

**Report of Subcommittee on Standards of
Attorney Conduct: Format Change**

**Committee on Professional Responsibility
New York City Bar**

November 22, 2005

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INTRODUCTION

The Subcommittee has been asked to comment on the proposed adoption of the format of the Model Rules of Professional Conduct. This report does not include comments regarding substantive rule changes and is limited strictly to the adoption of the format of the Model Rules.

Current Format for Standards of Attorney Conduct in New York

The New York standards for attorney conduct are now contained in the Code of Professional Responsibility. This Code is organized by Canons, Ethical Considerations, and Disciplinary Rules. The Canons are essentially chapter headings stating a general principle related to attorney conduct. The Ethical Considerations are intended – but are not always understood – to be aspirational guidelines for achieving the specified attorney conduct. The Disciplinary Rules are mandatory rules setting minimum standards of conduct. Only the Disciplinary Rules are adopted by the courts, but the Ethical Considerations and the Canons are often cited by the courts as authority.

Proposed Format Change

The Model Rules set forth the rules in concise statements and each rule is followed by commentary. The Rules in turn are organized into eight groups relating to the relationships, roles, and responsibilities applicable to attorneys in the general practice of law. In short, the Model Rules use a Restatement format, which facilitates the identification of rules relevant to any particular question.

Discussion

The Model Rules format has been adopted by 46 states and the District of Columbia. New York and Ohio are the only states to continue to use the Model Code format for the statement of their standards for attorney conduct. Ohio appears to be in the final stages of an anticipated switch to the Model Rules format; as of this writing, the deadline for public comments on the proposed change is February 15, 2006. Two other states, California and Maine, use rules that are not based on either the Code or the Rules.

Adoption of the format of the Model Rules will provide a major benefit to attorneys practicing in New York. By reorganizing the standards to follow the Model Rules, New York attorneys will have ready access to guidance developed in 47 other jurisdictions. Presently, that guidance is very difficult to apply in New York because the relevant rules in other jurisdictions are not directly correlated to a particular Canon, Ethical Consideration, or Disciplinary Rule. Moreover, New York attorneys wishing to engage in practice in states other than New York will be far more familiar with the relevant rules governing their conduct in those states since they will be accustomed to using a similarly numbered formatted set of rules in New York. Even if there

are substantive differences, New York attorneys will have better access to the rules in the other states by reason of their understanding of the organization of the Model Rules in New York.

Similarly, the judiciary and the Disciplinary Committees charged with enforcement of the standards governing attorney conduct will obtain significant benefit from the adoption of the Model Rules. These bodies will have much easier access to guidance developed in 47 other jurisdictions which will no doubt assist in the enforcement and administration of the Model Rules in New York. Even where substantive changes have been made, the guidance from these other jurisdictions will be more easily identified and any distinguishing characteristics more easily noted by the judiciary or Disciplinary Committees.

Beyond the benefit realized by access to guidance from other jurisdictions, use of the Model Rules format will also simplify research relevant to the appropriate standards governing attorney conduct, by replacing the confusing use of Canons, Ethical Considerations, and Disciplinary Rules by the well accepted format of rules followed by commentary. The use of Canons, Ethical Considerations, and Disciplinary Rules creates confusion between mandatory and exhortatory standards. In addition, whereas the Ethical Considerations often do not interpret or explain particular Disciplinary Rules, the comments in the Model Rules format relate directly to the rules on which they comment. Similarly, whereas many Disciplinary Rules are not explained by any particular Ethical Considerations, every Model Rule is explained by a Comment.

The Model Rules also simplify research by grouping the Rules under eight general categories. The use of Canons, on the other hand, unnecessarily separates standards governing related issues. Thus, the report of the New York State Bar Association Committee on Standards of Attorney Conduct regarding the proposed New York Rules of Professional Conduct notes that

the Rules relating to legal fees are placed under DR 2-106 while the Rules relating to the safeguarding of client property is placed at DR 9-102. Both of these Rules, however, relate to important financial aspects of the client-lawyer relationship. Moreover, neither Canon 2 nor Canon 9 clearly relate to the client-lawyer relationship. Research is unnecessarily complicated by this separation of standards relating to the same issue and their placement under headings that do not clearly identify issues addressed by these standards.

Also, attorneys from other jurisdictions who litigate *pro hac vice* in New York (or who take advantage of multistate practice under Rule 55, if New York adopts it), will understand New York's rules much better than they understand the Code.

Finally, nearly all New York lawyers who have graduated from law schools outside New York since about 1995 have studied primarily the ABA Model Rules, and even law students in New York primarily or heavily study the Model Rules rather than the New York Code, both because most New York law schools attract many students who come from (and are likely to practice in) jurisdictions other than New York, and because the Multistate Professional Responsibility Exam (the MPRE) focuses on the Model Rules, not the ABA Model Code of Professional Responsibility or the New York Code.

Conclusion

For the reasons set forth above, the Subcommittee recommends adoption of the Model Rules format.