

# The DR 1-107 Definition Of A Non-Legal "Professional"

BY ROY SIMON

**T**he most important word in new DR 1-107 (one of two new "MDP" rules that took effect on November 1, 2001) is "professional." The entire point of DR 1-107 is to authorize and regulate closer relationships between lawyers and nonlegal "professionals." Whereas new DR 1-106 governs a law firm's provision of professional or *nonprofessional* nonlegal services, new DR 1-107 governs only contractual relationships between lawyers or law firms on the one hand and nonlegal "professionals" or nonlegal "professional" service firms on the other. To understand DR 1-107, therefore, it is essential to understand the meaning of the word "professional" as the Courts intend us to understand that meaning.

The task of understanding the word "professional" is clouded because DR 1-107 seems to use the term in three different ways. The difficulty of understanding the word is further compounded by the fact that, although DR 1-107 just took effect on November 1, 2001, the courts amended both DR 1-107(B) and DR 1-107(C) in December of 2001.

## **Nonlegal "professionals" under DR 1-107(A)(1) and DR 1-107(B)**

The heart of DR 1-107 is that lawyers and law firms may enter into "contractual relationships" with nonlegal "professionals" or nonlegal "professional" service firms for the purposes of offering the public, on a "systematic and continuing basis," both the law firm's legal services and nonlegal "professional" services. (To simplify the language, this article will refer only to "lawyers" and to "nonlegal professionals," not to their firms, but the principles remain exactly the same whether the contracting parties are individuals or firms.)

However, the right to enter into contractual relationships with nonlegal professionals is not unlimited. Rather, DR 1-107(A) permits such contractual relationships only "provided that" they meet three specified conditions. The only condition relevant for purposes of this article is DR 1-107(A)(1), which requires the following:

The profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to section 1205.3 of the Joint Appellate Division Rules.

Section 1205.3 of the Rules, entitled "List of Professions," is contained in new Part 1205 entitled "Cooperative Business Arrangements Between Lawyers and Nonlegal Professionals," which took effect simultaneously with DR 1-107 on November 1, 2001. Section 1205.3 does not move our analysis very far along. It says:

- (a) The Appellate Divisions jointly shall establish and maintain a list of professions, designated by the Appellate Divisions *sua sponte* or approved by them upon application of a member of a nonlegal profession or nonlegal professional service firm, with whose members a lawyer may enter into a cooperative business arrangement to perform legal and nonlegal services as authorized by §1200.5-c [DR 1-107] of the Disciplinary Rules.
- (b) A profession shall be eligible for inclusion in the list if the profession is composed of individuals who, with respect to their profession, meet the requirements set forth in §1200.5-c(b)(1) [DR 1-107(B)(1)] of the Disciplinary Rules.

That brings us to the key for defining the term "professional"- the three criteria in DR 1-107(B).

### **The three criteria in DR 1-107(B)**

DR 1-107(B) was amended right before Christmas. As amended, DR 1-107(B) provides that for purposes of DR 1-107(A), each profession on the list maintained by Appellate Divisions shall have been designated based "upon a determination that the profession is composed of individuals who, with respect to their profession" meet three stringent criteria. Specifically, the Appellate Divisions must find that all of the individuals in the profession:

- (a) have been awarded a Bachelor 's Degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;
- (b) are licensed to practice the profession by an agency of the State of New York or the United States Government; and
- (c) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession. (*Underscoring indicates language added by the December 2001 amendments.*)

I will discuss each of these three criteria separately.

Before the December 2001 amendment, the first criterion was simple and completely objective - "a Bachelor's Degree or its equivalent from an accredited college or university." Thus, if a profession required all of its members to earn a B.A., a B.S., or any similar four-year degree from an accredited institution of higher learning, that profession would meet the first of the three criteria to make it eligible for inclusion on the Appellate Divisions' list of approved professions.

The December 2001 amendment enormously complicated this determination by providing professions with an option. Instead of requiring its members to earn a Bachelor's Degree, a profession can instead satisfy the education requirement by requiring all of its members to attain "an equivalent combination of educational credit from such a college or university *and work experience.*" What does that mean? The problem is that "work experience" is ambiguous. Does it mean work experience *before* starting work in a given profession, or does it mean "on the job" experience *after* starting work in that profession? Or does the work experience have to be connected with that profession at all?

As interesting as those questions are, I will not take time now to answer them. I frankly do not know the answers, and I don't think anyone will know for sure until the Courts approve some professions that do not require a Bachelor's Degree of their members but satisfy the alternative education test by requiring a combination of formal higher education and work experience. Rumors are circulating that the amendments will enable financial planners to get on the list of approved professions, but for now we will just have to wait.

The second criterion is the easiest - all members of the profession must be licensed by the State of New York or by some federal government agency. This is completely objective and should not pose any interpretive problems.

The third criterion is the hardest - the members of the profession must "adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession," and must face the penalty of suspension or revocation of their state or federal license if they violate that ethical code. Neither DR 1-107(B)(1) nor §1205.3 provides any guidance for determining whether a code of ethical conduct is "reasonably comparable" to our Code of Professional Responsibility.

Nonetheless, in December of 2001 the Appellate Divisions quietly issued the initial list of approved professions. The list includes five professions:

- Engineer
- Social worker
- Accountant
- Architect
- Surveyor

The list was issued so recently that I have not had time to study the ethical codes of the five listed professions. But we do know the answer to at least one big question. By approving accountants, the Appellate Divisions have indicated that they are not demanding conflict of interest rules as strict as the conflict rules of the legal profession. (By using the term "accountant" the courts sidestepped or neglected the subsidiary question: do we include all accountants or only those who have qualified as CPAs?)

The task of dissecting the Appellate Divisions' list of professions will have to wait until another day. At this juncture, I just want to make one simple and critical point: DR 1-107(A) and (B)(1) envision two different categories of professions - those that are actually listed on the Appellate Divisions' joint list, and those that are merely eligible to be listed on that list. What difference does that make? That is one of the questions I will address in the next section of this article.

### **Nonlegal "professionals" under DR 1-107(C)**

DR 1-107(C) is perhaps the most significant provision in the new MDP rules, and will almost certainly have the biggest impact on the day-to-day practice of law for the vast majority of lawyers. As amended in December of 2001, DR 1-107(C) provides as follows:

(C) ~~Section 1200.5-c(a)(1) [DR 1-107(A)(1)]~~ 1200.5-c(a) [DR 1-107(A)] shall not apply to relationships consisting solely of nonexclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm. (*Underscoring and strike-throughs indicate language added or deleted by the December 2001 amendments.*)

Understanding the import of these amendments requires a brief review. New EC 1-14, which is the first of six new Ethical Considerations that took effect on November 1, 2001 to expand on DR 1-107, begins by describing the two basic forms of contractual relationships encompassed by DR 1-107:

*EC 1-14* 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. ...

DR 1-107(C) concerns only the first of these two forms, nonexclusive reciprocal referrals. If the contractual relationship between lawyers and nonlegal professionals is limited to an agreement or understanding that they will refer matters to each other whenever appropriate, then DR 1-107(A)(1) does not apply. DR 1-107(A)(1) is the provision that requires nonlegal professionals to be "included in a list jointly established and maintained by the Appellate Divisions ...." Since that provision does not apply to mere reciprocal referral agreements, a lawyer may ethically enter into a nonexclusive reciprocal agreement or understanding with nonlegal professionals who are *not* on the Appellate Divisions' list of approved professions. The nonlawyers must be "professionals," but they need not be on the Appellate Divisions' approved list.

What does it mean to be a "professional" whose profession is not on the Appellate Divisions' list? I think it means two things.

First, if a nonlawyer belongs to a profession that is not on the official list of approved professions but is "eligible for inclusion in the list" (to use the language of § 1205.3(b)), lawyers may clearly enter into a nonexclusive reciprocal referral agreement or understanding with that nonlawyer. Although the lawyers may not enter into agreements with such "eligible" nonlegal professionals that "provide for the sharing of premises, general overhead, or administrative costs and services" (to quote EC 1-14), they may contract to refer matters back and forth whenever appropriate.

Second, if a nonlawyer belongs to a profession that is *not* "eligible for inclusion in the list" but is commonly considered to be a "profession," or if a nonlawyer *personally* meets the three criteria stated in DR 1-107(B)(1) even though his profession as a whole does not, then in my view DR 1-107(C) would also make it ethical for lawyers to enter into a nonexclusive reciprocal referral agreement or understanding with that non-lawyer. For example, lawyers should be permitted to enter into reciprocal referral agreements with insurance agents, chiropractors, real estate brokers, speech therapists, and others that belong to professions that may not be eligible for inclusion on the official Appellate Division list of approved professions. Otherwise, many lawyers will be unwilling to enter into reciprocal referral agreements with such people.

My second idea is more controversial. Nevertheless, unless the term "professional" includes individuals that personally satisfy the standards in DR 1-107(B)(1) or that society commonly thinks of as "professionals," then DR 1-107 may never live up to its promise of enabling lawyers and nonlegal professionals to offer coordinated legal and nonlegal professional services to the public on a "systematic and continuing basis." If reciprocal referral agreements are limited to nonlegal professionals whose professions are either on or eligible for the Appellate Divisions' official list of approved professions, many of the advantages of DR 1-107 will be lost.

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