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Comparing the New NY Rules of Professional Conduct To the NY Code of Professional Responsibility

By Roy Simon

On December 16, 2008, the Administrative Board of the New York Courts announced that on April 1, 2009 New York would replace all of the existing Disciplinary Rules and Definitions in the New York Code of Professional Responsibility with New York Rules of Professional Conduct. New York will thus become the last state in the Union to abandon the format of the old ABA Model Code of Professional Responsibility. But the new NY Rules of Professional Conduct maintain much of the language and substance of the existing New York Code of Professional Responsibility, drawing on both the Disciplinary Rules and the Ethical Considerations.

Making sense of the new Rules of Professional Conduct takes time and effort. The New York Courts have not released any explanation, commentary, or comparison table to illuminate the meaning or purpose of the new Rules. Consequently, we will have to do that work ourselves. By way of contrast, when the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") issued its proposed rules beginning in 2005, COSAC accompanied the proposals with a section-by-section commentary explaining the proposals and comparing them to both the existing New York Code of Professional Responsibility and the ABA Model Rules of Professional Conduct. COSAC also supplemented that commentary with detailed Reporters' Notes that explained the changes and sometimes cited case law or discussed comparable rules in other jurisdictions.

The first step in understanding the new Rules is to compare them to the existing New York Code of Professional Responsibility. To begin that process, I have created two correlation tables. The first table compares each term in new Rule 1.0 ("Terminology") with the comparable Definition (if there is one) in the New York Code of Professional Responsibility and the ABA Model Rules of Professional Conduct (on which many new definitions are based).

The second table compares each provision in the new Rules of Professional Conduct to the comparable provisions (if any) in the existing Code of Professional Responsibility. If a new Rule is the same as an existing Code except for updated cross-references and new terminology (such as "confidential information" instead of "confidences and secrets"), the Rule is considered identical to the existing provision.

Article III of the Correlation Table contains new Rule 3.3(a)(3), which represents perhaps the most radical break with the existing Code. Under DR 7-102(B)(1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall

reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" -- which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code.

In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1), and clears up the confusion that has reigned ever since the Court of Appeals decided *People v. DePallo*, 96 N.Y.2d 437 (2001).

We hope these tables are helpful to readers in sorting out the new Rules, and in appreciating both the tremendous similarity between the new Rules and the old Code and the many differences (often subtle) between the old and the new.

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CHART OF NEW NY RULES OF PROFESSIONAL CONDUCT

TABLE 1 Rule 1.0 – Terminology

| <i>New NY Rule 1.0</i> | <i>Comparable Definition in NY Code</i> | <i>Roy Simon's Commentary: The New NY Definition is ...</i> |
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| 1.0(a) "Advertisement" | Definition 11 | Identical to current NY definition. |
| 1.0(b) "Belief" or "believes" | <i>None</i> | Almost identical to ABA definition. |
| 1.0(c) "Computer-accessed communication" | Definition 12 | Identical to current NY definition. |
| 1.0(d) "Confidential information" | DR 4-101(A) | Differs significantly from both current NY definition and ABA Rule 1.6(a). |
| 1.0(e) "Confirmed in writing" | <i>None</i> | Differs significantly from ABA definition. |
| 1.0(f) "Differing interests" | Definition 1 | Identical to current NY definition. |
| 1.0(g) "Domestic relations matter" | Definition 10 | Identical to current NY definition. |
| 1.0(h) "Firm" or "law firm" | Definition 2 | Significantly changes current NY definition by deleting "limited liability company" and by adding "sole proprietorship or other association authorized to practice law" and "government law office." |

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| 1.0(i) “Fraud” or “fraudulent” | Definition 9 | Identical to current NY definition. |
| 1.0(j) “Informed consent” | <i>None</i> | Substantially similar to ABA definition. |
| 1.0(k) “Knowingly,” “known,” “know,” or “knows” | <i>None</i> | Almost identical to ABA definition. |
| 1.0(l) “Matter” | <i>None</i> | Changes ABA definition in Rule 1.11(e) significantly by adding “litigation,” “case,” “negotiation,” “arbitration,” and “mediation” to Rule 1.11(e)(1) and by deleting ABA Rule 1.11(e)(2) (which includes “any other matter covered by the conflict of interest rules of the appropriate government agency”) – and the NY definition applies throughout the rules, whereas the ABA definition is limited to Rule 1.11. |
| 1.0(m) “Partner” | <i>None</i> | Identical to ABA definition. |
| 1.0(n) “Person” | Definition 3 | New definition adds “individual” to current NY definition. |
| 1.0(o) “Professional legal corporation” | Definition 4 | Identical to current NY definition. |
| 1.0(p) “Qualified legal assistance organization” | Definition 8 | Identical in substance to current NY definition, but updates cross-references to other rules. |
| 1.0(q) “Reasonable” or “reasonably” | <i>None</i> | Expands ABA definition by adding: “When used in the context of conflict of interest determinations, ‘reasonable lawyer’ denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.” |
| 1.0(r) “Reasonable belief” or “reasonably believes” | <i>None</i> | Identical to ABA definition. |
| 1.0(s) “Reasonably should know” | <i>None</i> | Identical to ABA definition. |
| 1.0(t) “Screened” or “screening” | <i>None</i> | Identical to ABA definition. |
| 1.0(u) “Sexual relations” | 5-111(A) | Identical to current NY definition. |
| 1.0(v) “State” | Definition 5 | Identical to current NY definition. |
| 1.0(w) “Tribunal” | Definition 6 | Expands significantly on current NY definition. |
| 1.0(x) “Writing” or “written” | <i>None</i> | Almost identical to ABA definition but NY substitutes “photocopying” for the ABA’s “photostating.” |

TABLE 2

Article 1 through Article 8

ARTICLE 1

- RULE 1.1 COMPETENCE**
- RULE 1.2 SCOPE OF REPRESENTATION & ALLOCATION OF AUTHORITY BETWEEN LAWYER & CLIENT**
- RULE 1.3 DILIGENCE**
- RULE 1.4 COMMUNICATION**
- RULE 1.5 FEES & DIVISION OF FEES**
- RULE 1.6 CONFIDENTIALITY OF INFORMATION**
- RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS**
- RULE 1.8 CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES**
- RULE 1.9 DUTIES TO FORMER CLIENTS**
- RULE 1.10 IMPUTATION OF CONFLICTS OF INTERESTS**
- RULE 1.11 SPECIAL CONFLICTS OF INTERESTS FOR FORMER & CURRENT GOVERNMENT OFFICERS & EMPLOYEES**
- RULE 1.12 SPECIAL CONFLICTS OF INTERESTS FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS**
- RULE 1.13 ORGANIZATION AS CLIENT**
- RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**
- RULE 1.15 PRESERVING IDENTITY OF FUNDS & PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING & MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS**
- RULE 1.16 DECLINING OR TERMINATING REPRESENTATION**
- RULE 1.17 SALE OF LAW PRACTICE**
- RULE 1.18 DUTIES TO PROSPECTIVE CLIENTS**

| <i>New NY Rule</i> | <i>Comparable DR in NY Code</i> | <i>Roy Simon’s Commentary: The New NY Rule of Professional Conduct is ...</i> |
|--------------------|---------------------------------|---|
| 1.1(a) | <i>None</i> | Similar in substance to EC 6-1. |
| 1.1(b) | 6-101(A)(1) | Virtually identical to DR. |
| 1.1(c)(1) | 7-101(A)(1) | Identical in substance to DR but refers to “these Rules” instead of “Disciplinary Rules.” |
| 1.1(c)(2) | 7-101(A)(3) | Identical in substance to DR. |
| 1.2(a) | 7-101(A) | Similar in substance to DR and EC 7-7 but uses different language. |
| 1.2(b) | <i>None</i> | Identical to last sentence of EC 2-36 (formerly EC 2-27). |
| 1.2(c) | <i>None</i> | No equivalent DR or EC. |
| 1.2(d) | 7-102(A)(7) | Identical in substance to DR. |

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| 1.2(e) | 7-102(A)(1) & (B)(1) | First clause of Rule 1.2(e) is virtually identical to DR 7-102(B)(1) but deletes opening clause “[w]here permissible.” Second clause is virtually identical to a clause in DR 7-102(A)(1). |
| 1.2(f) | 7-101(B)(2) | Identical to DR. |
| 1.2(g) | 7-101(A)(1) | Identical in substance to last part of DR. |
| 1.3(a) | <i>None</i> | No equivalent DR or EC. |
| 1.3(b) | 6-101(A)(3) | Identical to DR. |
| 1.3(c) | 7-101(A)(2) | Identical in substance to DR. |
| 1.4(a) | <i>None</i> | Similar in substance to second sentence of EC 9-2. |
| 1.4(b) | <i>None</i> | Similar in substance to EC 7-8. |
| 1.5(a) | 2-106(A)-(B) | Similar in substance to DR, but Rule 1.5(a) also covers “an expense.” |
| 1.5(b) | <i>None</i> | Similar in substance to first part of Written Letter of Engagement rule (22 NYCRR Part 1215) in New York’s court rules, but Rule 1.5(b) applies to all engagements, regardless of the expected fee, unless the lawyer “will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client,” and Rule 1.5(b) does not require a writing. |
| 1.5(c) | 2-106(D) | Identical in substance to DR, but Rule 1.5(c) adds: “The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party.” |
| 1.5(d) | 2-106(C) | Identical in substance to DR, but Rule 1.5(d) adds: “(4) a nonrefundable retainer fee. A lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause, if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated.” |
| 1.5(e) | 2-106(F) | Identical to DR. |
| 1.5(f) | 2-106(E) | Identical in substance to DR. |

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| 1.5(g) | 2-107(A) | Similar in substance to DR, but Rule 1.5(g)’s opening phrase replaces the phrase “is not a partner in or associate of the lawyer’s law firm” with the broader phrase “is not associated in the same law firm.” Rule 1.5(g)(2) requires disclosure to the client of “the share each lawyer will receive,” and requires that “the client’s agreement is confirmed in writing.” |
| 1.5(h) | 2-107(B) | Identical in substance to DR. |
| 1.6(a) | 4-101(A)-(B) | Similar in substance to DR, but Rule 1.6(a) adds an exception where “disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community,” and applies to information gained during “or relating to” the representation of a client, “whatever its source,” and adds that confidential information “does not ordinarily include (i) a lawyer’s legal knowledge or legal |

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| | | research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.” |
| 1.6(b) | 4-101(C) | Similar in substance to DR, but Rule 1.6(b) adds exceptions when the lawyer reasonably believes necessary “(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.” |
| 1.6(c) | 4-101(D) | Identical in substance to DR. |
| 1.7(a) | 5-101 & 5-105(A)-(B) | Similar in substance to DRs but combines personal conflicts and client-to-client conflicts into a single paragraph, and combines restrictions on accepting representation and continuing representation into a single paragraph. |
| 1.7(a)(1) | 5-105(A)-(B) | Similar in substance to DR, but Rule 1.7 deletes from both DR 5-105(A) and (B) the phrase “if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer’s representation of another client,” leaving only the reference only to “representing differing interests.” |
| 1.7(a)(2) | 5-101 | Similar in substance to DR, but Rule 1.7(a)(2) replaces old phrase “if the exercise of professional judgment on behalf of the client will be or reasonably may be affected” with the new phrase “significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected.” |
| 1.7(b) | 5-101 & 5-105(C) | Partly similar in substance to the consent provisions in DRs 5-101 and 5-105(C), but Rule 1.7(b) adds additional criteria for consentability and specifies two forms of nonconsentable conflicts. |
| 1.8(a) | 5-104(A) | Similar in substance to DR 5-104(A), but Rule 1.8(a)(1) deletes the phrase “on which the lawyer acquires the interest” and clarifies the remainder. Also, Rule 1.8(a)(2) adds that the lawyer must advise the client “in writing” to seek independent counsel and adds that the lawyer must give the client “a reasonable opportunity to seek” independent counsel, and Rule 1.8(a)(3) replaces the requirement that the lawyer disclose to the client “the lawyer’s inherent conflict of interest” with a requirement that the lawyer disclose “the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.” |
| 1.8(b) | 4-101(B)(2) | Similar in substance to DR, but Rule 1.8(b) replaces the phrase “confidence or secret” with “information relating to the representation,” and prohibits the “use” of such information without referring specifically to whether a lawyer may “reveal” it. |
| 1.8(c) | <i>None</i> | Similar in substance to EC 5-5, but Rule 1.8(c) adds a “fair and reasonable” requirement and defines “related persons” for purposes of the rule. |
| 1.8(d) | 5-104(B) | Identical in substance to DR. |
| 1.8(e) | 5-103(B) | Identical to DR. |

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| 1.8(f) | 5-107(A) & (B) | Identical in substance to DRs, but Rule 1.8(f) combines the substance of DR 5-107(A) and DR 5-107(B) into one provision. |
| 1.8(g) | 5-106 | Almost identical in substance to DR, but Rule 1.8(g) applies only “absent court approval” of an aggregate settlement. |
| 1.8(h) | 6-102 | Similar in substance to DR, but Rule 1.8(h) replaces the phrase “seek, by contract or other means” with the phrase “make an agreement,” and Rule 1.8(h) augments the requirement of advising the client or former client that independent counsel is appropriate by adding that the advice must be “in writing” and that the lawyer must give the person “a reasonable opportunity to seek” independent counsel. |
| 1.8(i) | 5-103(A) | Identical in substance to DR. |
| 1.8(j) | 5-111(B)-(C) | Almost identical to DR, but Rule 1.8(j)(1)(ii) replaces the phrase “entering into sexual relations with a client” with the phrase “entering into sexual relations incident to any professional representation by the lawyer or the lawyer’s firm.” |
| 1.8(k) | 5-111(D) | Identical to DR. |
| 1.9(a) | 5-108(A)(1) | Almost identical in substance to DR, but Rule 1.9(a) omits the exception for “current or former government lawyers” (though the exception appears to remain, by inference, in Rule 1.11), and Rule 1.9(a) requires that the former client’s consent be “confirmed in writing.” |
| 1.9(b) | 5-108(B) | Almost identical in substance to DR, but Rule 1.9(a) replaces the phrase “consent ... after full disclosure” with “informed consent,” adds a specific reference to Rule 1.9(c), and requires that the former client’s consent be “confirmed in writing.” |
| 1.9(c) | 5-108(A)(2) | Similar in substance to DR, but Rule 1.9(c)’s lead-in language applies to not only to a lawyer who personally represented a client in a matter, but also to “a lawyer whose present or former firm” represented a client. Rule 1.9(c)(1) applies only when information is used “to the disadvantage of the former client. Also, in addition to prohibiting the “use” of a former client’s confidential information, Rule 1.9(c)(2) adds a parallel provision providing that a lawyer shall not “reveal” a former client’s confidential information. |
| 1.10(a) | 5-105(D) | Identical in substance to DR, but Rule 1.10(a) omits the reference to the rule governing former government lawyers (now Rule 1.11), which contains its own imputation provisions, and Rule 1.10(a) replaces the phrase “accept or continue employment” with the phrase “represent a client.” |
| 1.10(b) | 5-108(C) | Identical in substance to DR, but Rule 1.10(b) lacks its own provision for client consent because client waiver of all Rule 1.10 conflicts is now governed by Rule 1.10(d). |
| 1.10(c) | 5-108(A)(1) & 5-108(B) | Similar in substance to DRs, but Rule 1.10(c) reinforces restrictions on a lawyer who has moved laterally to a new firm by extending those restrictions to the firm that the lateral lawyer (“the newly associated lawyer”) has joined, and Rule 1.10(c) expressly mentions |

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| | | a “prospective” client. |
| 1.10(d) | 5-101 & 5-105(C) | Identical in substance to DRs, but incorporates their provisions solely by reference rather than repeating their waiver language, which is now found in Rule 1.7(b). |
| 1.10(e) | 5-105(E) | Similar in substance to DR, but Rule 1.10(e) simplifies the language by replacing the phrase “a policy implementing a system” with the phrase “shall implement and maintain a system,” and Rule 1.10(e) specifies four situations in which a law firm must check for conflicts. The second and third sentences of DR 5-105(E) are moved to Rules 1.10(f) and (g). |
| 1.10(f) | 5-105(E) | Identical in substance to second sentence of DR, but Rule 1.10(f) applies only to a “substantial” failure to comply with Rule 1.10(e). |
| 1.10(g) | 5-105(E) | Almost identical to DR. |
| 1.10(h) | 9-101(D) | Identical to DR. |
| 1.11(a) | 9-101(B)(1) | Similar in substance to DR, but Rule 1.11(a)(1) expressly requires a former public servant to comply with Rule 1.9(c) (which protects a former client’s confidential information), permits the conflict to be cured if “the appropriate government agency gives its informed consent,” and expressly provides that this rule does not apply to matters governed by Rule 1.12(a) (which governs former judges). |
| 1.11(b) | 9-101(B)(1) | Similar in substance to DR, but Rule 1.11(b) specifies that a firm desiring to escape imputed disqualification must act “promptly and reasonably” to set up a screen. Rule 1.11(b)(1)-(4) then sets out four features of a satisfactory screen, and preserves the “appearance of impropriety” criterion of DR 9-101(B)(1)(b) as a fifth requirement for a screen to work. |
| 1.11(c) | 9-101(B)(2) | Similar in substance to DR, but Rule 1.11(c) adds a definition of “confidential government information” and incorporates by the detailed screening requirements of Rule 1.11(b). |
| 1.11(d) | 9-101(B)(3) | Substantially identical to DR. |
| 1.11(e) | <i>None</i> | |
| 1.11(f) | 8-101 | Identical to DR. |
| 1.12(a) | 9-101(A) | Identical to DR. |
| 1.12(b) | <i>None</i> | |
| 1.12(c) | <i>None</i> | |
| 1.12(d) | <i>None</i> | |
| 1.12(e) | <i>None</i> | |
| 1.13(a) | 5-109(A) | Identical to DR. |
| 1.13(b) | 5-109(B) | Identical to DR except for some minor differences in punctuation. |
| 1.13(c) | 5-109(C) | Identical to DR. |
| 1.13(d) | <i>None</i> | |
| 1.14(a) | <i>None</i> | Loosely related to ECs 7-11 and 7-12. |
| 1.14(b) | <i>None</i> | Loosely related to EC 7-12. |
| 1.14(c) | <i>None</i> | |
| 1.15 | 9-102 | Identical to DR. |

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| 1.16(a) | 2-109 | Identical to DR, except that Rule 1.16(a) replaces the phrase “it is obvious” with the phrase “[the lawyer] reasonably should know.” |
| 1.16(b) | 2-110(B) | Almost identical to DR, but the lead-in language in Rule 1.16(b) covers court permission only by cross-reference to Rule 1.16(d), and Rule 1.16(b) substitutes the word “representation” for the old word “employment” throughout the rule. |
| 1.16(b)(1) | 2-110(B)(2) | Almost identical to DR, except that Rule 1.16(b)(1) replaces the phrase “it is obvious” with the phrase “[the lawyer] reasonably should know.” |
| 1.16(b)(2) | 2-110(B)(3) | Similar in substance to DR, but Rule 1.16(b)(2) replaces the old phrase “renders it unreasonably difficult to carry out the employment effectively” with the phrase “materially impairs the lawyer’s ability to represent the client.” |
| 1.16(b)(3) | 2-110(B)(4) | Almost identical to DR, but Rule 1.16(b)(3) omits the phrase “by his or her client.” |
| 1.16(b)(4) | 2-110(B)(1) | Almost identical to DR, except that Rule 1.16(b)(4) replaces the phrase “it is obvious” with the phrase “[the lawyer] reasonably should know.” |
| 1.16(c) | 2-110(C) | Similar in substance to DR, but Rule 1.16 moves the “material adverse effect” factor to a separate subparagraph of the rule. |
| 1.16(c)(1) | 2-110(C) | Identical to “material adverse effect” clause of DR. |
| 1.16(c)(2) | 2-110(C)(1)(b) | Identical to DR. |
| 1.16(c)(3) | 2-110(C)(1)(g) | Identical to DR. |
| 1.16(c)(4) | 2-110(C)(e) | Conceptually similar to DR. |
| 1.16(c)(5) | 2-110(C)(1)(f) | Identical to DR. |
| 1.16(c)(6) | 2-110(C)(1)(a) | Identical to DR. |
| 1.16(c)(7) | 2-110(C)(1)(d) | Almost identical to DR but adds “fails to cooperate in the representation” as an alternative ground for withdrawal. |
| 1.16(c)(8) | 2-110(C)(3) | Identical to DR. |
| 1.16(c)(9) | 2-110(C)(4) | Identical to DR. |
| 1.16(c)(10) | 2-110(C)(5) | Identical to DR. |
| 1.16(c)(11) | 5-109(C) | Incorporates substance of DR by referring to Rule 1.13(c), but goes further by referring also to “other law.” |
| 1.16(c)(12) | 2-110(C)(6) | Almost identical to DR, but substitutes “matter” for “proceeding.” |
| 1.16(c)(13) | 2-110(C)(1)(c) | Identical to DR. |
| 1.16(d) | 2-110(A)(1) | First sentence of Rule 1.16(d) is identical to DR, but Rule 1.16(d) adds: “When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.” |
| 1.16(e) | 2-110(A)(2) & (3) | Substantially similar to DRs but combines them into a single subparagraph and omits references to specific rule numbers. |
| 1.17 | 2-111 | Almost identical to DR, but Rule 1.17 replaces the old terminology “confidences and secrets” with the phrase “confidential information.” |
| 1.18(a) | None | |
| 1.18(b) | 4-101(B) & | Similar in substance to DRs but makes clear that confidentiality |

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| | 5-108(A)(2) | obligations apply “[e]ven when no client-lawyer relationship ensues” after a lawyer has discussions with a prospective client about the possibility of forming a client-lawyer relationship. Codifies the first sentence of EC 4-1, which says that a lawyer is required to preserve the confidences and secrets of one who has employed “or sought to employ” the lawyer. |
| 1.18(c) | 5-105(D) & 5-108(A)(1) | Conceptually similar to DRs but combines disqualification and imputation into a single subparagraph and applies the concepts to prospective clients, but Rule 1.18(c) disqualifies a lawyer from opposing a former prospective client in a substantially related matter only “if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter,” and even then refers to exceptions created by Rule 1.18(d). |
| 1.18(d) | None | |

ARTICLE 2

RULE 2.1 ADVISOR

RULE 2.2 (RESERVED)

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

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| 2.1 | <i>None</i> | Conceptually similar to ECs 5-1 and 7-8. |
| 2.2 | [Reserved] | |
| 2.3 | <i>None</i> | |
| 2.4 | <i>None</i> | Related to the subject matter of EC 5-20, but Rule 2.4 concerns a lawyer serving as a neutral between “persons who are not clients” whereas EC 5-20 concerns mediation between matters which involve “present or former clients.” |

ARTICLE 3

RULE 3.1 NON-MERITORIOUS CLAIMS & CONTENTIONS

RULE 3.2 DELAY OF LITIGATION

RULE 3.3 CONDUCT BEFORE A TRIBUNAL

RULE 3.4 FAIRNESS TO OPPOSING PARTY & COUNSEL

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| RULE 3.5 MAINTAINING & PRESERVING THE IMPARTIALITY OF TRIBUNALS & JURORS | | |
| RULE 3.6 TRIAL PUBLICITY | | |
| RULE 3.7 LAWYER AS WITNESS | | |
| RULE 3.8 SPECIAL RESPONSIBILITIES OF PROSECUTORS & OTHER GOVERNMENT LAWYERS | | |
| RULE 3.9 ADVOCATE IN NON-ADJUDICATIVE MATTERS | | |
| 3.1(a) | 2-109 & 7-102(A)(1)-(2) | Similar in substance to DRs but Rule 3.1(a) uses the term “frivolous” (whose definition is based on 22 NYCRR Part 130), and Rule 3.1(a) adds express permission for a lawyer a defendant in a criminal proceeding, or for any respondent facing incarceration, to “so defend the proceeding as to require that every element of the case be established.” |
| 3.1(b)(1) | 7-102(A)(2) | Similar in substance to DR. |
| 3.1(b)(2) | 7-102(A)(1) | Last clause of Rule 3.1(b)(2) borrows the phrase “merely to harass or maliciously injure another” from DR, but Rule 3.1(b)(2) also applies where “the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation.” |
| 3.1(b)(3) | 7-102(A)(5) | Similar to DR, but Rule 3.1(b)(3) applies only to “material” factual statements and does not mention “a false statement of law” (though Rule 3.3(a)(1) does). |
| 3.2 | <i>None</i> | |
| 3.3(a)(1) | 7-102(A)(5) | Similar in substance to DR, but Rule 3.3(a)(1) applies only to a false statement “to a tribunal” and adds that a lawyer shall not knowingly “fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” |
| 3.3(a)(2) | 7-106(B)(1) | Almost identical to DR, but Rule 3.3(a)(2) is phrased in the negative (“shall not knowingly ... fail to disclose”) rather than the positive (“shall disclose”). |
| 3.3(a)(3) (first sentence) | 7-102(A)(4) | Similar in substance to DR, but the first sentence of Rule 3.3(a)(3) replaces the phrase “use perjured testimony or false evidence” with the phrase “offer or use evidence that the lawyer knows to be false.” |
| 3.3(a)(3) (second sentence) | 7-102(B) | Similar in substance to DR, but Rule 3.3(a)(3) adds: “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.” |
| 3.3(a)(3) (third sentence) | <i>None</i> | Similar in substance to last sentence of EC 7-26. |
| 3.3(b) | 7-108(G) | Rule 3.3(b) is much broader than the DR because Rule 3.3(b) applies to all “criminal or fraudulent conduct related to the proceeding” whereas DR applies only to “improper conduct” by or toward jurors or their families – but DR always requires a lawyer to |

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| | | “reveal [such conduct] promptly to the court” whereas Rule 3.3(b) requires the lawyer to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” |
| 3.3(c) | 7-102(B) | Similar in substance to DR with respect to non-clients, but radically reduces protection for clients who have perpetrated a fraud on a tribunal (<i>e.g.</i> , perjury or false documentary evidence). Whereas DR 7-102(B)(1) required a lawyer to reveal a client’s fraud on a tribunal to the tribunal “except when the information is protected as a confidence or secret,” Rule 3.3(c) requires disclosure to the tribunal (if less drastic “remedial measures” have failed or are not feasible) “even if compliance requires disclosure” of confidential information. |
| 3.3(d) | <i>None</i> | |
| 3.3(e) | 7-106(B)(2) | Identical to DR. |
| 3.3(f) (1)-(3) | 7-106(C)(5)-(7) | Almost identical to DR, but Rule 3.3(f)(2) omits the phrase “which is degrading to a tribunal” that qualified “undignified or discourteous conduct” in DR 7-106(C)(6). |
| 3.3(f)(4) | <i>None</i> | |
| 3.4(a) (1)-(2) | 7-109(A)-(B) | Identical in substance to DR. |
| 3.4(a) (3)-(6) | 7-102(3), (5), (6) & (7) | Identical in substance to DR, but the opening language of Rule 3.3 (“A lawyer shall not”) omits the phrase “In the representation of a client” that began DR 7-102(A). |
| 3.4(b) | 7-109(C) | Identical in substance to DR, but Rule 3.3(b) adds a prohibition on offering “an inducement to a witness that is prohibited by law.” Also, Rule 3.3(b)(1) and (2) both end with the phrase “and reasonable related expenses,” thus making unnecessary the separate subparagraph allowing payment of “[e]xpenses reasonably incurred by a witness in attending or testifying” that had appeared in DR 7-109(C)(1). |
| 3.4(c) | 7-106(A) | Identical to DR. |
| 3.4(d) | 7-106(C)(1)-(4) | Almost identical to DR, except that Rule 3.4(d)(1) omits the phrase “to the case” after the word “relevant.” |
| 3.4(e) | 7-105 | Identical to DR. |
| 3.5(a)(1) | 7-110(A) | Similar in substance to DR, but Rule 3.5(a)(1) begins with the admonition that a lawyer shall not “seek or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law,” and qualifies the phrase “give or lend anything of value” with the words “when the recipient is prohibited from accepting the gift or loan.” |
| 3.5(a)(2) | 7-110(B) | Identical to DR. |
| 3.5(a)(3) | <i>None</i> | Parallel to various prohibitions on conduct relating to jurors, but Rule 3.5(a)(3) has no direct counterpart in DR 7-108. |
| 3.5(a)(4) | 7-108(A), (B) | Similar in substance to DR, but Rule 3.5(a)(4) omits the phrase “Before the trial of a case” that began DR 7-108(A). Also, Rule 3.3(a)(4) incorporates the prohibitions in DR 7-108(B) regarding |

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| | | communications “during the trial,” and 3.3(a)(4) eliminates the distinction between lawyers “connected” with a case and “not connected” with a case that had appeared in DR 7-108(B)(1) (a distinction that now appears in Rule 3.5(a)(6)) and (2). Finally, 3.3(a)(4) ends with the phrase “unless authorized to do so by law or court order,” which did not appear in the DR. |
| 3.5(a)(5) | 7-108(D) | Similar in substance to DR, but every subparagraph differs from the DR and no language is carried over from the DR except in Rule 3.5(a)(5)(iv), which prohibits any communication with a discharged juror that attempts “to influence the juror’s actions in future jury service.” |
| 3.5(a)(6) | 7-108(E) | Substantially similar to DR, but Rule 3.5(a)(6) reorders the wording. |
| 3.5(b) | 7-108(B)(2) | Identical to DR. |
| 3.5(c) | 7-108(F) | Identical to DR. |
| 3.5(d) | 7-108(G) | Identical to DR. |
| 3.6(a) | 7-106(A) | Substantially similar to DR, but Rule 3.6(a) does not cover “associated” lawyers, who are covered instead in Rule 3.6(e). |
| 3.6(b) | 7-106(B) | Identical to DR. |
| 3.6(c) | 7-106(C) | Almost identical to DR, but Rule 3.6(c) |
| 3.6(d) | 7-106(A) | Identical to last sentence of DR. |
| 3.6(e) | 7-106(A) | Substantially similar to “associated in a law firm or government agency” clause in first sentence of DR. |
| 3.7(a) | 5-102(A), (C) | Similar in substance to DRs, but Rule 3.7(a) eliminates the distinction between accepting employment (see DR 5-102(A)) and continuing employment (see DR 5-102(C)) in favor of a unified rule impliedly covering both. Rule 3.7(a) also replaces the phrase “the lawyer knows or it is obvious that the lawyer ought to be called as a witness” with the phrase “the lawyer is likely to be a witness.” |
| 3.7(a)(1) | 5-102(A)(1) | Identical to DR. |
| 3.7(a)(2) | 5-102(A)(3) | Substantially similar to DR, but Rule 3.7(a)(2) deletes the qualifying phrase “because of the distinctive value of lawyer as counsel in the particular case.” |
| 3.7(a)(3) | 5-102(A)(4) | Substantially similar to DR, but Rule 3.7(a)(3) replaces the phrase “legal services rendered in the case by the lawyer or the lawyer’s firm to the client” with the phrase “legal services rendered in the matter.” |
| 3.7(a)(4) | 5-102(A)(2) | Identical to DR. |
| 3.7(a)(5) | <i>None</i> | |
| 3.7(b)(1) | 5-102(B), (D) | Similar in substance to DRs, but Rule 3.7(b)(1) eliminates the distinction between accepting employment (see DR 5-102(B)) and continuing employment (see DR 5-102(D)) in favor of a unified rule impliedly covering both. Rule 3.7(b)(1) also eliminates the ban on accepting employment “in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer’s firm may be called as a witness” (see DR 5-102(B)). Instead, Rule 3.7(b)(1) says nothing about accepting employment |

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| | | but simply provides that a lawyer shall not “act as an advocate before a tribunal” if another lawyer in the lawyer’s firm is “likely” to be called as a witness. Also, Rule 3.7(b) replaces the phrase “the lawyer knows or it is obvious that the lawyer ought to be called as a witness” (see DR 5-102(B)) and the phrase “the lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness” (see DR 5-102(D)) with the single phrase “the lawyer is likely to be a witness.” Finally, Rule 3.7(b)(1) replaces the criterion that the lawyer’s testimony “would or might” be prejudicial to the client (see DR 5-102(B)), or “is or may” be prejudicial to the client (see DR 5-102(D)), with the criterion that the testimony “may” be prejudicial to the client. |
| 3.7(b)(2) | <i>None</i> | |
| 3.8(a) | 7-103(A) | Identical to DR. |
| 3.8(b) | 7-103(B) | Almost identical to DR, but Rule 3.8(b) replaces the word “evidence” with the phrase “evidence or information,” replaces the word “punishment” with “sentence,” and adds an exception when the prosecutor or other government lawyer is “relieved of this responsibility by a protective order of a tribunal.” |
| 3.9 | <i>None</i> | Similar in substance to first sentence of EC 8-4. |

ARTICLE 4

- RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**
- RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**
- RULE 4.3 COMMUNICATING WITH UNREPRESENTED**
- RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS**
- RULE 4.5 COMMUNICATION AFTER INCIDENTS INVOLVING PERSONAL INJURY OR WRONGFUL DEATH**

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| 4.1 | 7-102(A)(5) | Almost identical to DR, but Rule 4.1 adds the phrase “to a third person.” |
| 4.2(a) | 7-102(A)(1) | Almost identical to DR, but replaces the phrase “the lawyer representing such other party” with “the other lawyer,” and replaces the phrase “authorized by law to do so” with the phrase “authorized to do so by law.” |
| 4.2(b) | 7-102(B) | Almost identical to DR, but adds “otherwise” before “prohibited by law” and replace the phrase “if that party is legally competent” with the phrase “unless the represented person is not legally competent.” |
| 4.3 (first two sentences) | <i>None</i> | |
| 4.3 (last) | 7-104(A)(2) | Substantially similar to DR, but Rule 4.3 adds a scienter standard |

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| sentence) | | ("if the lawyer knows or reasonably should know"), adds "are or" before "have a reasonable possibility of being in conflict," and replaces the word "party" with "person." |
| 4.4 | <i>None</i> | |
| 4.5(a) | 7-111(A) & (B) | Similar in form to DR. but Rule 4.5(a) uses the phrase "specific incident" instead of "incident." Also, Rule 4.5(a) deletes the phrase "seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident" (which would apply only to plaintiffs' lawyers) and substitutes the phrase, "representing actual or potential defendants or entities that may defend and/or indemnify said defendants," which is taken from DR 7-111(B). |
| 4.5(b) | <i>None</i> | |

ARTICLE 5

- RULE 5.1 RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS & SUPERVISORY LAWYERS**
- RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER**
- RULE 5.3 LAWYER'S RESPONSIBILITY FOR CONDUCT OF NONLAWYERS**
- RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**
- RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**
- RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE**
- RULE 5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES**
- RULE 5.8 CONTRACTUAL RELATIONSHIP BETWEEN LAWYERS & NONLEGAL PROFESSIONALS**

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| 5.1(a) | 1-104(A) | Identical to DR. |
| 5.1(b) | 1-104(B) | Similar in substance to DR, but Rule 5.1(b) divides the DR into two parts. Rule 5.1(b)(1) applies only to a lawyer with "management responsibility in a law firm" and obligates such a lawyer to make reasonable efforts to ensure that "other lawyers" in the firm conform to the Rules, whereas the DR imposes this obligation only as to "the other lawyer." Rule 5.1(b)(2) is substantially the same as the DR but governs only a lawyer with "direct supervisory authority over another lawyer." |
| 5.1(c) | 1-104(C) | Similar in substance to DR, but Rule 5.1(c) makes no reference to supervision of nonlawyers, a subject now covered in Rule 5.3. |
| 5.1(d) | 1-104(D) | Similar in substance to DR, but Rule 5.1(d) makes no reference to responsibility for the conduct of nonlawyers, a subject now covered in Rule 5.3. Also, while Rule 5.1(d)(1) is identical to DR 1-104(D)(1), Rule 5.1(d)(2) divides DR 1-104(D)(2) into two parts (one for a lawyer who "knows" and another for a lawyer who |

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| | | “should have known”), and adds the phrase “a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or” before the phrase “has supervisory authority over the other lawyer.” |
| 5.2(a) | 1-104(E) | Almost identical to DR, but Rule 5.2(a) replaces the phrase “shall comply with” these Disciplinary Rules with the phrase “is bound by” these Rules. |
| 5.2(b) | 1-104(F) | Identical to DR. |
| 5.3 | 1-104(C)-(D) | Similar in substance to DRs, but Rule 5.3 covers only nonlawyers, and Rule 5.3(b) and makes changes to DR 1-104(D) parallel to the changes in Rule 5.1(d) (see above). |
| 5.4(a) | 3-102 | Identical to DR. |
| 5.4(b) | 3-103 | Identical to DR. |
| 5.4(c) | 5-107(B) | Identical to DR. |
| 5.4(d) | 5-107(C) | Similar in substance to DR, but the opening language replaces the phrase “a limited liability company, a limited liability partnership or professional corporation” with the phrase “an entity.” Also, after the phrase “is a member, corporate director or officer thereof,” Rule 5.4(d)(2) adds the phrase “or occupies a position of similar responsibility in any form of association other than a corporation.” |
| 5.5(a) | 3-101(B) | Almost identical to DR, but Rule 5.5(a) replaces the phrase “where to do so would be in violation of the regulations of the profession” with the phrase “in violation of the regulation of the legal profession.” |
| 5.5(b) | 3-101(A) | Identical to DR. |
| 5.6(a)(1) | 2-108(A) | Similar in substance to DR, but the opening language to Rule 5.6(a) replaces the phrase “shall not be a party to or participate in” with the phrase “participate in offering or making.” Also, Rule 5.6(a)(1) replaces the phrase “a partnership or employment agreement” with the phrase “a partnership, shareholder, operating, employment, or other similar type of agreement,” and deletes the phrase “created by the agreement” after the word “relationship,” and replaces the phrase “as a condition to payment of retirement benefits” with the phrase “except an agreement concerning benefits upon retirement.” |
| 5.6(a)(2) | 2-108(B) | Similar in substance to DR, but the opening language to Rule 5.6(a) replaces the phrase “shall not be a party to or participate in” with the phrase “participate in offering or making.” Also, Rule 5.6(a)(2) replaces the phrase “controversy or suit” with the word “controversy.” |
| 5.6(b) | <i>None</i> | |
| 5.7 | 1-106 | Identical to DR. |
| 5.8 | 1-107 | Identical to DR, but Rule 5.8 deletes the language in DR 1-107(D). |
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ARTICLE 6

RULE 6.1 VOLUNTARY PRO BONO SERVICE

RULE 6.2 (RESERVED)

RULE 6.3 MEMBERSHIP IN A LEGAL SERVICES ORGANIZATION

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

RULE 6.5 PARTNERSHIP IN LIMITED PRO BONO LEGAL SERVICES PROGRAMS

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| 6.1 | <i>None</i> | Similar in substance to EC 2-34 (formerly EC 2-25) |
| 6.2 | [Reserved] | |
| 6.3 | 5-110 | Almost identical to DR. |
| 6.4 | <i>None</i> | Conceptually similar to the last two sentences of EC 8-4. |
| 6.5 | 5-101-a | Identical to DR. |

ARTICLE 7

RULE 7.1 ADVERTISING

RULE 7.2 PAYMENT FOR REFERRALS

RULE 7.3 SOLICITATION & RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

RULE 7.4 IDENTIFICATION OF PRACTICE & SPECIALTY

RULE 7.5 PROFESSIONAL NOTICES, LETTERHEADS & SIGNS

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| 7.1 | 2-101 | Identical to DR, except that Rule 7.1 adds subparagraph (q) (regarding employment resulting from “activities designed to educate the public to recognize legal problems” and subparagraph (r) (regarding public speeches or writings on “legal topics”). |
| 7.2(a) | 2-103(D) | Identical to DR. |
| 7.2(b) | 2-103(F) | Identical to DR. |
| 7.3(a)-(c) | 2-103(A)-(C) | Identical to DR. |
| 7.3(d) | 2-103(E) | Identical to DR. |
| 7.3(e)-(i) | 2-103(G)-(K) | Identical to DR. |
| 7.4 | 2-105 | Identical to DR. |
| 7.5 | 2-102 | Identical to DR. |

ARTICLE 8

RULE 8.1 CANDOR IN THE BAR ADMISSION PROCESS

RULE 8.2 JUDICIAL OFFICERS & CANDIDATES

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT
RULE 8.4 MISCONDUCT
RULE 8.5 DISCIPLINARY AUTHORITY & CHOICE OF LAW

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| 8.1 | 1-101 | Similar in substance to DR, but Rule 8.1 combines the subjects of DR 1-101(A) and (B) into a single paragraph. Also, the introductory language of Rule 8.1 clarifies the DR by applying the rule to an application for admission “previously filed in this state or in any other jurisdiction.” Rule 8.1 replaces the phrase “further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute” with the much simpler phrase “in connection with the application of another person for admission to the bar.” |
| 8.2(a) | 8-102 | Similar in substance to DR, but Rule 8.2(a) replaces the single word “qualifications” with the phrase “qualifications, conduct or integrity,” and Rule 8.2(a) combines DR 8-102(A) (concerning candidates) and DR 8-102(B) (concerning sitting judges) into a single subparagraph. |
| 8.2(b) | 8-103 | Almost identical to DR, but Rule 8.2(b) replaces the phrase “section 100.5 of the Chief Administrator’s Rules Governing Judicial Conduct (22 NYCRR) and Canon 5 of the Code of Judicial Conduct” with the phrase “the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.” |
| 8.3(a) | 1-103(A) | Similar in substance to DR, but Rule 8.3(a) replaces the phrase “lawyer possessing knowledge” with the phrase “lawyer who knows,” and Rule 8.3 moves the DR’s exceptions for confidential information and lawyer assistance programs to Rule 8.3(c). |
| 8.3(b) | 1-103(B) | Similar in substance to DR, but Rule 8.3(b) replaces the phrase “shall reveal fully such knowledge or evidence upon proper request” with the phrase “shall not fail to respond to a lawful demand for information.” Also, Rule 8.3 moves the DR’s exception for confidential information to a separate Rule 8.3(c), and that rule adds an exception for information gained through participation in a lawyer assistance program. |
| 8.3(c) | 1-103(A) | Similar in substance to the two enumerated exceptions in the DR, but Rule 8.3(c) replaces the phrase “lawyer assistance or similar program or committee” with the phrase “lawyer assistance program.” |
| 8.4(a) | 1-102(A)(1)-(2) | Similar in substance to DRs, but Rule 8.4(a) adds that a lawyer shall not “attempt to violate” the Rules, and adds that a lawyer shall not “knowingly assist or induce another to do so.” Also, Rule 8.4(a) replaces the phrase “[c]ircumvent a Disciplinary Rule through the actions of another” with the phrase “or do so through the acts of another.” |

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| 8.4(b)-(d) | 1-102(A)(3)-(5) | Identical to DR. |
| 8.4(e)(1) | 9-101(C) | Almost identical to DR, but Rule 8.4(e)(1) applies to a lawyer “or law firm,” and it replaces the phrase “that the lawyer is able” with the phrase “an ability.” |
| 8.4(e)(2) | <i>None</i> | |
| 8.4(f) | <i>None</i> | |
| 8.4(g) | 1-102(A)(6) | Identical to DR. |
| 8.4(h) | 1-102(A)(7) | Identical to DR. |
| 8.5 | 1-105 | Identical to DR. |