
This report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on September 13, 2004.

Introduction

The New York County Lawyers’ Association (“NYCLA”) has been asked to review the New York State Bar Association’s (the “NYSBA”) Committee on Standards of Attorney Conduct (“COSAC”) proposed New York Rules of Professional Conduct (the “Proposed Rules”) 1.7, 1.9 and 1.10. We have reviewed the materials presented and conclude that this is a significant improvement to the current New York State Code of Professional Responsibility (the “New York Code”).

The Proposed Rules represent a significant advance in recognizing the realities of modern law practice while honoring New York’s tradition of strictly ethical practice. They differ from both the American Bar Association (“ABA”) model and the current New York Code, and do so in ways that fairly and properly balance the practicalities of 21st century lawyering with the time-tested protection of the public’s expectation that lawyers will exercise their independent judgment in their clients’ and only their clients’ interests.
I. Background

The first national standards for lawyers were the Canons of Professional Ethics (the “Canons”) adopted by the ABA in 1908 and subsequently by most state lawyer regulatory bodies. In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility (the “Model Code”), which was adopted by all 50 states. Following several years of experience with the Model Code, however, the ABA determined it was not sufficiently effective and appointed the Commission on the Evaluation of Professional Standards, otherwise known as the Kutak Commission. After six years of comment, debate and redrafting, the Kutak Commission proposed the Model Rules of Professional Conduct (the “Model Rules”) as its final work product, which the ABA adopted in 1983, replacing the Model Code.

New York was one of the first states to consider adoption of the ABA Model Rules, however, in 1985 the NYSBA’s House of Delegates voted to retain the New York Code. New York remains only one of five jurisdictions (the others being Oregon, Ohio, Iowa and Nebraska) that continue to rely on the Model Code format.

There are inherent differences between the format of the Model Rules and the Model Code. The Model Code has three tiers of rules which state general maxims; the Disciplinary Rules (“DR”) which are adopted by the courts and establish the minimum standards of ethical conduct to which all lawyers must adhere; and the Ethical Considerations (“EC”) which are adopted by the NYSBA and provide additional guidance to lawyers. The Kutak Commission found that the Model Code, with its varying standards found in the Canons, the ECs and the DRs, was cumbersome and
difficult to apply towards the practical resolution of ethical issues arising in the everyday practice of law.

The Proposed Rules adopt the format and numbering system of the Model Rules but do not adopt the language of the Model Rules and its accompanying commentaries *verbatim*. COSAC has rejected the Model Rules language in certain sections and has either recommended retaining the current New York Code language or adopting new language that provides more guidance or establishes more appropriate standards of conduct.

(The following suggestions and thoughts are based in part upon the comments received from a number of members of the NYCLA community.)

II. General Comments and Observations

A. Formatting

(a) There will be a change in New York with the adoption of the Model Rules format. The new formatting and numbering system of the Proposed Rules raises concern with respect to cross-referencing existing case law and various bar association opinions. These, of course, have always referenced the DRs and on occasion the ECs. Such concern, however, is probably insignificant because of the increasing use of electronic research aids by attorneys that focus upon topical searches rather than searches by citation. Cross-referencing should not be a concern.
B. Commentaries

(a) Comments to the Proposed Rules are specific to each Rule; in contrast the ECs in the New York Code are not specific to individual DRs.

(b) These commentaries are extensive and specific and should be of significant aid to the lawyer by explaining the Proposed Rules and containing advice on how to avoid potential malpractice and disciplinary troubles. They appear not to add obligations that are not contained in the Proposed Rules.

(c) The abundant commentaries (some comments have up to 40 sections to explain a proposed Model Rule) may result in a need for fewer formal opinions by bar associations in New York, as lawyers will have access to specific guidance.

III. Specific Comments

The first Proposed Rule to be reviewed is:

**Rule 1.7: Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if a reasonable lawyer would conclude that:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation will be materially limited, or the lawyer’s independent professional judgment on behalf of a client will be adversely affected, by the lawyer’s responsibilities to another client, a former client
or a third person or by the lawyer’s own financial, business, property or personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide loyal, competent and diligent representation to each affected client;

2. the representation is not prohibited by law;

3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent, confirmed in writing.

This conflicts of interest Rule is based more on a genuine adversity of interest and not just differences in interest, which exists in the New York Code.

There are certain suggestions, outlined below, which we believe will enhance the efforts of the drafters.

1. Paragraph (a)(2): Clause (2) lists three specific interests [“financial, business, property”] followed by “or personal interests.” Because the words “a lawyer’s own” are the lead in to this listing of interests it is obvious that each of them is a “personal interest.” Yet in Comment [10] the drafters chose not to rely on inference but to make this clear by describing these interests as “financial, property, business or other personal interests” (emphasis added). Therefore, it is recommended adding “other” before “personal” in Paragraph (a)(2).
2. Rule 1.7’s “Informed Consent” Quandary in light of Rule 1.0’s “Terminology”: “Rule 1.0(a) defines “Informed Consent” without reference to whether or not it is “confirmed in writing” or “signed.” Separately, in Rule 1.0(b) there is added a definition of “Confirmed in writing.” Comment [7] to Rule 1.0, with particular reference to, among other rules, Rules 1.7(b) and 1.9(a), says “[a] number of Rules require that a person’s consent be confirmed in writing” and adds that “[o]ther Rules require that a client’s consent be obtained in a writing signed by the client.” Rules 1.8(a) and (g), but not Rule 1.7, are cited as examples of Rules that require that the written consent be “signed.” The Reporter’s Note to Rule 1.7, in its bullet point 5, observes that “Proposed Rule 1.7 adopts the ABA requirement that client consent be confirmed in writing. In its immediately following unnumbered paragraph it says of Rule 1.7 that client consent to conflicts generally must be confirmed in writing (emphasis added)”.

The comments to Rule 1.7 are anything but consistent in how they express the requirements for client consent. Rule 1.7(b)(4) requires that a client’s informed consent be in writing. Comments [2] and [20] state that consents be “confirmed in writing”; Comment [19] iterates “properly obtained in accordance with the Rule”; [3], [4], [13] and [14] say “under the conditions of paragraph (b)”; but [6], [7], [11], [24] and [34] refer only to “informed consent.” The Proposed Rule itself appears clear enough on its face, although if it is intended that the confirmation must be signed, the Proposed Rule probably should so state.

B. The second Proposed Rule being reviewed is:

**Rule 1.9: Conflicts of Interest: Former Clients**

(a) *A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially*
related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) [Moved to Proposed Rule 1.10.]

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a client.

We make the following observations relating to this Rule.

1. **Comment [1]:** The lawyer’s continuing duties as expressed in the Comment’s first sentence are absolute, subject to exception only “in conformity with this Rule” (emphasis added). However, draft Rule 1.10 allows for other exceptions in respect of imputed conflicts of interest. To accommodate these, there could be added to the end of the Comment’s first sentence: “or as Rule 1.10 may otherwise permit in respect of imputed conflict of interest.”

2. **Comment [3]:** “Substantially related” and “substantial relationship” are understandably imprecise. However, the interjection of the adverb “ordinarily” three times in references to examples of what “will” or “will not” be disqualifying adds to the perplexity facing the lawyer in attempting to resolve the uncertainty. Subsection (3) of the Commentary to Rule 1.10(a), by its reference to why clause (ii) of Rule 1.10(a) now includes the prefatory words “under the circumstances a reasonable lawyer would conclude that,” suggests a way to mitigate the problem here in
Comment [3]. It explains that the modifying language was added there “in order to underscore that the test used to determine whether such a risk exists is objective, not, subjective.” A similar addition to Comment [3] to Rule 1.9, perhaps substituting “should” for “would”, would be desirable.

3. **Comment [34B]:** In a lawsuit context, there will almost always be a potential “adverse economic impact.” How much is substantial is a matter of some relativity and may put the lawyer in a quandary. It may be a matter of judgment, and the rule implies that, when in doubt, ask. Perhaps it would be better to add a materiality requirement here.

C. The third Proposed Rule being reviewed is:

**Rule 1.10: Imputation of Conflicts of Interest: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (i) the prohibition is based on a lawyer’s own financial, business, property, or personal interests and (ii) under the circumstances a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or the independent judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is significant and material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not represent a client in a matter that the firm knows or reasonably should know is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to the prospective or current client unless there is
no reasonably apparent risk that confidential information of the previously represented client will be used to that client’s material disadvantage because:

(1) A reasonable lawyer would conclude that any confidential information protected by Rules 1.6 and 1.9(b) communicated to the lawyer would not be material and significant to the current matter; and

(2) The firm acts promptly and reasonably to:

(i) notify all lawyers, and non-lawyer personnel, as appropriate, within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(ii) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer protected by Rules 1.6 and 1.9(b) that is material and significant to the current matter and is; and

(iii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(iv) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(f) A law firm shall make a written or electronic record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements, and:

(1) In order to effectively assist lawyers within the firm in complying with Rules 1.10, 1.11 and 1.8(k), the system must reasonably assist the law firm in detecting conflicts that will or reasonably may arise if (i) the firm agrees to represent a
new client; or (ii) the firm agrees to represent an existing client in a new matter; or (iii) the firm hires or associates with another lawyer; or (iv) an additional party is named or appears in a pending matter; and

(2) Whether or not another violation of these Rules occurs, a significant failure to keep records or to implement or maintain a conflicts checking system which complies with this paragraph shall be a violation by the firm.

4. **Paragraph (a):** Clause (i) lists three specific interests [“financial, business, property”] followed by “or personal interests.” Because the words “a lawyer’s own” are the lead in to this listing of interests, it is obvious that each of them is a “personal interest.” It would, therefore, be desirable to insert the word “other” before “personal interest.”

5. **Paragraph (b):** There is an inconsistency between the wording of this paragraph and the black letter Comments [5] and [5A]. This paragraph of the Rule refers, without qualification, to “information . . . that is significant and material to the matter.” Comment [5] to Paragraph (b) refers to “material information . . . that is likely to be significant” (emphasis added), and Comment [5A] uses the words “likely to be significant and material.” The inconsistency needs to be resolved by reviewing paragraph (b)’s wording. There also appears to be an inconsistency between the treatment of “the firm” in Paragraphs (b) and (c). Paragraph (c) speaks to what “the firm knows or reasonably should know.” The same qualification should be included in describing the firm’s responsibility under (b). This is especially important given that Comment [4X] acknowledges that “the fiction that the law firm is the same as a single lawyer [is] unrealistic in many situations.”

6. **Comment [5E]:** The comment ends with the sentence: “In any event, if, the newly associated lawyer acquired confidential information likely to be significant and
material in the current matter, the use of screens will not avoid the firm's imputed disqualification under this Rule.” That is indeed what Rule 1.10(c) says. Yet, Comments 5E and 5F themselves suggest that a large firm to which the newly associated lawyer moves should be able to avoid disqualification by the use of screens. The problem is that the large firm would have to show that BOTH prongs of the test had been met: (1) the confidential information is not material and significant to the current matter; AND (2) a compliant screen had been timely erected. The proposed Rule seems to embody a conclusion that is exactly what the reporter calls a “cynical” one: “screens are effective unless you need them.” As a practical matter, in a large firm as described in Comments 5E and 5F, there may only be marginal benefit of a screen.

IV. Conclusion

We congratulate the drafters of this exceptional effort and will owe them our gratitude for many years to come for bringing New York State into the 21st century’s standards.