



NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION

of the State Bar of New Mexico

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CONTENTS OF THIS ISSUE

Small Business Liability Relief and Brownfields Revitalization Act	1
Summary of 2202 Water Legislation	4
Summary of 2002 Energy Legislation	5
Upcoming Meetings	5
Meeting Minutes	6, 7
Revisions to ABA Model Rules ...	8
SONREEL Members	10

Congress Amends the Superfund Law and Enacts Brownfields Legislation: The Small Business Liability Relief and Brownfields Revitalization Act

By William Brancard, New Mexico State Land Office


On January 11, 2002, President Bush signed into law the **Small Business Liability Relief and Brownfields Revitalization Act** (Public Law 107-118). The new law combined two separate bills before Congress that dealt with CERCLA liability and with "brownfields" programs. In summary, the act amends CERCLA by providing potential immunity from liability for:

1. Persons who generated or transported municipal solid waste or small amounts of hazardous substances that ended up in a Superfund site
2. Prospective purchasers of contaminated property
3. Property owners whose land is contaminated from hazardous substances migrating from a contiguous property
4. Landowners who remediate property under a qualifying state cleanup program

The new legislation also establishes a statutory brownfield grant program that may be used by local governments and nonprofit organizations to redevelop brownfield sites, and provides financial assistance to states and tribes for establishing and administering brownfield or voluntary cleanup programs.

Small Business Liability Relief. Congress has been attempting to amend the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or Superfund) for at least five years but divisive

continued on page 2



issues have prevented a significant rewriting of the act. HR 1831 or the “Small Business Liability Protection Act” incorporated a number of small changes to CERCLA on which there was consensus. HR 1831 unanimously passed the House in 2001 and then was incorporated into the larger bill that included brownfields provisions.

The broad liability provisions, and the broad concepts of “owner,” “operator,” “transporter” and “generator,” under CERCLA have cast a wide net over many small businesses whose contribution to, or involvement with, the contaminated site in question are minor but whose exposure and costs can be significant. The new legislation seeks to narrow the CERCLA net by amending the liability section of CERCLA (section 107, 42 U.S.C. 9607) to add a “*de micromis*” exemption and a municipal solid waste exemption. In addition, the brownfields sections of the law also contain new limits on the broad liability of owners and operators. The benefits of these changes are generally prospective: the new exemptions do not apply to any party that has already settled with the government or had a judgment rendered against them.

The *de micromis* exemption applies to any person who generated or transported to a Superfund site less than 110 gallons of liquid materials, or 200 pounds of solid materials, which contained hazardous substances. All or part of the disposal or transportation must have occurred prior to April 1, 2001. A private party seeking contribution under CERCLA now bears the burden of proving that the other party is not *de micromis* and, if the defending party is found not liable for contribution, the contribution

seeker must pay legal costs. (codified at 42 U.S.C. 9607(o)).

Municipal Solid Waste Exemption. This applies when response costs or contribution is sought from a party solely because the party generated municipal solid waste that was disposed of at a Superfund site. The exemption applies to municipal solid waste generated from residential property, or from a ‘small business concern’ (as defined in the Small Business Act) that employs less than 100 people, or from a non-profit organization that employed less than 100 people at the site where the waste was generated. The legislation attempts to define “municipal solid waste” as waste that normally comes from a residence or a business but not from a manufacturing or processing operation. Examples are food, yard waste, clothing, office supplies, containers and household hazardous waste. No contribution action can be brought against a residential generator. A party seeking contribution against a small business or nonprofit corporation bears the burden of proving that the exemption does not apply, and will be liable for legal fees if they fail to prove their burden. (codified at 42 U.S.C. 9607 (p)).

The government can still go after a party that falls under either the *de micromis* or the municipal solid waste exemption if the government finds that the generated materials contributed significantly to the cleanup cost, or the party fails to cooperate or impedes the investigation or if, in the case of a *de micromis* party, the party was convicted of a crime for their activities.

The legislation also amends the Settlement section of CERCLA (section 122, 42 U.S.C. 9622) to allow *expedited settlements* with

potentially responsible parties that can demonstrate a limited ability, or an inability, to pay the cleanup costs. The government can accept a reduced amount from the party and can approve alternative payment methods. In return, a party accepting a reduced settlement cannot seek contribution from other parties and must cooperate with the government.

Brownfields. Title II of the new legislation is the Brownfields Revitalization and Environmental Restoration Act of 2001, which was originally a stand-alone bill, which unanimously passed the U.S. Senate in April 2001. The “brownfields problem” is the underutilization of previously used real property that is actually or potentially contaminated. Environmental liability legislation, particularly CERCLA, added significantly to the private sector’s reluctance to redevelop, or to even purchase or lease, such properties. The underuse of these properties, combined with the resulting increased demand for unused, or ‘greenfields’ properties, has brought pressure from both the economic development community and smart growth advocates to ease the burdens on brownfields redevelopment.

EPA and other local and federal agencies have been attempting to address the brownfields problem for a number of years. The result has been some funding for brownfields programs and some easing of potential environmental liabilities for brownfields redevelopers. This legislation seeks to institutionalize the brownfields programs, establish protections from liability for the purchasers and redevelopers of brownfields properties and increase the funding for the programs.

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Continued from page 2

Definition of Brownfield Site. A definition of 'brownfield site' is added to CERCLA (42 U.S.C. 9601 (39)) to include any piece of real property, "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant." Not included are sites that are either on the National Priorities List or are the subject of any of a number of types of administrative or judicial enforcement actions. Federal sites are excluded. Sites with PCB contamination are excluded but sites contaminated by petroleum products or by controlled substances or consisting of "mine-scarred land" are eligible.

Loan and Grant Programs.

These are established for brownfield site characterization and assessment and for remediation. Entities eligible for grants include state, local and tribal governments and quasi-governmental entities. The legislation lists ten criteria which the EPA must use in ranking applicants for grants, and the amount per site or per entity is capped.

Subtitle B of the Brownfields Act is entitled "Brownfields Liability Clarifications" but the changes to CERCLA liability contained in the subtitle are not limited to brownfield sites. Owners and operators of *property contiguous* or "otherwise similarly situated" to contaminated property are no longer potentially liable under CERCLA for contamination that migrated from the adjacent contaminated property if they did not cause, contribute or consent to the release, are not connected to the parties who caused the release, took actions to stop the

release and cooperated with the governmental cleanup actions. If the contamination is limited to groundwater that migrated beneath the owner's property, the owner is not required to investigate or remediate the contamination. (codified at 42 U.S.C. 9607 (q)).

To be eligible for the contiguous property exemption, the owner must also qualify as an "innocent purchaser" who, at the time they purchased the property, didn't know or have reason to know the property was contaminated and "conducted all appropriate inquiry." Obviously, any purchaser of a brownfields site today would not qualify under the innocent purchaser analysis, so the legislation adds a new exemption for a "*bona fide prospective purchaser*" (defined at 42 U.S.C. 9601 (40)). A bona fide prospective purchaser becomes an owner of previously contaminated property after this law takes effect and after conducting all appropriate inquiry. The purchaser, who cannot be related to any party potentially liable for the release, must take steps to control the contamination and must cooperate with government controls. While the purchaser thus avoids liability for the cleanup, the government will have a "*windfall lien*" on the property for any increase in the value of the property due to the cleanup and may exercise the lien on a sale to satisfy any unrecovered government cleanup costs. (codified at 42 U.S.C. 9607r).

The legislation also clarifies the *innocent purchaser* defense to CERCLA liability by providing greater detail on what did, and what does, comprise the requirement for "all appropriate inquiries." (CERCLA section 101(35); 42 U.S.C. 9601 (35)). Two standards

are imposed: one for property purchased prior to May 31, 1997 and one for property purchased after that date. For purchases prior to May 1997, EPA must consider whether the inquiry included physical inspections, records searches and interviews and other factors. For purchases after May 1997, the inquiry must meet the ASTM standards for a Phase I Environmental Site Assessment.

State Response Programs. A new section of CERCLA (section 128) establishes the requirements for programs to be developed by states and tribes to inventory brownfields sites and oversee response and cleanup actions at the sites. The legislation authorizes the appropriation of \$50,000,000 a year for 5 years for EPA to provide grants to states or tribes that have a response program and that entered into a memorandum of agreement with EPA. If a release occurs at a site where an authorized state program is overseeing a response action, EPA cannot take an enforcement action under CERCLA unless the state requests federal involvement or the EPA determines that the threat meets certain thresholds. EPA must provide the state notice of any proposed EPA enforcement action.

If a state or tribe is overseeing a response or is negotiating a response at a site under an authorized program, the President shall defer listing the site on the National Priorities List unless after deferring for a year, the President determines that reasonable progress is not being made on the cleanup.



Legislature Enacts House Bills 417, 421 to Address Water Issues in the Pecos River Basin

By Daniel Rubin, *New Mexico Interstate Stream Commission*

The 2002 Regular Legislative Session resulted in the passage of two notable bills designed to address the State's current and future water issues in the Pecos River Basin, including compliance with interstate compact obligations. House Bill 417 extends the deadline for expending funds appropriated to the New Mexico Interstate Stream Commission (ISC) for the purchase and retirement of water rights in the Pecos River Basin. It reflects, in substantial form, a consensus plan developed by the Pecos Ad Hoc Committee, comprised of many of the water stakeholders in the Pecos River Basin. House Bill 421 authorizes the New Mexico State Engineer's Office (OSE) to promulgate regulations for the purpose of recognizing water banks in the lower Pecos River as established by local water districts, acequias, and associations in the lower Pecos River Basin. Each bill is discussed in detail.

House Bill 417. House Bill 417, "Relating to water; changing the purpose of and extending the expenditure period for certain appropriations from the New Mexico irrigation works construction fund to purchase water rights in the Pecos River Basin for compliance with the Pecos river Compact; providing conditions for expenditures":

Section 1 of this bill extends the time for the ISC to expend the balances in five enumerated previous appropriations intended to fund the retirement of water rights along the Pecos River Basin and "other appropriate actions that would effectively

aid New Mexico in compliance with the United States Supreme Court amended decree in *Texas v. New Mexico*. . ." These previous appropriations total approximately \$30 million. Any funds not expended by the end of fiscal year 2005 shall revert to the New Mexico irrigation works construction fund.

Section 2 states three goals of these expenditures by the ISC: (1) establishing a base flow of the Pecos River of 50 cubic feet per second at the Artesia bridge, (2) providing 90,000 acre feet of water for delivery to Carlsbad Irrigation District, and (3) adequate water to fulfill Compact delivery requirements. It vests discretion with the ISC to determine the best means to fulfill these goals, and allows the ISC to purchase lands with appurtenant water rights.

Section 2 also places several conditions on these expenditures by ISC. First and foremost, ISC may not purchase land with appurtenant water rights without first obtaining agreement with Carlsbad Irrigation District, the Pecos Valley Artesian Conservancy District and the Fort Sumner Irrigation District. Although not discussed in the bill, requiring agreements with CID to convert water from irrigation purposes to stateline flow in turn will necessitate that the United States Bureau of Reclamation approve CID's conversion. A second condition is that the ISC may only purchase land with appurtenant water rights from willing sellers.

Section 2(D)(2) requires the ISC

to purchase with the first available funding 6,000 acres of land either "having rights to the delivery of water by the district or valid appurtenant water rights" in equal increments from (a) Carlsbad Irrigation District and (b) irrigated land between Brantley Dam and Sumner Reservoir.

Section 2 also sets requirements for ISC's request for bids from willing owners of land or water delivery rights designed to insure a competitive process, and authorizes ISC to enter into purchase contracts with the winners of the bidding process. In the event the ISC purchases water rights in excess of those needed to meet Compact obligations, the ISC must then offer such rights back to the original sellers, or failing in that, selling at current market price.

House Bill 421. House Bill 421, "Relating to water; providing for a lower Pecos River Basin below Sumner Lake water bank to facilitate compliance with the interstate compact; providing for acequia and community ditch water banks":

Section 1 of this bill authorizes the ISC to recognize a water bank established by local water districts, acequias, and water associations in the lower Pecos River Basin. It further authorizes the ISC to promulgate regulations governing such water banks. Any water bank so established must "(1) not impair other water rights, (2) not deplete water in the system above that level that would have occurred in the

absence of the transaction,
(3) comply with state law, and
(4) be within the same stream system
or underground water source.”

Section 1(C) further authorizes
acequias and community ditches to
establish water banks for the purpose
of temporarily relocating water
without change of purpose of use or
point of diversion. These alternate
water banks would not necessitate
any procedures before the OSE nor
be subject to ISC regulations, and
“banked” water rights would not be
subject to loss for non-use.

This bill also amends Sections 72-
5-28 and 72-12-8 of the New Mexico
statutes, which provides for the
forfeiture of water rights. These
sections now include paragraphs (H)
and (I), respectively, which similarly
exempt water deposited in one of the
water banks established by HB 421
from the forfeiture provisions of these
two statutory sections.

UPCOMING MEETINGS

Board meeting

August 14, 2002, noon
Montgomery & Andrews,
325 Paseo de Peralta, Santa Fe

Annual Meeting

September 13, 2002
Location TBA

Board Meeting

November 6, 2002, noon
Montgomery & Andrews
325 Paseo de Peralta, Santa Fe

Please attend!

Summary of Energy Legislation- 2002 Legislative Session

SB 187 Renewable Energy Production Tax Credit

This bill, sponsored by Senator
Sue Wilson Beffort, provides a tax
incentive to generate electricity from
solar and wind energy resources.
The tax incentive is one cent (\$0.01)
for each kilowatt-hour generated.
The maximum benefit to any single
corporate taxpayer is \$4 million per
year when 400,000 megawatt-hours
are generated from qualifying solar
or wind facilities of at least 20
megawatts capacity; the total incen-
tive program cost is capped at \$8
million per year (800,000 megawatt-
hours per year). A corporate tax-
payer may claim the credit for up to
ten consecutive years, and the credit
is deducted from a business' New
Mexico corporate income tax liabil-
ity for the taxable year. The credit
can be carried forward for five years.
Documentation of electricity pro-
duced and certification from the
New Mexico Energy, Minerals and
Natural Resources Department is
required by the Taxation and Rev-
enue Department to determine the
amount of the tax credit due the
taxpayer. The provisions of this act
apply to taxable years beginning on
or after July 1, 2002.

CS/HB 143 Electric Generation Facilities Tax Incentives

This bill, sponsored by Repre-
sentative Pauline Gubbels and then
substituted in the House Taxation
and Revenue Committee, amends
the Industrial Revenue Bond Act
and the County Industrial Revenue

Bond Act to allow “electricity
generation facilities that do not
provide retail electric services to New
Mexico customers” to qualify for
Industrial Revenue Bonds under the
definition of allowed projects. This
legislation also amends the Uniform
Division of Income for Tax Purposes
Act and the Investment Credit Act
to include “electricity generation
facilities that do not provide retail
electric services to New Mexico
customers” under the definition of
manufacturing. Finally, the bill
authorizes the cost of certain wind
energy equipment sold to govern-
mental entities to be deducted from
gross receipts for tax purposes,
thereby providing an incentive for
wind developers.

HJM 98 Study Impact of Power Plants

This memorial, sponsored by
Representative Don Tripp, requests
the appropriate interim legislative
committee to study the impact of
power plants on New Mexico's water,
natural resources and economy.
Among the issues identified for
study are the amount of water used
and disposed of by power plants, the
economic impact and employment
opportunities that result from new
power plants, the effects on the
environment and the type of pollu-
tion-control technologies used and
the feasibility of alternative sources
of energy to power plants.



Meeting Minutes

Annual Membership Meeting and Board Meeting, noon, Thursday, November 1, 2001

Montgomery & Andrews
325 Paseo De Peralta, Santa Fe, NM

Present: Maria O'Brien (chair), Lou Rose (Chair-elect), Letty Belin, Bill Brancard, Karen Fisher, Carol Leach, Greg Nibert, Steve Snyder

1. Election/Officers for 2002

The Nominating Committee reported that Carol Leach and Steve Hernandez were elected to 3-year terms starting in 2002. Lou Rose, as chair-elect, automatically received a new 3-year term. Maria O'Brien will have a 1-year term as past Chair in 2002. The following officers were confirmed for 2002: Lou Rose (chair), Letty Belin (budget officer) and Steve Hernandez (Secretary). A chair-elect will be chosen at a meeting in 2002.

2. Budget Report

Maria O'Brien reported that the section had over \$4400 left in the budget. The board agreed to use the money in the following order: (1) publish the *Natural Resources Reporter* this year; (2) scan all previous volumes of the *Reporter* and post on the Section Web site; and (3) offer the remaining funds to the Law School.

3. Newsletter/*Natural Resources Reporter*

Karen Fisher agreed to spearhead an effort to revive the section newsletter. Maria O'Brien reported that Stuart Butzier, the editor of the *Natural Resources Reporter*, had a number of articles. Maria would see if Stuart could publish a volume this year.

4. New Business: CLE

The Board discussed a number of ideas for a CLE program. The proposal to hold a program on the Internet has been dropped. Greg Nibert agreed to organize a seminar focusing on access to land for natural resources extraction. The goal would be to schedule a seminar in Spring 2002 in Santa Fe. The program would need participation from the BLM and the State land Office, and would hopefully include a speaker from the new federal administration. Bill Brancard agreed to help with the State Land office portion of the program.

MARK YOUR CALENDARS

The Natural Resources, Energy, & Environmental Law Section will be sponsoring a full-day seminar on **November 22, 2002** entitled: "**New Perspectives For Redeveloping New Mexico's Brownfields Properties.**" The seminar will be held at the Sheraton Old Town in Albuquerque. Cosponsors include Intera, Inc., the Center for Legal Education and the Real Property, Probate and Trust Section. Seating will be limited, so register early!



Meeting Minutes

Board Meeting, noon, Thursday, May 2, 2002

Montgomery & Andrews
325 Paseo de Peralta, Santa Fe, NM

Present: Lou Rose (Chair), Letty Belin, Bill Brancard, Carol Leach, Jeff Albright (by phone)

1. Minutes

Bill Brancard agreed to draft minutes for last November's annual meeting and this board meeting.

2. Budget Report

Lou Rose reported that the Section did not have a budget yet for this year. According to the State Bar, the Section revenues include carryover funds from last year totaling \$2780 and another \$4000 in dues collected this year. Lou Rose and Letty Belin agreed to draft a 2002 budget based on the expense allocation numbers used in previous years. The budget can be reviewed at the next meeting. Lou Rose will contact Maria O'Brien to determine if any monies were spent at the end of last year as suggested by the Board.

1. Newsletter/*Natural Resources Reporter*

Karen Fisher reported to Lou Rose that she had one long piece and a few short items for the newsletter. Bill Brancard agreed to prepare the minutes for inclusion in the newsletter. Lou Rose agreed to contact some people about environmental articles and Jeff Albright will draft a book review. Lou Rose will contact Stuart Butzier, the editor of the *Natural Resources Reporter*, about the status of the *Reporter*.

2. New Business: CLE/Speakers

The Board discussed a number of ideas for a CLE program and for possible speakers. Lou Rose reported that Greg Nibert's seminar focusing on access to land for natural resources was submitted to the State Bar, but with the departure of Steve Meilleur, nothing has happened. The board discussed ideas such as the rafting seminar conducted by Marilyn O'Leary last summer and a seminar on citizen involvement in administrative decision making. Jeff Albright will contact Marilyn O'Leary and Carol Leach, and Bill Brancard will work on the administrative process idea. The board also

discussed collaboration with the ABA and UNM Law School on seminars. The board also discussed bringing a speaker to New Mexico either as part of a seminar or as a separate event. One topic of interest is the changing federal energy policy and its impact on New Mexico. Possible speakers include a Bush administration Interior official and Senator Bingaman. Board members will follow up with their contacts.

3. Other Business

Officers. Lou Rose proposed to hold elections for chair-elect at the next board meeting.

Web site. The board discussed ideas for increasing the value of the section web site, including loading old issues of the *Natural Resources Reporter* and adding links to state agency administrative decisions.

Meeting dates. The board agreed to the following tentative dates for 2002 meetings: August 14 and November 6. As of now, the meetings will be held at noon in the Montgomery & Andrews office in Santa Fe.



The Ethics 2000 Process: Revisions to the ABA Model Rules approved by the ABA House of Delegates

By Irma S. Russell*

On Feb. 5, 2002, the ABA House of Delegates passed Report 401. It was proposed by the Ethics 2000 Commission for amending the ABA Model Rules of Professional Conduct, thus bringing the work of updating the Model Rules of Professional Conduct near completion. Although the ABA Model Rules have no direct application to any lawyer, they are of great importance because they serve as the articulation of ethical conduct by the leading organization representing lawyers in this country, the American Bar Association.

Moreover, the Model Rules are influential in the process by which states adopt binding rules of ethics. The states use the ABA Model Rules as a model for their rules of legal ethics, generally adopting the formulation set forth in the Model Rules in the vast majority of cases. These state rules apply to each lawyer who practices within their jurisdiction.

The ABA Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission," studied the Model Rules for four years before proposing revisions to the ABA House of Delegates. With the exception of the rules relating to multijurisdictional practice and the unauthorized practice of law, the House debated the proposals at its most recent meetings (August 2001 and February 2002). The House plans to vote on a proposal on multijurisdictional practice at its August 2002 meeting.

This article provides examples of the commission's work and examines a few changes likely to affect lawyers practicing in the environmental arena. In part because of matters of public health and safety, environmental lawyers have special interest in monitoring proposed rules and noting when the requirements of the rules may pose special difficulties or burdens in the environmental area.

For example, the risks associated with the transport of hazardous materials or manufacturing processes may raise concerns about a duty to disclose information that is proprietary. The same subject may create concerns about prohibitions against disclosing information when the disclosure will save a life.

Changes to Clarify the Rules

The commission made changes in the text of some rules simply to clarify the existing formulation of the rule. For example, it modified the text of Model Rule 1.16 to make it clear that the lawyer has a right to withdraw from a representation based on two independent bases. First, the lawyer can withdraw for any reason when the withdrawal will not adversely affect the client. Second, even when it may result in a material adverse effect, it is proper to withdraw if the lawyer has good cause, as defined in the rule.


Model Rule 1.6

The House of Delegates and the Ethics 2000 Commission endorsed viable exceptions to the prohibition

set forth in Model Rule 1.6. The House approved significant remedial changes to the controversial rule against disclosure of client information in cases where significant harm can be prevented by the disclosure of client information. It also retained the current rule that allows lawyers to disclose client information "to establish a claim or defense on behalf of the lawyer."

The amendments authorize (but do not require) lawyers to disclose client information when the disclosure is necessary to prevent "reasonably certain death or substantial bodily harm." Revised Model Rule 1.6 (b)(1). They also allow lawyers to disclose client information when necessary to "secure legal advice" about compliance with the Model Rules and to comply with "other law or a court order." Revised Model Rule 1.6 (b)(6). By its approval of these amendments, the ABA moved toward rejecting a categorical view of the duty of confidentiality as well as recognizing lawyers as trustworthy decision makers.

The ABA rejected some important amendments proposed by the commission. Subsection (b)(2) would have allowed lawyers to disclose client information to prevent "substantial injury to the financial interests or property of another." This permissive exception allowed disclosure only when the conduct of the client is a crime or fraud and, additionally, the client "has used or is using a lawyer's services" to advance the crime or fraud. Although this exception would



have expanded the basis for disclosure, it would have done so only in the rare circumstances of criminal or fraudulent conduct by a client who is misusing lawyer services to further the culpable enterprise.

Because a motion to delete Subsection (b)(2) passed by a substantial margin, the commission withdrew a related provision that would have permitted lawyers to disclose client information to “mitigate or rectify substantial injury to the financial interests or property of another.” Revised Model Rule 1.6 (b)(3). Like exception 2, this would have required both culpable client conduct (a crime or fraud) and, additionally, the use of lawyer services to further the crime or fraud.

The rejection of these proposed changes deprives lawyers of discretion to reveal client information to prevent significant harm even when the client has used or is using the lawyer’s services to further wrongful and damaging activity.

Moreover, deletion of these provisions may leave lawyers in danger of claims by third parties. The risk of actions by nonclients against lawyers seems particularly pronounced in the environmental area because of the significant public harm that may result from client conduct that relates to environment, energy and resource concerns.

The same analysis of dangers to third parties and the public that led the House of Delegates to pass Subsection (b)(1) to allow lawyers to disclose client information necessary to prevent peril to life and bodily harm also argues for empowering lawyers in other situations when the interests of third parties clearly outweigh the interests of a client. This is the case when a client mis-

uses the lawyer’s services to commit a crime or fraud that is likely to result in substantial injury to others. Like the other exceptions, the rejected provisions were entirely permissive.

Model Rule 4.2

The second most controversial model rule debated by the ABA is the rule barring lawyers from communicating with represented persons. Model Rule 4.2, entitled “Communication with Person Represented by Counsel,” prohibits a lawyer from knowingly discussing matters with a represented person concerning the subject matter giving rise to the representation. The purpose of this “anticonflict rule” is to protect individuals who are represented by lawyers from contact by other parties’ lawyers. The rationale is that the prohibition is necessary to prevent a represented person from disclosing information that may be harmful to his or her interests.

Model Rule 4.2 states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” The rule applies to parties in litigation and, additionally, to nonparties who have retained counsel to represent them in relation to a matter.

The controversy about Rule 4.2 predates the Ethics 2000 Commission process. In 1994, the Department of Justice (DOJ) stated its position that state ethics rules did not apply to criminal investigations conducted by the DOJ lawyers. The department issued a final rule declaring that “the circumstances

under which lawyers employed by the Department of Justice may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.” 59 Fed. Reg. 39910-01 (1994). In response, Congress passed the Citizen Protection Act in 1998, expressly stating that government lawyers are subject to state ethical rules.

The prohibition of the anticonflict rule is of particular importance in environmental class actions as well as any environmental matter with numerous parties and numerous professionals. A lawyer engaged in an environmental matter may need to communicate with a professional employed by an opponent. For example, environmental plaintiffs may need to learn the state of contamination of a site or the effects of various options for remediation. Contact with an employee or consultant of an opponent raises concern regarding the anticonflict provision.

The ABA approved the proposed revision to the rule that recognizes a court order as a basis for allowing a lawyer to contact a represented person without seeking the consent of the lawyer representing that person. A comment to the new rule notes the rule’s purpose of ensuring the “proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter.” Revised Rule 4.2, cmt. 1. The comment also notes the dangers of intruding on the lawyer-client relationship and the possibility of “uncounselled disclosure of information relating to the representation.”

SONREEL Members

Next Steps

The changes adopted by the House of Delegates offer significant corrections to the current rules and represent substantial progress toward addressing many of the problems identified with the Model Rules. The next step in the process is the proposal of the Model Rules to the state supreme courts for consideration for amending and updating the state rules of ethics applying to lawyers who practice within the state.

Lawyers who wish to learn more about the revisions approved by the ABA should visit the Ethics 2000 Commission's Website at <http://www.abanet.org/cpr/html>. Additionally, those who are interested can begin the process of studying and updating the state rules that present binding rules on all lawyers that practice within their jurisdiction.

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