

COSAC Recommends Adoption of ABA Model Rules Format

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[Author's note: All the quotations in this article were taken from the Introduction to the COSAC report. Future issues of NYPRR will contain articles about the specific recommendations of the Committee. See, also, pages 6-8 of this issue for the report's Executive Summary of changes in Model Rule 1.]

In a report issued on September 30, the NYSBA Committee on Standards of Attorney Conduct (COSAC) has recommended that New York follow virtually all the other states in adopting the format of the Model Rules of the American Bar Association. At the same time, the Committee has reviewed the substance of the Model Rules and has compared each Rule to the corresponding provision of the New York Code of Professional Responsibility.

“An effort was made to adopt the Model Rule language for purposes of national uniformity absent some compelling reason to do otherwise.” Nevertheless, the Committee recommended changes in the language and substance of some of the Model Rules, especially in those cases in which “a New York rule has 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.” The Committee also recommended the adoption of several new rules, including a rule that would permit reasonable restrictive covenants in law firm partnership agreements. The Committee suggested the title “New York Rules of Professional Conduct” for its revised set of rules.

The Committee pointed out that a majority of New York lawyers are already familiar with the format of the ABA Model Rules.

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

The Committee found several other reasons to prefer the ABA Model Rules format:

1) The Model Rules use the familiar Restatement type format, with black-letter rules followed by commentary. “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.”

2) The organization of the Model Rules makes it easier for lawyers to find the provisions governing a particular ethical issue. In the existing New York Code, for example, rules relating to the relationship between lawyer and client are scattered throughout the Code, while in the Model Rules, these rules are all contained in the first section under the simple heading “Client-Lawyer Relationship.”

3) The Model Rules contain many provisions not covered in the New York Code, such as: (Rule 1.18) a lawyer’s duties to prospective clients; (Rule 1.6(b)(4) a lawyer’s right to reveal a client’s confidences when the lawyer needs legal advice about the lawyer’s compliance with the rules; and (Rule 1.2(a) the client’s right to decide whether or not to settle a matter. These rules “are discussed – if at all – only in non-binding ‘aspirational’ Ethical Considerations.”

4) The rest of the country has “embraced 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.

5) Adoption of the Model Rules by New York would enable lawyers in other states to review and rely on New York precedents. “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.”

6) For the growing number of lawyers who travel outside of their state of admission to engage in the practice of law, adoption of the Model Rules format would facilitate multijurisdictional practice by eliminating confusion, inconsistencies and contradictions in the rules.

The Road Ahead

The COSAC report was the work of 28 participants, including Steven C. Krane as chair, Professor Roy D. Simon as vice-chair and chief reporter, and the Honorable Howard A. Levine as special counsel. The Committee was broken up into three subcommittees, each with its own chair (Marjorie E. Gross, David M. Schraver and M. David Tell) and its own Associate Reporter (Professors Roger C. Cramton, Steven Wechsler and Carol L. Ziegler). The subcommittee members included practitioners in the field of ethics, law professors and judges. Together, the subcommittees held 50 conference calls and spent 11 days in person plenary sessions, including full-day meetings in New York City, Albany and Rochester.

The COSAC report will now be considered by the NYSBA House of Delegates and by the Courts. The NYSBA delegates will consider the report in January and then in a series of six successive meetings. If approved by the NYSBA, the proposals would then be sent to the Courts. The Committee issued the following recommendation to the NYSBA:

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. 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 NYS-BA House of Delegates, would review the Comments after the Rules have been approved and make necessary conforming changes. The COSAC Report may be found at www.NYSBA.org/COSACreport .