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New York attorneys' new rules

Next month New York will follow the lead of 47 of the other 49 states in adopting the Rules of Professional Conduct based on the American Bar Association's Model Rules of Professional Conduct.

The new rules will replace New York's Code of Professional Responsibility, in effect since 1970.

The change was prompted, in part, by the New York State Bar Association's recommendation following five years of study that New York should convert to the ABA Model Rules format. A little more than a year ago, NYSBA submitted proposed rules to the Presiding Justices of the Appellate Divisions of the Supreme Court. After designating an internal committee to analyze and report on the recommendations, the Administrative Board of the Courts approved many of proposal. In December, the proposed rules were formally adopted, and will become effective April 1.

What does it mean for attorneys in New York?

Generally, attorneys' ethical obligations will remain consistent, notwithstanding conversion from the Code of Professional Responsibility to the Rules of Professional Conduct. There are some differences between the two sets of rules, however.

Confidentiality sometimes must be breached

The existing Code of Professional Responsibility does not mandate any circumstance in which an attorney must breach client confidentiality. DR 4-101(c)(3) — codified at 22 NYCRR §1200.19 — for instance, provides that a lawyer "may" reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." There is no requirement that a lawyer breach client confidentiality under any circumstance, however, even to prevent a crime.

Under the new rules, a lawyer still is granted the discretion to breach confidentiality to prevent a crime. RPC 1.6(b)(2) states that a lawyer may reveal confidential information "to prevent the client from committing a crime," and RPC 1.6(b)(1) expands the permissive disclosure to include the prevention of "certain death or substantial bodily injury." When a client commits a fraud upon a tribunal, however, the disclosure of confidential information is mandatory if it is necessary to remedy the fraud.

RPC 3.3(a)(3) states specifically that if a lawyer, the lawyer's client or a witness called by the lawyer "offered material evidence" before a tribunal and the lawyer becomes aware that the evidence was false, "the lawyer shall take reasonable remedial measures,

including, if necessary, disclosure to the tribunal."

Similarly, RPC 3.3(b) states that a lawyer, who is representing a client before a tribunal and knows the client intends to engage or is engaging in "criminal or fraudulent conduct related to the proceeding," is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

RPC 3.3(c) states that its duties are mandatory, and compliance is required "even if compliance requires disclosure of information otherwise protected by Rule 1.6," which includes confidential, attorney-client privileged information.

According to the Comments to ABA Model Rule 3.3, upon which New York's new RPC 3.3 is based, the scope of a lawyer's duty to disclose applies not only to representation of a client before an actual tribunal, but also when a lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition: "[F]or example, paragraph (a)(3) re-quires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false." ABA Comment to Model Rule 3.3.

The comments also emphasize that the prohibition against offering false evidence applies only when the lawyer knows the evidence is false. Knowledge of falsity can be inferred from the circumstances, according to ABA Comment to Model Rule 3.3. See also RPC 1.0(k) (defining "knowingly" as including a person's knowledge inferred from circumstance). While "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood." ABA Comment to Model Rule 3.3.

Be careful who you talk to

RPC 1.18 spells out for the first time in New York a lawyer's duty and obligation to a prospective client, the definition of which can include someone with whom the attorney never enters into a formal attorney-client relationship.

A prospective client is defined by RPC 1.18(a) as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Specifically excluded from the definition is one who unilaterally communicates information "without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-



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lawyer relationship,” or who specifically communicates with the lawyer “for the purpose of disqualifying the lawyer” on conflict of interest grounds. See RPC 1.18(e).

If a person is qualified as a prospective client, a lawyer “shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.” RPC 1.18(c). If a lawyer is disqualified under that provision, then the lawyer’s entire firm, likewise, is disqualified. RPC 1.18(c).

Exceptions to RPC 1.18 include instances in which both a client and a prospective client waive the conflict in writing, or when the lawyer discussing the matter with a prospective client shuts off communication to avoid exposure to more disqualifying information than necessary to determine whether to engage in the representation. Various steps are taken by the firm, which involve essentially the installation of a firewall between the disqualified lawyer and others within the firm who represent the current client on the adverse matter. Notably, the firewall must prohibit not only the flow of information, but also the sharing of any fee with the disqualified lawyer. RPC 1.18(d)(2).

Comments to Model Rule 1.18, upon which New York’s RPC 1.18 is based, state that “[a] lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. ... [A] prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.” ABA Comment to Model Rule 1.18.

Strive for ‘pro bono’ hours

Even though it’s not enforceable through the disciplinary process, RPC 6.1 reaffirms a lawyer’s responsibilities to provide *pro bono* services.

The rule “strongly” encourages lawyers to provide *pro bono* legal services “to benefit poor persons” of at least 20 hours each year, and that lawyers should try to contribute financially to organizations that provide such services.

Restrictions on lawyer gifts in wills

At RPC 1.8(c)(1), the rules also codify for the first time a ban against a lawyer’s solicitation of gifts from clients, including testamentary gifts “for the benefit of the lawyer or a person related to the lawyer.”

RPC 1.8(c)(2) also prohibits the preparation of a testamentary instrument that gives a gift to “the lawyer or a person related to the lawyer,” except when the lawyer or recipient of the gift “is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.” The existing code contained similar provisions, but they were not mandatory — only “aspirational” as so-called Ethical Considerations (versus Disciplinary Rules). See EC 5-5 and 5-6.

Written waiver of conflicts

It is always a best practice to obtain a written waiver of any conflict of interest from current and former clients when a client is represented in the same or substantially related matter in which the current client’s interests are materially adverse to those of the former client. DR 5-108, codified at 22 NYCRR §1200.27, did not require the former client’s consent to such representation to be in writing; however, RPC 1.9 does.

Confirming fee arrangements

RPC 1.5(b) requires fees and expenses to be communicated to a client before or within a reasonable time after the representation begins. The communication must be in writing when required by statute or court rule. The provision, arguably, extends the current letter of engagement rule codified at 22 NYCRR §1215, without the necessity of a writing, to matters currently excepted under that rule. Similar to 22 NYCRR §1215, however, RPC 1.5(b) still exempts situations in which “the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client.”

A complete copy of the new rules is online at www.nycourts.gov/rules/joint-appellate.

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