

NYSBA Proposed Rules of Professional Conduct – Part III

BY ROY SIMON

(Editor's note: This is the third in a series of articles by Roy Simon describing and explaining the proposed New York Rules of Professional Conduct. The Rules were approved by the New York State Bar Association's House of Delegates on November 3, 2007 and are now being reviewed by the Presiding Justices of the Appellate Divisions.)

Proposed Rules 1.1 through 1.4 –

Codifying Familiar Concepts

A beautiful feature of the proposed New York Rules of Professional Conduct is that they codify as mandatory Rules a number of familiar and well established concepts that currently appear only in the non-binding ethical Considerations or in case law. This month I will focus on four of the Rules that would import into the mandatory Rules of Professional Conduct various concepts that are widely accepted by New York lawyers but that are not found in the Disciplinary Rules of the existing New York Code of Professional responsibility.

Rule 1.1: Competence

Proposed Rule 1.1 addresses competence and neglect. The full text of proposed Rule 1.1 provides as follows:

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer shall not intentionally, recklessly or repeatedly:
 - (1) fail to provide competent representation to a client;
 - (2) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
 - (3) prejudice or damage the client during the course of the representation except as permitted or required by Rule 1.6, Rule 1.16 or Rule 3.3.

Many lawyers and clients would say that the first duty of a lawyer is to be competent. The existing Disciplinary Rules do not disagree with the proposition that a lawyer should be competent, but they do not directly mandate competent representation. Rather, DR 6-101(A)(2) and (3) provide only that a lawyer shall not “[h]andle a legal matter without preparation adequate in the circumstances” or “[n]eglect a legal matter entrusted to the client.” Proposed Rule 1.1(a), in contrast, affirmatively states that a lawyer “should provide competent representation to a client.”

Rule 1.1(a) does not formally define the phrase “competent representation,” but it does describe competent representation as “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” This is relatively abstract, but it provides more guidance than the existing Disciplinary Rules, which neither define nor describe “competent representation.” Moreover, the comments to Rule 1.1 elaborate on each of the operative terms. Regarding “knowledge” and “skill,” Comment 1 to Rule 1.1 adds several “relevant factors,” including: (1) “the relative complexity and specialized nature of the matter,” (2) “the lawyer’s general experience,” (3) “the lawyer’s training and experience in the field in question,” (4) “the preparation and study the lawyer is able to give the matter,” and (5) “whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.” Regarding “thoroughness,” Comment 5 explains that competent handling of a particular matter includes (1) “inquiry into and analysis of the factual and legal elements of the problem,” and (2) “use of methods and procedures meeting the standards of competent practitioners.” Regarding “preparation,” Comment 5 states that the required attention and preparation “are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.” These factors are admittedly general, but they give far more guidance than ECs 6-3 and 6-4, the closest equivalents in the existing Code.

What about a client emergency? May a lawyer assist a client in an emergency, under tight time constraints, outside the normal range of the lawyer’s competence? Yes. Comment 3 provides that a lawyer may assist a client in an emergency, even if the lawyer lacks the skill ordinarily required, “where referral to or consultation or association with another lawyer would be impractical.” However, a lawyer should limit emergency assistance to that “reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest.”

While drafting the proposed Rules, the NYSBA Committee on Standards of Attorney Conduct (“COSAC”) recognized the danger of including a Rule that made incompetence subject to professional discipline. Therefore, Rule 1.1(b) makes clear that a single instance of incompetence is not grounds for discipline unless the incompetent conduct was deliberate or reckless. Rather, Rule 1.1(b)(1) provides that a lawyer shall not “intentionally, recklessly or repeatedly” fail to provide competent representation to a client. (The subparagraph thus borrows its substance from the title of Dr 6-101, “Failing to Act Competently.”) Thus, a single, isolated mistake will not subject a lawyer to discipline unless the lawyer acted intentionally or recklessly. As stated in Comment 5A: “in general...a lawyer is not subject to discipline for a single instance of ordinary negligence by itself.” The same comment adds that the term “recklessly” encompasses “gross negligence.” (The designation “Comment 5A” – with a capital letter following the comment number – indicates that the comment was drafted by COSAC and does not appear in the ABA model Rules. COSAC used this system to preserve uniformity with the numbering of the ABA comments and to flag comments that ordinarily will not be found in other jurisdictions.)

Removing isolated instances of negligence from the scope of the mandatory Rules is consistent with the practice of disciplinary authorities, who seldom invoke existing DRs 6-101 or 7-101 to charge lawyers with professional misconduct for isolated instances of incompetence, lack of zeal, or damage to a client. A lawyer will still be liable to a client for damages for legal malpractice or breach of fiduciary duty for even a single instance of incompetence, lack of zeal, or damage to the client, but lawyers should not have to worry that a single careless act or omission can put a law license or a career in jeopardy. Rather, the

prevailing practice is that disciplinary machinery is invoked only if a lawyer has acted intentionally, recklessly or repeatedly, as the proposed Rule specifies.

The remainder of Rule 1.1 preserves familiar concepts now found in DR 7-101. Rule 1.1(b)(2), which parallels DR 7-101(A)(1), prohibits a lawyer from failing to “seek the objectives of the client through reasonably available means permitted by law and these Rules.” Rule 1.1(b)(3), which parallels DR 7-101(A)(3), prohibits a lawyer from prejudicing or damaging a client during the course of the representation except as permitted or required by the Rules on confidentiality, withdrawal, perjury, or lying to others (respectively, proposed Rules 1.6, 1.16, 3.3 and 4.1).

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Proposed Rule 1.2 addresses four subjects: (1) the division of authority between lawyer and client, (2) lack of endorsement of a client’s political, economic, social, or moral views or activities, (3) a lawyer’s right to limit the scope of a representation, and (4) a prohibition on assisting a client’s crime or fraud. The second and third topics are not covered in the existing Disciplinary Rules. The full text of Rule 1.2 provides as follows:

- (a) Subject to paragraphs (c) and (d), 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 may take such action on behalf of the client as is impliedly authorized to carry out the representation. 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.
- (b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.2(a) generally requires a lawyer to abide by a client’s decisions regarding the “objectives” of a representation, including a client’s decision whether to settle a civil matter and a criminal defendant’s decision whether to enter a plea, waive a jury trial, or testify. This portion of the Rule is consistent with existing Dr 7-101(A)(1), which provides that a lawyer shall not intentionally “[f]ail to seek the lawful objectives of the client,” and parallels EC 7-8, which says: “in the final analysis ... the lawyer should remember that the decision whether to forgo legally available objectives ...because of nonlegal factors is ultimately for the client and not for the lawyer.” The objectives are not described in the Disciplinary Rules but are spelled out in EC 7-7, which refers to a civil client’s right to decide “whether to accept a settlement offer or whether to waive an affirmative defense” and a criminal defendant’s right to decide

“what plea should be entered and whether an appeal should be taken.” Rule 1.2(a) imports specific examples of those objectives into the black letter Rules. (A criminal defendant’s right to decide whether to appeal is not mentioned in the text or comments in Rule 1.2. The omission does not take away a criminal defendant’s right to appeal, but it avoids the implication that the lawyer who handled the underlying case must also handle the appeal if the client so directs.)

Rule 1.2(a) also requires a lawyer to consult with a client concerning the “means” a lawyer will use (as opposed to “objectives”). This portion of Rule 1.2(a) captures the ideas in existing Dr 7-101(A)(1), which provides that a lawyer does not violate the obligation of zealous advocacy “by acceding to reasonable requests by opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.” It also resembles DR 7-101(B)(1), which provides that a lawyer representing a client may, “[w]here permissible, exercise professional judgment to waive or fail to assert a right or position of the client.”

In the existing Code, EC 7-7 elaborates on the division of authority between lawyer and client by providing: “in certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client....” However, the lawyer’s authority in the Code is much narrower than the lawyer’s authority in proposed Rule 1.2(a). As explained in EC 7-8, “in the final analysis ... the lawyer should remember that the decision whether to forgo legally available objectives or methods because of nonlegal factors is ultimately for the client and not for the lawyer.” (emphasis added.) Thus, EC 7-7 and EC 7-8 appear to give the client final authority over almost all decisions, whether objectives or means/methods, whereas Rule 1.2(a) gives the lawyer final authority over “means” and entrusts only “objectives” to the client.

In my view, the division between “objectives” and “means” in Rule 1.2(a) is more workable and sensible than EC 7-8’s scheme of client control over both objectives and “methods,” but since DR7-101 is fuzzier than EC 7-7 and EC 7-8 about where to draw the line between client authority and lawyer authority, it is hard to know exactly what the Code had in mind. Moreover, the Code may force a lawyer into making choices that benefit neither the client nor the lawyer. The last sentence of EC 7-8, for example, says that if a “client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by the Disciplinary Rules, the lawyer may withdraw from the employment.” (emphasis added.)

Finally, Rule 1.2(a) improves on the Code by requiring a lawyer to consult with the client “as required by Rule 1.4” regarding the means by which the client’s objectives are to be pursued. I will address this obligation to consult when I discuss Rule 1.4.

Rule 1.2(b) covers a totally different topic – representing unpopular clients. The Rule provides that a lawyer’s representation of a client does not constitute an “endorsement” of the client’s views or activities. It has no counterpart in the existing Disciplinary Rules, but is lifted verbatim from the last sentence of EC 2-27. As a practical matter, Rule 1.2(b) – like EC 2-27 – is not an enforceable Rule (despite its location in the black letter of the mandatory Rules). One might say it is more PR than DR. But the ABA hoped its presence in the black letter text would encourage lawyers to perform pro bono work for unpopular or unsavory clients and to accept court appointments to represent them. COSAC went along to preserve

national uniformity and to avoid the implication, if the Rule had been dropped, that New York disagreed with the ABA formulation.

Rule 1.2(c) is an important Rule, especially given the current vibrant debate over “unbundling” (i.e., performing only some of the services that a lawyer would ordinarily perform for a client in a given type of matter and letting the client handle the rest of the matter pro se). Rule 1.2(c) permits a lawyer to limit the scope of the representation under two conditions: (1) the limitation is reasonable, and (2) the client consents. This Rule reflects a common understanding among lawyers but has no equivalent in the existing Disciplinary Rules. The Rule nicely complements New York’s Written Letter of engagement Rule in 22 nyCrr Part 1215, which requires a lawyer to explain the scope of the engagement.

Rule 1.2(d), which prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer “knows is criminal or fraudulent,” is a vital Rule that sets some outer limits on zealous representation, but it is nothing new. It almost precisely parallels DR 7-102(A)(7), which provides that a lawyer shall not “[c]ounsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.” However, proposed Rule 1.2(d) substitutes the more specific word “criminal” for “illegal,” thus making clear that the Rule does not encompass conduct that is merely tortious or otherwise illegal but not criminal. yet this apparent difference is partially illusory, because proposed Rules 8.4(b) and (c) provide that a lawyer or law firm shall not “engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer” (emphasis added) or “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The conduct made improper by Rules 8.4(b) and (c) may be illegal but not criminal. As expressed in Comment 2 to Rule 8.4:

Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for illegal conduct that indicates lack of those characteristics relevant to law practice. Violations involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice are illustrative of illegal conduct that reflects adversely on fitness to practice law. Other types of illegal conduct may or may not fall into that category, depending upon the particular circumstances. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. [emphasis added.]

Thus, although Rule 1.2(d) technically does not bar a lawyer from assisting a client with illegal conduct as long as the conduct is not criminal or fraudulent, Rule 8.4(b) and (c) makes plain that assisting a client with non-criminal but illegal conduct remains professionally treacherous.

Rule 1.2(d) also clarifies the prohibition on assisting a client’s criminal or fraudulent conduct by adding that a lawyer “may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” The clarification is consistent with existing Dr 7-106(A), which permits a lawyer to “take appropriate steps in good faith to test the validity of” a ruling or standing Rule of a tribunal.

Rule 1.3: Diligence

Proposed Rule 1.3 consists of a single sentence: “A lawyer shall act with reasonable diligence and promptness in representing a client.” The Rule thus expresses affirmatively the concept in existing DR 6-101(A)(3) that a lawyer shall not “[n]eglect a legal matter entrusted to the lawyer.” But Rule 1.3 goes

further than DR 6-101 because it obligates a lawyer to act with reasonable diligence and promptness even when the lawyer's actions fall well above the minimal "neglect" threshold. Rule 1.3 should thus help to keep litigation and transactions moving forward even when a lawyer is in no danger of discipline for neglect.

Rule 1.4: Communication

Proposed Rule 1.4 governs a lawyer's duties to communicate with a client, a subject covered in EC 7-8 but not in the existing Disciplinary Rules. The Rule thus builds on the common law duty of agents (lawyers) to communicate with their principals (clients). The full text of Rule 1.4 provides as follows:

- (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(g), is required by these Rules; and
 - (ii) any information required by court Rule or other law to be communicated to a client;
 - (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.
- (c) In domestic relations matters, as defined in Rule 1.0(d), a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer.

Rule 1.4(a)(1)(i) provides that a lawyer shall promptly inform the client of decisions requiring the client's informed consent. The obligation to bring decisions to the client's attention is not expressly mandated by any existing Disciplinary Rule but is consistent with the first two sentences of EC 7-8, which state: "A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so."

Rule 1.4(a)(1)(ii) provides that a lawyer shall promptly inform the client of any information that a court Rule or other law requires the lawyer to communicate to a client. The Rule thus alerts lawyers that

communication obligations may stem from legal authorities outside the Rules of Professional Conduct. it has no equivalent in the existing Disciplinary Rules.

Rule 1.4(a)(2) requires that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” The Rule mirrors Rule 1.2(a), which provides that a lawyer, “as required by Rule 1.4, shall consult with the client as to the means” by which the client’s objectives are to be accomplished. Stating the same Rule in both places is justified because the subject matter fits comfortably under both Rule 1.2 (allocation of authority between lawyer and client) and Rule 1.4 (communication). The existing Disciplinary Rules do not expressly obligate a lawyer to consult with the client regarding means, but – as pointed out earlier – EC 7-8 encourages a lawyer to make sure that client decisions are informed, and states that “the decision whether to forgo legally available objectives or methods because of non-le- gal factors is ultimately for the client and not for the lawyer.” (emphasis added.)

Rule 1.4(a)(3) requires a lawyer to “keep the client reasonably informed about the status of the matter,” and Rule 1.4(a)(4) requires a lawyer to “promptly comply with a client’s reasonable requests for information.” These Rules will help avoid client frustration and dissatisfaction, and will thus increase public confidence in the legal profession. The Rules have no direct counterpart in the existing Disciplinary Rules.

Rule 1.4(a)(5) requires a lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct ...” This duty complements the lawyer’s duty in Rule 1.2(d) not to counsel or assist the client in criminal or fraudulent conduct. The sooner clients understand that a lawyer is prohibited from fulfilling their expectations, the sooner those clients can either abandon their plans or revise them to conform to the law. The Rule has no close equivalent in the existing Code.

Rule 1.4(b) requires that a lawyer “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” This complements Rule 1.4(a)(1)(i). The requirement to explain a matter sufficiently for the client to make decisions is currently addressed in EC 7-8 but not in the Disciplinary Rules.

Rule 1.4(c) requires a lawyer in domestic relations matters to “provide a prospective client with a statement of client’s rights and responsibilities at the initial conference and prior to the signing of a written retainer.” This carries forward verbatim existing DR 2-106(F). However, because the duty to provide a client with a statement of client’s rights and responsibilities is essentially a duty to communicate, and because the statement covers various subjects beyond fees, the language of Rule 1.4(c) is placed here rather than in the Rule governing fees (Rule 1.5). As a reminder, a reinforcing Rule, which conditions a lawyer’s right to a fee on timely providing the statement of client’s rights and responsibilities, is included in Rule 1.5(d)(iv).

Conclusion: Helpful But Not Controversial

The duties articulated in Rules 1.1 through 1.4 are not controversial. Most of them have rough counterparts – and sometimes exact counterparts – in the current New York Code of Professional responsibility, usually in the ethical Considerations rather than the Disciplinary Rules. Elevating them to black letter obligations should therefore not change law practice in New York, but they should provide

useful reminders to lawyers who want to strengthen the attorney-client relationship and cement the attorney-client bond without crossing the line into unethical conduct.

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