

**NEW YORK STATE BAR ASSOCIATION  
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT**

**PROPOSED NEW YORK RULES OF PROFESSIONAL CONDUCT**

Introduction

The Model Rules of Professional Conduct were adopted by the American Bar Association House of Delegates in August 1983. States immediately began to consider replacing the Model Code of Professional Responsibility with the new set of ethics rules. New York was among the first states to consider the Model Rules of Professional Conduct, but a proposal to adopt the Rules was rejected by a closely-divided NYSBA House of Delegates in November 1985. Recognizing that the Model Rules offered many improvements over the Code, what followed were two waves of “engrafting” of Model Rules language and concepts onto the framework of the existing New York Lawyers’ Code of Professional Responsibility. This process resulted in substantial amendments to New York ethics rules in 1990 and 1999. New York’s current Code, consequently, is an amalgam of Model Code and Model Rules provisions, interspersed with rules developed specifically by and for New York.

Commencing in 1997, the ABA undertook a full-scale review of the Model Rules of Professional Conduct, and created the Commission on Evaluation of the Rules of Professional Conduct, known as the “Ethics 2000” Commission. Based on the Commission’s work, the ABA House of Delegates adopted a broad range of amendments to the Model Rules in 2002. Additional amendments to the Model Rules relating to multijurisdictional practice and confidentiality were adopted by the ABA House during 2003.

In January 2003, the Committee on Standards of Attorney Conduct (“COSAC” or the “Committee”) began its own comprehensive evaluation of the revised Model Rules of

Professional Conduct. Consideration was given to the desirability of a change from the structure of the Model Code to that of the Model Rules, as well as to the substance of the provisions of the Model Rules themselves.

The work of COSAC was divided among three subcommittees, each considering approximately one-third of the provisions of the Model Rules and generating discussion drafts for review by the full committee. A distinguished ethics professor worked with each subcommittee as an associate reporter. Together, the subcommittees held approximately 50 conference calls, each from one to two hours in length. COSAC held 11 days of in-person plenary sessions, with full-day meetings being conducted in New York City, Albany and Rochester.

After 32 months of work, COSAC is pleased to propose a set of Rules of Professional Conduct for adoption in New York, now one of only two states that continues to adhere to the Model Code format.

#### Adoption of the Model Rules Format in New York

When New York first considered the Model Rules in 1985, only one other state, New Jersey, had adopted them. Today, in contrast, there is only one other state, Ohio, that retains the format of the Model Code, and it is well on its way to adoption of the Model Rules.<sup>1</sup> Perhaps as soon as the time this report is first debated in the NYSBA House of Delegates, New York will be the only state to retain the outmoded format of the Model Code.

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<sup>1</sup> As of September 2005, some 46 states and the District of Columbia, including all of New York's neighboring states, have adopted the Model Rules format as the basis for attorney discipline. Two states, California and Maine, have developed their own differently numbered unique rules of professional conduct, which are based on neither the Code nor the Rules.

There are several compelling reasons for adopting the Model Rules format. First, the structure of the Model Rules provides a more readily accessible source of ethical guidance for New York lawyers than does the current New York Code. Disciplinary enforcement cannot be the sole basis for ensuring ethical conduct by lawyers. Voluntary compliance with ethics rules is critical to maintaining the integrity of the Bar. To that end, it is essential that when lawyers have ethics questions they are able to locate easily and understand readily the rules governing them. The structure of the Code of Professional Responsibility,<sup>2</sup> however, does not lend itself to easy or ready reference and problem solving. The Disciplinary Rules (“DRs”), which are mandatory and set the minimum standards of conduct by which lawyers must abide, are grouped by abstract professional ideals, set forth as chapter headings, called “Canons” under the Code. Each chapter begins with several Ethical Considerations (“ECs”), which were intended initially as setting non-binding aspirational goals for lawyers, but have evolved over the years, particularly as amendments have been made to the New York Code, so that they serve the dual functions of recommending best practice guidelines and providing explanatory commentary on specific DRs. Unfortunately, the Code does not correlate the ECs and the DRs, making it difficult for all but the experts to find whatever explanation the ECs may provide. In addition, the nonbinding, aspirational ECs are frequently formulated in prescriptive terms, which leads to further confusion among both lawyers and courts.

The Model Rules were developed by the ABA because of dissatisfaction with both the format and the substance of the Model Code. The Model Rules employ the familiar Restatement-type format, with black letter rules followed by commentary. Comments follow

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<sup>2</sup> The Model Code of Professional Responsibility was adopted by the ABA in 1969 and became effective in New York State as of January 1, 1970.

each rule and are part of a unitary whole. The format focuses the reader's attention on the black-letter rule, not on the commentary or even less substantive "aspirational" standards. The structure makes it clear that there is only one set of Rules and that the Comments are subordinate to the text of the rule they follow.

We do not suggest that the organized bar should not exhort lawyers to adhere to ethical standards higher than those required to avoid professional discipline. Maintaining the integrity and reputation of the legal profession is an important goal of any code of conduct that may be adopted. However, commingling of aspirational goals and mandatory rules, the violation of which can subject a lawyer to disciplinary sanctions, should be avoided to the maximum extent possible. Courts, disciplinary authorities and legal practitioners are too likely to be and have on occasion been confused by the undifferentiated juxtaposition of the obligatory and the exhortative. Accordingly, we recommend that, once the New York Rules of Professional Conduct are adopted, as we hope they will be, an appropriate group within this Association develop a separate document containing aspirational or "best practice" guidelines to encourage lawyers to conform their conduct to the highest standards of professionalism.

Another benefit of the Model Rules format is that they are grouped by reference to the roles lawyers play and the tasks they perform, for example, representing clients both generally and more particularly in one of the various roles lawyers may play on behalf of their clients. The Model Rules's organization makes it easier for lawyers to find the provisions addressing a particular ethical issue. The Model Code, for example, places rules governing legal fees under DR 2-106 but rules governing safeguarding of client property under DR 9-102, virtually at opposite ends of the document. The fee rule appears under Canon 2, which states aphoristically that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel

Available.” The rule governing client property, one of the most important provisions of the New York Code, is virtually hidden under Canon 9, which states that “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” The Model Rules, in contrast, places these related rules together in its first section (as Rules 1.5 and 1.15, respectively) under the clear and simplified heading, “Client-Lawyer Relationship.”

The Model Rules also cover many topics that the Code does not. For example, Model Rules provisions regarding duties to prospective clients (Rule 1.18), the ability of lawyers to reveal client confidential information necessary to secure legal advice concerning compliance with the Rules of Professional Conduct (Rule 1.6(b)(4), and the right of the client to decide whether to settle a matter (Rule 1.2(a)), have no counterparts in our New York Disciplinary Rules, and are discussed – if at all –only in non-binding “aspirational” Ethical Considerations.

It is therefore not surprising that nearly all of the rest of the country has embraced the format of the Model Rules. Over the past 22 years, a nationwide body of law has developed under the Model Rules that New York lawyers cannot readily access because of the difference in format. In addition to case law and bar association ethics opinions from other states, most of the secondary literature about the professional responsibility of lawyers now focuses exclusively on the Model Rules. Adoption of the Model Rules format would facilitate ethical research by lawyers in New York, eliminating the need first to determine which Model Rule correlates to the DR or EC being researched and facilitating access to a large base of analysis and authority.

Correspondingly, lawyers outside of New York would be better able to review and rely upon New York precedents if the Model Rules were adopted here. At present, New York rulings, opinions and other authorities have little influence outside of the state. They are often discounted elsewhere because of New York’s continued reliance on the Model Code format.

Conversion to the Model Rules format would allow New York statements on ethics issues to be national headlines, not mere footnotes. Relatedly, for the growing number of lawyers who occasionally or frequently travel outside of their state of admission to engage in the practice of law, adoption of the Model Rules format would mean less confusion and fewer inconsistencies and contradictions in multijurisdictional practice.<sup>3</sup>

Our transition to the Model Rules should not be difficult. One of the objections to adoption of the Model Rules format in 1985 was that New York had, only 15 years before, embraced the Model Code after many years of existence under the Canons of Professional Ethics, and that it was therefore too soon to change to an untested structure. That argument no longer has validity. We have had sufficient experience under the Model Code format to recognize its deficiencies, and the rest of the country has had 20 years of growing and satisfied use of the Model Rules.

Importantly, the majority of New York lawyers are already fully familiar with the new format. Since 1982, persons seeking admission to the New York Bar have had to pass the Multistate Professional Responsibility Examination, which is based solely on the ABA Model Rules. Over two-thirds of all NYSBA members were admitted to practice in 1982 or later, and thus were required to learn the Model Rules prior to admission. Today, law schools throughout the state and country emphasize the Model Rules in teaching ethics to their students. Retention of the Model Code format only complicates the teaching of ethics in New York law schools because of the need to choose between teaching two sets of sometimes inconsistent regulations

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<sup>3</sup> For example, as noted above, all six states bordering on New York have already adopted the Model Rules format.

or, worse, simply ignoring the New York Code altogether and focusing solely on the more accessible and understandable Model Rules.

We are also familiar with a number of Model Rules concepts, as some provisions have found their way into the New York Code through the 1990 and 1999 amendments, as well as the proposed amendments regarding multijurisdictional practice approved by the NYSBA House of Delegates in June 2003, now under consideration by the courts. While the “cut and paste” approach of engrafting parts of the Model Rules into the Code has given us some of the benefits of consistency with national standards, it has not afforded New York lawyers the benefit of its far more accessible and understandable structure or the ability to tap into the nationwide body of law that has developed under the Model Rules for 20 years.

There have been many changes in the legal profession since 1985, when the Model Rules were rejected by the NYSBA, or even since 1996, when the NYSBA began consideration of the last significant wave of amendments to the New York Code. Over the past 20 years, membership in the bar has nearly doubled. New practice areas have emerged and others have faded. Technology has radically altered the way in which lawyers communicate with their clients, other lawyers and the public. Multijurisdictional practice has become more commonplace. The time for a fresh look at our ethics rules has come. COSAC believes that adopting the format of the Model Rules of Professional conduct is critical to improving ethics compliance in New York, and the Committee recommends its adoption.

### The Work of the Committee

Following an organizational meeting held in New York on January 21, 2003, COSAC was divided into three subcommittees. Subcommittee I is chaired by M. David Tell, of Wantagh, Subcommittee II by Marjorie E. Gross of New York and Subcommittee III by David M.

Schraver of Rochester. COSAC is honored to have the services of three of the most outstanding ethics professors in the country as associate reporters, one of whom was assigned to each subcommittee. Working with Subcommittee I is Professor Steven Wechsler of the Syracuse University College of Law. Professor Roger C. Cramton of the Cornell Law School works with Subcommittee II, and Professor Carol L. Ziegler of the Brooklyn Law School and the Columbia University School of Law is the associate reporter for Subcommittee III. Chief Reporter for the project, and Vice-Chair of the Committee, is Professor Roy D. Simon of the Hofstra University School of Law. Steven C. Krane of New York chairs the Committee. The Honorable Howard A. Levine of Albany serves as Special Counsel to COSAC. The two dozen members of the Committee were drawn from a broad range of practice areas and settings, and represented the entire state geographically. All of the members of the Committee have substantial experience in matters of legal ethics and professional responsibility. Biographical sketches of the members of the committee are attached as an Appendix to this report.<sup>4</sup>

Each subcommittee was assigned approximately one-third of the rules for review. The rules were further divided into three groups (denominated as Groups A, B and C), for purposes of staging and sequencing of work. The subcommittees prepared draft reports on each rule, which were in turn presented to the full Committee at plenary sessions. The subcommittees met, mainly by conference call, on approximately 50 occasions in the aggregate, with much discussion being carried out in addition through e-mail communications. Plenary sessions were held in New York City on October 16, 2003, January 27, 2004, April 20, 2004, June 28, 2004, December 6, 2004, January 25, 2005 and April 19, 2005. A two-day plenary session was held in

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<sup>4</sup> The Committee expresses its appreciation to James R. Hollyer and Matthew J. Morris for their assistance in the final preparation of this report.

Albany on October 3-4, 2004, and the Committee's final two-day plenary session was held in Rochester on June 5-6, 2005.

Following initial review at plenary sessions, discussion drafts of the rules contained in Group A were published for comment on the NYSBA web site.<sup>5</sup> We received comments from the following organizations: the Association of the Bar of the City of New York; the Bar Association of Erie County; the NYSBA Commercial and Federal Litigation Section; the NYSBA Committee on Professional Ethics; the NYSBA Labor and Employment Law Section; the National Employment Lawyers Association/New York; the New York County Lawyers' Association; the Richmond County Bar Association and the Young Lawyers Section. All of those comments were considered at the final Rochester plenary session, at which time this report was approved.

The methodology followed by the Committee was to review the ABA Model Rule, the corresponding provision of the New York Code, versions of the Model Rule as adopted in other states, together with the relevant case law, ethics opinions and commentary. COSAC's goal was, with respect to each Rule, to develop the best possible formulation of the provision based on all of the available resources. An effort was made to adopt the ABA Model Rule language for purposes of national uniformity absent some compelling reason to do otherwise. Compelling reasons were found, for example, where a New York rule had been adopted or amended relatively recently after considerable study, or where COSAC believed that the New York rule was better written or offered clearer guidance. In those circumstances, the New York rule was

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<sup>5</sup> Drafts of Rules 1.6, 1.13, 3.3 and 3.4 were released for public comment in December 2003. Drafts of Rules 1.7, 1.9 and 1.10 were released for public comment in May 2004. Drafts of Rules 1.8, 5.4, 5.6, 5.7 and 5.8 were released for public comment in September 2004.

imported into the Model Rules format, sometimes with suggested changes in the nature of fine-tuning. COSAC endeavored to avoid following the Model Rules slavishly, while also not departing from them lightly.<sup>6</sup>

Our recommendation is that the NYSBA approve the change in format from the New York Lawyers' Code of Professional Responsibility to the New York Rules of Professional Conduct, and that it ask the Courts of the State of New York, particularly the four departments of the Appellate Division of the Supreme Court, to adopt the Rules and Comments. We note that, historically, the Appellate Division has only adopted the Disciplinary Rules as part of the New York Code. The Ethical Considerations have traditionally been adopted by the NYSBA House of Delegates.<sup>7</sup> It is possible that the Appellate Division, should it decide to adopt the Model Rules format, may only adopt the Rules, and not the Comments. In that case, we anticipate that COSAC, and then the NYSBA House of Delegates, would review the Comments after the Rules have been approved and make necessary conforming changes.

While not every member of the Committee agreed with every proposal contained in this report, a few votes being closely divided, this report reflects a consensus of the committee. COSAC urges the NYSBA House of Delegates, and then the Courts of the State of New York, to

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<sup>6</sup> To the maximum extent possible, the numbering of the Model Rules has been preserved. In some cases, this has resulted in paragraphs of rules or comments being intentionally omitted. Also, particularly in the case of comments, we have added new paragraphs by using letters, e.g., "3A," rather than renumbering all of the sequentially following comment paragraphs. We have adopted this approach to facilitate correlation between New York's Rules of Professional Conduct, the ABA Model Rules, and the rules in effect in the rest of the country.

<sup>7</sup> Other states differ as to whether the courts have chosen to adopt the comments as well as the rules. Only in a minority of states do the courts adopt both. We believe, however, that the comments would be far more authoritative were they to be adopted by the Appellate Division, and therefore recommend that they do so.

adopt the proposed New York Rules of Professional Conduct as being in the best interests of lawyers, judges and the people of this state.

### Structure of the Report

Following an executive summary that contains a general description of the more significant rules set forth in this report, a separate chapter is devoted to each rule. Each chapter contains its own summary, followed by a two-column presentation of the text of the New York Rule of Professional Conduct set alongside our own “COSAC Commentary,” which are explanatory notes prepared by the Committee discussing the substance and wording of the proposed rule. Following the side-by-side presentation is a description of the changes between COSAC’s proposed Rule of Professional Conduct and the corresponding current New York Code provisions. Lastly, many provisions also have Reporters’ Notes, which provide further background information and discussion regarding the substance of the proposed rule and the reasons underlying the Committee’s recommendations.

A separate volume contains two additional resource documents. The first is the proposed New York Rules of Professional Conduct, consisting of the Rules and Comments as presented by COSAC, without the additional explanation or reference materials set forth in this Report. The second is a version of the proposed New York Rules of Professional Conduct marked to show changes from the ABA Model Rules.

This report, and the accompanying volume, are all available on the Internet through the NYSBA web site ([www.nysba.org](http://www.nysba.org)).

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<sup>8</sup> Served through January 2005.

## **EXECUTIVE SUMMARY**

### **Major Differences Between the COSAC Proposals and the Current New York Lawyer's Code of Professional Responsibility**

The proposed New York Rules of Professional Conduct differ in many ways from the current New York Lawyer's Code of Professional Responsibility. This segment of COSAC's report briefly highlights the most significant differences. (Where the language of the proposed rules is substantially similar to the language of the existing New York Code of Professional Responsibility, this segment of the Report is silent. Thus, silence indicates that a proposed rule generally tracks the language of the equivalent Code provision.)

*Note:* All citations to Disciplinary Rules (DRs) and Ethical Considerations (ECs) refer to the current New York Lawyer's Code of Professional Responsibility, which is frequently referred to herein as the "New York Code" or simply "the Code." Citations to Rules (*e.g.*, "Rule 1.6") and to "Comments" refer to the New York Rules of Professional Conduct proposed by COSAC.

#### ***Preamble and Scope***

The proposed Preamble and Scope differ significantly from the Preamble and Preliminary Statement in the existing New York Code.

#### ***Rule 1.0 Terminology***

COSAC proposes thirteen new defined terms in the Terminology section. In addition, a detailed Comment explains most of the defined terms. The increase in defined terms should increase the clarity and consistency of the Code. (All of the terms in the Terminology section appear in more than one proposed rule. Terms that appear in only one rule are defined in that rule.)

#### ***Rule 1.1 Competence***

In the current New York Code, Canon 6 provides that a lawyer "Should Represent a Client Competently," and EC 6-1 provides that a lawyer "should act with competence," but DR 6-101 does not affirmatively mandate competent representation and makes no effort to define competence. Proposed Rule 1.1 fills that gap.

#### ***Rule 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client***

Currently, EC 7-7 provides guidance regarding allocation of decision making authority, but no Disciplinary Rule does so. Rule 1.2(a) elevates the core ideas in EC 7-7 to a Disciplinary Rule and provides that a lawyer must abide by a client's decisions on specified matters.

### ***Rule 1.4      Communication***

EC 7-8 provides limited guidance regarding a lawyer's duty to communicate with a client. Rule 1.4(a) provides broader guidance by specifying various topics on which a lawyer must consult with a client.

### ***Rule 1.5      Fees and Division of Fees***

Rule 1.5(a), like DR 2-106(A), prohibits "excessive or illegal" legal fees, but Rule 1.5(a) extends this prohibition to "expenses" as well. Rule 1.5(a) then generally lists the same factors as DR 2-106(B) for determining whether a fee is excessive, but adds a new factor (the client's "opportunity and ability to compare and negotiate legal fees") and relegates DR 2-106(B)'s threshold test for an excessive fee ("a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee") into one of the ten factors to consider in deciding whether a fee is excessive.

Rule 1.5(b) generally requires a lawyer to communicate the scope of the representation and the basis or rate of the fees and expenses "before or within a reasonable time after commencing the representation, except with the lawyer will charge a regularly represented client on the same basis or rate." The rule also requires a lawyer to communicate any later changes in the basis or rate. These requirements are consistent with the requirements of New York's written letter of engagement rule, 22 NYCRR Part 1215, but Rule 1.5(b) applies even if fees are expected to be less than \$3,000 (though Rule 1.5(b), unlike Part 1215, does not require the communication about fees and expenses to be in writing).

Rule 1.5(e) permits lawyers in different firms to divide fees on essentially the same terms as DR 2-107(A), but requires the lawyers to disclose the share each lawyer will receive.

### ***Rule 1.6      Confidentiality of Information***

Rule 1.6(a) abandons DR 4-101's confusing dichotomy between "confidences" and "secrets" in favor of the unified term "confidential information." Rule 1.6(a) then defines "confidential information" to include "information gained during and relating to the representation of a client" but ordinarily excluding "legal knowledge or legal research" and "generally known" information, thus more closely matching the bar's custom and understanding than DR 4-101(A). The rule also permits a lawyer to reveal confidential information when "impliedly authorized," which accords with existing practice even though not in the text of DR 4-101(C).

Rule 1.6(b) contains two new exceptions to confidentiality: "(1) to prevent reasonably certain death or substantial bodily harm"; and "(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm." It also narrows the existing self-defense exception so that it applies to an accusation of wrongful conduct if the accusation is (a) "concerning the lawyer's representation of the client" and (b) "made in a proceeding that has been brought or that the lawyer reasonably believes will be brought."

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

Rule 1.7(a) clears up the ambiguities in DR 5-105 by specifying that a “concurrent conflict exists when either (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 that the lawyer’s independent professional judgment will be adversely affected.

Rule 1.7(b) permits a representation despite a concurrent conflict if, among other things, the lawyer “reasonably believes” that the lawyer can provide “competent and diligent” representation to each affected client and each client gives “informed consent, confirmed in writing.”

**Rule 1.8**      *Current Clients: Special Conflict of Interest Rules*

Rule 1.8 consists of ten separate conflicts rules, plus one rule that imputes most of these conflicts (all but sex with clients) to other lawyers in the same firm.

Rule 1.8(a), governing business transactions between lawyer and client, retains much of DR 5-104(A) but deletes the introductory limitation that DR 5-104(A) applies only if the lawyer and client “have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client. Instead, the Rule 1.8(a)(2) expands the requirement that the lawyer advise the client to seek independent counsel in the transaction, and give the client a reasonable opportunity to seek independent counsel, unless the client is already represented by independent counsel (in which case the lawyer “shall advise the client that it is desirable for the client to continue to be independently represented”). Rule 1.8(a)(3) reinforces this requirement by mandating that the lawyer obtain the client’s informed written consent not only to the terms of the transaction (as in DR 5-104) but also to “the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.”

Rule 1.8(c) generally prohibits a lawyer from soliciting “any substantial gift” from a client (including a testamentary gift) unless certain conditions are met. The rule thus covers ground now addressed only in EC 5-5.

Rule 1.8(e) permits a lawyer to advance court costs and expenses of litigation “the repayment of which may be contingent on the outcome of the matter,” in contrast to DR 5-103(B)(1), and permits a lawyer to pay court costs and litigation expenses outright when representing an indigent “or” pro bono client (in contrast to the requirement in DR 5-103(B)(2) that the client be both indigent and pro bono).

Rule 1.8(h)(1), unlike DR 6-102(A), permits a lawyer to make an agreement prospectively limiting the lawyer’s liability to a client for malpractice if “the client is independently represented in making the agreement.”

Rule 1.8(k) imputes the conflicts in Rule 1.8 to other lawyers in the same firm, except the rule on sex with clients (meaning that if one lawyer in a firm has a prohibited sexual relationship with a client, the other lawyers in the firm have not automatically violated Rule 1.8).

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

Rule 1.10(a), unlike DR 5-105(D), does not impute conflicts based on a lawyer's own financial, business, property, or other personal interests unless a reasonable lawyer would perceive "no significant risk" that representation by other lawyers in the firm "will be materially limited or the independent judgment of the participating lawyers in the firm will be adversely affected."

Rule 1.10(c), unlike DR 5-105(D), permits a law firm to use screening to avoid disqualification due to a laterally hired lawyer, but only in the narrow circumstance where there is "no substantial risk" that the former client's confidential information will be used to her disadvantage because (1) the confidential information in question is not "material and significant" in the current matter and (2) the firm acts "promptly and reasonably" to set up an effective screen to "prevent the flow of information about the matter" between the personally disqualified lateral and the other lawyers in the firm.

Rule 1.10(f) continues the conflict-checking obligation imposed by DR 5-105(E) when a firm accepts a new engagement, but expands the conflict-checking obligation to two other situations likely to create conflicts that could not have been caught by the original conflicts check (hiring a new attorney for the firm, or adding a new party in a pending matter).

***Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees***

Rule 1.11(a) generally tracks DR 9-101(B) but makes clear that a former government lawyer must not disclose the former client's confidential information or use that information against the former client.

Rule 1.11(b), like DR 9-101(B)(1), permits screening to cure a former government lawyer's conflict, but Rule 1.11(b) refines the elements of an effective screen, removes the requirement that the disqualified lawyer "is appropriated no part of the fee" from the matter, and adds an obligation to notify the appropriate government agency about the screening.

Rule 1.11(c) formulates a special rule for imputing conflicts of interest within a government office where a lawyer in the office is personally disqualified. The rule permits other lawyers in the office to handle a representation despite the presence of a personally disqualified lawyer if the other lawyers (1) reasonably believe they can provide competent and diligent representation and (2) the government office promptly and effectively screens off the disqualified lawyer. The current New York Code has no comparable Disciplinary Rule.

***Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral***

Rule 1.12 (a) expresses the same concept as DR 9-101(A) regarding former judges but replaces the phrase "acted on the merits" with "participated personally and substantially" (echoing the

phrase used in Rule 1.11 and DR 9-101(B)) and expands the rule to cover former impartial arbitrators, mediators, and other neutrals.

Rule 1.12(b) contains a special provision allowing a law clerk to negotiate for employment with parties involved in matters in which the clerk is participating personally and substantially, but only after notifying the judge. The current New York Code has a flat ban with no comparable “notice” provision.

Rule 1.12(c) permits a government office to continue representation despite the presence of a personally disqualified lawyer provided the office implements certain screening measures.

Rule 1.12(d) makes clear that an arbitrator selected by a party in multimember arbitration panel is not prohibited from later representing the party in the matter.

### ***Rule 1.13      Organization as Client***

Rule 1.13(b) begins by tracking the first sentence of DR 5-109(B), but the rest of DR 5-109(B) is replaced by a single sentence providing: “Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization . . . .”

Rule 1.13(d) permits a lawyer representing an organization also to represent other constituents subject to Rule 1.7 (the general conflict of interest rule), provided consent is given by an official other than the individual to be represented.

### ***Rule 1.14      Client with Diminished Capacity***

Rule 1.14 addresses the complex issues that arise when a lawyer represents a minor, a mentally impaired client, or a client with otherwise diminished capacity. In the current New York Code, those issues are addressed only by ECs 7-11 and 7-12, which often provide inadequate guidance.

### ***Rule 1.16      Declining or Terminating Representation***

Rule 1.16(a) is substantially identical to DR 2-110(B) (which governs mandatory withdrawal), except that the problem of litigation positions “merely” for purposes of harassment are dealt with in Rule 3.1 rather than in the withdrawal rule.

Rule 1.16(b) largely tracks DR 2-110(C) (which governs permissive withdrawal), but eliminates some grounds for permissive withdrawal that overlap grounds for mandatory withdrawal, allows a lawyer to withdraw if the client insists on taking action that the lawyer considers “repugnant” or with which the lawyer has a “fundamental disagreement,” requires a lawyer to give “reasonable warning” to a client before withdrawing for nonpayment of fees, makes clear that an unreasonable financial burden on the lawyer is grounds for withdrawal only if it was “not reasonably foreseeable when the relationship began,” and allow withdrawal when “permitted under Rule 1.13(c) [equivalent to DR 5-109(B)] or other law.”

Rule 1.16(d) is similar to DR 2-110(A)(2)-(3).

***Rule 1.17 Sale of Law Practice***

Rule 1.17 is substantially identical to DR 2-111, except Rule 1.17(e) provides that the fee charged a client by a lawyer who buys a law practice “shall not be increased by reason of the sale.” DR 2-111((E) contains the same language, but qualifies it by adding “unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.” Rule 1.17(e) deletes that qualifying “unless” clause.

***Rule 1.18 Duties to Prospective Client***

Rule 1.18(a) and (b) make clear that when a lawyer and a prospective client discuss the possibility of forming an attorney-client relationship, the lawyer owes a duty of confidentiality to the person. Rule 1.18(c) disqualifies a lawyer from opposing a prospective client in a substantially related matter if the lawyer “received information from the prospective client that could be significantly harmful to that person,” and disqualifies other lawyers in the firm unless the firm complies with the consent or screening provisions in Rule 1.18(d). The current New York Code has no Disciplinary Rule equivalent to Rule 1.18.

***Rule 2.3 Evaluation for Use by Third Persons***

Rule 2.3(a) generally permits a lawyer to evaluate a client’s matter for a third person. For example, (i) a lawyer for the seller of property may be asked to provide the buyer with an opinion that the seller has good title, or (ii) a lawyer for a securities issuer may be asked to provide the SEC with an opinion regarding the legality of the securities. However, if the evaluation is likely to affect the client’s interests “materially and adversely,” then under Rule 2.3(b) the lawyer shall not provide the evaluation absent the client’s informed consent. Rule 2.3(c) makes clear that information relating to the evaluation is protected by Rule 1.6 (the basic confidentiality rule). The current New York Code has no equivalent to Rule 2.3, but the rule reflects common practice.

***Rule 2.4 Lawyer Serving as Third-Party Neutral***

Lawyers often serve as mediators, arbitrators, or other types of third-party neutrals who are not representing a client in a matter, but no Disciplinary Rule in the current New York Code governs lawyers in those roles. Rule 2.4 supplies some guidance. Rule 2.4(a) defines the term “third-party neutral.” Rule 2.4(b) requires a lawyer serving as a third-party neutral to “inform unrepresented parties that the lawyer is not representing them,” and to explain the difference between a third-party neutral and a client representative to a party who does not understand the lawyer’s role as a third-party neutral.

### ***Rule 3.1 Meritorious Claims and Contentions***

Rule 3.1(a), which is similar to DR 7-102(A)(1)-(2), prohibits a lawyer from bringing or defending a proceeding or asserting or controverting an issue in the proceeding unless the lawyer has a basis in law and fact that is not “frivolous.” Rule 3.1(b) defines the term “frivolous” in a fashion consistent with 22 NYCRR § 130-1.1, which is the main sanctions provision in New York’s court rules. The current Code does not define “frivolous.”

### ***Rule 3.2 Delay of Litigation***

Rule 3.2 prohibits a lawyer representing a client from using means that have “no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.” The rule resembles DR 7-102(A)(1), which prohibits steps that would serve “merely to harass or maliciously injure another.”

### ***Rule 3.3 Candor Toward the Tribunal***

Rule 3.3 governs a lawyer representing a client before a tribunal. Rule 3.3(a) provides that a lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal, or (2) fail to disclose directly adverse controlling authority not disclosed by opposing counsel, or (3) offer evidence that the lawyer “knows to be false.” Rule 3.3(a)(3) further provides that if a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer “comes to know of its falsity,” the lawyer “shall take reasonable remedial measures, including, if necessary disclosure to the tribunal.” This mandate arguably goes beyond DR 7-102(B) but is consistent with recent decisions of the New York Court of Appeals.

Rule 3.3(b), which goes well beyond the current Code, requires a lawyer representing a client in an “adjudicative proceeding” to take “reasonable remedial measures, including, if necessary, disclosure to the tribunal,” if the lawyer “knows” that a client or any other person intends to engage or has engaged in “criminal or fraudulent conduct related to the proceeding,” including bribery, witness intimidation, unlawfully destroying or concealing documents, and other specified wrongs.

Rule 3.3(c) provides that the mandatory disclosure duties imposed by Rules 3.3(a) and (b) “continue to the conclusion of the proceeding and apply even if compliance requires disclosure” of confidential information.” Moreover, after a proceeding concludes, a lawyer “may” reveal confidential information to the extent the lawyer “reasonably believes necessary to rectify the consequences of a client’s fraud on the tribunal.” These provisions give lawyers greater power to correct fraud on a tribunal than DR 4-101 and DR 7-102(B) provide.

Rule 3.3(d), which has no equivalent in the current Code, provides that a lawyer in an ex parte proceeding must inform the tribunal of “all material facts known to the lawyer” – whether or not the facts are adverse – that will enable the tribunal to make an informed decision.

### ***Rule 3.4 Fairness to Opposing Party and Counsel***

Rule 3.4 parallels several existing New York Disciplinary Rules designed to ensure fairness to opposing parties and their counsel, and adds some new provisions covering situations not addressed in the current Code.

Rule 3.4(e), which has no direct equivalent in the current Code, provides that a lawyer shall not “make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

Rule 3.4(g), which also has no equivalent in the current Code, provides that a lawyer shall not ask a person other than a client to refrain from voluntarily giving relevant information to another party unless: “(1) the person is a relative or an employee, former employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interest will not be adversely affected by refraining from giving such information.”

Rule 3.4(h) provides that a lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter “when doing so is prohibited by law.” This broadens the scope of DR 7-105 by removing the qualification that the lawyer’s actions be “solely” to obtain an advantage in a civil matter, but simultaneously narrows the scope of DR 7-105 by prohibiting the conduct only when “prohibited by law.”

### ***Rule 3.7 Lawyer as Witness***

Rule 3.7 greatly simplifies DR 5-102, which governs lawyers who wish to act (or are acting) as both advocate and witness in the same proceeding. Rule 3.7(a) prohibits a lawyer from acting as “advocate at a trial” in which the lawyer is likely to be a “necessary” witness on a “significant issue of fact” unless various exceptions apply. Four of these exceptions are substantially identical to exceptions found in DR 5-102(A)(1)-(4), but the proposed rule also permits testimony “authorized by the tribunal with good cause.”

### ***Rule 3.8 Special Responsibilities of a Prosecutor***

Rule 3.8 substantially expands the ethical responsibilities of prosecutors and other government lawyers, which are barely addressed in the existing Code.

Rule 3.8(a) expands on DR 7-103(A) by adding that a prosecutor shall not continue to prosecute a charge that the prosecutor “knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.”

Rule 3.8(b), which has no equivalent in the existing Code, provides that a prosecutor shall not seek to prevent a person under investigation or an accused person from exercising the right to counsel.

Rule 3.8(c), which has no equivalent in the existing Code, provides that a prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights.

Rule 3.8(d) is similar to DR 7-103(B) but (1) distinguishes between the sentencing stage and other stages of prosecution and (2) recognizes that a court may relieve a prosecutor of the disclosure obligations.

Rule 3.8(e), which has no equivalent in the existing Code, prohibits a prosecutor from subpoenaing a lawyer to testify about a present or former client unless the information sought is not privileged, is essential, and cannot feasibly be obtained in any other way.

Rule 3.8(f), which significantly expands DR 7-107(A), restricts a prosecutor's right to make extrajudicial statements that have a "substantial likelihood of heightening public condemnation of the accused," and requires a prosecutor to exercise reasonable care to prevent those assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.8(g), which has no equivalent in the existing Code, provides that when a prosecutor learns about new evidence creating a "reasonable likelihood" that a convicted defendant did not commit the offense for which he was convicted, the prosecutor shall (1) disclose the evidence to the defendant and an appropriate court or authority, and (2) investigate the guilt or innocence of the convicted defendant.

Rule 3.8(h), which has no equivalent in the existing Code, provides that when a prosecutor knows of "clear and convincing evidence" that an innocent person has been convicted, the prosecutor must "take appropriate steps to set aside the prior conviction."

### ***Rule 3.9 Advocate in Nonadjudicative Proceedings***

Rule 3.9, whose closest analog in the existing Code is EC 8-4, provides that a lawyer who communicates with a legislative body or administrative agency in a representative capacity in connection with a nonadjudicative matter shall (1) disclose that the appearance is in a representative capacity, and (2) comply with specified Rules of Professional Conduct.

### ***Rule 4.2 Communication with Person Represented by Counsel***

Rule 4.2(a) is substantially the same as DR 7-104(A)(1) in the current New York Code, but the proposed rule replaces the term "party" with the term "person." This is not intended to change the meaning of the rule because various ethics opinions have stated that the term "party" in DR 7-104(A)(1) means "person."

Rule 4.2(b) is similar to DR 7-104(B), which allows a lawyer to cause a client to communicate with a represented opposing party upon reasonable advance notice to the represented party's counsel, but proposed Rule 4.2(b) eliminates the advance notice requirement, which COSAC considered a potential impediment to client-to-client communications that may help to resolve disputes.

***Rule 4.3 Dealing with Unrepresented Person***

Rule 4.3 includes the language of DR 7-104(A)(2) nearly verbatim, but adds that a lawyer shall not “state or imply that the lawyer is disinterested,” and requires a lawyer to make reasonable efforts to correct a misunderstanding by the unrepresented person if the lawyer knows that the person misunderstands the lawyer’s role.

***Rule 4.4 Respect for Rights of Third Persons***

Rule 4.4(a), whose closest analog in the existing Code is the much narrower DR 7-102(A)(1), prohibits a lawyer who is representing a client from using “means that have no substantial purpose other than to embarrass or harm a third person,” or from using “methods of obtaining evidence that violate the legal rights of such a person.”

Rule 4.4(b), which has no equivalent in the existing Code, provides that a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent “shall promptly notify the sender.”

***Rule 5.1 Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers***

Rule 5.1 generally tracks DR 1-104 of the existing Code, but has been modified in relatively minor ways to increase clarity and to account for law firm structures other than partnerships. The duty of supervision has been extended to lawyers with direct supervisory authority over other lawyers.

***Rule 5.3 Responsibilities for Non-Lawyers***

Rule 5.3 generally tracks DR 1-104(C) and (D) of the existing Code (which governs supervisory responsibilities regarding both lawyers and nonlawyers), but has been modified in relatively minor ways to increase clarity and to account for law firm structures other than partnerships. The duty of supervision has been extended to lawyers with direct supervisory authority over non-lawyers.

***Rule 5.4 Professional Independence of a Lawyer***

Rule 5.4(a) incorporates nearly verbatim the language of DR 3-102 prohibiting fee sharing with nonlawyers, but adds references to “disabled or disappeared” lawyers, and adds a new Rule 5.4(a)(4) that permits a lawyer (unless prohibited by statute or court rule) to share court-awarded legal fees with a nonprofit public interest organization that employed, retained, or recommended the lawyer.

**Rule 5.5**      ***Unauthorized Practice of Law; Multijurisdictional Practice of Law***

Rule 5.5 differs significantly from DR 3-101 but is identical to the proposed amendments to the Code approved by the New York State Bar Association House of Delegates on June 21, 2003. Those proposed amendment are now pending before the Appellate Division.

**Rule 5.6**      ***Restrictions on Right to Practice***

Rule 5.6(a) divides restrictive employment or partnership agreements for lawyers into two categories: associates (or similar employees), and partners (or the equivalent). With respect to associates, Rule 5.6(a)(1) tracks DR 2-108(A) by prohibiting agreements that restrict the right of associates to practice after terminating an employment relationship (except agreements concerning retirement benefits). But with respect to partners, Rule 5.6(a)(2) breaks new ground by prohibiting only agreements that “unreasonably” restrict the right to practice after termination.

Rule 5.6(b), prohibiting no-sue agreements in connection with the settlement of litigation, is substantially the same as DR 2-108(B).

**Rule 5.7**      ***Responsibilities Regarding Non-Legal Services***

Rule 5.7(a)-(c) are substantially the same as DR 1-106, but Rule 5.7(d) has no equivalent in the existing Code. Rule 5.7(d) addresses a situation in which a law firm is simultaneously providing both legal and non-legal services to a client in the same matter or in substantially related matters. Specifically, Rule 5.7(d) provides that a law firm shall not (whether directly or through an affiliated entity) simultaneously provide legal and non-legal services to a client in a matter (or in substantially related matters) unless (i) the law firm complies with Rule 1.8(a) (which governs business transactions with clients) and (ii) the law firm believes it can provide competent representation to the client, and (iii) the client gives informed consent, confirmed in writing.

**Rule 5.8**      ***Contractual Relationships with Non-Legal Professionals***

Rule 5.8 incorporates most of DR 1-107, but the introductory language in DR 1-107(A) (“The practice of law has an essential tradition of complete independence and uncompromised loyalty”) has been moved to the Comment because it does not create standards intended to be enforced through the disciplinary system. In addition, the language of DR 1-107(C) (which governs non-exclusive reciprocal referral agreements) has been clarified and moved to proposed Rule 7.4(b), which also governs referrals.

**Rule 6.1**      ***Voluntary Pro Bono Publico Service***

Rule 6.1 is essentially identical to EC 2-25 as amended by the House of Delegates on April 2, 2005, but adds a new Rule 6.1(d) making clear that the professional obligation set forth in Rule 6.1 “is not intended to be enforced through the disciplinary process and the failure to fulfill the

aspirational goals of this Rule should be without legal consequence.” (Rule 6.1 is the only “aspirational” rule in COSAC’s proposals.)

***Rule 6.2      Accepting Appointments***

Rule 6.2, whose closest analog in the existing Code is EC 2-29, provides that a lawyer shall not seek to avoid a court appointment to represent a person “except for good cause.”

***Rule 6.4      Law Reform Activities Affecting Client Interests***

Rule 6.4 permits a lawyer to serve an organization involved in law reform activities even if the reform may affect a client’s interests, but when a lawyer knows that the interests of the client “may be materially affected by a decision in which the lawyer participates,” the lawyer must disclose that fact (but need not identify the particular client). The rule thus covers situations now addressed in EC 8-4.

***Rule 6.5      Nonprofit and Court-Annexed  
Limited Legal Services Programs***

Rule 6.5(a), which has no equivalent in the existing Code, permits lawyers to participate in government, bar association, or not-for-profit legal services organization programs that provide “short-term limited legal services to a client” where neither the lawyer nor the client expect that the lawyer will provide continuing representation in the matter. Rule 6.5(a)(1) exempts a lawyer participating in such a program from complying with the rules governing conflicts with present and former clients unless the lawyer “knows that the representation . . . involves a conflict of interest,” and even in that situation the rule does not prohibit the lawyer from providing services “sufficient to make an appropriate referral of the client to another program” as long as the lawyer discloses the conflict to the client. Finally, Rule 6.5(a)(2) exempts the lawyer from complying with the imputed conflict rule unless the lawyer “knows” that another lawyer associated with the lawyer is disqualified from the matter due to a conflict with a present or former client.

Rule 6.5(b) provides that Rule 1.10 (the main rule imputing conflicts within a firm) “is inapplicable to a representation governed by this Rule” unless the situation falls within the ambit of Rule 6.5(a)(2).

***Rule 7.1      Communications Concerning a Lawyer’s Services***

Rule 7.1, which governs lawyer advertising and solicitation, incorporates the language of DR 2-101(A) and adds a test of materiality to the prohibition on false, deceptive or misleading advertising. The filing and retention requirements of DR 2-101(F) have been changed to require that copies of all advertisements be retained by the lawyer for one year, but that none be filed. The remainder of DR 2-101 has been incorporated into the Comment to Rule 7.1.

**Rule 7.2**      *Payment for Referrals*

Rule 7.2(b) incorporates language from DR 2-103(B), but adds a significant new provision, Rule 7.2(b)(4), that permits a lawyer to enter into reciprocal referral agreements with other lawyers or nonlawyers – whether or not the nonlawyers are professionals – if “(i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.” The new provision thus expands and reinforces DR 1-107(C), which says that DR 1-107(A)’s restrictions on contractual relationships between lawyers and nonlegal professionals do not apply to non-exclusive reciprocal referral agreements between lawyers and nonlegal “professionals.”

**Rule 7.3**      *Direct Contact with Prospective Clients*

Rule 7.3(a) preserves most of DR 2-103(A), but limits application of the rule to solicitations in which “pecuniary gain” is a “significant motive” for the soliciting lawyer. Rule 7.2(a)(1) makes clear that the ban on in-person solicitation also extends to “live” telephone contact and “real-time electronic contact,” but does not apply to solicitations directed to another lawyer.

Rule 7.3(c) requires direct mail solicitations to be marked “Lawyer Advertising.”

Rule 7.3(d) closely tracks DR 2-103(D), but Rule 7.3(d)(4) allows a lawyer to participate in a prepaid legal services plan even if the plan solicits memberships using methods that would be prohibited to the lawyer personally, and allows a lawyer to initiate or promote a prepaid legal services plan as long as the lawyer does not also own the plan.

**Rule 7.4**      *Identification of Practice and Specialty*

Rule 7.4(a), unlike DR 2-105(A), permits a lawyer to state that the lawyer “specializes” in a particular area of practice. However, Rule 7.4(c), which is similar to DR 2-105(C), provides that a lawyer shall not state “or imply” that a lawyer is “certified” as a specialist in a particular field unless (1) the lawyer has been certified as a specialist by “an organization that has been approved or accredited by the American Bar Association” and (2) the name of the certifying organization is “clearly identified” in the communication claiming the certified specialty. The rule thus drops the disclaimer required by DR 2-105(C)(1) and (2), and (unlike DR 2-105) does not permit a claim of specialty certification based on certification by another state unless the state’s certification program has been approved or accredited by the ABA.

**Rule 7.5**      *Firm Names and Letterheads*

Rule 7.5 incorporates most of the restrictions in DR 2-102, including the ban on trade names, but deletes DR 2-102(A)’s detailed rules regarding business cards, professional announcements, signs, and letterheads.

**Rule 7.6**      ***Political Contributions to Obtain Government Legal Engagements or Appointments by Judges***

Rule 7.6 provides that a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm “makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.” The rule thus addresses issues covered in EC 2-37 and EC 2-38, which COSAC has imported into the Comment to Rule 7.6.

**Rule 8.1**      ***Truthfulness in Bar Admission Matters***

Rule 8.1(a) generally tracks DR 1-101(A) by prohibiting a bar admission applicant from making a “false statement of material fact” in connection with an application for bar admission.

Rule 8.1(b) adds that an applicant shall not “fail to disclose a material fact requested in connection with a lawful demand for information from an admissions authority,” which parallels a requirement in DR 1-103(B) that currently applies only to lawyers.

Rule 8.3(c) adds that the rule “does not require disclosure of information protected by Rule 1.6” (the basic confidentiality rule), thus making clear that the rule does not mandate disclosures by a lawyer for a bar admission applicant.

**Rule 8.2**      ***Judicial Officers***

Rule 8.2(a) is substantially similar to DR 8-102(A) and (B), but replaces the term “knowingly” with the phrase “knows to be false or with reckless disregard for its truth or falsity,” a standard based on First Amendment opinions written by the United States Supreme Court.

**Rule 8.3**      ***Reporting Professional Misconduct***

Rule 8.3 generally tracks DR 1-103. However, Rule 8.3(b) explicitly extends the reporting requirement to a lawyer who “knows that a *judge* has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office” (emphasis added), whereas DR 1-103(B) requires a lawyer to reveal such knowledge only “upon proper request of a tribunal or other authority . . . .”

**Rule 8.4**      ***Misconduct***

Rule 8.4 generally tracks DR 1-102, but Rule 8.4(f) adds that a lawyer or law firm shall not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.” In addition, COSAC has deleted the prohibition in DR 1-102(A)(7) on “conduct that adversely reflects on the lawyer’s fitness as a lawyer” because most such conduct is already covered by specific subparagraphs, especially Rule 8.4(b), which prohibits “illegal conduct that adversely reflects on the lawyer’s . . . fitness as a lawyer.”

***Rule 8.5      Disciplinary Authority and Choice of Law***

Rule 8.5 is identical to the version of DR 1-105 that was approved by the House of Delegates on June 21, 2003. That proposal is now pending before the Appellate Division.

## APPENDIX

### BIOGRAPHICAL SKETCHES OF COMMITTEE MEMBERS<sup>9</sup>

**Dierdre A. Burgman** is counsel at Sullivan & Worcester LLP in Manhattan, where her practice is currently concentrated in commercial and constitutional litigation. In the private sector, she has worked for major New York firms, including Cahill Gordon & Reindel. She has also served in several public sector positions: as Senior Vice President and General Counsel of the New York State Urban Development Corporation, where she had chief legal responsibility for a number of matters, including the 42<sup>nd</sup> Street Development Project; as General Counsel of the Hudson River Park Conservancy; and as a Deputy Inspector General of the State of New York. Ms. Burgman is a former Director of NYCLA and a former Member of the NYSBA's House of Delegates. She has served on four legal ethics-related committees, including the Committee on Professional and Judicial Ethics and Committee on Professional Responsibility of the ABCNY.

**Marilyn T. Carreras** is a practicing lawyer and maintains a general and trial practice in the upstate resort town of Windham. She is a graduate of Fordham Law School and has been in practice for over 23 years. She is licensed to practice law in the states of New York, Florida and Colorado. In addition to serving on COSAC, she currently serves on the NYSBA By-Laws Committee. She has served on the Attorney Professionalism Committee for 8 years and on the Committee to Review the Standards of Judicial Conduct. Ms. Carreras has lectured for the State Bar, for local organizations and has been an alternate member of the State Bar Nominating Committee.

**Peter V. Coffey** practices in Schenectady with the firm of Englert, Coffey and McHugh. He graduated from Albany Law School, where he was a member of the Law Review. He previously has served as a member and Chair of the Committee on Professional Standards of the Third Judicial Department, as President of the Schenectady County Bar Association, as President of the Legal Aid Society of Northeastern New York, and as Vice President of the New York State Bar Association. He has been awarded the Distinguished Service Award for his service to legal aid organizations in Schenectady County and the President's Pro Bono Service Attorney Award of the New York State Bar Association. Currently, he is Secretary of the NYSBA Real Property Law Section and a Life Fellow of both the American Bar Foundation and the New York State Bar Foundation.

**Roger C. Cramton** (Associate Reporter, Subcommittee II) is a Professor of Law at Cornell Law School, a position he has held since 1973. He previously served as Dean of the Cornell Law School, and also as a Professor of Law at the University of Chicago and the University of Michigan. He has served as a law professor since 1958; prior to which he spent five years in government as a law clerk, the head of an independent federal agency, and an assistant attorney

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<sup>9</sup> In the biographical sketches, the American Bar Association is abbreviated as "ABA," the New York State Bar Association as "NYSBA," the Association of the Bar of the City of New York as "ABCNY," and the New York County Lawyers' Association as "NYCLA." This Committee continues to be referred to as "COSAC."

general in the U.S. Department of Justice. Since 1980, his principal field of scholarship has been the law and ethics of lawyering. Prof. Cramton served as the initial chairman of the Legal Services Corporation and, subsequently, as a member of two national commissions concerned with the federal courts and their judges. In his capacity as a member of the Council of the American Law Institute, he worked on the Restatement of the Law Governing Lawyers.

**Evan A Davis** is a litigation partner at Cleary Gottlieb Steen & Hamilton LLP. He is a graduate of the Columbia Law School where he was Editor-in-Chief of the Columbia Law Review. He is a past President of the ABCNY and served as Counsel to Governor Mario M. Cuomo between 1985 and 1990. He chaired the City Bar's Committee on the Model Rules when the Rules were first proposed, has been a member of several State Bar Committees considering revisions to professional ethics rules in New York and participated actively in most of the key debates in the ABA House of Delegates relating to the Model Rules.

**Kenneth L. Gartner** is a civil and criminal trial judge in the Nassau County District Court, a position he has held for the past five years. He is also an adjunct professor at the Jacob D. Fuchsberg Law Center, Touro College, where he teaches a seminar for judicial interns examining the judge's role, in theory and practice. He received his J.D., *cum laude*, from S.U.N.Y. Buffalo, where he was Managing Editor of the Law Review. Judge Gartner is the attorney-adviser to a successful high school Mock Trial team and has spent several years as the Chair of a committee that annually chooses a law school Moot Court brief for national recognition by *Scribes* - the American Association of Writers on Legal Subjects. Prior to his election as a judge, he served as an antitrust/litigation associate of a Manhattan law firm and, subsequently, as a partner in the firm of Meyer, Suozzi, English & Klein, P.C. Gartner spent 17 years as a trial and appellate litigator, when, among other things, he defended attorneys in grievance proceedings. He is also a past Chair of both the Nassau County Bar Association Professional Ethics Committee and this Committee, and is or has been a member of the ABCNY Committee on Professional Responsibility, the Federalist Society Professional Responsibility Practice Group, and the American Association of Professional Responsibility Lawyers.

**A. Paul Goldblum** has served as a trial lawyer, appellate counsel and regional lawyer for Liberty Mutual for 35 years. He was a chair of the Committee on Professional Discipline, and of the Commission on Judicial Administration. For 16 years, he had been a member, and is a former chair, of the Grievance Committee for the 2nd and 11th Judicial Districts. He is a member of the NYSBA House of Delegates, and a former Vice President, from the 11th Judicial District, and a former President of the Queens County Bar Association.

**Bruce A. Green** is the Louis Stein Professor at Fordham Law School, where he teaches legal ethics and directs the Louis Stein Center for Law and Ethics. He currently serves as a member of the Council of the ABA Section of Litigation, as Reporter to the ABA Task Force on the Attorney-Client Privilege, as a member of the Multistate Professional Responsibility Examination drafting committee, as a member of House of Delegates of the NYSBA, as a Director of NYCLA, and as a member of the ethics committees of both the NYSBA and the ABCNY. He previously served as a member of the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department; as a member of the New York City Conflicts of Interest Board; and as chair of the Professional Responsibility Section of the Association of American Law Schools. Prior to joining the Fordham faculty, Professor Green was a law clerk to Judge James L. Oakes and to Justice

Thurgood Marshall, and was an Assistant U.S. Attorney and Chief Appellate Attorney in the Office of the U.S. Attorney for the Southern District of New York.

**Marjorie E. Gross** (Chair, Subcommittee II) is Senior Vice President and Senior Regulatory Counsel of The Bond Market Association, the trade association for the fixed income securities industry. She has practiced securities and banking law since 1974, primarily as in-house counsel for banks. She is a member of the NYSBA's Committee on Professional Ethics and Committee to Review the Code of Judicial Conduct, and was a member of the NYSBA committees that considered adoption of the ABA Model Rules in 1985 and that amended the Code of Professional Responsibility in 1990 and 1999. She has also chaired the NYCLA Committee on Professional Ethics and was an Adviser to the American Law Institute's Restatement of the Law Governing Lawyers.

**Ralph L. Halpern** is a partner in the Buffalo law firm of Jaeckle, Fleischmann & Mugel, LLP. He earned his J.D. degree, *cum laude*, from the University of Buffalo in 1953, where he was associate editor of Law Review. Halpern has served in the Judge Advocate General's Corps of the U.S. Army. He has been a member of the NYSBA House of Delegates, Chairman of the NYSBA Committee on Professional Ethics, the Secretary and the Vice-Chairman of the International Law and Practice Section, and the chairman of several additional committees. He has served as a member of the House of Delegates of the ABA and is a member of the American Judicature Society, the American Law Institute and the Erie County Bar Association.

**Kristie H. Hanson** is a 1989 graduate of South Texas College of Law. After practicing corporate law for a year in Houston, Texas, she returned to her native Schenectady, where she has maintained a general practice since 1990 concentrating on social security disability, personal injury and bankruptcy cases. In addition to serving on COSAC, Ms. Hanson has also served on the Committee on Professional Discipline.

**Steven C. Krane** (Chair) is a partner in the Litigation and Dispute Resolution Department of Proskauer Rose LLP in New York City concentrating in legal ethics, sports law and alternative dispute resolution. He is Co-Chair of the firm's Law Firm Advisory Practice Group, and serves as ethics partner and pro bono partner for the firm. He is a 1981 graduate of the New York University School of Law and served as law clerk to Judge Judith S. Kaye of the New York Court of Appeals from 1984 to 1985. Mr. Krane was President of the NYSBA from 2001-02, and has chaired COSAC and its predecessor, the Special Committee to Review the Code of Professional Responsibility, since 1995. From 1999 to 2003 he also served as Vice-Chair of the NYSBA Special Committee on the Law Governing Firm Structure and Operation. He was a member of the NYSBA Committee on Professional Ethics from 1990 to 1994, has been a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility since 2004 and also served for nine years on the Committee on Professional and Judicial Ethics of the ABCNY (three years each as Secretary, Member and ultimately as Chair). From 1996 through 1999, Mr. Krane was a member of the Departmental Disciplinary Committee, First Judicial Department in New York, where he was a Hearing Panel Chair. He has also served as a Hearing Panel Chair for the Committee on Grievances of the United States District Court for the Southern District of New York. Mr. Krane has written and lectured

extensively on attorney ethics issues and for several years taught professional responsibility at the Columbia University School of Law.

**Gerard M. LaRusso** is an attorney in private practice. He received his B.A. from Rutgers in 1967, his J.D. from St. John's University School of Law in 1970, and his Masters of Law from New York University in 1974. He previously served as Chief Counsel for the Fourth Department Disciplinary Committees, from 1989 to 2002, and as Principal Counsel for the 7<sup>th</sup> District Grievance Committee, from 1977 to 1989. He has been a member of the NYSBA Committee on Professional Discipline since 1991 and was named its Chair in 2004.

**Howard A. Levine** (Special Counsel) is senior counsel to Whiteman Osterman & Hanna in Albany. Prior to joining the firm, Judge Levine had served in a variety of public service positions. From 1993 to 2002, he was an Associate Judge on the New York State Court of Appeals and, from 2000 to 2002, he was Chair of the New York Federal-State Judicial Council. From 1982 to 1993 he was an Associate Justice on the Supreme Court Appellate Division, Third Department. In 1981, he was a Justice of the State Supreme Court, Fourth Judicial District. From 1971 to 1980, he was a Family Court Judge for Schenectady County. From 1967 to 1970, he was the District Attorney of Schenectady County. From 1961 to 1966, he was an Assistant District Attorney for Schenectady County. From 1959 to 1970, he was in private practice in Schenectady and, from 1957 to 1959, he was an Associate at the law firm of Hughes, Hubbard, Blair and Reed in New York City. He now concentrates his practice on arbitration, mediation, and appellate and commercial litigation.

**Susan B. Lindenauer** was a *cum laude* graduate of Columbia Law School. Upon graduation, she joined Cleary, Gottlieb, Steen & Hamilton as an associate. In 1966, she joined The Legal Aid Society, the nation's oldest and largest provider of indigent legal services, where she became a member of the Civil Division. She worked with clients in providing direct representation at the trial and appellate levels and undertook legislative work. In 1977, she became general counsel and is currently counsel to the president and attorney-in-charge. Beyond her work at Legal Aid, Ms. Lindenauer also has served on a variety of committees formed to improve the legal system, including chairing the Criminal Justice Section of the NYSBA, as well as the Committee on Legal Aid and the ABCNY Committee on Legal Assistance. She has served on the executive committee of the State Bar and is vice chair of the Lawyers Committee to Preserve Legal Services.

**Sarah Diane McShea** is a solo practitioner in New York City and has practiced in the attorney ethics field since 1980. She advises lawyers, law firms, in-house counsel and government agencies on ethics and professional practice issues, represents lawyers and law firms in disciplinary proceedings, litigates sanctions and disqualification proceedings, represents bar applicants and serves as an expert witness on ethics issues. Ms. McShea is an adjunct professor of professional responsibility at Brooklyn Law School, a member of the Editorial Board of the *ABA/BNA Lawyers' Manual on Professional Conduct* (Chair, 1999-2000), and Chair of the ABCNY/NYCLA Legal Referral Service Committee. Before opening her own firm, she served as Deputy Chief Counsel to the Departmental Disciplinary Committee in the First Department and Chief of the Public Corruption Bureau, Brooklyn District Attorney's Office. Ms. McShea is a past President of the Association of Professional Responsibility Lawyers (1997-98).

**Ronald C. Minkoff** is a shareholder of Frankfurt Kurnit Klein & Selz, P.C., where his practice emphasizes commercial litigation, regulatory defense and professional responsibility. He is the President-Elect of the Association of Professional Responsibility Lawyers, a nationwide organization devoted to the "law of lawyering." He is Chair of the ABCNY's Joint Subcommittee on the Model Rules of Judicial Conduct, and past Chair of the Association's Committee on Professional Discipline. He also is an Adjunct Professor of Professional Responsibility at Brooklyn Law School, where he has taught for eight years. He has written and lectured extensively on a variety of professional responsibility subjects, including conflicts of interest, partnership disputes, the "no contact" rule, Sarbanes-Oxley and many others.

**Sandra S. O'Loughlin** is a partner at Hiscock & Barclay, LLP and an Adjunct Professor and Lecturer at the State University of New York at Buffalo School of Law. She graduated *cum laude* from the State University of New York at Buffalo School of Law and has practiced law for over 25 years. She is a member of the National Association of Bond Lawyers and is a member of the Business Law Section of the American Bar Association and its Committee on Securities Regulation. Additionally, Ms. O'Loughlin serves as the Chair of the Character and Fitness Committee for the New York State Supreme Court, Appellate Division, Fourth Department, Eighth Judicial District. In addition to her service as a member of COSAC, she has served on various other NYSBA committees, including the Special Committee on Unlawful Practice of Law and, for over 15 years, the Committee on Professional Ethics. She has chaired the Professional Ethics Committee of the Bar Association of Erie County and for many years has also served as a member of its Grievance Committee.

**Anne Patrice Richter** is the founder of McManus, Collura & Richter, P.C. She graduated from the College of William and Mary with a BA in 1983 and received her J.D. from New York Law School in 1990, where she graduated *cum laude* and received the American Jurisprudence Award in Trusts. She was previously a member of the firm of Conway, Farrell, Curtin & Kelly, P.C., where she practiced professional liability defense law, and an Assistant Vice President of General Reinsurance Corporation. Additionally, she served as the Notes and Comments Editor of the New York Law School Journal of International and Comparative Law.

**David M. Rubin** is a partner in the law firm of Golenbock Eiseman Assor Bell & Peskoe LLP, specializing in real estate and real estate litigation. He has been a member of the ABCNY Committee on Professional and Judicial Ethics and a speaker at PLI ethics courses. He is currently a member of the ABCNY Complaint Mediation Panel and a member of the Panel of Arbitrators of the American Arbitration Association.

**David M. Schraver** (Chair, Subcommittee III) is a partner in the law firm of Nixon Peabody LLP, where he is managing partner of the Rochester office. His practice involves civil litigation in state and federal courts; and he is listed in The Best Lawyers in America for business litigation. Mr. Schraver graduated *cum laude* from Harvard College and is a *magna cum laude* graduate of the University of Michigan Law School, where he was a Note and Comment Editor of the Michigan Law Review. He served in the U.S. Navy Judge Advocate General's Corps from 1971 to 1974. Mr. Schraver is a past President of the Monroe County Bar Association; a member of the NYSBA Executive Committee, the Finance Committee and the House of

Delegates; and is a past member of its Committee on Professional Ethics. He is also a member of the ABA House of Delegates.

**Roy D. Simon** (Chief Reporter and Vice-Chair) is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law. He graduated from Williams College and N.Y.U. School of Law, where he was Editor-in-Chief of the Law Review. After clerking for District Judge Robert Merhige in Richmond, Virginia, and practicing law at Jenner & Block in Chicago, he became a law professor at Washington University in St. Louis in 1983. He joined the Hofstra faculty in 1992. Prof. Simon annually writes *Simon's New York Code of Professional Responsibility Annotated*, annually co-authors *Regulation of Lawyers: Statutes and Standards* (with Professor Stephen Gillers of NYU), and writes a monthly column for the *New York Professional Responsibility Report*. He currently serves on the NYSBA's Committee on Professional Ethics, the Nassau County Bar's professional ethics committee, and the ABCNY Task Force on the Role of the Lawyer in Corporate Governance. He completed a three-year term on the ABCNY Committee on Professional and Judicial Ethics in 2005.

**M. David Tell** (Chair, Subcommittee I) was, until retirement at the end of 2004, a member of Wormser, Kiely, Galef & Jacobs LLP, in New York City, where he primarily practiced real estate and hospitality law. He has been active for many years in the NYSBA and is currently a member of this committee, the Committee on Attorney Professionalism, and the House of Delegates. He is also currently a member of the Board of Directors, a Vice-Chair of the Grievance Committee, a member of the Special Financial Oversight Committee, and was formerly the Chair and is currently a member of the Ethics Committee of the Nassau County Bar Association. Mr. Tell is a past member of the ABCNY Committee on Professional and Judicial Ethics, Committee on Professional Discipline and Committee on Professional Responsibility.

**Judson Vickers** is a Senior Counsel in the Legal Counsel Division of the New York City Law Department. Before joining the Law Department, he clerked for Judge Carol Bagley Amon in the United States District Court for the Eastern District of New York and was a litigation associate at the law firm of Gordon Altman Butowsky Weitzen Shalov & Wein.

**Michael Whiteman** is a founding member of Whiteman Osterman & Hanna, LLP, where he has concentrated his practice in the areas of utility law and regulation, corporate organization and transactions, government contracts and professional, business and government ethics and responsibility. A graduate of Harvard College (*magna cum laude*) and the Harvard Law School (*cum laude*), Mr. Whiteman later served as Counsel to Governor Nelson A. Rockefeller and Malcolm Wilson. He is a member of the NYSBA Committee on Professional Ethics, which he chaired from 1987 to 1991, and chairs the Association's Special Committee to Study Issues Affecting Same Sex Couples.

**Steven Wechsler** (Associate Reporter, Subcommittee I) is Professor of Law at Syracuse University College of Law and serves as Associate Reporter to this committee. He is a graduate of Cornell University (B.S. 1967) and received his M.B.A., with high distinction, from the University of Michigan Graduate School of Business Administration in 1973. He attended the University of Michigan Law School, where he was Associate Editor of the Michigan Law Review; he received his J.D., *magna cum laude*, in 1975 and was awarded the Order of the Coif.

After graduation, Wechsler worked as an associate at the Denver law firm of Holme Roberts & Owen from 1975 to 1979 when he began his academic career. Wechsler teaches Contracts, Professional Responsibility and Negotiation Skills. He has served as Associate Dean for Academic Affairs and Associate Dean for Research and Library Services at the College of Law. He served as a member of the Grievance Committee for the 5<sup>th</sup> Judicial District and is now a member of the NYSBA Committee on Professional Ethics. Wechsler is a frequent lecturer at CLE programs and writes in the area of Professional Responsibility. He is the author of the Professional Responsibility section of the annual survey of New York Law published by the Syracuse Law Review and has written several articles for the New York Professional Responsibility Report.

**Ellen Yaroshefsky** is Clinical Professor of Law and the Executive Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law in New York. She is also the director of Cardozo's annual two week Intensive Trial Advocacy Program and is Cardozo's Trial Team supervisor. Additionally, Yaroshefsky is of counsel to Hinshaw & Culbertson, LLP, concentrating her practice in the law of lawyering. She represents lawyers and law firms in criminal, civil and disciplinary matters and serves as an expert witness on legal ethics issues. From 1975 to 1982, she was a criminal defense lawyer practicing in Seattle, Washington. In 1982, she joined the Center for Constitutional Rights in New York, litigating civil rights, criminal and international human rights cases. She was in private practice in New York from 1988 to 1992, and continued to litigate civil rights and criminal cases. Since 1992, she has been a full-time member of the Cardozo faculty. Yaroshefsky serves as an ethics consultant and frequently lectures on topics involving the law of lawyering, criminal advocacy and trial practice to a wide variety of bar associations and other groups. She has served on various committees of the ABCNY and is currently a member of its Professional Responsibility Committee.

**Carol L. Ziegler** (Associate Reporter, Subcommittee III) received her B.A. degree from Cornell University and her J.D. degree from New York University School of Law. She practices and teaches professional responsibility and legal ethics as an adjunct professor at Brooklyn and Columbia Law Schools. She was a full-time member of the Brooklyn Law School faculty from 1988 to 2004, where she also served as an Associate Dean for ten years. She previously served as General Counsel to the New York City Commission on Human Rights, Special Assistant Counsel and Counsel to the Chancellor of the New York City Public Schools and as a staff attorney for Brooklyn Legal Services Corporation A and the Public Education Association. She was a member of the NYSBA Committee on Professional Ethics and the ABCNY Committee on Professional Discipline. She serves as a member of the Magistrate Selection Panel for the Eastern District of New York.