In With the Rules, Out With the Code

By Steven C. Krane and David A. Lewis

Change has come to New York legal ethics. On April 1, 2009, after nearly a quarter century, New York finally joined the rest of the country in abandoning the American Bar Association's (ABA) Model Code of Professional Responsibility (the "Model Code") format by adopting the format of the ABA's Model Rules of Professional Conduct (the "Model Rules"). New York's Code of Professional Responsibility (the "Code") has officially been transformed into the fresh and modern New York Rules of Professional Conduct (the "Rules").

This transformation from Code to Rules was by no means simple. While only the courts have the authority to promulgate the state's legal ethics rules in New York,[1] a leading force behind this transformation was the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC). COSAC collaborated with bar associations across all of New York for more than five years to produce a comprehensive set of rules that were presented to the New York courts in early 2008.

New York could have been the second state to adopt the Model Rules, instead of among the last, but in 1985, the NYSBA House of Delegates narrowly rejected a proposal to adopt the ABA's Model Rules format. In January

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2003, however, after the ABA's "Ethics 2000" Commission revised the Model Rules, COSAC began work on a New York version of the Model Rules.[2] COSAC issued an initial draft report in September 2005 after circulation of a number of discussion drafts of the key rules.

"He who leaps high must take a long run." – Danish Proverb

After an extensive comment period for state and local bar associations and other interested parties, the proposed rules were debated by the NYSBA House of Delegates over a period of time spanning much of 2006 and 2007. The proposed rules were approved by the NYSBA in November 2007 and presented to the New York courts for approval in February 2008. After revising that proposal,[3] the Rules were officially adopted by the courts in December 2008 and became effective April 1, 2009. At the end of this summer, Maine will adopt a version of the Model Rules, and California will be the only jurisdiction in the country that has not adopted some version of the ABA's Model Rules.

Why Make the Change?

One familiar criticism of the old Code stemmed from its unwieldy and confusing format. For example, the Disciplinary Rules (DRs) were often confused with the Ethical Considerations (ECs). The DRs were the binding ethical rules; the ECs were "aspirational" goals only. This led to some situations where lawyers faced discipline for violating non-binding ECs.

Another common criticism was that the Code was too focused on litigation. Many lawyers felt that a more holistic approach to legal ethics was needed. The new Rules recognize that the client-lawyer relationship manifests itself in many different contexts, not just in litigation. Reflecting this more comprehensive approach, the Rules are categorized according to these different contexts, which include: acting as a counselor, acting as an advocate, transacting with persons other than clients, working in law firms and associations, participating in public service, providing information about legal services, and maintaining the integrity of the profession.

The most obvious benefit of the Rules is their format. Those lawyers who frequently refer to *The Restatements of the Law* published by the American Law Institute will find it very familiar. Blackletter rules have taken the place of the old DRs. The Comments[4] have replaced the purely "aspirational" ECs and provide ready access to a detailed and more comprehensive discussion of each rule.

The format change also means that New York lawyers can now converse with lawyers from another jurisdiction about, for example, the rules regarding confidentiality by simply referring to "Rule 1.6." This is a common-sense change. No longer will New York lawyers have to translate their rules out of a foreign language, having to refer to a system of regulation rejected by the rest of the nation. The format change will help harmonize national ethics standards and facilitate the growing trend of multijurisdictional practice. New York precedents will become more accessible and more relevant to the rest of the country. New York lawyers can likewise more easily tap into the precedents of other jurisdictions and apply those analyses to the Rules.

Substantive Changes

Many lawyers might be wondering, aside from the new format, do any of the substantive rule changes really matter? Why devote the time and attention required to understand the changes? After all, if a lawyer is a fair-minded, moral person, shouldn't that be enough to assure that the actions he or she takes will automatically be ethical?

Some lawyers might even take the position that all you need do to stay out of ethical "hot water" is to follow the advice of President Abraham Lincoln. In 1850, Lincoln offered this succinct advice as a part of his guidance to a group of would-be lawyers: "[R]esolve to be honest at all events."

Good advice indeed. However, given the ever-increasing complexity of the ethical quandaries facing lawyers, simply being honest, fair-minded and morally upstanding will not always equate to being an ethical lawyer. For a lawyer to act within the ethical boundaries imposed by our self-regulated profession, more is required than simply trying to do the right thing. Legal ethics and morality are neither synonymous nor coextensive; therefore, a thorough understanding of the Rules is indispensable. The reality is that a large number of disciplinary violations come about not because of any intent to flout the ethics rules, but rather from a lack of knowledge about what the rules require.

"The young man knows the rules, but the old man knows the exceptions." – Oliver Wendell Holmes

New York's lawyers have numerous opportunities to learn about the Rules through "live" and Web-based courses that help fulfill continuing legal education requirements. Here are just a few highlights of some of the changes brought about by the Rules that are featured in these programs.

Written Engagement Letters

With respect to client-lawyer agreements (note that the "client" now rightfully comes first in the relationship, replacing the old "attorney-client" nomenclature), Rule 1.5 makes written engagement letters mandatory and any violations will be subject to professional discipline. However, lawyers cannot forget their many other obligations with respect to engagement letters.[5]

> "Beware of the person who can't be bothered by details." – William Feather

Terminology

Rule 1.0 provides detailed definitions that expand on the terms that were previously set forth in the Code and includes a number of significant new definitions.[6]

Client Conflict Waivers and Informed Consent

A lawyer may undertake or continue a representation notwithstanding a conflict of interest only if the lawyer obtains the "informed consent" of the affected clients. "Informed consent" is defined in Rule 1.0(j).[7] An important change for all New York lawyers is that Rule 1.7 requires that the informed consent of the client be "confirmed in writing" as defined by Rule 1.0(e).[8] Lawyers that rely heavily on their BlackBerrys and other forms of electronic communication can take comfort in the fact that e-mail is sufficient for the purpose of meeting the "writing" requirement of Rule 1.0(x).[9]

Zealous Advocacy

The word "zeal" has been totally eliminated from the Rules and replaced by the concept of "diligence." The term "zealous advocacy" from English common law had been incorporated into Canon 7 of the ABA's Canons of Professional Ethics, promulgated in 1908. The term eventually found a home in the Model Code at DR 7-101. When the ABA adopted its Model Rules, the term "zealous advocate" was deleted. Instead, the ABA put in a comment to Model Rule 1.3 that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." While some of this language has been retained in Comment 1 to Rule 1.3, titled "Diligence," the word "zeal" has been removed.

Candor Toward the Tribunal

In order to act as an advocate for a client, lawyers rely on their clients to provide basic facts and information on which they will base their advocacy. Being an effective advocate is a critical skill and fundamental to the success of any lawyer. Equally important, however, is good judgment. What is a lawyer to do when the lawyer learns that he or she has misrepresented facts or even presented "bad" law to a Tribunal? Does it matter if the event took place many years ago?

Rule 3.3 provides, apparently without any temporal limitation whatsoever, that whenever a lawyer becomes aware of a false statement of material fact or law previously made to a Tribunal by either the lawyer, the client or a witness called by the lawyer, the lawyer must correct that statement and take reasonable remedial measures, up to and including the disclosure of confidential information otherwise protected by Rule 1.6. The old Code provided an exception that prevented the disclosure of information that was protected as a "confidence or secret," an exception that swallowed the rule. Rule 3.3 has eliminated any such exception in these circumstances. In this respect, Rule 3.3 follows the maxim of Justice Brandeis that "sunshine is the best disinfectant."

Inadvertent Disclosure

The fundamental ideals of client confidentiality and diligent advocacy are two of the bedrock principles of the profession and help make the legal system work. Many times there is no tension between these two principles because they often work in harmony. When a lawyer inadvertently discloses confidential information to an adversary, however, a serious "dilemma" presents itself.

The evolution of technology has allowed lawyers to become more productive and more efficient than was ever previously possible. Many lawyers now rely heavily on some means of electronic communication for corresponding with their clients. It is common for lawyers to send and receive hundreds of e-mails in a single day. However, this new and convenient mode of communication brings with it a few potential nightmares as well.[10] For example, who among us does not know some poor soul who has hit "reply to all," when a simple "reply" was all that was intended? Today, all it takes to inadvertently disclose confidential information is a single click of a mouse. This type of mistake can occur in a fraction of a second, but the potential consequences can last for a lifetime. Based on how common some of these nightmare scenarios have become, lawyers needed more guidance as to what to do when they occur.

Prior to April 1, 2009, when a lawyer received from an adversary a misdirected communication that revealed confidential information, the lawyer's obligations were not at all clear. One could take little, if any, specific guidance from the text of the old ethics rules, which were entirely silent on the subject. This lack of guidance led to a number of divergent ethics opinions seeking to create standards to apply in these circumstances. In trying to address inadvertent disclosures, a number of ethics com-

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mittees found that a lawyer's duty to the client permits the receiving lawyer to use the adversary's inadvertently disclosed confidential information freely in order to benefit the receiving lawyer's client.[11] Other ethics committees went to the opposite end of the spectrum and held – without any support in the Code – that a lawyer must notify the adversary immediately when in receipt of an inadvertent disclosure of confidential information and then abide by the adversary's reasonable instructions, such as destruction or "return to sender."[12]

> "When you're finished changing, you're finished." – Benjamin Franklin

Finally, Rule 4.4(b) brings the long-standing inadvertent disclosure debate in New York to a close as a matter of ethics. It follows the ABA's approach in offering a middle ground and provides a reasonable solution with direct guidance.[13] Rule 4.4(b) provides that a receiving lawyer can no longer take advantage of an adversary's mistake by keeping an inadvertent disclosure secret by simply remaining silent. However, the only obligation placed on the receiving lawyer is to "notify" the sender. There is no corresponding duty to abide by the sender's instructions as to how to resolve the situation. The burden of taking any remedial measures now falls squarely on the shoulders of the sender.

The Future

The changes in the New York ethics rules are a considerable step in the right direction, but there is still much to be done. As the ethics leaders that were responsible for these important changes begin to look to leadership from the next generation, the focus must be on advancing our regulatory scheme to include rules that recognize the ongoing changes in the practice of law.

The practice of law is no longer contained within strict traditional geographic boundaries. E-mail, faxes and even legal advice routinely crisscross state lines and span the globe. The Internet has all but obliterated the traditional obstacles to multijurisdictional practice. We can no longer afford to ignore the reality that lawyers have become more and more mobile and come into contact, even if only temporarily, with clients outside of their home jurisdiction. New York needs more rules that recognize this reality and provide clear guidance to lawyers that they can rely on in their everyday practice of law.

The NYSBA proposed the adoption of a multijurisdictional practice rule similar to the ABA's Model Rule 5.5 – a rule that three-fourths of the states have embraced – that would recognize that lawyers who come into a jurisdiction on a temporary basis to represent their clients are not acting unlawfully. This proposal was rejected by the New York courts without any explanation. The New York courts likewise rejected the portion of proposed Rule 5.5 that would have permitted in-house counsel to work for their employers in New York without the need to become admitted to the New York Bar. Most of the rest of the country now permits this, and some jurisdictions have registration requirements that raise considerable revenues for their court systems. As of this date, 37 other jurisdictions have adopted a rule identical or similar to the ABA's Model Rule 5.5, and all but one of the rest have it under consideration. New York is the only jurisdiction to have flatly rejected such a rule. "Give us your tired, your poor, but not your lawyers," New York says.

Perhaps New York is simply content to be a free rider, with New York lawyers welcome to go into other jurisdictions on a temporary basis while refusing to afford out-of-state lawyers the same benefit. If this position is not changed, however, New York lawyers may have a price to pay. Other states may amend their multijurisdictional practice rules to include reciprocity provisions in retaliation against jurisdictions that have an isolationist view on this issue, such as New York has.[14] Adopting a version of the ABA's Model Rule 5.5 into the New York Rules would recognize the increasing importance of multijurisdictional and cross-border practice in a globalized economy and would help provide ethical guidance for the many lawyers who deal with this growing trend in their everyday practice of law.[15]

Despite some shortcomings, however, the changes wrought by the courts in adopting the Rules should be welcomed by all lawyers. While we may have to make some slight adjustments in getting used to our new format and there is still more work to be done, the Rules will undoubtedly serve New York lawyers well for many years to come. ■

1. *See* N.Y. Judiciary Law § 90(2).

2. COSAC was comprised of 24 lawyers knowledgeable in the field of legal ethics and highly diverse with respect to their practice areas. The committee was also reflective of the diverse geographic makeup of New York, with virtually the entire state represented. The committee also benefited from the efforts of four top-echelon ethics professors serving as reporters.

3. A copy of the proposed rules as presented to the New York Courts by the NYSBA is available at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home.

4. The Comments were drafted by COSAC and approved by the NYSBA House of Delegates.

5. *See, e.g.*, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and Part 137 of the Rules of the Chief Administrator of the Courts.

6. These new definitions include: an expanded definition of "tribunal," "confirmed in writing," "informed consent," "matter," "reasonable," "reasonably," "reasonable lawyer," "reasonable belief" and "reasonably believes," "screened" and "screening," "writing" and "written" (including "signed").

7. “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

8. “Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

9. “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

10. *See, e.g.*, Jeremy Feinberg, Statewide Special Counsel for Ethics for the New York Unified Court System, *Risky Business: E-Mail at Work for Personal Purposes*, The New York Professional Responsibility Report (January 2008).

11. *See, e.g.*, Oregon Opinion 2005-150 (2005), Pennsylvania State Bar Opinion 2005-22 (2005), Philadelphia Opinion 94-3 (1994), Utah State Bar Opinion 99-01, North Dakota Opinion 95-14 (1995), Massachusetts Opinion 99-4 (1999).

12. *See, e.g.*, Tennessee Formal Opinion 2004-F-150 (2004), Virginia Opinion 1702 (1997), Pennsylvania State Bar Opinion 99-150 (1999), Colorado Opinion 102 (1998), New York County Opinion 730 (2002).

13. *See, e.g.*, ABA Standing Committee on Ethics and Professional Responsibility Formal Opinions 05-437 (2006), *Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 November 10, 1992 (2005) and 06-440 Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinions 94-382 (July 5, 1994)*.

14. *See, e.g.*, Connecticut Rule of Professional Conduct 5.5(c) (“A lawyer admitted in another United States jurisdiction *which accords similar privileges to Connecticut lawyers in its jurisdiction*, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction.”) (emphasis added).

15. For a more detailed discussion and resource on the growing trend of the cross-border practice of law and cross-border legal ethics, go to Proskauer Rose LLP’s International Practice Guide e-book titled *Proskauer on International Litigation and Arbitration available at* www.proskauerguide.com.