

## Canons 1 and 2 – Ethical Considerations

The Disciplinary Rules approved by the NYSBA House of Delegates on November 4 and reprinted on Page 1 were accompanied by a number of new EC's. These EC's read as follows:

### **CANON 1**

#### **Provision of Nonlegal Services**

**EC 1-9 (new).** For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services, when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, DR 1-106(A)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of the Code of Professional Responsibility with respect to the nonlegal services. DR 1-106(A)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal services.

**EC 1-10 (new).** Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(2) requires that the lawyer providing the nonlegal services adhere to the Disciplinary Rules, unless exempted by DR 1-106(A)(4). Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Disciplinary Rules with respect to the nonlegal services, unless exempted by DR 1-106(A)(4).

**EC 1-11** (new). The Disciplinary Rules will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in DR 1-106(A)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services.

**EC 1-12** (new). Although a lawyer may be exempt from the application of Disciplinary Rules with respect to nonlegal services on the face of DR 1-106(A), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Disciplinary Rules that are dependent upon the existence of a representation or attorney-client relationship. Other rules, such as those prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (DR 1-102), requiring lawyers to report certain attorney misconduct (DR 1-103), and prohibiting lawyers from misusing the confidences or secrets of a former client (DR 4-101(B)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under DR 1-106(A). A lawyer or law firm is always subject to these Disciplinary Rules with respect to the rendering of legal services.

### **Contractual Relationships Between Lawyers and Nonlegal Professionals**

**EC 1-13** (new). DR 1-107 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, determining the manner in which lawyers are hired or trained, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of pro bono publico and other public-interest legal work, financial and budgetary decisions relating to the legal practice, and determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

**EC 1-14** (new). The contractual relationship permitted by DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may also provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in DR 2-103(B)(1) and DR 1-107(D). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in DR 1-107 including, at a minimum, DR 2-102(B), DR 5-105(A), DR 5-105(B), DR 5-107(B), DR 5-107(C), and DR 5-108(A). Thus, the lawyer or law firm may

not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with DR 1-107(A)(2) or EC 1-13. More generally, a law firm's interest in maintaining an advantageous relationship with a nonlegal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest subject to DR 5-101(A).

**EC 1-15 (new).** Each lawyer and law firm having a contractual relationship under DR 1-107 has an ethical duty to observe these Disciplinary Rules with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in DR 1-102(A)(2) against a lawyer or law firm circumventing a Disciplinary Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

**EC 1-16 (new).** When in the context of a contractual relationship permitted under DR 1-107 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

**EC 1-17 (new).** To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under DR 1-107 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The Office of Court Administration maintains a public list of eligible professions. Individuals and firms in this state may apply for the inclusion of particular professions on the list, or professions may be added to the list by the Office of Court Administration sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by DR 1-107 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

**EC 1-18 (new).** Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an of counsel relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to DR 5-105(D), and that the law firm would be required

to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the nonlegal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals who are themselves subject to regulation.

## CANON 2

### Lawyer Advertising

EC 2-10 (amended by underlined text). A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising strata-gems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. Special care should be taken to avoid the use of any statement or claim which is false fraudulent misleading deceptive or unfair, or which is violative of any statute or rule of court, in disclosing information, by advertisements or otherwise, relating to a lawyer's legal or nonlegal education, experience or professional qualifications, the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer, or the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm to the extent permitted by DR 1-107 and the nature and extent of services available through those contractual relationships A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state. [Editor's note: EC 2-10 is not new. Underscoring indicates additions to existing text.]