Rule of Professional Conduct 1.1 (Competence)

The ABA proposed changes to the comment to Rule of Professional Conduct 1.1 (Competence) to require that a lawyer obtain informed consent from the client prior to outsourcing legal work. The Special Committee did not recommend an amendment to our Rule of Professional Conduct 1.1 on outsourcing legal work, as our Rule on competence differs from the Model Rule.

The Supreme Court decided not to adopt the proposed comment.

15. Rule of Professional Conduct 8.5 (Choice of Law)

The ABA proposed a change to the comment to Rule of Professional Conduct 8.5 (Choice of Law) permitting lawyers and clients to enter into a nonbinding written agreement specifying a jurisdiction for ethics rules choice of law purposes. The Special Committee did not recommend this comment to Rule of Professional Conduct 8.5.

The Supreme Court decided not to adopt the proposed comment.

16. Rule of Professional Conduct 5.5 (Multijurisdictional Practitioners)

The ABA proposed a change to the comment to Rule of Professional Conduct 5.5 providing that out-of-state lawyers may not advertise their legal services in a jurisdiction where they are not licensed, and prohibiting lawyers from assisting others in practicing law in violation of the rules. The Special Committee did not recommend a comment to Rule of Professional Conduct 5.5 (Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law) regarding certain conduct that clearly violates other Rules or opinions; the amendment appeared unnecessary.

The Supreme Court decided not to adopt the proposed comment.

The next five items (numbered 17 through 21) address the Special Committee's recommendations on other matters, not specifically proposed by the ABA Commission.

17. New Rule on Civility (Rule of Professional Conduct 8.4)

The Special Committee recommended a new rule on civility and professional conduct to be added to Rule of Professional Conduct 8.4 (Misconduct) providing: "A lawyer shall treat with courtesy and respect all persons involved in the legal process." The Special Committee found that there is a need to reinforce, in the text of the Rules, the fundamental and overarching obligation of lawyers to conduct themselves professionally and civilly inside and outside court.

The Supreme Court agrees that lawyers should conduct themselves civilly inside and outside court but decided not to codify that existing professional obligation in a new rule of ethics.

18. Rule of Professional Conduct 5.2 (Proposed “Safe Harbor”)

The Special Committee recommended a new paragraph (c) in Rule of Professional Conduct 5.2 (Responsibilities of a Subordinate Lawyer) that provides a “safe harbor” for lawyers who, in good faith, seek advice from firm ethics counsel or independent counsel on ethical conduct. The Special Committee sought to encourage all lawyers to obtain advice in good faith – by presenting accurate details and fully considering the issues – to firm ethics counsel or independent counsel when they are faced with difficult questions of professional duty.

The Supreme Court agrees that responsible practitioners should seek advice on complex ethics questions but decided not to amend the Rule to provide a “safe harbor” from discipline.

19. Rule of Professional Conduct 8.5 (Choice of Law)

The Special Committee recommended an amendment to Rule of Professional Conduct 8.5 (Disciplinary Authority; Choice of Law) regarding the discipline rules to be applied when the predominant effect of the conduct is in a different jurisdiction. It states: “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 Supreme Court decided to adopt the proposed amendment.

20. Rule of Professional Conduct 5.5 (Multijurisdictional Practitioners)

The Special Committee recommended an amendment to Rule of Professional Conduct 5.5 (Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law) that would permit foreign (licensed outside the United States) lawyers to practice New Jersey law as multijurisdictional practitioners.

The Supreme Court decided not to adopt the proposed amendment.

21. Comments to the Rules of Professional Conduct.

The Special Committee recommended that nonbinding comments to all Rules of Professional Conduct be developed and adopted by a Court committee.

The Supreme Court decided not to adopt this proposal.