

State Bar Committee Proposes Four New Ethics Rules

BY LAZAR EMANUEL

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") has been engaged in a comprehensive review of the New York Code of Professional Responsibility since early in 2003. The Committee is charged with monitoring and evaluating the New York Code of Professional Responsibility and other provisions that regulate lawyers and the practice of law in New York State.

The Committee is circulating four proposed New York Rules of Professional Conduct and is seeking comments on these proposals from the bench, the bar, and the public. The proposals would introduce the following Rules

- Rule 1.6 Confidentiality of Information
- Rule 1.13 Organization as Client
- Rule 3.3 Candor Toward the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel

The full text of the Committee's proposals may be found at www.nysba.org. Click on News, Notes & Notices, then on Notice to the Bench, Bar and Public.

These proposed rules follow the format and numbering system of the ABA Model Rules of Professional Conduct, which is now used in 44 states and the District of Columbia. Three of the remaining jurisdictions - Iowa, Ohio, and Oregon - are actively considering adoption of a Model Rules format. In the ABA Model Rules format, each black letter rule is followed by detailed comments that serve as guides to understanding and interpreting a given rule. This differs from the format of the existing New York Code of Professional Responsibility, which does not match the Code's Ethical Considerations (which are largely aspirational) with specific Disciplinary Rules.

The Committee has proceeded on the presumption that the language of the ABA Model Rules of Professional Conduct and the accompanying Comments should be adopted only if the ABA language would serve New York's lawyers, clients, and judges at least as well as equivalent provisions in the existing New York Code of Professional Responsibility. In many instances, the Committee has rejected the ABA language and has proposed instead that New York retain its current language, or that New York adopt new language that provides more guidance or establishes more appropriate standards of conduct than the current New York or ABA rules.

Committee Invites Comments

The Committee intends to reconsider these proposed rules in light of comments from the bench, the bar, and the public before submitting them to the NYSBA House of Delegates for approval. The Committee therefore invites interested individuals and organizations to submit written comments to Kathleen

Baxter, Senior Director - Legal and Governmental Affairs. Comments may be submitted by e-mail to: kbaxter@nysba.org .

E-mail comments may be submitted either in the body of an e-mail message or as e-mail attachments. Attachments will be accepted in either Word or WordPerfect, but Word is preferred.

Comments may also be submitted by mail to Kathleen Baxter, Esq., Senior Director, Legal and Governmental Affairs, New York State Bar Association, One Elk Street, Albany, NY 12207.

Written comments may be submitted at any time but will be most helpful if received by March 31, 2004.

The Committee will hold a **public hearing and discussion regarding these proposed rules and the work of the committee in general on Tuesday, January 27, 2004 from 3:00 to 5:00 p.m. at the Marriott Marquis (Ziegfeld Suite, Fourth Floor) 1535 Broadway, New York City** in conjunction with the New York State Bar Association's Annual Meeting. Individuals and organizations that wish to appear and comment at the public hearing should contact Kathleen Baxter in advance by letter or e-mail.

Text of Proposed Rule 1.6, ABA Model Rule 1.6, and NY DR 4-101

Because space is limited, NYPRR has reproduced here only the text of the proposed rule affecting confidentiality - proposed Rule 1.6, as well as the text of existing ABA Model Rule 1.6 and of New York's existing DR 4.101.

NY PROPOSED RULE 1.6: CONFIDENTIALITY OF INFORMATION (December 30, 2003 Draft)

(a) A lawyer shall not reveal confidential information as defined in this Rule or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent as defined in Rule 1.0(e),
- (2) the disclosure is impliedly authorized to carry out the representation, or
- (3) the disclosure is permitted by paragraph (b).

Confidential information consists of information gained during and relating to the representation of a client whatever its source, except that it 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, endeavor or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;] Note: this item appears in brackets because the committee was equally divided as to its inclusion.
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person where the

lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

- (1) 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;
- (2) (i) to respond to an accusation of wrongful conduct by any person concerning the lawyer's representation of the client made in a proceeding that has been brought or that the lawyer reasonably believes will be brought; or (ii) to establish or collect a fee; or
- (4) when permitted or required under these Rules or required by law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION (August 2003)

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud
- (3) that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (5) to secure legal advice about the lawyer's compliance with these Rules;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (7) to comply with other law or a court order.

NY DR 4-101: PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT

- A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

- B. Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - a. Reveal a confidence or secret of a client.
 - b. Use a confidence or secret of a client to the disadvantage of the client.
 - c. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

- C. A lawyer may reveal:
 - a. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - b. Confidences or secrets when permitted under Disciplinary
- D. Rules or required by law or court order.
 - a. The intention of a client to commit a crime and the information necessary to prevent the crime.
 - b. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
 - c. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.
 - d. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4- 101(C) through an employee.