

Should New York Adopt The ABA Model Rules?

BY ROY SIMON

For the last year, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") has been reviewing and revising the New York Code of Professional Responsibility. The review is now bearing fruit. On December 30, 2003, COSAC posted its first four proposed rules on the New York State Bar Association's web site, www.nysba.org, and asked the bench, bar, and public to submit comments by March 31, 2004. [See, NYPRR, February 2004, pages 9-10.] The proposed rules adopt the format and much of the language of the ABA Model Rules of Professional Conduct. Consequently, many New Yorkers are asking whether New York should adopt the ABA Model Rules of Professional Conduct. This article gives my views on that question. (I serve as Vice-Chair of COSAC and the Chief Reporter for the project, but the views expressed here are strictly my own and have not been approved or endorsed by COSAC.)

The status quo

New York's current Code of Professional Responsibility is based on the old ABA Model Code of Professional Responsibility, which was originally written in the late 1960's and adopted in New York effective January 1, 1970. The numbering system and much of the language in New York's Code are taken verbatim from the ABA Model Code. Like the old ABA Code, the New York Code of Professional Responsibility divides the Code into (1) nine separate axiomatic "Canons," which are basically like chapter headings; (2) Ethical Considerations ("EC's") in each Canon, which are "aspirational" (meaning that a lawyer may not be disciplined for violating them); and (3) Disciplinary Rules ("DR's"), which are "mandatory" in character, meaning that a lawyer may be disciplined for violating them). (The New York courts have adopted only the Disciplinary Rules, not the Ethical Considerations, but this makes little difference because courts and disciplinary authorities still turn to the EC's for guidance and interpretation.)

The ABA began developing the Model Rules in 1976, when the ABA appointed the Kutak Commission. The Commission originally intended merely to update and amend the Model Code of Professional Responsibility, but the Commission soon realized that the Model Code had many flaws and should be entirely replaced by a new set of rules in a "Restatement" format, with each black letter Rule followed by an explanatory Comment. In 1983, the ABA formally adopted the ABA Model Rules of Professional Conduct to replace the Model Code. In 1984, New Jersey became the first state to adopt a version of the ABA Model Rules of Professional Conduct, and in succeeding years more and more states have adopted the ABA Model Rules. Today, 43 states and the District of Columbia use a Model Rules format. Only five states continue to use the Model Code format (Canons, EC's, and DR's): New York, Iowa, Nebraska, Ohio, and Oregon. But in February of 2004, the Oregon Supreme Court tentatively approved conversion to an ABA Model Rules format, and amended ethics rules in the ABA Model Rules format are also pending before the Iowa Supreme Court. Committees in Ohio and Nebraska are actively studying a conversion to the ABA Model Rules format. Soon, therefore, New York may be the only state that retains

the old ABA Model Code format. [Two states, Maine and California, use their own unique rules and numbering systems.]

The ABA has worked hard to keep the ABA Model Rules up to date. Since 1987, the ABA has amended the Model Rules nearly every year. In 1997, to keep up with globalization, advances in technology, and the new Restatement of the Law Governing Lawyers, the ABA created a blue-ribbon Ethics 2000 Commission to re-evaluate the entire ABA Model Rules of Professional Conduct. In 2001 and 2002, the ABA House of Delegates approved nearly all of the changes proposed by the Ethics 2000 Commission, as well as additional changes proposed by the ABA Commission on Multijurisdictional Practice, which made sweeping changes to the rules governing lawyers who practice law in states where they are not admitted to the bar.

The old Model Code, meanwhile, has remained stagnant – the ABA has not amended it since the ABA adopted the Model Rules in 1983. But New York has amended its own Code frequently. The New York courts adopted comprehensive amendments to the Code in 1990, after the State Bar rejected the ABA Model Rules. The courts amended specific rules in the New York Code in 1994 and 1996. In 1999, the courts again comprehensively amended the Code. In 2001, reacting to a national debate over so-called "multidisciplinary practice," the New York courts adopted two new Disciplinary Rules (DR's 1-106 and 1-107) to define the responsibilities of lawyers who are involved in providing non-legal services and to establish detailed rules for contractual relationships between lawyers and nonlegal professionals. The Code has not been amended since 2001, but in July of 2003 the New York State Bar Association sent the courts proposed amendments to DR 1-105(B) and 3-101(B) that would permit so-called "multijurisdictional practice" by lawyers from outside New York. Those proposals remain pending.

COSAC and its work

Because the legal profession is changing rapidly, the New York State Bar Association created COSAC as a standing committee to monitor and propose changes to the rules regulating lawyers and law practice in New York. COSAC is a hand-picked committee composed of twenty-two lawyers who are familiar with legal ethics issues. The members are from around the state – Rochester, Buffalo, Albany, Schenectady, and Windham, as well as from Brooklyn, Queens, Long Island, and New York City. COSAC members work in large firms and solo practice; they represent large corporations and ordinary individuals; some are litigators, while others are transactional lawyers; some represent mostly plaintiffs, others represent mostly defendants, and some represent both; one member works in-house at a large corporation, another works in New York City's legal department, and still another works at a legal services office; two members are law professors, and one member is a sitting state court judge. In sum, COSAC is a diverse, well-balanced committee with a wealth of experience in the ethics field and a wide range of perspectives on the regulation of lawyers.

COSAC has divided the ABA Model Rules into three groups, with a separate Subcommittee of COSAC in charge of each group, and each Subcommittee has hired a Reporter. The Reporters are law professors who are highly regarded in the field of legal ethics – Steven Wechsler of Syracuse University School of Law, Roger Cramton of Cornell Law School, and Carol Ziegler of Brooklyn Law School. The Subcommittees are comparing the current New York Code to the ABA Model Rules and deciding whether the ABA provisions on a given subject are preferable in light of the unique circumstances affecting the public and the legal profession in New York State. Then the Subcommittees refine the

language, sentence by sentence and word by word, to make sure it provides clear, workable guidance to New York lawyers.

After deciding the text of the black letter rule, the Subcommittee marches paragraph by paragraph through the ABA Comment that follows each rule and revises it to the extent necessary, to reflect the text of the proposed New York rule or to amplify or clarify the ABA's language. If the full Committee eventually approves the proposed new rules, they are posted (together with comments by the Reporters to explain COSAC's thinking process) on the State Bar's web site for a period of public comment. Proposed rules will be revised in light of the public comments, and within a year or two COSAC will present a full set of proposed rules to the State Bar House of Delegates. Eventually, the House of Delegates will forward a single, comprehensive package of rules to the courts, which will adopt, reject, or modify each proposed rule on its own merits. The process of judicial approval could take a long time — after the House of Delegates sent the Krane Committee's proposed Code amendments to the courts in March of 1997, the courts took more than two years to act on the proposals.

The main question: Tradition or Transformation?

The primary question today is whether to stick with New York's 33-year-old tradition of the Code format or whether to transform the New York Code to the format of the ABA Model Rules of Professional Conduct. Which alternative is better for New York?

In my view — and again, I am speaking only for myself, not for COSAC — there are few reasons to stick with the current clumsy format of the New York Code, and many reasons to transform our Code to a Model Rules format. In particular, I think New York should adopt the format and numbering of the ABA Model Rules virtually without change. Moreover, I think New York should use the language of the ABA Model Rules as a working base, and then — in light of the rich history and special characteristics of the legal profession in New York — we should build and improve on the ABA Model Rules by: (1) using the ABA language where New York's current language offers no significant advantage; (2) keeping any New York Code language that we like much better than the ABA language; and (3) improving both the ABA and the New York language where necessary to clarify the meaning, to fill gaps, to make the rules more practical, or to serve other purposes. The guiding philosophy in every instance is to produce the best possible ethics rules for the lawyers, judges, and people of New York State.

What are the advantages of adopting the ABA Model Rules format and building on its language and organization, rather than simply amending the New York Code of Professional Responsibility while retaining its present format and numbering scheme? I will suggest five important advantages to transforming our Code to a Model Rules format.

Easier to use. No matter what the ethics rules may say, they won't serve their purpose unless attorneys can find the rules they need and understand their meaning. One serious problem with our current Model Code format is that the Ethical Considerations, which often explain the Disciplinary Rules, are not correlated with the Disciplinary Rules. For example, suppose you want to know the meaning of the phrase "reasonable advance notice" in New York's unique DR 7-104(B). Where do you look? There is an Ethical Consideration that defines "reasonable advance notice," but which one? Canon 7 contains thirty-nine separate EC's — nearly eight small-print pages in the State Bar's edition of the Code — and nothing tells a lawyer which EC explains which DR. Should a lawyer read through every EC until she finds the right one? (Maybe you can find the right one, since you are interested in legal ethics — but can your

partner or associate find it without your help?) And some EC's relate to DR's in other Canons. For example, the last sentence of EC 7-8 states that if a client in a non-adjudicatory matter "insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." That language relates directly to DR 2-110(C)(1)(e). What is this language doing in EC 7-8, without any cross-reference to DR 2-110?

The ABA Model Rules format helps solve these problems. First, the ABA format prints a Comment right after each rule. Some Comments contain many paragraphs, but the ABA uses headings to provide guidance. Second, many Comments refer to specific paragraphs of the rules they are explaining. For example, Comment 15 to ABA Model Rule 1.7, which is in a series of Comments headed "Prohibited Representations," notes that "under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation." Those cross-references to specific paragraphs are enormously helpful in understanding the rules.

More topics. The ABA Model Rules cover many topics that the New York Disciplinary Rules do not cover. For example, ABA Model Rule 1.18 ("Duties to Prospective Client"), which was added to the ABA rules in 2001, deals in detail with the obligations of a lawyer and a lawyer's law firm to people who discuss the possibility of forming an attorney-client relationship but then hire a different lawyer (or don't hire anyone). New York has no equivalent, unless you count the first sentence of EC 4-1, which says that a lawyer has an obligation to preserve the confidences and secrets of one who has employed "or sought to employ" the lawyer. Or consider ABA Model Rule 1.6(b)(4), which permits a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to secure legal advice about the lawyer's compliance with these Rules." New York has no equivalent, even though New York lawyers have for years contacted bar association ethics committee or lawyers outside their firms to get advice on ethics issues. Or consider ABA Model Rule 1.2(a), which flatly states that a lawyer "shall abide by a client's decision whether to settle a matter." New York relegates that important concept to a clause in EC 7-7 ("it is for the client to decide whether to accept a settlement offer"). Shouldn't our rules of ethics govern issues that arise frequently? Shouldn't our rules reflect the customs of our profession, especially when those customs foster ethical professional conduct?

Expanded research database. Adopting the ABA Model Rules format would vastly increase our access to useful research sources regarding legal ethics. Today, the database for researching the New York Code of Professional Responsibility is thin. Although four different ethics committees in New York State have issued ethics opinions for decades (the ethics committees of the New York State Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Nassau County Bar), their total output remains miniscule. All of the ethics opinions ever published by the four active ethics committees fit on less than half of a standard law library bookshelf — about the volume of opinions the New York Appellate Division puts out in a single year. Judicial opinions also occasionally address legal ethics questions, but most of these opinions address ethics questions that arise during litigation. Even combining the judicial opinions and the ethics opinions, therefore, New York lawyers don't have a large enough database to answer many of the questions that arise about professional conduct.

If we converted to a Model Rules format, however, we could access up-to-date cases and ethics opinions from nearly every Model Rules jurisdiction, plus the ABA itself. This is a substantial body of ethics law.

As mentioned above, nearly all other jurisdictions currently use a Model Rules format and most of the ABA Model Rules language, and four of the states that still use the Model Code format are in various stages of moving to the Model Rules format. If New York follows this trend and joins the Model Rules bandwagon, looking for cases and ethics opinions from other states will be relatively easy. Searching by rule number is usually easier than searching for specific words on an online research service. For example, the best legal ethics research site on the web, the American Legal Ethics Library at Cornell Law School's Legal Information Institute (www.law.cornell.edu/ethics), is organized according to the Model Rules numbering system. Any lawyer who knows the ABA Model Rules numbering system can easily search for rules, ethics opinions, and commentary on any given rule from nearly every state. (If you've never tried the Cornell site, try it — you'll like it.) It is true that states have adopted their own variations on the ABA Model Rules, but most of these variations retain enough of the Model Rules language to make it worthwhile to read cases and ethics opinions construing them.

If New York stays with the Model Code format, on the other hand, we will become increasingly isolated from the national research databases for legal ethics. Precedents from other states will be of little relevance and New York lawyers will have to be content with the small database of New York cases and ethics opinions, many of which are already out of date due to amendments in the Code language over the years.

National practice. When New York lawyers litigate outside New York, they are subject to the rules of the jurisdiction where the action is pending. New York's own DR 1-105(B)(1) provides that if New York disciplinary authorities charge a New York lawyer with improper conduct in connection with a proceeding in a court before which the lawyer has been admitted to practice (either generally or pro hac vice), "the rules to be applied shall be the rules of the jurisdiction in which the court sits" Thus, New York lawyers who litigate in state or federal courts in other states have to learn the ABA Model Rules format, because most states are Model Rules states. Why should New York lawyers who litigate in Connecticut, Massachusetts, New Jersey, Pennsylvania, Vermont, or anywhere else have to learn a whole new ethics language? I don't think they should.

Greater influence outside New York. Adopting the Model Rules format would also give New York courts and ethics committees increased influence on the development of the law nationally. We want that influence so that New York lawyers who litigate in other states will encounter interpretations of the ethics rules similar to New York's interpretations. Even today, New York opinions can be highly influential in other jurisdictions when New York's Code language is close to the Model Rules language used in most states. See, e.g., *Niesig v. Team I*, 76 N.Y.2d 363 (1990), a leading case interpreting DR 7-104 (the "no-contact" rule), and *Lord, Day & Lord v. Cohen*, 75 N.Y.2d 95 (1989), a leading case limiting penalties for lawyers who compete with their former firms. The closer New York's Disciplinary Rules are to the rules of other jurisdictions, the more influential New York's interpretations will be outside New York. But if New York continues to follow the Model Code format and rejects the Model Rules language, New York will have less and less influence on the way other states interpret their ethics rules.

Downsides to adopting a Model Rules format

Of course, there may be some downsides to converting to a Model Rules format, and converting to a Model Rules format may not be necessary to remedy the problems with our current Code of Professional Responsibility. In this section I will address some of the possible problems. Jarring change? Would conversion to the Model Rules language and format cause a jarring change among New York lawyers? I

doubt it. Law students today focus on the ABA Model Rules, not on the New York Code of Professional Responsibility, even in the fifteen law schools located in New York. That has been true for over a decade because all of the major professional responsibility textbooks are geared to the ABA Model Rules — and because lawyers in 43 states and the District of Columbia are going to be practicing under a Model Rules format. (When I conduct CLE programs, I occasionally ask how many lawyers have had systematic instruction in the New York Code of Professional Responsibility. Fewer than 10% usually raise their hands. Have you asked your associates whether they have systematically studied the New York Code of Professional Responsibility?) Even most practicing lawyers in New York have invested relatively little time learning the New York Code of Professional Responsibility. There will undoubtedly be some transition pain, but lawyers must be able to find the guidance they are looking for, which is often difficult under the current Code, and the rules must be clearly written and make sense for lawyers, clients, and the public in light of New York's special circumstances and traditions. As I see it, that is COSAC's main goal. We could simply revise the language of the New York Code without changing the format, but why would we do that? What would we gain? In my view, we would gain nothing.

Neither fish nor fowl. Unfortunately, COSAC's line-by-line, custom-tailored approach to revising the Code of Professional Responsibility has a big disadvantage. As Professor Bruce Green of Fordham recently pointed out at the annual CLE program sponsored by the State Bar's Committee on Professional Discipline, COSAC is risking the benefits of national uniformity by proposing neither to keep the existing New York Code nor to adopt the ABA Model Rules of Professional Conduct. Rather, COSAC intends to propose a unique set of rules that is neither fish nor fowl. That will cause us to lose the body of court cases and ethics opinions interpreting the New York Code. At the same time, since COSAC is modifying the language of many of the ABA Model Rules, New York lawyers will not be able to draw fully on the substantial body of ethics opinions and other guidance issued by the ABA itself. Nor will we be able to use ethics precedents from other states until we determine whether those states use the same wording that New York uses. Thus, Professor Green argues, the interpretative problems with the COSAC rules will be "enormous."

For several reasons, I disagree. First, COSAC plans to keep language from the New York Code whenever that language has a decided advantage over the language of the Model Rules. As 9th Judicial District Chief Disciplinary Counsel Gary Cassella noted at the same CLE program on which Bruce Green appeared, we can adopt the Model Rules format but still tailor the language to retain whatever elements of New York law that we like. If we like old case law like *Lord, Day & Lord v. Cohen or Niesig v. Team I*, we can write those holdings into the rules. We don't need to retain the entire Code and its awkward format to preserve a handful of key concepts. Whether a particular New York phrase has a well established interpretation is relevant to making the choice between the existing New York Code and the ABA Model Rules. In the end, much of New York's Code language and the accompanying body of interpretive guidance will remain intact.

Second, the problem that worries Prof. Green already exists, and it hasn't hurt us much. Already, several New York rules do not match either the Model Code or the Model Rules. Consider New York's DR 1-102(A) (imposing professional discipline on law firms as entities), DR 1-104 (imposing special supervisory obligations on New York lawyers), DR 1-107 (governing contractual obligations between lawyers and nonlegal professionals), DR 5-105(E) (requiring New York law firms to check for conflicts of interest), DR 7-104(B) (governing a lawyer's encouragement of client-to-client contact between parties represented by counsel), and DR 9-102 (which is much more detailed than the client funds rule in the ABA Model Code

or Model Rules). All of these rules are unique to New York, but we adopted them because they improve the guidance available to lawyers who practice here. That should be the test for COSAC's work as well. As long as our entire revised Code is not totally unique (like California's), we will get used to it quickly and benefit from the changes.

Send in your comments

The initial COSAC proposals are posted on the web at www.nysba.org. Thanks to recent advances in technology, this marks the first time that proposed New York ethics rules are posted on the web. Moreover, COSAC is encouraging people to send comments by email, so commenting on the proposed ethics rules is easier than ever. COSAC needs the help of lawyers — especially lawyers with experience handling ethics questions — to evaluate these proposals. If you want to help produce the best possible set of Rules of Professional Conduct for New York, please review the proposals and send COSAC your thoughts.

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