AMERICAN BAR ASSOCIATION
CPR/SOC PROFESSIONAL RESPONSIBILITY COMMITTEE

MINUTES OF THE MEETING

Saturday, February 4, 2017
12:00 – 2:00 PM
Johnson I/II, 3rd Floor
Hyatt Regency Miami
Miami, FL

Section/Division Liaisons:
Barbara K. Howe, Chair
Rew R. Goodenow, Vice-Chair and Section of Business Law
Tom Grella, Law Practice Division
Lisa Dickinson, Section of Tort Trial and Insurance Practice
Lawrence W. Hanson, Section of International Law
Albert Harvey, Senior Lawyers Division
William H. Horton, Section of Health Law
Thomas G. Wilkinson, Jr., Section of Litigation

CPR Committee Representatives:
Shontrai Irving, Standing Committee on Specialization
Janet Green Marbey, CPR Diversity Committee
Frank X. Neuner, Jr., Standing Committee on Client Protection

Affiliated Organizations:
George R. Clark, Association of Professional Responsibility Lawyers (APRL)
Douglas J. Ende, National Organization of Bar Counsel (NOBC)

ABA/CPR Counsel:
Angie Burke, Director, Program and Planning
Larson Frisby, Governmental Affairs Office
John A. Holtaway, Policy Implementation Counsel
Tracy Kepler, Director
Dennis Rendleman, Ethics Counsel
Ellyn S. Rosen, Deputy Director
Martin Whittaker, Specialization Counsel

Guests:
Bucky Askew, Section of Legal Education and Admissions to the Bar
Charlotte (Becky) Stretch, Section of Legal Education and Admissions to the Bar
I. Approval of Minutes: The members approved the minutes of the October 13, 2016 business meeting that was conducted by teleconference.

II. Chair’s Report: Chair Howe welcomed the Committee members and liaisons to Miami and reported that Policy Implementation Counsel John Holtaway will be retiring from the American Bar Association effective Friday, April 28, 2017. Additionally, she noted that at the conclusion of the 2017 ABA Annual Meeting, Rew Goodenow will become the Chair of the CPR/SOC Professional Responsibility Committee.

Chair Howe reminded the Committee that the CPR/SOC Professional Responsibility Committee was created to assist Sections and Divisions and the Center for Professional Responsibility in coordinating professionalism initiatives to ensure the maximum use of available resources. This includes identifying professionalism and ethics issues; alerting Committee members to ABA projects and initiatives that could benefit from Section/Division input and comments; working jointly on ethics CLE projects; making recommendations to the ABA Standing Committees on Ethics, Professionalism, Client Protection, Professional Discipline, and Specialization; and serving as a forum for the general exchange of information among ABA entities relative to ethics and professionalism.

Chair Howe encouraged all Committee members and liaisons to attend the 43rd National Conference on Professional Responsibility, 33rd National Forum on Client Protection, and Annual National Specialization Roundtable that will be conducted May 31 – June 3, 2017 at the Hyatt Regency in St. Louis.

III. Center for Professional Responsibility Director’s Report: Director Tracy Kepler emphasized the need for collaborative work between the Center’s Standing Committees and the Sections and Divisions. Director Kepler noted that she has an open door policy and she encouraged all Committee members and liaisons to contact her and let her know of any projects and programs where the Center and the Sections can work together. Director Kepler noted that she is the process of re-organizing the responsibilities for the Center staff. Finally, she encouraged everyone to attend the National Conference in St. Louis and reported that there will a program covering Proactive Management Based Regulation (PMBR).

IV. Resolutions with Reports to the House of Delegates – 2017 ABA Midyear Meeting
Shontrai Irving, Chair of the Standing Committee on Specialization, reported that the Committee will be withdrawing Resolution 109 that sought to have accredited the Privacy Law Program of the International Association of Privacy Professionals of Portsmouth.

Bucky Askew and Becky Stretch, from the Section of Legal Education and Admissions to the Bar, discussed the merits of Resolution 110B. The Resolution concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2017 to Standard 316 (Bar Passage) of the ABA Standards and Rules of Procedure for Approval of Law Schools.
V. Public Forum, August 3, 2017 - APRL Proposal to amend Model Rules of Professional Conduct re: Information about Legal Services: Vice-Chair Goodenow noted that all opinions from ABA entities on the APRL advertising proposals need to be heard and he suggested that the Committee members encourage their entities to review the proposals and submit written comments. Deputy Director Ellyn Rosen agreed with Vice-Chair Goodenow and said the Center will work to keep the vetting process transparent. She asked all Committee members to let the Center know how their entities are reacting to the APRL advertising proposals. The current deadline for comments is March 1, 2017.

VI. Reports from Section/ Professional Responsibility Committees and Liaisons:

A. Section of Health Law: William Horton reported that the Section’s ethics committee is more engaged than it has been in years. The Committee is monitoring the amended Model Rule 8.4 across the country, especially in those jurisdiction where there are many section members. Mr. Horton stated the Section will be presenting the 18th Annual Emerging Issues in Healthcare Law. The Conference covers the most emergent topics facing the healthcare bar. As the healthcare industry undergoes changes and continues to develop with healthcare reform and enforcement, this Conference presents an incredible opportunity to stay ahead of the trends. The Conference will be held March 8-11, 2017 in New Orleans. The Conference will include an ethics component: Ethics Challenges for In-House Counsel and Lawyers Who Advise Them.

B. National Organization of Bar Counsel (NOBC): Doug Ende reported that the NOBC is discussing and studying the Association of Professional Responsibility Lawyers’ Advertising Report. Mr. Ende stated that the NOBC is currently working with the National Task Force on Lawyer Well-Being and is studying PMBR (Proactive Management Based Regulation).

C. Law Practice Division: Tom Grella reported that Paula Frederick is the Chair of the Ethics and Professionalism Committee this year but was otherwise occupied and could not attend the meeting. The Division continues to monitor Resolutions with Reports that have a professional responsibility component and that is why he is attending the meeting.

D. Section of Tort Trial and Insurance Practice: Lisa Dickinson reported that the Section will be filing a Resolution with Report at the 2017 ABA Annual Meeting in New York. The Resolution urges all federal, state, tribal, territorial, and local legislative, judicial and other governmental bodies to support the principles that:

(1) where communications or materials are protected from compelled disclosure by the attorney-client privilege or work product protection, the holder of that privilege or protection does not waive the privilege or protection by sharing such communications or materials with another person who,

(a) having common legal interests with the holder in some litigated, potentially litigated, or nonlitigated matter or in related matters,
has expressly or impliedly agreed with the holder of the privilege or protection (i) to cooperate with one another to develop and pursue a joint strategy with respect to some aspect of the matter or matters in which the parties have common interests, and (ii) to maintain the confidentiality of any privileged or protected communications or materials shared in pursuit of such cooperation; provided that the communications or materials shared relate to the parties' common interests;

(2) no party to such a common-interest arrangement can unilaterally waive privilege or protection with respect to communications or materials other than the waiving party's own communications or materials;

(3) in the event of later dispute between or among the parties to the common-interest, any party may use communications or materials shared against any other party;

(4) existence of a common-interest or agreement to a common-interest arrangement is not a basis to compel the holder of a privilege or protection to disclose to others having that common interest any communications or materials that the holder does not voluntarily share;

(5) while some authorities condition protection of common-interest sharing on each party to the common-interest arrangement being separately represented, no such requirement should be applied when the parties to the common-interest arrangement are part of a network created by a preexisting relationship (e.g., indemnitor-indemnitee, insurer-insured, patent holder-licensee, or lead lender and participants in the loan) that (a) binds them to a common outcome on the issue(s) as to which they have a common interest,

(b) creates duties to respect one another’s interests, and

(c) creates rights to participate in decision making regarding the common interest.

E. Section of International Law: Lawrence Hanson stated that the International Ethics Committee serves to give voice to ethical and professional responsibility issues that affect cross-border practice. As an example, he reported that the Committee has been working with the Mexican Bar Association to ensure that citizens of Mexico have access to pro bono legal services provided by Mexican licensed lawyers.

F. Section of Litigation: Tom Wilkinson reports that the section will be submitting written comments on the APRL Advertising proposals. He noted that the section’s Ethics and professionalism Committee continues to publish an active ethics newsletter.

http://www.americanbar.org/content/dam/aba/publications/litigation_committees/ethics/winter2016.authcheckdam.pdf

G. Senior Lawyers Division: General Albert Harvey reported that the Division is adjusting to the increase in its membership to some 68,000 members. All dues-paying ABA members who are age 62 and older are automatically enrolled in the Division. The Division will be presenting a CLE program regarding senior lawyer opioid addiction on May 5, 2017 in Maryland.

H. Section of Business Law: Vice-Chair Rew Goodenow reported that Business Law Section Spring Meeting will be held on April 6-8, 2017 in New Orleans. Vice-Chair
Goodenow stated that the Professional Responsibility Committee will be presenting a program entitled: *Ethics in Negotiating and Preserving Privilege in M&A Transactions*.

I. ABA Governmental Affairs Office (GAO): Larson Frisby reported that:

- The ABA continues to vigorously oppose legislation and proposed agency rules that would impose burdensome and intrusive gatekeeper and other regulations on lawyers, including bills that would subject the legal profession to key anti-money laundering (AML) and suspicious activity reporting (SAR) requirements of the Bank Secrecy Act and regulations that would require lawyers to report confidential client information to the government.

- GAO’s concern is that by requiring lawyers to divulge confidential client information to the federal government, the legislation and regulations would undermine the attorney-client privilege, the confidential lawyer-client relationship (and ABA Model Rule 1.6), and traditional state court regulation of lawyers and the legal profession.

- During the 114th Congress, the ABA lobbied against several gatekeeper bills, including the “Incorporation Transparency and Law Enforcement Assistance Act” (S. 2489, sponsored by Sen. Sheldon Whitehouse (D-RI); and H.R. 4450, sponsored by Rep. Carolyn Maloney, D-NY)).

  - Although a House Financial Services task force held a hearing on H.R. 4450, neither of the bills advanced during the 114th Congress.

  - However, the threat is ongoing, and Sen. Whitehouse and Rep. Maloney are expected to reintroduce similar legislation early in the 115th Congress.

- Meanwhile, the GAO was pleased when the Treasury Department and the Federal Deposit Insurance Corporation (FDIC) modified their final customer due diligence and deposit insurance rules in 2016 to include ABA-proposed language. This language in both final rules clarifies that when law firms establish IOLTA or other trust or escrow accounts on behalf of their clients, the law firms need not disclose confidential information regarding their clients or their funds held in those accounts to the government.

- Towards that end, the ABA continues to actively promote the ABA Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (ABA Guidance), the ABA/IBA/CCBE Lawyers Guide to Detecting and Preventing Money Laundering, and other important educational materials to lawyers, courts, and the entire legal profession, both in the U.S. and abroad.

- The ABA Gatekeeper Task Force, GAO, and ABA leadership are also encouraging the ABA Ethics Committee to consider developing a new Model Rule of Professional Conduct that, if adopted by a state’s highest court, would...
directly address the obligation of lawyers in that state to perform appropriate client due diligence with respect to AML/CFT issues.

- GAO believe adopting such a Model Rule—and/or making the ABA Guidance more binding on lawyers—would be the best way to prevent Congress, the Treasury Department, and other governmental entities from imposing much more burdensome legislation or regulations on lawyers and law firms.

- The ABA also continues to oppose various federal agency policies and proposed rules that would undermine the attorney-client privilege.

- In October 2016, the ABA urged the Consumer Financial Protection Bureau (CFPB) to modify its proposed records disclosure rule to prevent the CFPB from sharing privileged information it receives from supervised or regulated entities with any other foreign, state, or other non-federal government agency, as such sharing could threaten the privileged status of the information.

- The ABA plans to work with the National Creditors Bar Association (NARCA) in the 115th Congress in an effort to pass legislation that would amend the Fair Debt Collection Practices Act (FDCPA) to restore a partial exemption for creditor lawyers when they are engaged in litigation activities to collect debts for clients and to expand the existing lawyer exemption we secured in the Dodd-Frank Act to include creditor lawyers.

- This is consistent with ABA policy adopted in 1986 in which we opposed legislation to remove the original lawyer exemption from the FDCPA and our 2009 policy opposing legislation and regulations on lawyers engaged in the practice of law.

- GAO has reached out to the ABA Business Law Section, GPSolo Division, and Litigation Section to seek their input and assistance on this project, and we are hopeful that the new political situation (with a Republican President and Congress) will increase our chances of passing the legislation.

- The ABA continues to work closely with 34 state, local, and specialty bars, over 65 law firms, the American Institute of CPAs (AICPA), and other coalition allies to fight draft legislation in the House and Senate that would force many law firms and other personal service businesses to switch from the current cash-based method of accounting to the accrual-based method.

- GAO strongly opposes these proposals because they would cause serious financial hardship for many law firms, accounting firms, and other personal service businesses by forcing them to pay taxes on “phantom income” they have not received and may never receive. Because it would harm so many of our members, this important law firm “pocketbook” issue is part of our
“Independence of the Legal Profession” legislative priority adopted by the Board of Governors.

K. Standing Committee on Client Protection: Frank Neuner reported that as a backlash to the adoption of the anti-harassment, anti-discrimination provisions in amended ABA Model Rule 8.4, there was a resolution presented to the Louisiana State Bar Association House of Delegates at its January 21, 2017 meeting that called for the creation of a Christian Values Preservation Section of the Louisiana Bar. The Resolution was withdrawn.

L. Center Diversity Committee: Janet Green Marbey stated the Committee will present a program on implicit bias at the 43rd National Conference on Professional Responsibility in St. Louis.

M. Association of Professional Responsibility Lawyers (APRL): George Clark thanked those persons and entities that attended the public forum on the APRL advertising proposals that was held on Friday, February 3, 2017. He reminded everyone that written comments on the proposals are due by March 1, 2017. APRL will continue to work with Center Committees and other interested parties to refine the proposals. For a transcript of the public forum and additional information and resources, click here. The Chair of the Standing Committee on Ethics and professional Responsibility, Myles Lynk, has appointed a Working Group of representatives of Center and other entities to review the APRL proposal and comments received.

VII. Resources from the Center for Professional Responsibility: Center Programming and Planning Director Angie Burke reported that the Center will present three Center Awards at the National Conference on Professional Responsibility in St. Louis: 2017 E. Smythe Gambrell Professionalism Award, 2017 Michael Franck Professional Responsibility Award, and the 2017 Rosner and Rosner Young Lawyers Professionalism Award. She announced that Robert Creamer has been selected as the recipient of the 2017 Michael Franck Award and that other recipients will be announced shortly. Ms. Burke encouraged all Section/Divisions to include the Center for Professional Responsibility as a co-sponsor of their CLE programs and in return the Center will advertise the program to its 2000 Center members.

VIII. Future Business Meetings:

A. April 2017 Teleconference
   Date/Time TBD

B. Saturday, August 12, 2017
   12:00 PM – 2:00 PM
   2017 ABA Annual Meeting
   Hotel TBD
   New York, NY
VII. Future CPR Conferences:


Respectfully submitted,

John A. Holtaway  
Lead Senior Counsel  
Client Protection and Policy Implementation