

# Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part I)

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.

## Understanding New Rules Takes Time and Effort

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, I think, is to compare them to the existing New York Code of Professional Responsibility. To begin that process, I have created three 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 from Rule 1.1 through Rule 1.10 to the comparable provisions (if any) in the existing Code of Professional Responsibility. (Eventually, I will also prepare tables comparing the New York Rules of Professional Conduct to the ABA Model Rules of Professional Conduct and to the COSAC proposals as finally modified and approved by the State Bar and recommended to the Courts.)

The third table simply lists the comparable existing DR (if there is one) for each provision in New York Rules 1.11 through 8.5 (i.e., the remainder of the new Rules).

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. Later parts of this article will include tables with detailed comparisons of Rules 1.11 through 8.5 (continuing the second table in this article).

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New York's existing Code of Professional Responsibility will be replaced on April 1, 2009 by the New York Rules of Professional Conduct. The format and numbering system are based on the ABA Model Rules. The Rules introduce a number of important ethics changes for New York lawyers. NYPRR asked Professor Roy Simon to comment on the changes, which he has done in the following three tables.

#### COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table A. Terminology (Definitions)

In the NY Rules of Professional Conduct	In the Code of Professional Responsibility	Roy Simon's Commentary: The new Definition is ...
1.0(a) "Advertisement"	Definition 11	Identical to Code definition.
1.0(b) "Belief" or "believes"	<i>None</i>	Almost identical to ABA definition.
1.0(c) "Computer-accessed communication"		Identical to Code definition.
1.0(d) "Confidential information" (Defined in Rule 1.6)	Definition 12	Differs significantly from both Code 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 Code definition.
1.0(g) "Domestic relations matter"	Definition 10	Identical to Code definition.
1.0(h) "Firm" or "law firm"	Definition 2	Significantly changes Code definition by deleting "limited liability company" and by adding "sole proprietorship or other association authorized to practice law" and "government law office."
1.0(i) "Fraud" or "fraudulent"	Definition 9	Identical to current Code 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.

## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table A. Terminology (Definitions) *Continued*

In the NY Rules of Professional Conduct	In the Code of Professional Responsibility	Roy Simon's Commentary: The new Definition is ...
1.0(m) "Partner"	<i>None</i>	Identical to ABA definition.
1.0(n) "Person"	Definition 3	New definition adds "individual" to Code definition.
1.0(o) "Professional legal corporation"	Definition 4	Identical to Code definition.
1.0(p) "Qualified legal assistance organization"	Definition 8	Identical in substance to Code 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 Code definition.
1.0(v) "State"	Definition 5	Identical to Code definition.
1.0(w) "Tribunal"	Definition 6	Expands significantly on Code definition.
1.0(x) "Writing" or "written"	<i>None</i>	Almost identical to ABA definition but Rule 1.0(x) substitutes "photocopying" for the ABA's "photostating."

## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table B. Comparing new Rule to Existing Code

New Rule	Comparable DR in NY Code	Roy Simon's Commentary: The New Rule of Professional Conduct is ...
1.1(a)	None	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)	None	Identical to last sentence of EC 2-36 (formerly EC 2-27).
1.2(c)	None	No equivalent DR or EC.
1.2(d)	7-102(A)(7)	Identical in substance to DR.
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 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)	None	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)	None	Similar in substance to second sentence of EC 9-2.
1.4(b)	None	Similar in substance to EC 7-8.
1.5(a)	2-106(A)-(B)	Similar in substance to DR but also covers "an expense."
1.5(b)	None	Similar in substance to first part of Written Letter of Engagement rule (22 NYCRR Part 1215) in New York's court rules.
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.
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."

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## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table B. Comparing new Rule to Existing Code *Continued*

New Rule	Comparable DR in NY Code	Roy Simon's Commentary: The New Rule of Professional Conduct is ...
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 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 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 the phrase "information relating to the representation," and prohibits the "use" of such information without referring specifically to whether a lawyer may "reveal" it.

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## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table B. Comparing new Rule to Existing Code *Continued*

New Rule	Comparable DR in NY Code	Roy Simon's Commentary: The New Rule of Professional Conduct is ...
1.8(c)	None	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.
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) requires "...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 also 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 the phrase "informed consent," and 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 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."

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## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table B. Comparing new Rule to Existing Code *Continued*

New Rule	Comparable DR in NY Code	Roy Simon's Commentary: The New Rule of Professional Conduct is ...
1.10(b)	5-108(C)	Identical in substance to DR, but Rule 1.10(b) does not expressly refer to 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 ("the newly associated lawyer") by extending those restrictions to the firm that the lateral lawyer has joined, and Rule 1.10(c) expressly mentions 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.

## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table C. Rule/DR Correlations

New NY Rule	Comparable DR in NY Code	New NY Rule	Comparable DR in NY Code
<b>Article 1</b>		1.14(a)	<i>None</i>
1.11(a)	9-101(B)(1)	1.14(b)	<i>None</i>
1.11(b)	9-101(B)(1)	1.14(c)	<i>None</i>
1.11(c)	9-101(B)(2)	1.15	9-102
1.11(d)	9-101(B)(3)	1.16(a)	2-109
1.11(e)	<i>None</i>	1.16(b)	2-110(B)
1.11(f)	8-101	1.16(c)	2-110(C)
1.12(a)	9-101(A)	1.16(d)	2-110(A)(1)
1.12(b)	<i>None</i>	1.16(e)	2-110(A)(2)
1.12(c)	<i>None</i>	1.17	2-111
1.12(d)	<i>None</i>	1.18	<i>None</i>
1.12(e)	<i>None</i>	<b>Article 2</b>	
1.13(a)	5-109(A)	2.1	<i>None</i>
1.13(b)	5-109(B)	2.2	[Reserved]
1.13(c)	5-109(C)	2.3	<i>None</i>
1.13(d)	<i>None</i>	2.4	<i>None</i>

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## COMPARISON TABLES FOR THE NEW YORK RULES OF PROFESSIONAL CONDUCT

Table C. Rule/DR Correlations *Continued*

New NY Rule	Comparable DR in NY Code
<b>Article 3</b>	
3.1(a)	7-102(A)(1)-(2)
3.1(b)	7-101(A)
3.2	None
3.3(a)(1)	7-102(A)(5)
3.3(a)(2)	7-106(B)(1)
3.3(a)(3)	7-102(A)(4)
3.3(b)	None
3.3(c)	7-102(B)
3.3(d)	None
3.3(e)	7-106(B)(2)
3.3(f)(1)-(3)	7-106(C)(5)-(7)
3.3(f)(4)	None
3.4(a)(1)-(2)	7-109(A)-(B)
3.4(a)(3)-(6)	7-102(3)-(5), (7)
3.4(b)	7-109(C)
3.4(c)	7-106(A)
3.4(d)	7-106(C)(1)-(4)
3.4(e)	7-105
3.5(a)(1)-(2)	7-110(A)
3.5(a)(3)	None
3.5(a)(4)	7-108(A)
3.5(a)(5)	7-108(D)
3.5(a)(6)	7-108(E)
3.5(b)	7-108(B)(2)
3.5(c)	7-108(F)
3.5(d)	7-108(G)
3.6(a)	7-106(A)
3.6(b)	7-106(B)
3.6(c)	7-106(C)
3.6(d)	7-106(A)
3.6(e)	7-106(A)
3.7(a)	5-102(A), (C)
3.7(b)	5-102(B), (D)
3.8	7-103
3.9	None
<b>Article 4</b>	
4.1	7-102(A)(5)
4.2(a)	7-102(A)(1)
4.2(b)	7-102(B)
4.3	7-104(A)(2)
4.4	None

New NY Rule	Comparable DR in NY Code
4.5(a)	7-111(A)
4.5(b)	None
<b>Article 5</b>	
5.1	1-104(A)-(D)
5.2	1-104(E)-(F)
5.3	1-104(C)-(D)
5.4(a)	3-102
5.4(b)	3-103
5.4(c)	5-107(B)
5.4(d)	5-107(C)
5.5	3-101
5.6(a)	2-108
5.6(b)	None
5.7	1-106
5.8	1-107
<b>Article 6</b>	
6.1	None
6.2	[Reserved]
6.3	5-110
6.4	None
6.5	5-101-a
<b>Article 7</b>	
7.1	2-101
7.2(a)	2-103(D)
7.2(b)	2-103(F)
7.3(a)-(c)	2-103(A)-(C)
7.3(d)	2-103(E)
7.3(e)-(i)	2-103(G)-(K)
7.4	2-105
7.5	2-102
<b>Article 8</b>	
8.1	1-101
8.2	8-102
8.3	1-103
8.4(a)	1-102(A)(1)-(2)
8.4(b)-(d)	1-102(A)(3)-(5)
8.4(e)(1)	9-101(C)
8.4(e)(2)	None
8.4(f)	None
8.4(g)	1-102(A)(6)
8.4(h)	1-102(A)(7)
8.5	1-105