

# Form Over Federalism: The Case for Consistency in State Ethics Rules Formats\*

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State ethics rules are now in play nationwide. The work of the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct, popularly known as the Ethics 2000 Commission, is virtually complete. The ABA House of Delegates finished its review of the Commission's proposed revisions to the Model Rules at the February 2002 midyear meeting.<sup>1</sup> The House approved substantially all of the Commission's recommendations, and so the Ethics 2000 version of the Model Rules have become the new ABA Model Rules.

Because forty-three jurisdictions have adopted some form of the original 1983 version of the Model Rules, bar associations and courts in nearly all of those jurisdictions have or will soon appoint committees to review the 2002 version of the Model Rules and make recommendations for changes to their existing rules. This simultaneous nationwide review of state ethics rules offers a rare chance to correct a real defect in the current system: the inconsistent and sometimes bewildering formats that many jurisdictions have used in adapting their rules to the Model Rules.

The purpose of this paper is to urge those who are reviewing their state rules to seize this unique opportunity to recast the form of those rules in a manner consistent with the ABA Model

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Rules. Six simple “Conventions of Consistency” are listed at the end of this paper. Following these conventions would result in a consistent format for legal ethics rules in all states. This, in turn, will enable lawyers to promptly and safely determine whether and how any particular state ethics rule varies from the corresponding ABA Model Rule.

## THE CURRENT SITUATION

The current situation of state ethics rules formats is a crazy quilt. Forty-two states and the District of Columbia have adopted a form of the 1983 Model Rules. Among the rest, New York and Oregon have retained the format of the 1969 ABA Model Code of Professional Responsibility, but engrafted several provisions of the Model Rules into the Model Code format.<sup>2</sup> Even California, which has its own unique system of rules, has borrowed Model Rules language for some of its rules of conduct.<sup>3</sup>

A majority of the jurisdictions that have adopted a form of the Model Rules have kept their rules format substantially consistent with the Model Rules, but several have strayed to varying degrees. The most common variation appears to be in the rules regulating lawyer advertising and solicitation. Many states have altered both the form and substance of those rules.<sup>4</sup> Fortunately, these changes have usually been made within the general Model Rules format, and therefore substantive variations are relatively easy to locate.

Another subject of frequent revision is Model Rule 1.6, the rule on confidentiality of client information. Most states have amended Model Rule 1.6 to expand the circumstances in which a lawyer *may*, or in a few states *must*, disclose a client's criminal or fraudulent conduct.<sup>5</sup> Like the changes to the advertising rules, these variations have typically been located in each state's version of Rule 1.6, so that any lawyer familiar with the Model Rules should find them readily.

Changes in many other state rules have not been as easy to track. As noted above, Oregon adopted much of the substance of the 1983 Model Rules, but retained the 1969 Model Code format. It has also created some new provisions. For example, unlike either the 1983 Model Rules or the Model Code, Oregon has a separate rule [Oregon DR 10-101] on definitions. The definition in DR 10-101(B)(2) of "full disclosure" in the context of consent to an actual or likely conflict of interest imposes the substantive requirement that disclosure must "include a recommendation that the recipient seek independent legal advice to determine if consent should be given and shall be contemporaneously confirmed in writing." This significant duty is not referenced in the conflicts provisions of the Oregon rules, and so it is not likely to be noted by a lawyer not already familiar with those rules.

Texas adopted most of the Model Rules, but renumbered the rules that it chose in its own unique system. It added a digit, usually a zero, to many of the rule numbers so that all the rules have three-digit numbers. Thus, the rule on fees [Model Rule 1.5] is now Texas Rule 1.05. Model Rule 2.2 ["Intermediary"] was revised and renumbered to become Texas Rule 1.07. The

rule on organizational clients [Model Rule 1.13] became Texas Rule 1.12. These changes are logical and would cause no confusion if the Texas rules were the only set of rules. However, these rules are only a part of the national system of lawyer regulation, and changing the numbering system can create confusion among Texas and non-Texas lawyers alike. The greatest disservice may be to Texas practitioners researching the Model Rules analogues from which their rules are derived. Unless the lawyers work regularly with the ethics rules, such research will be challenging.

But Oregon and Texas are not alone. While Illinois generally followed the Model Rules format when adopting its current rules, it parked provisions held over from its former rules, which were based on the Model Code, in places where many lawyers are unlikely to find them. One example is Illinois Rule 1.2, titled "Scope of Representation" as is the corresponding Model Rule. However, in addition to the five paragraphs of the Model Rule (one of which has been moved from paragraph (e) to a new paragraph (i)), four new and different subjects are covered by the rule. New paragraph (e) perpetuates a former Illinois Code provision [DR 7-105] against threatening criminal charges to gain an advantage in a civil matter, a prohibition not found in the Model Rules. Regardless of whether this rule is good policy, its obscure placement suggests that many Illinois lawyers may never find it, even if they are looking for such a rule.

Another anomaly in Illinois Rule 1.2 is that new paragraphs (f), (g), and (h), which deal primarily with a lawyer's duties with respect to representation in litigated matters, cover topics that are also covered in Illinois Rules 3.1 and 3.3. Illinois Rule 1.2(f) is simply repetitious of

Illinois Rule 3.1, which is substantially the same as Model Rule 3.1. Of greater concern is Illinois Rule 1.2(g), another former Illinois Code provision [DR 7-102(b)] that deals with a lawyer's duty of candor to a court in cases of client fraud. Illinois Rule 1.2(g) is inconsistent with Illinois Rule 3.3(b) on the same subject, giving Illinois lawyers potentially conflicting directions in this important situation.<sup>6</sup> If more attention had been paid to the form of the rules, the substantive confusion most likely would have been avoided.

Another instance where a change in form could have substantive consequences is shown by a recent (October 2001) amendment to the Missouri Rules of Professional Conduct. The amendment was a new provision that deals with potential conflicts of interest of private lawyers who also hold public office. It became new paragraph (d) of Missouri Rule 1.11, which is analogous to Model Rule 1.11, and entitled "Successive Government and Private Employment." The change displaced original paragraphs (d) and (e), which became new paragraphs (e) and (f), respectively, making those provisions less easy to find. Moreover, the new provision concerns *simultaneous*, rather than *successive*, public and private service, formerly the only subject of the rule. Thus, many lawyers will have difficulty finding the new provision even if they are aware that such a rule exists. In contrast, when New Hampshire adopted a new regulation concerning private lawyers holding public office, it created a separate rule, which became that state's Rule 1.11A. There is much less chance for confusion in this format.

Several jurisdictions have made similar types of changes.<sup>7</sup> Some, like Washington, that did not adopt Model Rule 1.13 on organizational clients, failed to reserve that rule number and

renumbered subsequent rules so that those numbers do not match the corresponding Model Rule numbers. Others have moved the definitions or “Terminology” section of their rules to the end, rather than the beginning of the rules, as in the Model Rules. Again, such changes would not matter in a world with only one set of ethics rules. But these inconsistencies can cause needless confusion, especially among those who are familiar with the Model Rules format. As explained below, a majority of lawyers in every state are in fact already familiar with the Model Rules.

A final observation on the current situation in state ethics rules is that several states that adopted a form of the Model Rules nevertheless failed to adopt the ABA comments to those rules.<sup>8</sup> This omission is more than an issue of form. The comments are an integral element of the Model Rules. The ABA comments were reviewed and revised by the Ethics 2000 Commission with the same care and attention as the black letter rules, and they were subject to the same approval process by the House of Delegates. Thus, the ABA comments provide important explanatory detail to the Model Rules, information that could be critical to the application of the rules by practicing lawyers. The present review process offers an opportunity for those states without comments to correct that unfortunate situation.

## **THE MODEL RULES RULE**

Despite the variation among the states, the Model Rules format is the *lingua franca* of ethics discourse. All the standard works on legal ethics, including the treatises by Professors Hazard and Hodes, Professor Wolfram, and Professor Rotunda, are organized around the Model

Rules format.<sup>9</sup> The American Legal Ethics Library of the Legal Information Institute, Cornell Law School, the primary source of ethics rules and commentary on the Internet, is organized on the Model Rules format. Another important primary reference work on ethics, the *Annotated Model Rules of Professional Conduct* (4<sup>th</sup> ed. 1999), published by the ABA, is organized on the Model Rules. Finally, the principal periodical on ethics and professional responsibility, the *ABA/BNA Lawyers' Manual on Professional Conduct*, also organizes its reporting on the Model Rules.

Even lawyers who do not work regularly with ethics issues are likely to be familiar with the Model Rules. Every law school that is accredited by the ABA must teach the Model Rules to all its students. Standard 302(b) of the *ABA Standards of Approval of Law Schools* (2001) provides that a law school "... shall require all students in the J.D. degree program to receive instruction in the ... responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct..." For that reason, the Model Rules have become part of the standard law school curriculum.

Study of the Model Rules continues beyond law school for the vast majority of American lawyers. The Multistate Professional Responsibility Examination (MPRE) is now required for admission to the bar of every United States jurisdiction except Maryland, Washington, and Wisconsin.<sup>10</sup> For questions on the MPRE that deal with lawyer discipline, the "... correct answer will be governed by the current ABA Model Rules ..."<sup>11</sup> Regarding individual state ethics rules, the National Conference of Bar Examiners, the sponsor of the MPRE advises: "As a general rule,

particular local statutes or rules of court will not be tested in the MPRE."<sup>12</sup> Thus, the ethics rules format that most practicing lawyers know, regardless of where they practice, is the Model Rules format.

## **FORM DOES MATTER**

There is no dispute that the most important task of any committee reviewing its state ethics rules will be to seek the right result on the substance of each rule. But form can have important consequences. An elegant rule is of little use if a significant number of practitioners are unlikely or unable to find it when they have an ethics issue to resolve.

Outside the area of ethics, there seems to be general agreement that a consistent format is appropriate for regulatory schemes with multijurisdictional application. No one would suggest, for example, that the Uniform Commercial Code should take a different form in different states. Recognition of the need to avoid confusion and misunderstanding of the law governing commercial transactions has apparently overcome any local interests in maintaining unique statutory formats.

The same approach should apply to state ethics rules. Like the issues governed by the Uniform Commercial Code, the practice of law is no longer a purely local matter. The work of the ABA Commission on Multijurisdictional Practice (MJP Commission) has shown that an increasing number of lawyers now represent clients in connection with transactions and litigation

that take place in jurisdictions where the lawyers may not be licensed. The MJP Commission's Final Report (August 2002) recommended that Model Rule 5.5 be amended to permit a lawyer admitted in another United States jurisdiction to render legal services in certain common situations on a temporary basis in a jurisdiction in which the lawyer is not admitted.<sup>13</sup> These situations include services that: (1) are undertaken in association with a local lawyer who participates actively in the matter; (2) are reasonably related to a pending or potential proceeding before a tribunal if the lawyer is authorized to appear in the matter or reasonably expects to be authorized; (3) are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding if the services are reasonably related to the lawyer's practice where the lawyer is admitted and are not services for which the forum requires *pro hac vice* admission; or (4) are not within (2) or (3) above, but are reasonably related to the lawyer's practice where the lawyer is admitted.

The MJP Commission's Final Report also recommended an amendment to Model Rule 8.5 to provide a new choice-of-rule provision that will make a state's legal ethics rules applicable to conduct of any lawyer rendering or offering to render legal services in that state, even if the lawyer is not licensed there.<sup>14</sup> (The proposed amendments to Model Rules 5.5 and 8.5 were approved by the House of Delegates at the August 2002 annual meeting and are now part of the Model Rules.) If out-of-state lawyers are to be bound by a state's legal ethics rules when providing services in that state, it is obviously in the state's interest to facilitate compliance with those rules by those not familiar with them.

Given these recent changes in the Model Rules concerning multijurisdictional practice, it seems safe to predict that the incidence of multijurisdictional practice will continue to grow. This means that lawyers will need to consult the ethics rules of other states more frequently than in the past. Lawyers are more likely to find the rules provision relevant to their inquiry if they are already familiar with the rules format. This may be especially true in times of stress, which may be the only time that many lawyers consult the ethics rules.

Fortunately, there seems to be no compelling reason not to follow a consistent ethics rules format based on the Model Rules in every jurisdiction. Even if following the Model Rules format in a particular jurisdiction would result in substantial changes to the existing rules, such changes would cause little, if any, confusion among the majority of practicing lawyers. As discussed above, the average lawyer's acquaintance with ethics rules is most likely to be based on the Model Rules. For ethics mavens, there will be no confusion at all because they already know the Model Rules.

The only conceivable argument against adoption of a format consistent with the Model Rules might be that it would take too much of the drafting committee's time. However, the relatively small number of hours spent by the drafting committee conforming a state's rules to the Model Rules format will surely save countless additional hours of lawyers trying to translate that state's system in the future. The cost-benefit analysis for the profession seems clear.

In sum, it seems evident that an ethics rules format that is consistent from state to state will assist all lawyers in finding the rules that govern their conduct. A consistent format may even help lawyers to better learn and understand the ethics rules.<sup>15</sup> The only way to achieve such consistency is to use the ABA Model rules as a template. The following conventions are an attempt to aid that result.

## CONVENTIONS OF CONSISTENCY

1. Use the 2002 Model Rules numbering system for all “black letter” rules and comments.
2. If a particular rule, paragraph, or comment of a Model Rule is not adopted, leave that rule, paragraph, or comment blank. Designate omitted rules, paragraphs, or comments as “reserved.” This serves two purposes. First, it tells the lawyers in that jurisdiction and the rest of the world that the jurisdiction decided not to adopt or modify that particular provision of the Model Rules. Second, it eliminates the need to renumber the rules, paragraphs, or comments that follow, a practice that would inevitably cause additional confusion.
3. Keep the same rule and paragraph designations for similar subject matter whenever possible, even if the substance is changed from the Model Rules. For example, the exceptions to the general duty of confidentiality are stated in Model Rule 1.6(b). It will

aid understanding of the rule if lawyers could always find that information in rule 1.6(b) in every jurisdiction.

4. Place new and unique provisions at the at the end of the rule. For example, if a jurisdiction wishes to add a new provision regarding imputation of conflicts, it should become new Rule 1.10(e) of that jurisdiction. As in Convention 2, this serves two purposes. It signals clearly that the jurisdiction has a new and different rule; and it reduces the confusion caused when unique state provisions are assigned rule numbers or paragraphs that cover different subjects in the Model Rules and other states.
5. Place new or additional comments dealing with similar subject matter after the corresponding Model Rules comment. For example, Comment [2] to Model Rule 1.13 concerns communications with a constituent of an organizational client. If the jurisdiction wishes to create an additional comment on that topic, the additional comment should be new Comment [2A]. Again, this will highlight the new material and minimize potential confusion. New comments with no analogous or related material in the Model Rules should be placed at the end of all other comments.
6. Explain in comments any variations from the Model Rules. There are many reasons why a jurisdiction, having made the decision to adopt the Model Rules and comments in general, may decide not to adopt particular provisions of those rules or comments. However, it is important for lawyers to know those reasons so they may better understand

the rules and conform their conduct to the standards that the jurisdiction's supreme court has set.

## **CONCLUSION**

The completion of the ABA Ethics 2000 review and revision of the Model Rules of Professional Conduct has led to the near simultaneous review of ethics rules throughout the United States. If the reviewers in each state are willing to follow a few simple conventions, they can easily address important local substantive concerns in a form compatible with the Model Rules format, the format with which their lawyers are already familiar. A consistent rules format in all jurisdictions will make lawyers better informed about their duties to their clients, the courts, and the profession.

## ENDNOTES

- \* Revised August 2002 from the Spring 2002 edition of *The Professional Lawyer*.
- \*\* Robert A. Creamer is Vice President and Loss Prevention Counsel of Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS). The views expressed in this paper are the author's and not necessarily those of ALAS. The author is indebted to Joseph R. Lundy of ALAS and Professor Paul B. Creamer of Columbia University for their comments on this paper.

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1. Consideration of revisions to Model Rules 5.5 and 8.5 was deferred pending the final report of the ABA Commission on Multijurisdictional Practice. The revisions to Model Rules 5.5 and 8.5 proposed by that commission were approved by the House of Delegates at the August 2002 annual meeting.
  2. For example, New York DR 1-105 ("Disciplinary Authority and Choice of Law") is almost identical to Model Rule 8.5; New York DR 5-108 ("Conflict of Interest - Former Client") is based on provisions of Model Rules 1.9 and 1.10; and New York DR 1-109 ("Organization as Client") incorporates most of Model Rule 1.13.

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3. For example, California Rule 3-300 (“Avoiding Interests Adverse to a Client”) is substantially similar to Model Rule 1.8(a); and California Rule 3-600 (“Organization as Client”) is clearly derived from Model Rule 1.13.
  4. For example, the District of Columbia adopted an amended Model Rule 7.1 and omitted Model Rules 7.2, 7.3, and 7.4 entirely, but retained Model Rule 7.5.
  5. For an explanation of the variations, *see* Reporter’s Note to *Restatement Third, The Law Governing Lawyers* § 67 (2000).
  6. For an explanation of the inconsistency between Illinois Rules 1.2(g) and 3.3(b), *see* Illinois State Bar Association Opinion 94-24 (May 17, 1995) .
  7. For example, the counterparts in various states to Model Rule 1.16 on declining or terminating representation include Kentucky Rule 3.130, Nevada Rule 166, Rhode Island Rule 1.17, Texas Rule 1.15, and Washington Rule 1.15.
  8. These states include Arizona, Illinois, Louisiana, Montana, Nevada, Oregon, Rhode Island, and Washington.

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9. These treatises are: *The Law of Lawyering* (3d ed. 2001), by Professors Geoffrey C. Hazard, Jr., of the University of Pennsylvania Law School, and W. William Hodes, of Indiana University School of Law (Emeritus); *Modern Legal Ethics* (1986), by Professor Charles W. Wolfram of Cornell Law School; and *Legal Ethics, The Lawyer's Deskbook on Professional Responsibility* (2000), by Professor Ronald D. Rotunda of the University of Illinois College of Law.
  10. See National Conference of Bar Examiners Web site: [www.ncbex.org/tests.htm](http://www.ncbex.org/tests.htm).
  11. *Id.*
  12. *Id.*
  13. The MJP Commission's Final Report is available at [www.abanet.org/cpr](http://www.abanet.org/cpr). See Recommendation 2.
  14. *Id.*, see Recommendation 3, proposing to add to Model Rule 8.5(a) the following sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."

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15. A discussion of the influence of a consistent format on learning is beyond the scope of this short paper. However, recent studies of the learning process have suggested that consistent context can play an important role in conceptual processing. See Jeffrey P. Toth and Eyal M. Reingold, "Beyond Perception: Conceptual Contributions to Unconscious Influences of Memory," in *Implicit Cognition*, Geoffrey Underwood ed., Oxford University Press (1996).