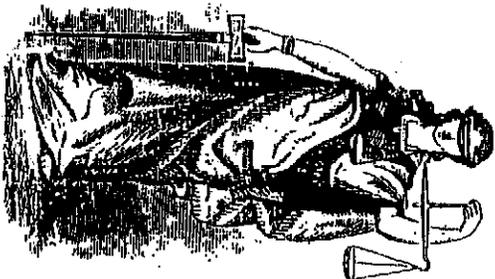


**CONTINUING LEGAL EDUCATION
SPRING 2009**

May 18, 2009

New York's New Rules of Professional Conduct

Michael S. Ross, Esq. and Marvin Raskin, Esq.



SPONSORED BY:
APPELLATE DIVISION, FIRST DEPARTMENT
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

CO-SPONSORED BY:
APPELLATE DIVISION, SECOND DEPARTMENT
and

THE COMMITTEE ON CRIMINAL JUSTICE OPERATIONS OF THE CITY BAR ASSOCIATION

COPYRIGHT © 2009
ALL RIGHTS RESERVED

APPELLATE DIVISION – FIRST JUDICIAL DEPARTMENT
IN CONJUNCTION WITH THE OFFICE OF
THE ASSIGNED COUNSEL PLAN
OF THE CITY OF NEW YORK

PRESENTS:

“NEW YORK’S NEW RULES OF
PROFESSIONAL CONDUCT
EFFECTIVE APRIL 1, 2009”

A CONTINUING LEGAL EDUCATION COURSE

MAY 18, 2009
6:00 P.M. TO 8:00 P.M.

PRESENTED AT THE SUPREME COURT BUILDING
60 CENTRE STREET
NEW YORK, NEW YORK

OUTLINE
PREPARED BY:

MICHAEL S. ROSS, ESQ.
60 EAST 42ND STREET
FORTY-SEVENTH FLOOR
NEW YORK, NEW YORK 10165
(212) 505-4060

michaelross@rosslaw.org

COPYRIGHT © 2009
BY MICHAEL S. ROSS, ESQ.
ALL RIGHTS RESERVED

APPELLATE DIVISION – FIRST JUDICIAL DEPARTMENT
IN CONJUNCTION WITH THE OFFICE OF
THE ASSIGNED COUNSEL PLAN
OF THE CITY OF NEW YORK

PRESENTS:

“NEW YORK’S NEW RULES OF
PROFESSIONAL CONDUCT
EFFECTIVE APRIL 1, 2009”

OUTLINE

PREPARED BY:

MICHAEL S. ROSS, ESQ.

I. Introduction.

- A. Effective April 1, 2009, New York finally joins 47 other State jurisdictions by moving to an ethical structure patterned after the American Bar Association structure of “Model Rules.” New York finally abandons the archaic system of Canon, Ethical Considerations and Disciplinary Rules. New York will now have “Rules” with “Commentary” authored by the New York State Bar Association’s “Committee on Standards of Attorney Conduct.”

The new Rules and Commentary are available at:

<http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCsWithComments.pdf>

- B. Although New York has moved to the Model Rule format, the four Appellate Divisions which have promulgated and released the new rules on December 16, 2008 have created a “blend” of ethical principles drawn from former New York rules, A.B.A. rules as well as other sources. Lawyers will be able to draw upon, where applicable, interpretation of New York’s former rules and the A.B.A. Model Rules.

II. Significant Changes.

A. Overview.

It is still too early to predict even the immediate impact of the new Rules, but there are a number of new rules which New York attorneys should closely examine. They are addressed in Office of Court Administration announcements (http://www.courts.state.ny.us/press/pr2008_7.shtml): the ABA/BNA Lawyers Manual on Professional Responsibility, “New York Adopts Format of Model Rules ...” (Vol. 24, No. 26, Dec. 24, 2008); Roy Simon, The New York Professional Responsibility Report, “Comparing the NY Rules of Professional Conduct to the Existing NY Code of Professional

Responsibility” – Parts I and II – Feb. 2009 and March 2009; Roy Simon, The New York Professional Responsibility Report, “Some Interesting Provisions In the New Rules” – Parts I and II – April 2009 and May 2009; and in other publications.

Although lawyers will need to familiarize themselves with all of the new provisions, set forth below are a number of provisions which stand out as being particularly important to this writer.

B. Scope Of Representation And Allocation Of Authority Between Client and Lawyer (Rule 1.2).

Previously, New York lawyers had to draw on case law or the A.B.A. Model Rules in order to understand the scope of their authority. Now Rule 1.2 sets out a lawyer's obligation to abide by a client's decisions regarding the objectives of representation, including whether to settle a civil matter or to enter a plea, waive a jury trial or testify in a criminal matter.

Rule 1.2(a) provides: “Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

C. Fee Agreements And Division Of Fees (Rule 1.5).

1. Retainer Agreements.

As a matter of ethics (and not necessarily court rules) Rule 1.5(b) requires a lawyer to communicate fees and expenses to the client before or within a reasonable time after commencement of representation, and thereby extends the current letter of engagement rule (22 N.Y.C.R.R. Section 1215), to all matters currently excepted under that rule (unless the client has been regularly represented by the lawyer). However, this Rule makes it clear that where another rule or statute requires the fee agreement to be in writing, then it must be in writing.

Rule 1.5(b) provides: "A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when 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. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client."

2. Fee Sharing.

The Appellate Divisions have now spoken clearly about the requirements of fee sharing among lawyers not in the same firm. The client must be advised of the sharing and of the amount of the sharing. Rule 1.5(g) provides:

"A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

- (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation,
- (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
- (3) the total fee is not excessive." (Emphasis added.)

The significant change in the Rule is that the client

must be advised of *how* the lawyers will be sharing the fees (e.g., the percentage split).

3. Minimum Fees.

"Minimum Fees" (albeit *not* "non-refundable retainers") are now permitted by Rule 1.5(d)(4) which provides that "[a] lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause, if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated...." (Non-refundable retainers, which were outlawed in Matter of Cooperman, 83 N.Y.2d 465 [1994], are now ethically and specifically prohibited by Rule 1.5[d].)

Recently, the Michigan Supreme Court found no violation of disciplinary rules based on an attorney's use of this retainer agreement that required the client to pay a minimum fee written as follows:

"1. Client agrees to pay Attorney a MINIMUM FEE OF \$4,000.00 which shall be payable as follows:

Retainer \$4,000.00

Balance \$-0-

This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.

2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.

3. Hourly rate: Attorney \$195.00

Assistant \$ _____

Michael S. Ross, Esq.
New York's New Ethics Rules

4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.

11. ... The Client is entitled to terminate this agreement subject to its contractual liability to the law firm for services rendered.”

In his concurring opinion to the Order which dismissed the ethics charges against the attorney, Michigan Supreme Court Justice Marilyn J. Kelly stated:

“However, counsel might be aided in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.”¹

¹Grievance Administrator v. Cooper, 757 N.W.2d 867 (Sup. Ct. Mich. 2008). It remains to be seen whether New York courts will embrace the language in Cooper. In any event, the retainer language in the Cooper case could well be improved if: 1) the task (i.e., the scope of the work) to be performed by the attorney as part of the minimum fee were clearly defined; and 2) the agreement more clearly explained that the minimum fee is the least the attorney will charge for completing the task. See Roy Simon, “Interesting Provisions in the New Rules – Part I Rule 1.0 through Rule 1.6,” The New York Professional Responsibility Report, p. 4 (April 2009).

D. Confidentiality Of Information (Rule 1.6) And Conduct Before A Tribunal (Rule 3.3).

1. Rule 1.6 eliminates former D.R. 4-101's cumbersome use of the terms "secret" and confidential" information with the all-encompassing term "confidential information" – which refers to all information gained during the representation, irrespective of the source.
2. Rule 1.6(a)(2) now makes it clear that disclosure of confidential client information impliedly authorized to advance the client's best interests when it is reasonable or customary.
3. Rule 1.6(b) has been *expanded* to permit a lawyer to reveal or use confidential client information necessary to "prevent reasonably certain death or substantial bodily harm."²
4. Rule 1.6(b)(3) – which is similar to former D.R. 4-105(C)(5) – allows lawyers "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."
5. Rule 1.6(b)(4) permits a lawyer to reveal confidential information in order to obtain ethics-related advice, i.e., the disclosure made be made to the extent necessary to secure legal advice about compliance

²Comment 6B to this Rule explains: "Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph."

with ethical rules or other laws.

6. Rule 3.3(a)(3) is a *radical departure* from the former rules. Rule 3.3(a)(3) requires a lawyer to correct a false statement of material fact or law previously made to the tribunal by the lawyer or the client and to take necessary remedial measures, including disclosure of confidential client information. That new Rule provides:

“A lawyer shall not knowingly ... offer or use evidence that the lawyer knows to be false. 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”

Thus, unlike the limits imposed upon lawyers by former D.R. 7-102(B)(1), now when a client commits a fraud on a tribunal, and refuses to correct the fraud after the attorney remonstrates, the attorney must reveal the fraud. Significantly, unlike the Model Rules, the new New York Rule does not specify an endpoint of this obligation.

Of course, only time will tell how courts will apply this clear new rule to the conundrum of client perjury in criminal cases and whether the guidance lawyers have is “crystal clear.” Cf. People v. Berroa, 99 N.Y.2d 134 (2002); People v. DePallo, 96 N.Y.2d 437 (2001); People v. Darrett, 2 A.D.3d 16 (1st Dept. 2003).

7. Rule 3.3(b) provides that “[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

8. *The new Rules eliminate the former New York Disciplinary Rule (i.e., D.R. 7-102[B](1)) which requires disclosure of a crime or client fraud on a “person”, and substituted it with a new Rule 3.3 which is limited to disclosure of client fraud on a tribunal. Note that A.B.A. Model Rule 4.1(b) which requires disclosure of facts necessary to avoid assisting a client fraud or crime where the lawyer’s services have been used (and where the information is not protected by Rule 1.6’s confidentiality provision) is not part of the newly adopted New York Rules.*

E. Current Clients: Specific Conflict Of Interest Rules (Rule 1.8).

Rule 1.8(c) prohibits a lawyer from soliciting any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or from preparing on a client’s behalf an instrument giving a gift to the lawyer or a person related to the lawyer, unless the lawyer or recipient of the gift is related to the client and a reasonable lawyer would find the transaction fair and reasonable.

In a business transaction between lawyer and client, Rule 1.8(a) requires the lawyer to advise the client in writing to seek the advice of independent counsel and to give the client a reasonable opportunity to do so; and the client must give informed written consent that addresses the lawyer’s role in the transaction and whether the lawyer is representing the client in the transaction.

F. Duties To Prospective Clients (Rule 1.18).

Rule 1.18 governs a lawyer’s duties to a prospective client when that person and the lawyer ultimately do not form an attorney-client relationship. It applies the same duty of confidentiality owed to former clients. However, a lawyer or law firm may oppose a former prospective client if the lawyer’s current client and former prospective client give informed written consent, or the law firm may do so if certain conditions are met, including timely screening of the disqualified lawyer and prompt written notice to the former prospective client. Rule 1.18’s provisions do not extend to a person who communicates with a lawyer *in order* to disqualify the lawyer.

The Rule provides:

“A person who:

- (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship; or
- (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of [the disqualification rule].”

G. Diligence And Proper Communication (Rules 1.3 and 1.4).

“Diligence” as an attorney is now clearly explained in Rule 1.3 which provides: “A lawyer shall act with reasonable diligence and promptness in representing a client. ... A lawyer shall not neglect a legal matter entrusted to the lawyer. ... A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.”

Proper “communication” with a client is finalized defined. Rule 1.4 codifies a lawyer’s duty to communicate effectively with the client, including keeping the client reasonably informed about the status of the matter promptly complying with a reasonable request for information. Rule 1.4 explains that:

“(a) A lawyer shall:

- (1) promptly inform the client of:
 - (i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
 - (ii) any information required by court rule or other law to be communicated

to a client; and

(ii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

H. Written Waivers Of Conflict Of Interest Must Be In Writing (Rule 1.7(b)(4)).

At last, New York lawyers have been give a bright-line requirement that a waiver of a conflict of interest in connection with current clients can only occur when, in the words of Rule 1.7(b)(4), “each affected client gives informed consent, confirmed *in writing*.”

“Confirmed in writing” is now a defined term under Rule 1.0(e):

“‘Confirmed in writing’ denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

In Opinion 829, issued April 29, 2009, the New York State Bar

Association's Committee On Professional Ethics expressed the view that where a lawyer prior to the adoption of New York's new ethical rules obtained an oral waiver of a conflict of interest, the lawyer need *not* obtain a new consent to the conflict if the oral waiver was valid when given.

I. "Informed Consent" Is Now A Defined Term (Rule 1.0(i)).

The definitions section of the new Rules is robust and among the terms confined is "informed consent." Now lawyers are told that informed consent has the element of risks and alternatives. Rule 1.0(j) provides:

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."³

³In *Celgene Corp. v. KV Pharmaceutical Co.*, 2008 WL 2937415 (D.N.J. July 29, 2008), the Court disqualified the Buchanan Ingersoll & Rooney P.C. firm from representing the defendant in a patent dispute even though the plaintiffs, who were also clients of the Buchanan firm, had previously executed advance waivers of conflicts. The federal magistrate judge who issued the ruling found that the defendant had not given informed consent. Even with a sophisticated client, the court cautioned:

"The extent of the necessary disclosure is what is important.... [T]his is a question that must be conscientiously resolved by each attorney in the light of the particular facts and circumstances that a given case presents. It is utterly insufficient simply to advise a client that he, the attorney, foresees no conflict of interest and then to ask the client whether the latter will consent to the multiple representation. This is no more than an empty form of words. A client cannot foresee and cannot be expected to foresee the great variety of potential areas of disagreement that may arise in a real estate transaction of this sort. The attorney is or should be familiar with at least the more common of these and they should be stated and laid before the client at some length and with considerable specificity. Of course all eventualities cannot be foreseen, but a great many can." (Id. at * 5 [citing to *In re Lanza*, 65 N.J. 347, 352-353 (1974)])

The Court made it clear that more information had to be provided to the client, other than the request by the firm for open-ended authority to represent a potentially adverse party:

"First, both agreements propose a future course of conduct that is very open-ended and vague. Both [waiver consent] provisions are so general that a reader has no clear idea what course of conduct Buchanan anticipated: what kinds of cases are substantially related? Did the parties anticipate that Buchanan would be adverse to Celgene in other parent cases? Second, there is nothing in the agreements to indicate that Buchanan communicated to Celgene adequate information or explanation about the risks of the proposed course of conduct, with regard to

(continued...)

Michael S. Ross, Esq.
New York's New Ethics Rules

This clear definition of informed consent is now incorporated into various individual conflict of interest rules.

J. "Screening" For Conflicts Is Not Formally Recognized.

The new Rules *declined* the suggestion that the rules adopt a screening provision that would allow firms to avoid imputed disqualification by screening lawyers who were hired laterally from other firms. New York lawyers must be aware that New York does not have what is the equivalent of newly-adopted A.B.A. Model Rule 1.10 which permits lawyers with potentially disqualifying information to be screened, so long as written notice is given to the affected former client and other protocols are put into place to ensure compliance with the screening process. The New York view on the "imputation of disqualification" and the possibility of screening the attorney with the disqualifying information, is summarized in cases such as Papyrus Technology Corp. v New York Stock Exchange, 325 F.Supp.2d 270 (S.D.N.Y. 2004). There the court found that "[t]he touchstones of the imputation inquiry are the significance of the prohibited lawyer's involvement in and knowledge of the former client's confidences and secrets [internal citation omitted]." Id. at 279. Courts look at the degree of the lawyer's involvement in the former client's case; the recency of that involvement; the extent and timing of efforts to screen the lawyer from the rest of the firm and the size of the firm. Id. at 279-81.

3(...continued)

concurrent conflicts of interest: would Celgene be comfortable if Buchanan represented a generic pharmaceutical company in a patent case? Third, there is nothing in the agreements to indicate that Buchanan explained to Celgene reasonably available alternatives to the proposed course of conduct, such as Celgene asking Buchanan to specifically define 'substantially related' or requesting an even broader limitation-perhaps that Buchanan would not represent any generic drug companies. The record does not show that Celgene received anything in return for agreeing to these provisions. Indeed, the agreements only appear to benefit Buchanan-which further underscores the importance of Buchanan fully explaining the meaning and implications of the waiver. Neither agreement manifests informed consent within the meaning of [the ethics conflict rules and definition of informed consent]." (Id. at *8)

The Celgene case stands as a reminder to law firms to draft waivers which are specific, even when the waiving client is a sophisticated one. See generally, Michael J. Dilema, "Advance Waivers of Conflicts of Interest in Large Law Firm Practice," Georgetown Journal of Legal Ethics, Vol 22:97 (2009); Anthony E. Davis, "Another Look at Advance Waivers," New York Law Journal, Sept. 8, 2008, p. 3, col. 1.

COPYRIGHT © 2009
BY MICHAEL S. ROSS, ESQ.
ALL RIGHTS RESERVED

K. Personal Interest Exception To The Conflict Rules Not Recognized.

The new Rules declined to adopt a personal interest exception for implied disqualification, similar to A.B.A. Model Rule 1.10(a) which provides that if an individual in a firm is disqualified due to a personal reason (such as bias), the entire firm is not disqualified on an imputed basis.⁴

L. Obligations To Unrepresented Party (Rule 4.3).

Rule 4.3 now makes clear the duties of lawyers towards unrepresented parties. The Rule provides:

“In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.”

M. Receipt Of Inadvertently Sent Confidential Information (Rule 4.4[b]).

Finally, lawyers need no longer rely on a patchwork of court decisions and ethics opinions when confronted with the situation of inadvertently sent confidential information. Rule 4.4(b) provides:

“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

N. Representing Clients With Diminished Capacity (Rule 1.14).

Rule 1.14 provides guidance to a lawyer whose client has diminished capacity. The guidance is drawn from the Model Rules and was much needed. A lawyer make take action to protect the client from

⁴ A.B.A. Model Rule 1.10(a) provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

substantial physical and financial harm, and permits disclosure of confidential client information to the extent reasonably necessary to protect the client's interests. Rule 1.14 provides:

“(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.”

How does this new Rule apply to children? As one recent article explained:

“What does the new rule mean for lawyers who represent children? Most significantly, it proscribes substituting judgment unless a child will be at risk of substantial harm if the lawyer takes no protective action. It is no longer ethically permissible to substitute judgment for issues that arise in the course of representation of a child client, even if the client has diminished capacity and can not act in his own interests, unless that high level of risk exists. Rather than simply deciding some risk to [a child client] exists, before substituting judgment, [the child]'s lawyer must now do a careful assessment of how serious the risks is that [the child] will die because her medication will not be administered properly if she is returned home. She should also assess whether alternative measures such as visits by a home health care worker might significantly reduce the risk to [the child].

Under the new rule, whether substitution of judgment is permissible becomes an issue-by-issue assessment requiring differential diagnosis – it can vary for the same client with the same capacity, depending on

the severity of risk the issue presents to the client. A client who wants his lawyer to take a position that, while not in the client's best interests, does not put the client at substantial risk of harm, is entitled to have an advocate for that position.

The new rules also reinforce the guidance given by the New York State Bar Association, the Juvenile Rights Division and many others that a lawyer should always attempt to resolve any differences of opinion with a client through traditional lawyering duties, such as intensive client counseling. Through normal counseling, lawyers will often be able to explain to a client why a particular option may serve the client's best interests, and may even be persuaded by a client that the position of the client is the most sensible."

Andrew Shepard and Theo Liebman, "New Professional Responsibility Rules and Attorney for the Child," New York Law Journal, March 11, 2009, p. 3, col. 1 (footnote omitted).

O. Advertising Rules Remain Unchanged From The Rules That Went Into Effect On February 1, 2007.

There have been no significant changes in the advertising Rules.

P. Multijurisdictional Practice Rules Of The A.B.A. Code Were Not Adopted.

In what was one of the biggest surprises and disappointments in the new Rules, the Appellate Divisions did not adopt a variant of A.B.A. Model Rule 5.5. There is no clear safe haven for lawyers who practice temporarily in New York; nor do in-house corporate lawyers have the umbrella of limited practice which that rule provides in other jurisdictions. Whether or when New York ever adopts a rule similar to Model Rule 5.5 is uncertain, but what is clear is that in-house corporate lawyers and other lawyers who practice in New York without being admitted to the Bar should expect ethics counsel in order to determine their responsibilities.

Q. Comments About Judges And Judicial Candidates (Rule 8.2).

Rule 8.2 expands the prohibition against false statements of fact regarding "qualifications or conduct of judges or judicial candidates to include false statements about "conduct or integrity."

Rule 8.2(a) provides that "[a] lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or

integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.”

R. Obstructive And Delaying Conduct (Rule 3.2).

Rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding or cause needless expense. This Rule seems to engraft into the Rules the same principles incorporated into State and Federal sanctions provisions.

This Rule now clearly provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”

S. Communication With A Represented Person (Rule 4.2).

Rule 4.2 provides that:

“(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.”

This new Rule takes the place of former D.R. 7-104(A), which provided that “[d]uring the course of the representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate on the subject of the representation with a *party* the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” (Emphasis added.) Thus, the new Rule continues to utilize the word “party” and not “person.” The New York State Bar Association’s Committee on Attorney Standards (“COSAC”) had proposed that the term “party” be replaced with the term “person” to give broader reach to the no-contact rule, but the Appellate Divisions declined to change the Rule; and, indeed, in

Michael S. Ross, Esq.
New York's New Ethics Rules

1999, the Appellate Divisions' amendment to the Rule specifically used the term "party" and not "person."

The interesting question becomes whether or not courts and/or grievance and disciplinary committees will find that there nonetheless still exists a *supposed* dichotomy between the Rule's application to civil and criminal cases. Previously, New York's D.R. 7-104(A) had been interpreted not to apply to attorneys in criminal cases based upon the language of D.R. 7-104(A) which contains the language of "party" not "person." See, e.g., Grievance Committee for Southern District v. Simels, 48 F.3d 640 (2d Cir. 1995); People v. Kabir, 13 Misc.3d 920 (Sup. Ct. Bronx Co. 2006). Other ethics opinions suggest that in civil cases, the former Rule would be applied broadly to "persons." New York State Bar Assoc. Op. 735 (2001); New York State Bar Assoc. Op. 656 (1993) ("we have [previously] described DR 7-104's scope as applicable to represented 'persons,' not merely 'technical parties'"). *By clearly keeping the term "party" and not "person," have the Appellate Divisions announced that Rule 4.2 is applicable only to parties represented by counsel and is not applicable to the broader category of persons represented by counsel?*

CONTINUING LEGAL EDUCATION

**APPELLATE DIVISION FIRST DEPARTMENT IN
CONJUNCTION WITH THE OFFICE OF THE ASSIGNED
COUNSEL PLAN OF THE CITY OF NEW YORK**

**RULES OF PROFESSIONAL CONDUCT
EFFECTIVE APRIL 1, 2009**

PRESENTED MAY 21, 2009

AT

**THE SUPREME COURT BUILDING
60 CENTRE STREET
NEW YORK, NEW YORK**

Prepared by:

**Marvin Ray Raskin, Esq.
944 Gerard Avenue
Bronx, New York 10452
718-293-2222**

TABLE OF CONTENTS

Introduction.....	Page 3
Definitions.....	Page 4
Attorney Client Communication.....	Page 5
Attorney Conflicts of Interest.....	Page 6
Diminished Capacity Clients.....	Page 7
Non-Meritorious Claims.....	Page 8
Responsibility of Prosecutors and Government Lawyers.....	Page 8
Disciplinary Protocols Under The New Rules Of Professional Conduct For Attorneys Confronted With Client Perjury – How The Attorney Can Minimize Ineffective Assistance Of Counsel Reversals Under The Sixth Amendment Of The United States Constitution.....	Page 9, 10, 11
Disciplinary Protocols For Attorneys And Judges Who Are Confronted With A <u>Darrett/Caban/Andrades</u> Dilemma.....	Page 11

INTRODUCTION

The purpose of this CLE is to acquaint attorneys with several changes that have taken effect on April 1, 2009, as a result of the joint Appellate Division Order adopting the new Rules of Professional Conduct. While here are a great many similarities between the new Rules of Professional Conduct and the old Disciplinary Code, there are also significant changes that relate to the day to day practice in Criminal Term. It is hopeful that this introductory CLE will assist the defense attorney in dealing with issues relevant to the new Rules of Professional Conduct.

The old Disciplinary Code was comprised of the actual Disciplinary Rules and Ethical Consideration. The Ethical Considerations "were aspirational in character and represent the objectives towards which every member of the profession should strive." The Ethical Considerations represent a group of concepts upon which a lawyer should rely for guidance in various commonplace situations. The Disciplinary Rules are mandatory in character and affirm the minimal level of conduct below which no lawyer should fall without being subject to disciplinary action.

The new rules of Professional Conduct have been adopted without attendant Ethical Considerations. This does not mean that the Ethical Considerations that previously complimented the Code have been abandoned completely. A number of the new Rules of Professional Conduct adopt as mandatory, conduct previously codified in the Ethical Considerations.

Both Mr. Raskin and Mr. Ross are available in the event any questions arise with respect to the new Rules or the content of this CLE.

SELECTED NEW RULE REFERENCES

TERMINOLOGY

While many of the old code rules are included in the new Rules of Professional Conduct, there are some additions and changes of moment for your reference. In particular, the terminology defined under Rule 1.0 contain sections (e) “Confirmed in writing,” (j) “Informed consent” and (x) “writing.” This terminology is referenced in the ensuing Rules effective April 1, 2009. It appears that the new Rules expand the lawyer’s obligation to inform the client with respect to “material developments” involving his/her case.

Rule 1.0(e) “confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to a person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal if it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Rule 1.0(j) “informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision and after the lawyer has adequately explained to the person the material risk of the proposed course of conduct and reasonably available alternatives.

Rule 1.0(x) “writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with intent to sign the writing.

ATTORNEY CLIENT COMMUNICATION

New Rule of Professional Conduct 1.4 (Communicator) adopts what was previously codified in Ethical Consideration 7-8 and 9-2. Rule 1.4 (a) (1) (iii) provides that a lawyer shall promptly inform the client of material developments in the matter including settlement or plea offers. Rule 1.4 (a) (3) requires the lawyer keep the client reasonably informed about the status of the matter. Rule 1.4 (b) requires that the lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule 1.4 implicitly requires the attorney to inform the client of any status changes, in addition to material developments specified in Rule 1.4 (a) (1) (iii). The reasonable consultation requirement of 1.4 (a) (2) is a common sense approach to any attorney client relationship. Rule 1.4, if adhered to by the attorney, will avoid many of the pitfalls in DR 6-101 (Failing to Act Competently) now replaced by Rules 1.1 (a and b), 1.3 (b) and 1.8 (h).

A significant addition to the Code is Rule 1.4 (a) (1) (ii). This section mandates that a lawyer shall promptly advise his client of "any information required by court rule or other law to be communicated to a client." Here again the common sense approach applies. In order to resolve the potential of a claim by a client that his attorney failed to advise him of an appropriate plea disposition or other significant status change in the case, a lawyer should promptly advise a client of his or her receipt of noteworthy case information. For example, a plea offer, whether or not memorialized on the record by the prosecution, by telephone or conveyed by the court, requires immediate communication between lawyer and client. In the event of a significant change of status or the intention to accept, reject or consider a plea offer, Rule 1.4 implicitly requires recognition between the lawyer and client regarding the plea or status change. It appears incumbent upon the lawyer to place a memo to the file or a statement on the record of the conveyance of this information or plea offer.

ATTORNEY CONFLICTS OF INTEREST- PAST CLIENTS

New Rule of Professional Conduct 1.10 (Imputation of Conflicts of Interest) is relevant to the Court when dealing with institutional defenders. New Rule 1.10 (e) requires a law firm to make written records of engagements and maintain a system by which these engagements are checked against current and previous clients. New Rule 1.10 (f) underscores that the failure to keep records or to implement and maintain a conflicts checking system as a violation of the new Rules. New Rule 1.10 (g) states that "A violation of this section is the responsibility of both the law firm as well the individual lawyer." It follows logically that The Legal Aid Society, Bronx Defenders, or other institutional defender must now maintain a protocol to prevent a conflict between new clients and prior engagements. This section appears to permit an aggrieved criminal defendant the ability to lodge a grievance for a violation under the conflict of interest section.

ATTORNEY CONFLICTS OF INTEREST- CURRENT CLIENTS

DR5-105(c) provides that a lawyer may represent multiple clients "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and it each consent's to the representation after full disclosure of the implication of the simultaneous representation and the advantages of and risks involved." This is customarily referred to as a potential Gomberg conflict. People v. Gomberg, 38 NY 2d 307.

New Rule 1.7 (b) (4) provides that a lawyer may represent a client notwithstanding the existence of a concurrent conflict of interest if "each affected client gives informed consent confirmed in writing. The confirmed in writing provision as defined under the New Rule Definitions 1.0 (e) denotes "a statement by a person made on the record of any proceedings before a tribunal." It appears that the lawyer can obviate the necessity for a formal writing to the client by memorializing the Gomberg constraints on the record. Under the new Rules, the Code "disinterested lawyer test" has been replaced by the "reasonable lawyer test of new Under Rule 1.7 (a)."

DIMINISHED CAPACITY CLIENTS

A significant addition to the new Rules is Rule 1.14, Client With Diminished Capacity. In view of the fact that many criminal defendants are encumbered by psychological disabilities or mental impairment of a significant kind, this rule requires that criminal defense attorneys, "who reasonably believe that the client has diminished capacity, must take reasonably protective action to protect the client in appropriate cases seeking the appointment of a guardian ad litem, conservator or guardian." The logical application of this section will create the need for Criminal Term to have sufficient support services and expertindependents to implement compliance. New Rule 1.14 (c) permits a lawyer to reveal information about his client, normally privileged, in furtherance of the attorney's efforts to protect a client with perceived diminished capacity.

The lawyer must consider an application to the court under Rule 1.14 since it directly impacts a potential complaint by the client against the lawyer under Rule 1.2(a). Rule 1.2(a) provides that a lawyer shall abide a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are pursued. Rule 1.2 further provides that a lawyer shall abide a client's decision whether to settle a matter. In a criminal case, lawyer is obligated by the new Rules to abide a client's decision, after consultation with his attorney, as to whether to enter a plea, waive a jury or testify in his own behalf. These serious issues would be adversely impacted by a client with diminished capacity under Rule 1.14. Clearly, the lawyer would need assistance and aid of court resources in order to avoid a complaint.

Rule 1.6 (a)(2) and (b)(4) appear to permit the lawyer to reveal confidential information, otherwise protected by the attorney client privilege when reasonably necessary to ensure proper representation in accordance with the Rules.

NON-MERITORIOUS CLAIMS

New Rule 3.1-Non-Meritorious Claims and Contentions are particularly relevant to the criminal lawyer. New Rule 3.1 (a) states in part "A lawyer shall not bring or defend a proceeding, or assert, or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." This section specifically states that a lawyer for the defendant in the criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless "defend the proceeding as to require that every element of case be established."

New Rule 3.1 (b) 2 States that "Frivolous conduct for the purpose of this rule is where the conduct has no reasonable purpose other than to delay or prolong the resolution of litigations....." or (3) "a lawyer knowingly asserts material factual elements that are false." As the experienced criminal term jurist knows, criminal defense advocates are routinely required to assert claims made by a client that seem bizarre or illogical. Nonetheless, the lawyer must, in defense of his client exert his/her efforts to provide a vigorous and single minded focus on defense of the client. It appears while 3.1 permits the criminal defense attorney to defend the proceeding "as to require at every element of the case be established," the lawyer must be ever mindful that the assertion of a materialy false statement on behalf of his client could have potential disciplinary consequences.

RESPONSIBILITY OF PROSECUTORS AND GOVERNMENT LAWYERS

The court should be mindful that new Rule 3.8 is virtually identical to DR 7 103. This Rule requires that "a prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel, of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of the tribunal." The new statute includes the phrase "except when relieved of this responsibility by a protective order of the tribunal." These words were not part of the original Code. Rule 3.8 permits a judge, in his/her discretion to deny disclosure of certain exculpatory material under a protective order when the circumstances require it.

**DISCIPLINARY PROTOCOLS UNDER THE NEW RULES OF
PROFESSIONAL CONDUCT FOR ATTORNEYS CONFRONTED WITH
CLIENT PERJURY - HOW THE ATTORNEY CAN MINIMIZE
INEFFECTIVE ASSISTANCE OF COUNSEL REVERSALS UNDER THE
SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

In 2005 the Court of Appeals decided People v. Caban, 5 N.Y. 3d 143. The Caban trial took place before Judge John Moore in Bronx County. In Caban, the Court Appeals rejected the federal rule established in Strickland v. Washington, 466 U.S. 668. The two (2) pronged Strickland test required that in order to prevail on a federal claim of ineffective assistance, the defendant must demonstrate both counsels' deficient performance and that the deficient performance prejudiced the defendant. Caban expanded the rights of petitioners stating that prejudice exists when there is a reasonable probability that the result of the proceeding would have been different, but for counsel's unprofessional errors. Therefore, our state standard of meaningful representation, contrasting Strickland, does not require a defendant to satisfy the Strickland two pronged prejudice test. Under the State Constitution in Caban, a single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise defendant's right to a fair trial. Further, to establish ineffective assistance, defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct. Caban at page 152. The New York State Standard offers greater protection than the Federal test to defendants who challenged their conviction on Sixth Amendment grounds.

Two other significant cases regarding a defendant's Sixth Amendment claim of ineffective assistance of counsel are People v. Andrades, 4 NY 3d 35, affirming 4 AD3d 180. Andrades was also a Judge Moore trial in Bronx Supreme Court. Andrades is instructive to the court with respect to an attorney who feels his client may perjure himself on the witness stand. Further guidance may be found in People v. DePallo, 96 NY 2d 437 where the Court specifically refers to Disciplinary Rule 7-102 in discussing protocols a lawyer must follow under these unique circumstances

A tutorial for attorneys and judges on hownot to proceed can be found in People v. Cedric Darrett 2 AD3d 16. In Darrett, counsel made a premature and unequivocal announcement of a client's perjurious intentions thus disclosing a client's confidence. This was frowned upon in the First Department decision. This decision arose out of a First Degree Murder conviction in New York County. The Appellate Court ultimately held the case in abeyance and remanded for a new Huntley Hearing. The issue before the Court was the ex parte and off the record conference between the Court and counsel during the defendant's cross examination at the Huntley Hearing. Counsel expressed concern to the trial court that her client might commit perjury. Ultimately, the defendant continued testifying and did not commit perjury. The Appellate Court criticized both the trial court and trial counsel but leveled most blame on the attorney.

The principal issue is whether the trial attorney overextended herself by giving information to the Court above and beyond that which was necessary in order to comply with Disciplinary Rule 7-102 A (4) (A lawyer shall not knowingly use perjured testimony) and B (1), (A lawyer shall call upon the client to rectify the fraud – if the client refuses the lawyer must reveal the fraud to the tribunal). The attorney who is confronted with this dilemma must comply with Disciplinary Rule 4-101 C (3) (A lawyer may reveal information necessary to prevent a client from committing a crime) while not violating DR 4 101 A.

The decision is very detailed and complex from the stand point of the trial attorney. The trial attorney is thrust on the precipice of a dilemma because the attorney is caught between conflicting Disciplinary Rules.

In Darrett the Appellate Court concluded that counsel revealed to the Court more than was necessary to convey her belief, ultimately unrealized, that her client intended perjury. Counsel by her actions, revealed this information to the fact finder at the Huntley Hearing.

By being confronted with the lawyer's information the Court was placed in the predicament of having virtually no choice but either to abort, delay and transfer the hearing to another justice, or, to complete it and rely on its own expressed assurance of impartiality. In this case the error was made more egregious by the court's stating at time of sentence ".... your own attorney had to come to me in camera and informed me that she didn't want to stay on your case anymore as a matter of ethics because you perjured yourself and you knew you were perjuring yourself."

The Appellate Division held that the trial attorney's revelation was both premature and unduly detailed. The Court goes on to suggest as an example that counsel should first alert the fact finding Court to an existence of a disagreement between a lawyer and client about the client's anticipated testimony and then, request the Court's permission to allow the defendant/client to testify in narrative form. Thereafter, counsel would simply elicit testimony from the defendant in narrative form and not make inquiries that might invite perjury or comment on summation in this regard. The Appellate Division suggests that the lawyer make private notes or take measures out of the judges' presence in ways that would not place the fact finding court in a difficult position of learning the details of the damaging factual matters that might raise questions about its impartiality. The court suggests that defense counsel should make a record privately summarizing the actions he or she is taking in order to resolve the ethical dilemma.

**DISCIPLINARY PROTOCOLS FOR ATTORNEYS WHO ARE
CONFRONTED WITH A DARRETT/CABAN/ANDRADES DILEMMA**

Step 1: DR 2-110 B (1) = Rule 1.16(b)(4)
DR 2-110 B (2), = Rule 1.16 (b)(1)
DR 2-110 C 1a, b, c, and d = Rules 1.16 © [6, 2, 13 and 7]
DR 2-110 C (2) = Rules 1.16 (b)(1) and (c)(3).

Step 2: DR 4 101 A = Rule 1.6,
DR 4 101 B (1 and 2) = Rule 1.6 (a)
DR 4 101 C (2 and 3) = Rules 1.6 (b)(6) and (b)(2)
DR 7-101 A (3) = Rule 1.1 ©(2)

Step 3: DR 7-102 A [3, 4, and 7] = Rules 3.4 (a)(3), 3.3 (a)(3) and (c),
3.4 (a)(4) and 1.2 (d)
DR 7-102 B (1) = Rules 3.3 (b) and (c)

SAMPLE MINIMUM FEE RETAINER

PREPARED BY MARVIN RAY RASKIN, ESQ.

22 N.Y.C.R.R. Section 1200 - Rules of Professional Conduct Rule 1.5 (d) (4)

Rule 1.5 Fees and Division of Fees
Rule 1.5 (d) (4)

The practitioner should be ever mindful of the prohibition against nonrefundable retainer fees. See Matter of Coopeman, 83 NY2d 465, where an attorney violated the non refundable fee rule and was suspended for a period of two (2) years. The Court of Appeals affirmed the Appellate Division suspension at 187 A.D. 2d 56.

22 NYCRR 1400.4 states: "An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with the client that provides for the payment of the specific amount below which the fee will not fall based upon the handling of the case to its conclusion."

The new Rules are still being distilled by The Departmental Disciplinary Committee, the Grievance Committees and the Court. While there is no definitive New York minimum fee stricture, a minimum fee paragraph for a criminal defense practitioner may appear as follows assuming all the prerequisite provisions appear in the client's written retainer:

The office billable rate is \$300.00 per hour as mentioned previously in this retainer. The minimum fee for a misdemeanor matter will range between 2½ to 4 hours depending on the complexity of the case. The minimum fee for a felony matter will range between 4 to 6 hours depending on the complexity of the case. The client agrees to this minimum fee as and for the services to be rendered in order set up the file. The client agrees that the initial services to be rendered by the attorney and his staff include, but are not limited to: research the Penal Law and Criminal Procedure Law statutes related to the accusatory instrument or anticipated arrest charge, file a Notice of Appearance, obtain and review necessary documents on behalf of the client from the client, court or other source, and generate initial communication with the prosecuting agency. The client agrees that this minimum fee is for the purpose of permitting the attorney to properly prepare the client's case file to go forward with this representation. The client agrees that this minimum fee is reasonable and acknowledges that the attorney has explained the nature of the services to the client's satisfaction. The client fully and completely understands the circumstances under which the fee is to be incurred.

NEW RULES/RULES

CONVERSION TABLES

PREPARED BY

ROBERT P. GUIDO, ESQ.

SPECIAL COUNSEL FOR
GRIEVANCE MATTERS
APPELLATE DIVISION
SECOND DEPARTMENT

NEW YORK RULES OF PROFESSIONAL CONDUCT
Effective April, 2009

CORRELATION TABLE

Former Rules	Former DR's	New Rules
1200.1	Definitions	1.0 Terminology
(a)	(1)	(f)
(b)	(2)	(h)
(c)	(3)	(n)
(d)	(4)	(o)
(e)	(5)	(v)
(f)	(6)	(w)
(g) (reserved)	(7)	
(h)	(8)	(p)
(i)	(9)	(i)
(j)	(10)	(g)
(k)	(11)	(a)
(l)	(12)	(c)
1200.2	1-101	8.1
1200.3	1-102	
(a)(1)	(A)(1)	8.4(a) [violate a rule]
(a)(2)	(A)(2)	8.4(a) [through actions of another]
(a)(3)	(A)(3)	8.4(b)
(a)(4)	(A)(4)	8.4(c)
(a)(5)	(A)(5)	8.4(d)
(a)(6)	(A)(6)	8.4(g)
(a)(7)	(A)(7)	8.4(h)

1200.4	1-103	
(a)	(A)	8.3(a) and (c)
(b)	(B)	8.3(b) and (c)
1200.5	1-104	
(a)	(A)	5.1(a)
(b)	(B)	5.1(b)(1) and (2)
(c)	(C)	5.1(c) [partners/associates]; 5.3(a) [nonlawyers]
(d)(1) and (2)	(D)(1) and (2)	5.1(d)(1) and (2) [lawyers]; 5.3(b) [nonlawyers]
(e)	(E)	5.2(a)
(f)	(F)	5.2(b)
1200.5-a	1-105	8.5
1200.5-b	1-106	5.7
1200.5-c	1-107	5.8
1200.6	2-101	7.1(a) through(p)
1200.7	2-102	7.5
1200.8	2-103	
(a)	(A)	7.3(a)
(b)	(B)	7.3(b)
(c)	(C)	7.3(c)
(d)	(D)	7.2(a)
(e)	(E)	7.3(d)
(f)	(F)	7.2(b)
(g)	(G)	7.3(e)
(h)	(H)	7.3(f)
(i)	(I)	7.3(g)
(j)	(J)	7.3(h)
(k)	(K)	7.3(i)

1200.9	2-104	
(a)	(A) [repealed]	
(b)	(B) [repealed]	
(c)	(C)	7.1(q)
(d)	(D)	Not explicitly included, but implicit within 7.2(b)(1)
(e)	(E)	7.1(f)
(f)	(F)	Not included
1200.10	2-105	7.4
1200.11	2-106	
(a)	(A)	1.5(a)
(b)	(B)	1.5(a)
(c)(1)	(C)(1)	1.5(d)(1)
(c)(2)	(C)(2)	1.5(d)(5) 1.5(d)(4) [nonrefundable]
(c)(3)	(C)(3)	1.5(d)(2)
(d)	(D)	1.5(c)
(e)	(E)	1.5(f)
(f)	(F)	1.5(e)
1200.12	2-107	
(a)	(A)	1.5(g)
(a)(1)	(A)(1)	1.5(g)(2)
(a)(2)	(A)(2)	1.5(g)(1)
(a)(3)	(A)(3)	1.5(g)(3)
(b)	(B)	1.5(h)
1200.13	2-108	
(a)	(A)	5.6(a)(1)
(b)	(B)	5.6(a)(2)

1200.14	2-109	1.16(a)
1200.15	2-110	
(a)(1)	(A)(1)	1.16(d)
(a)(2)	(A)(2)	1.16(e)
(a)(3)	(A)(3)	1.16(e) [refund fee]
(b)(1)	(B)(1)	1.16(b)(4)
(b)(2)	(B)(2)	1.16(b)(1)
(b)(3)	(B)(3)	1.16(b)(2)
(b)(4)	(B)(4)	1.16(b)(3)
(c)	(C)	1.16(c)(1) [without adverse effect]
(c)(1)(i)	(C)(1)(a)	1.16(c)(6)
(c)(1)(ii)	(C)(1)(b)	1.16(c)(2)
(c)(1)(iii)	(C)(1)(c)	1.16(c)(13)
(c)(1)(iv)	(C)(1)(d)	1.16(c)(7)
(c)(1)(v)	(C)(1)(e)	1.16(c)(4)
(c)(1)(vi)	(C)(1)(f)	1.16(c)(5)
(c)(1)(vii)	(C)(1)(g)	1.16(c)(3)
(c)(2)	(C)(2)	1.16(b)(1) and (c)(13)
(c)(3)	(C)(3)	1.16(c)(8)
(c)(4)	(C)(4)	1.16(c)(9)
(c)(5)	(C)(5)	1.16(c)(10)
(c)(6)	(C)(6)	1.16(c)(12)
1200.15-a	2-111	1.17 [retains 2-111 in full, except for the following edits to numbering: 2-111(B)(2)(a),(b),(c), and (d) correspond to 1.17(b)(2)(i),(ii),(iii), and (iv)]
1200.16	3-101	
(a)	(A)	5.5(b)
(b)	(B)	5.5(a)

1200.17	3-102	5.4(a)
1200.18	3-103	5.4(b)
1200.19	4-101	
(a)	(A)	1.6 [definition of "confidential information"]
(b)(1)	(B)(1)	1.6(a)
(b)(2)	(B)(2)	1.6(a)
(b)(3)	(B)(3)	1.6(a)(1)
(c)(1)	(C)(1)	1.6(a)(1)
(c)(2)	(C)(2)	1.6(b)(6)
(c)(3)	(C)(3)	1.6(b)(2)
(c)(4)	(C)(4)	1.6(b)(5)(ii) [collect fee] 1.6(b)(5)(i) [defend accusation]
(c)(5)	(C)(5)	1.6(b)(3)
(d)	(D)	1.6(c)
1200.20	5-101	1.7(a)(2) and (b)(4)
1200.20-a	5-101-a	6.5
1200.21	5-102	
(a) and (c)	(A) and (C)	3.7(a)
(b) and (d)	(B) and (D)	3.7(a) and (b)
1200.22	5-103	
(a)	(A)	1.8(i)
(b)	(B)	1.8(e)
1200.23	5-104	
(a)	(A)	1.8(a)
(b)	(B)	1.8(d)
1200.24	5-105	
(a)	(A)	1.7(a)(1)
(b)	(B)	1.7(a)(1)

(c)	(C)	1.7(b)
(d)	(D)	1.10(a); 1.12(d)
(e)	(E)	1.10(e), (f), and (g)
1200.25	5-106	
(a)	(A)	1.8(g)
1200.26	5-107	
(a)	(A)	1.8(f)(1)
(b)	(B)	1.8(f)(2) and (3); 5.4(c)
(c)	(C)	5.4(d)
1200.27	5-108	
(a)(1)	(A)(1)	1.9(a)
(a)(2)	(A)(2)	1.9(c)
(b)	(B)	1.9(B)
(c)	(C)	1.10(b) and (c)
1200.28	5-109	
(a)	(A)	1.13(a)
(b)	(B)	1.13(b)
(c)	(C)	1.13(c)
1200.29	5-110	6.3
1200.29-a	5-111	
(a)	(A)	1.0(u) [definition of "sexual relations"]
(b)	(B)	1.8(j)(1)
(c)	(C)	1.8(j)(2)
(d)	(D)	1.8(k)
1200.30	6-101	
(a)(1)	(A)(1)	1.1(b)
(a)(2)	(A)(2)	1.1(a)
(a)(3)	(A)(3)	1.3(b)

1200.31	6-102	1.8(h)
1200.32	7-101	
(a)(1)	(A)(1)	1.1(c)(1) [seek objectives] 1.2(e) [accede to requests] 1.2(g) [punctual/courtesy]
(a)(2)	(A)(2)	1.3(c)
(a)(3)	(A)(3)	1.1(c)(2)
(b)(1)	(B)(1)	1.2(e) [exercise professional judgment]
(b)(2)	(B)(2)	1.2(f)
1200.33	7-102	
(a)(1)	(A)(1)	3.1(a) and (b)(2); 4.4(a)
(a)(2)	(A)(2)	3.1(a) and (b)(1)
(a)(3)	(A)(3)	3.4(a)(3)
(a)(4)	(A)(4)	3.3(a)(3) and (c); 3.4(a)(4)
(a)(5)	(A)(5)	3.1(a) and (b)(3); 3.3(a)(1) and (c); 4.1
(a)(6)	(A)(6)	3.4(a)(5)
(a)(7)	(A)(7)	1.2(d)
(a)(8)	(A)(8)	3.4(a)(6)
(b)(1) and (2)	(B)(1) and (2)	3.3(b) and (c)
1200.34	7-103	
(a)	(A)	3.8(a)
(b)	(B)	3.8(b)
1200.35	7-104	
(a)(1)	(A)(1)	4.2(a)
(a)(2)	(A)(2)	4.3
(b)	(B)	4.2(B)
1200.36	7-105	3.4(e)
1200.37	7-106	
(a)	(A)	3.4(c)

(b)(1)	(B)(1)	3.3(a)(2) and (c)
(b)(2)	(B)(2)	3.3(e)
(c)(1)	(C)(1)	3.4(d)(1)
(c)(2)	(C)(2)	3.4(d)(4)
(c)(3)	(C)(3)	3.4(d)(2)
(c)(4)	(C)(4)	3.4(d)(3)
(c)(5)	(C)(5)	3.3(f)(1)
(c)(6)	(C)(6)	3.3(f)(2)
(c)(7)	(C)(7)	3.3(f)(3)
1200.38	7-107	
(a)	(A)	3.6(a),(d), and (e)
(b)	(B)	3.6(b)
(c)	(C)	3.6(c)
1200.39	7-108	
(a)	(A)	3.5(a)(3) and (4)
(b)(1)	(B)(1)	3.5(a)(3) and (4)
(b)(2)	(B)(2)	3.5(b)
(c)	(C)	3.5(a)(3) and (4)
(d)	(D)	3.5(a)(5)(iii) and (iv)
(e)	(E)	3.5(a)(6)
(f)	(F)	3.5(c)
(g)	(G)	3.5(d)
1200.40	7-109	
(a)	(A)	3.4(a)(1)
(b)	(B)	3.4(a)(2)
(c)(1) and (2)	(C)(1) and (2)	3.4(b)(1)
(c)(3)	(c)(3)	3.4(b)(2)

1200.41	7-110	
(a)	(A)	3.5(a)(1)
(b)	(B)	3.5(a)(2)
1200.41-a	7-111	
(a)	(A)	4.5(b); 7.3(e)
(b)	(B)	4.5(a)
1200.42	8-101	1.11(f)
1200.43	8-102	8.2(a)
1200.44	8-103	8.2(b)
1200.45	9-101	
(a)	(A)	1.12(a)
(b)(1)	(B)(1)	1.11(a) and (b)
(b)(2)	(B)(2)	1.11(c)
(b)(3)	(B)(3)	1.11(d) and 1.12(c)
(c)	(C)	8.4(e)(1)
(d)	(D)	1.10(h)
1200.46	9-102	1.15 [retains 9-102 in full, with non-substantive editorial changes]

Prepared by Robert P. Guido
January, 2009

NEW YORK RULES OF PROFESSIONAL CONDUCT
 Effective April, 2009

CORRELATION TABLE

New Rules	Former Rules	Former Code
Rule 1.0 Terminology	1200.1	Definitions
(a)	(k)	(11)
(b)		
(c)	(j)	(12)
(d)		
(e)		
(f)	(a)	(1)
(g)	(j)	(10)
(h)	(b)	(2)
(i)	(i)	(9)
(j)		
(k)		
(l)		
(m)		
(n)	(c)	(3)
(o)	(d)	(4)
(p)	(h)	(8)
(q)		
(r)		
(s)		
(t)		
(u)	1200.29-a(a)	5-111(A)
(v)	(e)	(5)

	(f)	(g)
(w)		
(x)		
Rule 1.1		
(a)	1200.30(a)(2)	6-101(A)(2)
(b)	1200.30(a)(1)	6-101(A)(1)
(c)(1)	1200.32(a)(1)	7-101(A)(1)
(c)(2)	1200.32(a)(3)	7-101(A)(3)
Rule 1.2		
(a)		EC 7-7
(b)		EC 2-27
(c)		
(d)	1200.33(a)(7)	7-102(A)(7)
(e)	1200.32(b)(1)	7-101(B)(1)
(f)	1200.32(b)(2)	7-101(B)(2)
(g)	1200.32(a)(1)	7-101(A)(1)
Rule 1.3		
(a)		
(b)	1200.30(a)(3)	6-101(A)(3)
(c)	1200.32(a)(2)	7-101(A)(2)
Rule 1.4		EC 7-8; EC 9-2
Rule 1.5		
(a)	1200.11(a) and (b)	2-106(A) and (B)
(b)		
(c)	1200.11(d)	2-106(D)
(d)(1)	1200.11(c)(1)	2-106(C)(1)
(d)(2)	1200.11(c)(3)	2-106(C)(3)
(d)(3)		
(d)(4)	1200.11(c)(2)(b)	2-106(C)(2)(b) domestic relations matter only

(d)(5)	1200.11(c)(2)	2-106(C)(2)
(e)	1200.11(f)	2-106(F)
(f)	1200.11(e)	2-106(E)
(g)(1)	1200.12(a)(2)	2-107(A)(2)
(g)(2)	1200.12(a)(1)	2-107(A)(1)
(g)(3)	1200.12(a)(3)	2-107(A)(3)
(h)	1200.12(b)	2-107(B)
Rule 1.6		
(a) "confidential information"	1200.19(a)	4-101(A)
(a)(1)	1200.19(b)(3) and (c)(1)	4-101(B)(3) and (C)(1)
(a)(2)		
(a)(3)	1200.19(b) and (c)	4-101(B) and (C)
(b)(1)		
(b)(2)	1200.19(c)(3)	4-101(C)(3)
(b)(3)	1200.19(c)(5)	4-101(C)(5)
(b)(4)		
(b)(5)	1200.19(c)(4)	4-101(C)(4)
(b)(6)	1200.19(c)(2)	4-101(C)(2)
(c)	1200.19(d)	4-101(D)
Rule 1.7		
(a)(1)	1200.24(a) and (b)	5-105(A) and (B)
(a)(2)	1200.20(a)	5-101(A)
(b)	1200.20(a); 1200.24(c)	5-101(A); 5-105(C)
Rule 1.8		
(a)	1200.23(a)	5-104(A)
(b)	1200.19(b)(2)	4-101(B)(2)
(c)		EC 5-5; EC 5-6

(d)	1200.23(b)	5-104(B)
(e)	1200.22(b)	5-103(B)
(f)	1200.26(a) and (b)	5-107(A) and (B)
(g)	1200.25(a)	5-106(A)
(h)	1200.31(a)	6-102(A)
(i)	1200.22(a)	5-103(A)
(j)(1)	1200.29-a(b)	5-111(B)
(j)(2)	1200.29-a(c)	5-111(C)
(k)	1200.29-a(d)	5-111(D)
Rule 1.9		
(a)	1200.27(a)(1)	5-108(A)(1)
(b)	1200.27(b)	5-108(B)
(c)	1200.27(a)(2)	5-108(A)(2)
Rule 1.10		
(a)	1200.24(d)	5-105(D)
(b)	1200.27(c)	5-108(C)
(c)	1200.27(b)(1)	5-108(B)(1)
(d)		
(e), (f) and (g)	1200.24(e)	5-105(E)
(h)	1200.45(d)	9-101(D)
Rule 1.11		
(a)	1200.45(b)(1)	9-101(B)(1)
(b)	1200.45(b)	9-101(B)
(c)	1200.45(b)(2)	9-101(B)(2)
(d)	1200.45(b)(3)	9-101(B)(3)
(e)		
(f)	1200.42(a)	8-101(A)

Rule 1.12		
(a)	1200.45(a)	9-101(A)
(b)		EC 5-20
(c)	1200.45(b)(3)(b)	9-101(B)(3)(b)
(d)	1200.24(d)	5-105(D)
(e)		
Rule 1.13		
(a)	1200.28(a)	5-109(A)
(b)	1200.28(b)	5-109(B)
(c)	1200.28(c)	5-109(C)
(d)		EC 5-18
Rule 1.14		
EC 7-11: EC 7-12		
Rule 1.15		
1200.46		
9-102		
Rule 1.16		
(a)	1200.14(a)	2-109(A)
(b)(1)	1200.15(b)(2)	2-110(B)(2)
(b)(2)	1200.15(b)(3)	2-110(B)(3)
(b)(3)	1200.15(b)(4)	2-110(B)(4)
(b)(4)	1200.15(b)(1)	2-110(B)(1)
(c)(1)	1200.15(c)	2-110(C)
(c)(2)	1200.15(c)(1)(iii)	2-110(C)(1)(b)
(c)(3)	1200.15(c)(1)(vii)	2-110(C)(1)(E)
(c)(4)	1200.15(c)(1)(v)	2-110(C)(1)(e)
(c)(5)	1200.15(c)(1)(vi)	2-110(C)(1)(f)
(c)(6)	1200.15(c)(1)(i)	2-110(C)(1)(a)
(c)(7)	1200.15(c)(1)(iv)	2-110(C)(1)(d)
(c)(8)	1200.15(c)(3)	2-110(C)(3)
(c)(9)	1200.15(c)(4)	2-110(C)(4)

(c)(10)	1200.15(c)(5)	2-110(C)(5)
(c)(11)		
(c)(12)	1200.15(c)(6)	2-110(C)(6)
(c)(13)	1200.15(c)(1)(iii)	2-110(C)(1)(e)
(d)	1200.15(a)(1)	2-110(A)(1)
(e)	1200.15(a)(2) and (a)(3)	2-110(A)(2) and (a)(3)
Rule 1.17 [retains 2-111 in full. except for the following edits to numbering: 1.17(b)(2)(i),(ii),(iii), and (iv)] correspond to 2-111(B)(2)(a),(b),(c), and (d)]	1200.15-a	2-111
Rule 1.18		EC 4-1
Rule 2.1		EC 7-8
Rule 2.2 (reserved)		
Rule 2.3		
Rule 2.4		
Rule 3.1	1200.14(a): 1200.33(a)(1), (2), and (5) [see also 22 NYCRR Part 130]	2-109(A): 7-102(A)(1), (2), and (5)
Rule 3.2		
Rule 3.3		
(a)(1)	1200.33(a)(5)	7-102(A)(5)
(a)(2)	1200.37(b)(1)	7-106(B)(1)
(a)(3)	1200.33(a)(4)	7-102(A)(4)
(b)	1200.33(b)(1) and (2)	7-102(B)(1) and (2)
(c)		
(d)		
(e)	1200.37(b)(2)	7-106(B)(2)
(D)(1)	1200.37(c)(5)	7-106(C)(5)

(f)(2)	1200.37(c)(6)	7-106(C)(6)
(f)(3)	1200.37(c)(7)	7-106(C)(7)
(f)(4)		
Rule 3.4		
(a)(1)	1200.40(a)	7-109(A)
(a)(2)	1200.40(b)	7-109(B)
(a)(3)	1200.33(a)(3)	7-102(A)(3)
(a)(4)	1200.33(a)(4)	7-102(A)(4)
(a)(5)	1200.33(a)(6)	7-102(A)(6)
(a)(6)	1200.33(a)(8)	7-102(A)(8)
(b)(1)	1200.40(c)(1) and (2)	7-109(C)(1) and (2)
(b)(2)	1200.40(c)(3)	7-109(C)(3)
(c)	1200.37(a)	7-106(A)
(d)(1)	1200.37(c)(1)	7-106(C)(1)
(d)(2)	1200.37(c)(3)	7-106(C)(3)
(d)(3)	1200.37(c)(4)	7-106(C)(4)
(d)(4)	1200.37(c)(2)	7-106(C)(2)
(e)	1200.36(a)	7-105(A)
Rule 3.5		
(a)(1)	1200.41(a)	7-110(A)
(a)(2)	1200.41(b)	7-110(B)
(a)(3)	1200.39(a) and (b)(1)	7-108(A) and (B)(1)
(a)(4)	1200.39(a) and (b)(1)	7-108(A) and (B)(1)
(a)(5)(i)		
(a)(5)(ii)		
(a)(5)(iii)	1200.39(d)	7-108(D)
(a)(5)(iv)	1200.39(d)	7-108(D)
(a)(6)	1200.39(e)	7-108(E)

(b)	1200.39(b)(2)	7-108(B)(2)
(c)	1200.39(f)	7-108(f)
(d)	1200.39(e)	7-108(G)
Rule 3.6		
(a)	1200.38(a)	7-107(A)
(b)	1200.38(b)	7-107(B)
(c)	1200.38(c)	7-107(C)
(d)	1200.38(a)	7-107(A)
(e)	1200.38(a)	7-107(A)
Rule 3.7		
(a)	1200.21(a) and (c)	5-102(A) and (C)
(b)(1)	1200.21(b) and (d)	5-102(B) and (D)
(b)(2)		
Rule 3.8		
(a)	1200.34(a)	7-103(A)
(b)	1200.34(b)	7-103(B)
Rule 3.9		EC 8-4
Rule 4.1	1200.33(a)(5)	7-102(A)(5)
Rule 4.2		
(a)	1200.35(a)(1)	7-104(A)(1)
(b)	1200.35(b)	7-104(B)
Rule 4.3	1200.35(a)(2)	7-104(A)(2)
Rule 4.4		
(a)	1200.33(a)(1)	7-102(A)(1)
(b)		
Rule 4.5		
(a)	1200.41-a(a)	7-111(a)

(b)	1200.41-a(a) and 1200.8(g)	7-111(a) and (b) and 2-103(G)
Rule 5.1		
(a)	1200.5(a)	1-104(A)
(b)	1200.5(b)	1-104(B)
(c)	1200.5(c)	1-104(C)
(d)	1200.5(d)	1-104(D)
Rule 5.2		
(a)	1200.5(e)	1-104(E)
(b)	1200.5(f)	1-104(F)
Rule 5.3		
(a)	1200.5(c)	1-104(C)
(b)	1200.5(d)	1-104(D)
Rule 5.4		
(a)	1200.17(a)	3-102(A)
(b)	1200.18(a)	3-103(A)
(c)	1200.26(b)	5-107(B)
(d)	1200.26(c)	5-107(C)
Rule 5.5		
(a)	1200.16(b)	3-101(B)
(b)	1200.16(a)	3-101(A)
Rule 5.6		
(a)(1)	1200.13(a)	2-108(A)
(a)(2)	1200.13(b)	2-108(B)
(b)		
Rule 5.7		
	1200.5-b	1-106
Rule 5.8		
	1200.5-c	1-107
Rule 6.1		

Rule 6.2 (reserved)		
Rule 6.3	1200.29	5-110
Rule 6.4		EC 8.4
Rule 6.5	1200.20-a	5-101-a
Rule 7.1		
(a) through (p)	1200.6(a) through (p)	2-101(A) through (P)
(q)	1200.9(c)	2-104(C)
(r)	1200.9(e)	2-104(E)
Rule 7.2		
(a)	1200.8(d)	2-103(D)
(b)	1200.8(f)	2-103(F)
Rule 7.3		
(a)	1200.8(a)	2-103(A)
(b)	1200.8(b)	2-103(B)
(c)	1200.8(c)	2-103(C)
(d)	1200.8(e)	2-103(E)
(e)	1200.8(g)	2-103(G)
(f)	1200.8(h)	2-103(H)
(g)	1200.8(i)	2-103(I)
(h)	1200.8(f)	2-103(J)
(i)	1200.8(k)	2-103(K)
Rule 7.4	1200.10	2-105
Rule 7.5	1200.7	2-102
Rule 8.1	1200.2	1-101
Rule 8.2		
(a)	1200.43(a) and (b)	8-102(A) and (B)
(b)	1200.44(a)	8-103(A)

Rule 8.3	1200.4	1-103
Rule 8.4		
(a)	1200.3(a)(1) and (2)	1-102(A)(1) and (2)
(b)	1200.3(a)(3)	1-102(A)(3)
(c)	1200.3(a)(4)	1-102(A)(4)
(d)	1200.3(a)(5)	1-102(A)(5)
(e)(1)	1200.45(c)	9-101(C)
(e)(2)		
(f)		
(g)	1200.3(a)(6)	1-102(A)(6)
(h)	1200.3(a)(7)	1-102(A)(7)
Rule 8.5	1200.5-a	1-105

Prepared by Robert P. Guido
March, 2009