

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 and January issues of NYPRR contained COSAC's proposals for changes in Model Rules 1 to 3. This issue continues with the proposed changes to Model Rules 4-2 to 5.8.]

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 4.2 Communication with Person Represented by

Counsel. Rule 4.2(a) is substantially the same as DR 7-104(A)(1) in the current New York Code, but the proposed rule replaces the term "party" with the term "person." This is not intended to change the meaning of the rule because various ethics opinions have stated that the term "party" in DR 7-104(A)(1) means "person." Rule 4.2(b) is similar to DR 7-104(B), which allows a lawyer to cause a client to communicate with a represented opposing party upon reasonable advance notice to the represented party's counsel, but proposed Rule 4.2(b) eliminates the advance notice requirement, which COSAC considered a potential impediment to client-to-client communications that may help to resolve disputes.

Rule 4.3 Dealing with Unrepresented Person. Rule 4.3 includes the language of DR 7-104(A)(2) nearly verbatim, but adds that a lawyer shall not "state or imply that the lawyer is disinterested," and requires a lawyer to make reasonable efforts to correct a misunderstanding by the unrepresented person if the lawyer knows that the person misunderstands the lawyer's role.

Rule 4.4 Respects for Rights of Third Persons. Rule 4.4(a), whose closest analog in the existing Code is the much narrower DR 7-102(A)(1), prohibits a lawyer who is representing a client from using "means that have no substantial purpose other than to embarrass or harm a third person," or from using "methods of obtaining evidence that violate the legal rights of such a person."

Rule 4.4(b), which has no equivalent in the existing Code, provides that a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent "shall promptly notify the sender."

Rule 5.1 Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers. Rule 5.1 generally tracks DR 1-104 of the existing Code, but has been modified in relatively minor ways to increase clarity and to account for law firm structures other than partnerships. The duty of supervision has been extended to lawyers with direct supervisory authority over other lawyers.

Rule 5.3 Responsibilities for Non-Lawyers. Rule 5.3 generally tracks DR 1-104(C) and (D) of the existing Code (which governs supervisory responsibilities regarding both lawyers and nonlawyers), but has been modified in relatively minor ways to increase clarity and to account for law firm structures other than partnerships. The duty of supervision has been extended to lawyers with direct supervisory authority over nonlawyers.

Rule 5.4 Professional Independence of a Lawyer. Rule 5.4(a) incorporates nearly verbatim the language of DR 3-102 prohibiting fee sharing with nonlawyers, but adds references to "disabled or disappeared" lawyers, and adds a new Rule 5.4(a)(4) that permits a lawyer (unless prohibited by statute or court rule) to share court-awarded legal fees with a nonprofit public interest organization that employed, retained, or recommended the lawyer.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law. Rule 5.5 differs significantly from DR 3-101 but is identical to the proposed amendments to the Code approved by the New York State Bar Association House of Delegates on June 21, 2003. Those proposed amendment are now pending before the Appellate Division.

Rule 5.6 Restrictions on Right to Practice. Rule 5.6(a) divides restrictive employment or partnership agreements for lawyers into two categories: associates (or similar employees), and partners (or the equivalent). With respect to associates, Rule 5.6(a)(1) tracks DR 2-108(A) by prohibiting agreements that restrict the right of associates to practice after terminating an employment relationship (except agreements concerning retirement benefits). But with respect to partners, Rule 5.6(a)(2) breaks new ground by prohibiting only agreements that "unreasonably" restrict the right to practice after termination.

Rule 5.6(b), prohibiting no-sue agreements in connection with the settlement of litigation, is substantially the same as DR 2-108(B).

Rule 5.7 Responsibilities Regarding Non-Legal Services. Rule 5.7(a)-(c) are substantially the same as DR 1-106, but Rule 5.7(d) has no equivalent in the existing Code. Rule 5.7(d) addresses a situation in which a law firm is simultaneously providing both legal and non-legal services to a client in the same matter or in substantially related matters. Specifically, Rule 5.7(d) provides that a law firm shall not (whether directly or through an affiliated entity) simultaneously provide legal and non-legal services to a client in a matter (or in substantially related matters) unless (i) the law firm complies with Rule 1.8(a) (which governs business transactions with clients) and (ii) the law firm believes it can provide competent representation to the client, and (iii) the client gives informed consent, confirmed in writing.

Rule 5.8 Contractual Relationships with Non-Legal Professionals. Rule 5.8 incorporates most of DR 1-107, but the introductory language in DR 1-107(A) (“The practice of law has an essential tradition of complete independence and uncompromised loyalty”) has been moved to the Comment because it does not create standards intended to be enforced through the disciplinary system. In addition, the language of DR 1-107(C) (which governs nonexclusive reciprocal referral agreements) has been clarified and moved to proposed Rule 7.4(b), which also governs referrals.