

Professional Responsibility Report

The Newsletter for New York Lawyers on Ethics & Professionalism

January 2006

Consultation with In-House Ethics Counsel Does Not Create Conflict with Client

BY LAZAR EMANUEL

When a law firm is confronted with a legal or ethical issue involving its representation of a client, it has two viable alternatives: it can either turn to a lawyer or a committee of lawyers within the firm knowledgeable in the field of ethics and professionalism, or it can retain outside counsel. Ethics Opinion 789 of the Committee on Professional Ethics of the New York State Bar Association (10/26/05) will encourage law firms to adopt the first of these alternatives.

The Committee rejected the reasoning of a line of cases which suggested that consultation between a law firm and its in-house lawyers created a potential conflict between the firm and its clients and that the in-house lawyers' advice might not be privileged as against an existing client. It concluded, instead, that in-house consultation on issues of professionalism does not create a conflict of interest under the provisions of the New York Code of Professional Responsibility ("Code") and that the client's informed consent is not required before the consultation.

For purposes of the Opinion, the Committee assumed that a New York law firm had charged a committee of its lawyers with responsibility for advising the firm's lawyers on issues of professional responsibility and their legal and ethical obligations to clients. These issues might include, for example: limits on the duty of zealous representation, interpreting and applying the rules on conflicts of interest, responding to a client's claim of unethical conduct, and assessing whether the firm had failed in the performance of its professional duties to a client.

The Committee stressed that the Code considers every law firm to be an institution separate from its individual lawyers and imposes obligations accordingly. For example, DR 1-104 requires every law firm to make "reasonable efforts" to secure compliance with the Code by its lawyers, mandates adequate supervision of the firm's lawyers, and "allocates responsibility between supervisory and subordinate lawyers in the firm." Other provisions of the Code apply to law firms as distinguished from its individual lawyers.

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Confidential Disciplinary Proceedings and the First Amendment? (Part II)

BY ROY SIMON

Last month, I discussed New York Judiciary Law § 90(10), which mandates (with narrow exceptions) that all disciplinary proceedings against lawyers remain confidential (*i.e.*, closed to the public) unless and until a court in the Appellate Division imposes public discipline. I also discussed recommendations that § 90(10) be amended to allow public disclosure of disciplinary proceedings before the Appellate Division imposes public discipline – for example, to open proceedings to the public once the disciplinary authorities have established a *prima facie* case against an attorney.

So far, the New York State Bar Association has opposed all efforts to open disciplinary proceedings before discipline is imposed, and the New York State Legislature has shown no interest in amending § 90(10) on its own initiative. But a strong case can be made that § 90(10) in its present form violates the First Amendment to the United States Constitution. This month's article discusses judicial opinions from New York and elsewhere that have tested the constitutionality of rules and statutes imposing confidentiality on disciplinary proceedings against lawyers and other professionals. My central question is whether mandatory confidentiality violates the First Amendment.

Confidentiality and the First Amendment in New York Courts

No state or federal court sitting in New York has heard a First Amendment challenge to § 90(10). However, several lower courts have heard First Amendment challenges to confidentiality provisions in statutes governing other professions. The decisions of those courts suggest that a First Amendment challenge to § 90(10) would fail.

For example, in *Johnson Newspaper Corp. v. Melino*, 151 A.D.2d 214 (3d Dep't 1989), a newspaper chain sought access to a disciplinary proceeding against a professional governed by Education Law § 6510(3). The Supreme Court noted New York State's strong policy of public access to judicial and administrative proceedings, but found "a countervailing

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presumption of confidentiality with respect to disciplinary proceedings" and therefore held that "the closure of professional disciplinary proceedings does not violate petitioner's First Amendment access to government."

The Third Department affirmed. The court first noted that there was "little precedential law to guide us in our determination," then turned to a two-tiered test that the United States Supreme Court had developed in *Press-Enterprise Co. v. Superior Court of California of Riverside*, 478 U.S. 1 (1986). Tier one of the *Press-Enterprise* test asked "whether the place and process have historically been open to the press and general public." The court observed that New York has "no historical basis for open professional disciplinary hearings." Tier two of the test asked "whether public access plays a significant positive role in the functioning of the particular process in question." The court said that the public has not played a significant role in licensing or policing professionals in New York because those matters had generally been left to the expertise of the Department of Education. The court thus held that there was "no qualified right of access under the 1st Amendment as to such hearings."

Similarly, in *J.P. v. Chassin*, 189 A.D.2d 137 (4th Dep't 1993), the court refused to find a First Amendment right of access to medical disciplinary proceedings. Citing *Press-Enterprise Co. v. Superior Court of California of Riverside*, *supra*, the Fourth Department said: "It has been the traditional policy of this State to maintain confidentiality in professional misconduct proceedings until final determination." That policy of confidentiality, the court said, "serves the public purpose of removing any disincentive to the filing of professional misconduct complaints by protecting any private or confidential information that a complainant would not want publicly disclosed." (In other words, the purpose of confidentiality is to protect the complainant, not the accused professional.) The Chassin court therefore concluded:

[I]n the absence of a clear declaration by the Legislature of an intention to alter what has been the recognized and established practice, and in light of the categorical support given by the Court of Appeals toward maintaining confidentiality in professional disciplinary proceedings, it would be inappropriate for this Court to inaugurate such a seismic change.

However, one case from the First Department has reached the opposite conclusion. In *Doe v. Office of Professional Medical Conduct*, 188 A.D.2d 347 (1st Dep't 1992), a physician facing a disciplinary hearing sought a declaration that all aspects of the professional disciplinary proceedings against him would be "strictly confidential and may not be disclosed to the public unless and until an adverse determination is rendered

in such proceedings" The court denied the declaration, distinguishing *Johnson Newspaper* on grounds that the "policy and tradition" of the Education Department (whose confidentiality practices had been challenged in *Johnson*) differed from the policy and tradition of the Health Department (which ran the Office of Professional Medical Conduct). Specifically, the Health Department had a policy of "maintaining confidentiality while complaints are investigated, but conducting open proceedings once complaints are substantiated and charges are served." The First Department found this policy to be "rational and in accord with the strong public policy of this state of assuring public access to administrative proceedings."

The main precedent cited by the First Department in *Doe* was *Herald Co. v. Weisenberg*, 59 N.Y.2d 378 (1983). There, endorsing New York's "strong public policy" of public access to judicial and administrative proceedings, the Court of Appeals held that an unemployment insurance hearing "is presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard." But *Herald Co.* cannot be very encouraging to those who want to open lawyer disciplinary proceedings, for the Court of Appeals also noted that "[w]here the Legislature has chosen to temper or abrogate the presumption of openness, it has done so in specific language." Of course, the Legislature has done so in specific language in § 90(10) of the Judiciary Law, whereas the Labor Law at issue in *Herald Co. v. Weisenberg* did not contain any provision for closed unemployment hearings.

Courts Outside New York

Several courts outside of New York – including the United States Supreme Court – have been more receptive to challenges to confidentiality provisions governing disciplinary proceedings.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), a state court jury had found a corporate newspaper publisher guilty of violating a Virginia statute that imposed criminal penalties for breaching the confidentiality of proceedings before Virginia's Judicial Inquiry and Review Commission. The Supreme Court reversed the conviction on First Amendment grounds, holding that the state's interests in protecting the reputation of its judges and in maintaining the integrity of its courts were insufficient to justify the criminal penalties.

In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), a client had filed a grievance against his attorney, and the Bar reprimanded the attorney for violating the Code of Professional Responsibility. The client then wanted to speak and write about the incident, but Florida Bar Rule 3-7.1

prohibited complainants from disclosing any information regarding Bar disciplinary proceedings, and the Florida Bar had announced that it would prosecute violators for contempt of court. When the client challenged the rule on First Amendment grounds, the court ruled in his favor and declared the confidentiality rule unconstitutional.

In striking down Florida's confidentiality rule, the court rejected the Bar's asserted interests as inadequate or illogical. For example, the Bar claimed that confidentiality encouraged the filing of complaints and the cooperation of witnesses, but the court said:

Why a complainant would be more inclined to file a grievance against his lawyer, with the knowledge that he is thereby forever barred from speaking publicly about the grievance, is unclear. Indeed, it is just as likely that potential claimants would be dissuaded from initiating disciplinary proceedings if they reasonably believed that filing a petition with the Florida Bar would subject them to a perpetual bar from speaking out about the grievance. Thus, an equally compelling assertion can be made that the effect of Bar Rule 3-7.1, along with the attendant threat that violators of the rule will be held in contempt of court, may actually serve to discourage the filing of complaints

Similarly, citing the Supreme Court's opinion in *Landmark Communications*, the *Doe* court said:

If maintaining the reputation of the judiciary as an abstract end is insufficient to justify encroaching upon the robust exercise of free speech, then maintaining the reputation of lawyers or the Bar is, in our view, equally insufficient. ... [P]rotecting the reputation of an individual, or indeed the profession as a whole, would be insufficient justification for absolutely barring the dissemination of truthful information.

The Montana Supreme Court has distinguished but not disagreed with *Doe v. Supreme Court of Florida*. In *Goldstein v. Commission on Practice of Supreme Court*, 297 Mont. 493 (2000), a 4-3 decision, the Montana Supreme Court held that Montana's confidentiality rule governing lawyer disciplinary proceedings did not violate the Montana State Constitution. (The rule was not challenged on First Amendment grounds, and the court did not mention the First Amendment in its opinion.) Montana's confidentiality rules provided that "[a]ll disciplinary proceedings which are prior in time to the filing of a formal complaint with the Clerk of the Supreme Court and all documents in connection therewith shall be confidential." But once a formal complaint was filed, the proceedings became public except for (a) deliberations of the disciplinary body, and (b) information or proceedings governed by a protective order. The Montana Supreme Court distinguished *Doe v. Supreme Court of Florida* on

grounds that the Florida rule had imposed confidentiality even after disciplinary authorities had found a grievance to be meritorious, whereas Montana's rule imposed confidentiality only *before* the filing of a formal complaint.

The New Hampshire Supreme Court has also addressed the confidentiality issue. In *Petition of Brooks*, 140 N.H. 813 (1996), a client who had filed grievances against three separate attorneys argued that New Hampshire's confidentiality rule violated his right to free speech by subjecting him to possible contempt proceedings for divulging information related to the complaints. The New Hampshire Supreme Court agreed, concluding that the rule hampered "speech traditionally accorded the most solicitous protection of the first amendment; namely, criticism of the government's performance of its duties."

The *Brooks* court expressly rejected the Bar's argument that the confidentiality rule was necessary to protect the reputation of the State Bar as an institution, and to protect the reputations of individual attorneys who were the subject of frivolous complaints. In *Landmark Communications, supra*, the United States Supreme Court had held that "injury to official reputation is an insufficient reason for repressing speech that would otherwise be free," and that the institutional reputation of the courts "is entitled to no greater weight in the constitutional scales." Based on these holdings, the New Hampshire Supreme Court concluded: "Surely the reputation of the State bar is entitled to no more protection than is the reputation of the State judiciary." Accordingly, the *Brooks* court held that New Hampshire's confidentiality rule failed First Amendment scrutiny because it was "not sufficiently narrowly tailored to meet compelling State interests."

More recently, in *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004), the Tennessee Supreme Court heard a challenge to Tennessee Supreme Court Rule 25, which mandated confidentiality regarding attorney disciplinary proceedings. The Tennessee Attorney General asserted three compelling interests to justify the rule: "(1) protection of the reputation of an attorney and the Bar from meritless complaints; (2) protection of the anonymity of complainants and other persons supplying information to the Board; and (3) maintenance of the integrity of pending investigations." The court found these interests to be insufficient and consequently held that Rule 25 violated the First Amendment.

The New Jersey Supreme Court Speaks

Building on *Landmark Communications, Doe v. Florida Supreme Court, Petition of Brooks*, and *Doe v. Doe*, the New Jersey Supreme Court recently decided *R.M. v. Supreme Court of New Jersey*, 185 N.J. 208, 883 A.2d 369, 2005 WL 2660498 (N.J. Oct. 19, 2005). There, the plaintiff challenged New Jersey Rule

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1:20-9, which generally required complainants to maintain strict confidentiality until the disciplinary authorities decided to file a complaint. (Rule 1:20-9 was thus much narrower than New York Judiciary Law § 90(10), which mandates confidentiality throughout disciplinary proceedings until public discipline is imposed.)

In *R.M.*, a client (*R.M.*) had filed a grievance against her lawyer. In response, the grievance authorities sent *R.M.* a standard form letter, which said:

Under Supreme Court Rule 1:20-9(a), once you file this grievance form you are REQUIRED thereafter to keep all communications about this ethics matter CONFIDENTIAL during the investigation until and unless a complaint is issued and served. Only at that time does confidentiality end and the matter become public. ... [D]uring the investigation you may not disclose the fact that you have filed an ethics grievance to persons other than members of the attorney disciplinary system, except to discuss the case with other witnesses or to consult an attorney.

Rule 1:20-9 contained five exceptions (*e.g.*, the respondent attorney waived or breached confidentiality, or the matter became “common knowledge to the public”), but none of the exceptions applied. The woman therefore challenged Rule 1:20-9 on First Amendment grounds, arguing that it was “an impermissible restraint on free speech” because it prevented her from making truthful statements about the ethics process (including the fact that she had filed a grievance) and unduly suppressed criticism of the system of attorney discipline.

The State countered that mandating confidentiality in disciplinary proceedings until a formal ethics complaint is filed furthers three “compelling interests”: (1) protecting the reputations of lawyers who are unfairly accused of wrongdoing; (2) encouraging attorneys who have engaged in minor misconduct to agree to “diversion” in lieu of discipline (*i.e.*, to agree to conditions such as reimbursing legal fees to clients, completing a client’s legal work, participating in an alcohol or drug rehabilitation program, or getting psychological counseling); and (3) preserving the integrity of the disciplinary system and its investigative process.

The *R.M.* court began its analysis by reviewing basic First Amendment principles:

... The First Amendment protects “[a]ll ideas having even the slightest redeeming social importance.” Although the protection of speech is not absolute, laws that punish the dissemination of truthful information are generally presumed to be constitutionally infirm. To sustain government proscription of the publication of truthful speech, the State has the burden of demonstrating that the

law furthers a compelling interest. Moreover, even if the regulation of speech advances a compelling interest, the State must also show that the regulation is narrowly tailored to achieve that interest. [Citations omitted.]

Applying these standards, the New Jersey Supreme Court concluded that Rule 1:20-9, both as written and as applied, violates the First Amendment because “it is not narrowly tailored to advance a compelling interest.” Protecting the reputations of attorneys and the bar does not justify restricting a grievant’s speech, and “such restrictions breed resentment rather than respect.” The confidentiality rule also prohibits a grievant from criticizing ethics committees for unreasonably delaying an investigation, and such a restriction cannot survive First Amendment scrutiny. Ethics committees are part of the government that the public has a right to discuss and debate, and the judicial branch “is no more immune from the reach of the First Amendment than the executive or legislative branches.”

Finally, the court rejected the State’s asserted interests in encouraging diversion and in protecting the integrity of pending investigations. Both were worthy goals, but neither was “a compelling interest that justifies a prohibition on speech that would otherwise be free.” Accordingly, the court held that “a grievant is not barred from divulging the fact that he or she filed a grievance, the content of that grievance, and the result of the process.”

Conclusion: The Impact on New York

The New Jersey Supreme Court is not the first court to hold that confidentiality rules relating to lawyer disciplinary proceedings violate the First Amendment. As discussed above, the Tennessee Supreme Court, the New Hampshire Supreme Court, and the United States District Court for the Southern District of Florida have also upheld First Amendment challenges to rules prohibiting grievants from publicizing complaints against their attorneys. Moreover, the United States Supreme Court has condemned confidentiality rules governing hearings on alleged judicial misconduct. But the New Jersey Supreme Court’s opinion is likely to have greater impact on New York than the earlier rulings because New Jersey is our neighbor state, and because the New Jersey Supreme Court’s opinion is detailed, carefully reasoned, brand new, and sweeping in its condemnation of strict confidentiality.

The reasoning employed in Florida, Tennessee, New Hampshire, and New Jersey strongly suggests that § 90(10) violates the First Amendment. Section 90(10) is among the strongest confidentiality rules in the nation regarding lawyer disciplinary proceedings, and the few exceptions in § 90(10) that permit open disciplinary proceedings have seldom been invoked in practice. With the New Jersey precedent in place,

it is only a matter of time before a complainant in New York challenges § 90(10) of the Judiciary Law on First Amendment grounds. Given the solid phalanx of precedent that has developed outside New York since 1990, the challenger is likely to win.

The State Bar and the Legislature should avoid the embarrassment of having § 90(10) declared unconstitutional. Lawyers should be the first ones to seek to change a law that violates the sacred First Amendment. Indeed, forty jurisdictions across America now allow public access to lawyer disciplinary proceedings at some point before public discipline is imposed. The latest of these forty jurisdictions is Pennsylvania. On October 16, 2005, the Pennsylvania Supreme Court amended its court rules to permit public access to disciplinary proceedings once the grievance authorities have filed a formal petition for discipline against a lawyer and the lawyer has either filed a response or the time for filing a response has expired – *see* amended Rule 402. (Complaints against lawyers that do not result in a petition for discipline will remain confidential.)

I hope that the New York State Bar Association and the New York Legislature will now revisit the issue of open disciplinary proceedings in light of the growing line of cases holding that strict confidentiality for attorney disciplinary proceedings from beginning to end is unconstitutional. In light of those cases, and in light of Pennsylvania's recent example, the Legislature should then amend § 90(10) to open disciplinary proceedings to the public once the disciplinary authorities have filed formal charges and the respondent attorney has either filed a response or let the time for filing a response expire. A thoughtful legislative amendment to § 90(10) will be much better for the public and the profession than a judicial decision striking down § 90(10) on First Amendment grounds. ■

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Consultation with In-House Ethics Counsel Does Not Create Conflict

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The rules governing law firms create an obligation on each firm to establish "protocols" and measures appropriate for the size and practice of the firm. EC 1-8 describes the scope of this obligation:

A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a senior lawyer or special committee, and continuing legal education in professional ethics.

A firm's ethical obligations under the Code often raise issues affecting a client's interests. The firm may owe conflicting duties to another existing or former client, to the court, to opposing counsel, or to the legal system as a whole. When this happens, the firm must either resolve the issue internally by consulting with one of its own lawyers or turn to others for advice. To require a firm always to seek the guidance of outside counsel is "simply impractical in the day-to-day life of many law firms." Issues of professional responsibility often require prompt resolution. This is best provided by lawyers knowledgeable about the firm, its client relationships and its culture. To hold otherwise is to create "a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to defend itself."

The NYSBA Committee found support for its conclusion that consultation with in-house counsel on an ethics issue does not create a conflict with the client's interests in the literature supporting an in-house ethical infrastructure. "Research in other organizational contexts shows that [in-house compliance] specialists tend to promote the development of compliance procedures within firms, and may play a leading role in defining industry standards for compliance."

Elizabeth Chambliss & David B. Wilkens, *The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms*, 44 Ariz. L. Rev. 559, 560-61 (2002). One commentator has encouraged the expanded use of in-house counselors:

Many law firms already have an 'ethics committee' or 'ethics partner' to serve as the firm's internal resource for deciding ethics questions, and firms of more than a dozen lawyers that do not have an ethics committee ought to

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form one. Roy D. Simon, *SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED* 68 (2005).

In-house Consultation Does Not Create Conflict

The Committee deemed the relationship between an in-house ethics advisor and his firm to be the same as the relationship between a corporation and its own corporate legal officer.

"The Code treats lawyers who practice as retained advisors to a corporation no different[ly] from other lawyers, and it is clear that in-house lawyers have an attorney-client relationship with the corporation that employs them." The Code defines the term "law firm" to include "the legal department of a corporation or other organization." In the same way as with corporate counsel and their corporate employers, an in-house ethics advisor has an attorney-client relationship with his law firm.

This relationship requires analysis under DR 5-101(A) of the Code.

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

DR 5-105(D) imputes the prohibitions in DR 5-101(A) to all the lawyers in the law firm and raises this question: is it a conflict under DR 5-101(A) for a law firm to seek advice on the firm's ethical obligations to a client while the firm is representing that client?

The NYSBA Committee did not believe that a firm's interest in ensuring compliance with its ethical duties, or in anticipating and avoiding a possible violation of those duties, usually raises any issues under DR 5-101(A). "A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client." On the contrary, it is an interest forming the fabric of that relationship and a required part of its duties in carrying out the representation. "It is, in other words, not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment."

A law firm is confronted with ethical and legal issues concerning its clients every day and is required to resolve them. Its decision to resolve them by in-house consultation does not change the nature of its interests. "Such consultation...has been a part of law practice for many generations and indeed is encouraged by the Code. It is too much a part of the fabric and tradition of legal practice to require

specific disclosure and consent."

There are circumstances, however, in which the firm's interest in protecting itself can give rise to a conflict under DR 5-105(A) or in which the firm will be required to disclose to the client the conclusions reached in the in-house consultation. For example, it may conclude that the client has a claim against the firm arising from its legal services, or that the firm needs the client's consent to undertake the representation of another client. In these circumstances, the firm may have to disclose its conclusions to the client.

But the obligation to disclose in some cases does not affect the fundamental right to consult with an in-house "ethics resource."

"Differing Interests"

DR 5-105(A) and DR 5-105(B) together require that a law firm "decline" or "not continue" employment by multiple clients if the multiple representation would be likely to involve the firm in representing "differing interests," unless "a disinterested lawyer would believe that the lawyer can competently represent the interests of each and each consents to the representation after full disclosure...of the advantages and risks involved" [DR 5-105(C)].

Although consultation between a lawyer representing a client of the firm and in-house ethics counsel creates a client-attorney relationship, the Committee found that the firm and the client do not have "differing interests" as that term is defined by the Code. The Code's definition of "differing interests" is "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client..." A law firm's consultation with in-house counsel will facilitate the proper exercise of its professional judgment and the discharge of its duty of loyalty to the client in the same way as a conference between a lawyer of the firm and one of its clients "is intended to facilitate the client's lawful achievement of legitimate objectives." The Committee concluded, "Simply put, seeking advice on how best to accommodate a lawyer's multi-faceted obligations in service of one or more clients does not, without more, entail the kind of 'differing interests' that DR 5-105(A) and (B) regulates." It follows that a firm need not get the informed consent of its client before the consultation.

Nor is the law firm required to inform the client that an in-house consultation has occurred. In some cases, however, the firm will be obligated to advise the client of its conclusions. This obligation would arise, for example, if the firm concludes that the client has a decision to make, or that the firm has committed a significant error or omission, or that the firm has a conflict. ■

EXECUTIVE SUMMARY

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

[Editor's Note: The December issue of NYPRR contained COSAC's proposals for changes in Model Rule 1. This issue contains the proposed changes in MR 2 and MR 3.]

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 2.3. Evaluation for Use by Third Persons. Rule 2.3(a) generally permits a lawyer to evaluate a client's matter for a third person. For example, (i) a lawyer for the seller of property may be asked to provide the buyer with an opinion that the seller has good title, (ii) a lawyer for a securities issuer may be asked to provide the SEC with an opinion regarding the legality of the securities. However, if the evaluation is likely to affect the client's interests "materially and adversely," then under Rule 2.3(b) the lawyer shall not provide the evaluation absent the client's informed consent. Rule 2.3(c) makes clear that information relating to the evaluation is protected by Rule 1.6 (the basic confidentiality rule). The current New York Code has no equivalent to Rule 2.3, but the rule reflects common practice.

Rule 2.4. Lawyer Serving as Third-Party Neutral. Lawyers often serve as mediators, arbitrators, or other types of third-party neutrals who are not representing a client in a matter, but no Disciplinary Rule in the current New York Code governs lawyers in those roles. Rule 2.4 supplies some guidance. Rule 2.4(a) defines the term "third-party neutral." Rule 2.4(b) requires a lawyer serving as a third-party neutral to "inform unrepresented parties that the lawyer is not representing them," and to explain the difference between a third-party neutral and a client representative to a party who does not understand the lawyer's role as a third-party neutral.

Rule 3.1. Meritorious Claims and Contentions. Rule 3.1(a), which is similar to DR 7-102(A)(1)-(2), prohibits a lawyer from bringing or defending a proceeding or asserting or controverting an issue in the proceeding unless the lawyer has a basis in law and fact that is not "frivolous." Rule 3.1(b) defines the term "frivolous" in a fashion consistent with 22 NYCRR § 130-1.1, which is the main sanctions provision in New York's court rules. The current Code does not define "frivolous."

Rule 3.2. Delay of Litigation. Rule 3.2 prohibits a lawyer representing a client from using means that have "no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." The rule resembles DR 7-102(A)(1), which prohibits steps that would serve "merely to harass or maliciously injure another."

Rule 3.3. Candor Toward the Tribunal. Rule 3.3 governs a lawyer representing a client before a tribunal. Rule 3.3(a) provides that a lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal, or (2) fail to disclose directly adverse controlling authority not disclosed by opposing counsel, or (3) offer evidence that the lawyer "knows to be false." Rule 3.3(a)(3) further provides that if a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer "comes to know of its falsity," the lawyer "shall take reasonable remedial measures, including, if necessary disclosure to the tribunal." This mandate arguably goes beyond DR 7-102(B) but is consistent with recent decisions of the New York Court of Appeals.

Rule 3.3(b), which goes well beyond the current Code, requires a lawyer representing a client in an "adjudicative proceeding" to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal," if the lawyer "knows" that a client or any other person intends to engage or has engaged in "criminal or fraudulent conduct related to the proceeding," including bribery, witness intimidation, unlawfully destroying or concealing documents, and other specified wrongs.

Rule 3.3(c) provides that the mandatory disclosure duties imposed by Rules 3.3(a) and (b) "continue to the conclusion of the proceeding and apply even if compliance requires disclosure of confidential information." Moreover, after a proceeding concludes, a lawyer "may" reveal confidential information to

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the extent the lawyer “reasonably believes necessary to rectify the consequences of a client’s fraud on the tribunal.” These provisions give lawyers greater power to correct fraud on a tribunal than DR 4-101 and DR 7-102(B) provide.

Rule 3.3(d), which has no equivalent in the current Code, provides that a lawyer in an ex parte proceeding must inform the tribunal of “all material facts known to the lawyer” – whether or not the facts are adverse – that will enable the tribunal to make an informed decision.

Rule 3.4. Fairness to Opposing Party and Counsel. Rule 3.4 parallels several existing New York Disciplinary Rules designed to ensure fairness to opposing parties and their counsel, and adds some new provisions covering situations not addressed in the current Code.

Rule 3.4(e), which has no direct equivalent in the current Code, provides that a lawyer shall not “make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”

Rule 3.4(g), which also has no equivalent in the current Code, provides that a lawyer shall not ask a person other than a client to refrain from voluntarily giving relevant information to another party unless: “(1) the person is a relative or an employee, former employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interest will not be adversely affected by refraining from giving such information.”

Rule 3.4(h) provides that a lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter “when doing so is prohibited by law.” This broadens the scope of DR 7-105 by removing the qualification that the lawyer’s actions be “solely” to obtain an advantage in a civil matter, but simultaneously narrows the scope of DR 7-105 by prohibiting the conduct only when “prohibited by law.”

Rule 3.7. Lawyer as Witness. Rule 3.7 greatly simplifies DR 5-102, which governs lawyers who wish to act (or are acting) as both advocate and witness in the same proceeding. Rule 3.7(a) prohibits a lawyer from acting as “advocate at a trial” in which the lawyer is likely to be a “necessary” witness on a “significant issue of fact” unless various exceptions apply. Four of these exceptions are substantially identical to exceptions found in DR 5-102(A)(1)-(4), but the proposed rule also permits testimony “authorized by the tribunal with good cause.”

Rule 3.8. Special Responsibilities of a Prosecutor. Rule 3.8 substantially expands the ethical responsibilities of prosecutors and other government lawyers, which are barely addressed in the existing Code.

Rule 3.8(a) expands on DR 7-103(A) by adding that a prosecutor shall not continue to prosecute a charge that the prosecutor “knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.”

Rule 3.8(b), which has no equivalent in the existing Code, provides that a prosecutor shall not seek to prevent a person under investigation or an accused person from exercising the right to counsel.

Rule 3.8(c), which has no equivalent in the existing Code, provides that a prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights.

Rule 3.8(d) is similar to DR 7-103(B) but (1) distinguishes between the sentencing stage and other stages of prosecution and (2) recognizes that a court may relieve a prosecutor of the disclosure obligations.

Rule 3.8(e), which has no equivalent in the existing Code, prohibits a prosecutor from subpoenaing a lawyer to testify about a present or former client unless the information sought is not privileged, is essential, and cannot feasibly be obtained in any other way.

Rule 3.8(f), which significantly expands DR 7-107(A), restricts a prosecutor’s right to make extrajudicial statements that have a “substantial likelihood of heightening public condemnation of the accused,” and requires a prosecutor to exercise reasonable care to prevent those assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.8(g), which has no equivalent in the existing Code, provides that when a prosecutor learns about new evidence creating a “reasonable likelihood” that a convicted defendant did not commit the offense for which he was convicted, the prosecutor shall (1) disclose the evidence to the defendant and an appropriate court or authority, and (2) investigate the guilt or innocence of the convicted defendant.

Rule 3.8(h), which has no equivalent in the existing Code, provides that when a prosecutor knows of “clear and convincing evidence” that an innocent person has been convicted, the prosecutor must “take appropriate steps to set aside the prior conviction.”

Rule 3.9. Advocate in Nonadjudicative Proceedings. Rule 3.9, whose closest analog in the existing Code is EC 8-4, provides that a lawyer who communicates with a legislative body or administrative agency in a representative capacity in connection with a nonadjudicative matter shall (1) disclose that the appearance is in a representative capacity, and (2) comply with specified Rules of Professional Conduct. ■



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Self-Assessment Test

January 2006

New York Professional Responsibility Report

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1. Ethics Opinion 789 encourages a law firm:
 - to consult with in-house ethics counsel
 - to consult on ethics issues only with outside counsel
 - to submit all ethics issues to the NYSBA Committee on Professional Ethics
2. In Opinion 789, the NYSBA Committee on Professional Ethics:
 - rejected a line of cases on in-house ethics consultations
 - adopted a line of cases on in-house ethics consultations
 - distinguished a line of cases on in-house ethics consultation.
3. DR 1-104 of the New York Code of Professional Responsibility requires every law firm:
 - to conduct classes in Continuing Legal Education
 - to conduct classes in ethics and professionalism
 - to allocate responsibility between supervisory and subordinate lawyers.
4. According to Opinion 789, requiring a law firm to submit all ethics questions to outside counsel is:
 - preferable to consultation between the firm and in-house counsel
 - unconstitutional
 - impractical in the day-to-day life of many firms
5. Roy Simon advocates that every law firm with 12 or more lawyers should:
 - enter into a continuing contract with outside counsel for advice on ethics
 - hire a lawyer specializing in ethics and professionalism
 - form an ethics committee
6. When a lawyer in a law firm consults with a firm's in-house ethics counsel, the relationship between them is:
 - the relationship of two associates
 - the relationship of supervising attorney and subordinate attorney
 - the relationship of lawyer and client.
7. In Opinion 789, the Committee found:
 - a law firm need not obtain the client's consent before a consultation with in-house ethics counsel
 - consultation with in-house ethics counsel requires consent in advance by the client
 - a law firm must advise the client that an issue affecting it requires consultation with ethics counsel.
8. After consultation with ethics counsel, a law firm must disclose its conclusion to the client:
 - as soon as a conclusion is reached
 - if the law firm disagrees with counsel's opinion
 - if the conclusion is that the client may have a malpractice claim against the law firm.
9. In Opinion 789, the Committee concluded:
 - the relationship between lawyer and client always creates "differing interests"
 - the term "differing interests" applies only as between one client of the firm and another client
 - consultation between a law firm and its in-house ethics counsel does not involve "differing interests" from the client's.
10. Under ABA Model Rule 2.3, when a lawyer evaluates a client's matter for a third party:
 - the lawyer is not required to obtain the consent of the client before releasing the evaluation
 - the lawyer may not release the evaluation without the client's consent if it affects the client's interest adversely
 - the lawyer must make the evaluation available to anyone who requests it.
11. Under ABA MR 3.3(b) a lawyer representing a client in an adjudicative proceeding must:
 - disclose any suspicion of criminal conduct by his client
 - treat as confidential any disclosure of criminal activity by his client
 - take "reasonable remedial measures," including disclosure, if he knows that a client has committed a crime.

12. ABA Model Rule 3.4(h) prevents a lawyer from threatening to present criminal charges to obtain an advantage in a civil matter:

- under any circumstances
- when doing so is prohibited by law
- when doing so is prohibited by the rules of the court.

13. Under Model Rule 3.7, a lawyer may appear as advocate and witness in a matter when:

- the lawyer's testimony is advantageous to the client
- the lawyer's testimony is on a contested issue
- authorized by the tribunal with good cause.

14. Under Model Rule 3.8(a), a prosecutor may not prosecute a charge:

- if he believes the suspect is not guilty
- if he knows that the charge is not supported by evidence sufficient to establish a prima facie showing of guilt
- unless the evidence proves the suspect's guilt beyond a reasonable doubt.

15. Model Rule 3.8(f) restricts a prosecutor's right to make extra-judicial statements that:

- would incite a mob to violence
- jeopardize the interests of the accused
- have substantial likelihood of heightening public condemnation of the accused.

16. Model Rule 3.8(h) requires a prosecutor who has "clear and convincing" evidence that an innocent person has been convicted to:

- petition the court to release the person immediately
- take appropriate steps to set aside the prior conviction
- distribute a press release announcing the person's innocence.

17. In the *Press Enterprise Co.* case, the Supreme Court applied a two-tier test to determine whether a disciplinary hearing by the Department of Education should be open to the public. Tier one asked:

- have similar hearings been historically open to the public
- does the public have a vested interest in open hearings
- are the interests of the respondent adequately protected?

18. In *Herald Co. v. Weisenberg*, the Court of Appeals:

- held that disciplinary hearings should always be open to the public
- endorsed New York's strong public policy of open access to judicial and administrative hearings
- held that disciplinary proceedings against lawyers should be closed.

19. In *Landmark Communications*, a case involving the conviction of a newspaper publisher under a Virginia statute imposing penalties for breaching the confidentiality of proceedings against judicial officers, the Supreme Court:

- upheld the conviction
- reversed the conviction on First Amendment grounds
- remanded the case to the Virginia courts.

20. The New Jersey statute involved in the *R.M.* case differed from New York's § 90(10) in that under the statute:

- all disciplinary proceedings against lawyers were confidential until the proceedings were ended.
- proceedings against lawyers were confidential only until the disciplinary authorities decided to file a complaint
- proceedings against lawyers were open to the public at all stages.

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