

Executive Summary:

Differences Between COSAC Proposals & Current Code

Major Differences between the COSAC Proposals and the Current New York Lawyer's Code of Professional Responsibility.

[Editor's Note: The December, January and February issues of NYPRR contained COSAC's proposals for changes in Model Rules 1 to 5.8. This issue concludes the series by reporting the proposed changes to Model Rules 6.1 through 7.6.]

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

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

Rule 6.1 Voluntary Pro Bono Publico Service. Rule 6.1 is essentially identical to EC 2-25 as amended by the House of Delegates on April 2, 2005, but adds a new Rule 6.1(d) making clear that the professional obligation set forth in Rule 6.1 "is not intended to be enforced through the disciplinary process and the failure to fulfill the aspirational goals of this Rule should be without legal consequence." (Rule 6.1 is the only "aspirational" rule in COSAC's proposals.)

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

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

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs. Rule 6.5(a), which has no equivalent in the existing Code, permits lawyers to participate in government, bar association, or not-for-profit legal services organization programs that provide "short-term limited legal services to a client" where neither the lawyer nor the client expect [sic] that the lawyer will provide continuing representation

in the matter. Rule 6.5(a)(1) exempts a lawyer participating in such a program from complying with the rules governing conflicts with present and former clients unless the lawyer “knows that the representation . . . involves a conflict of interest,” and even in that situation the rule does not prohibit the lawyer from providing services “sufficient to make an appropriate referral of the client to another program” as long as the lawyer discloses the conflict to the client. Finally, Rule 6.5(a)(2) exempts the lawyer from complying with the imputed conflict rule unless the lawyer “knows” that another lawyer associated with the lawyer is disqualified from the matter due to a conflict with a present or former client. Rule 6.5(b) provides that Rule 1.10 (the main rule imputing conflicts within a firm) “is inapplicable to a representation governed by this Rule” unless the situation falls within the ambit of Rule 6.5(a)(2).

Rule 7.1 Communications Concerning a Lawyer’s Services. Rule 7.1, which governs lawyer advertising and solicitation, incorporates the language or [sic] DR 2-101(A) and adds a test of materiality to the prohibition on false, deceptive or misleading advertising. The filing and retention requirements of DR 2-101(F) have been changed to require that copies of all advertisements be retained by the lawyer for one year, but that none be filed.

The remainder of DR 2-101 has been incorporated into the Comment to Rule 7.1.

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

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

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

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

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

specialty certification based on certification by another state unless the state's certification program has been approved or accredited by the ABA.

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

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