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THE 1999 AMENDMENTS TO THE ETHICAL CONSIDERATIONS IN NEW YORK'S CODE OF PROFESSIONAL RESPONSIBILITY

Roy Simon

I. INTRODUCTION

It is an honor to be on a program named for a lawyer who is so beloved and esteemed and who devoted as much of his own professional life to the legal world and to the improvement of the legal profession as Neil Shayne did. It is a great opportunity to be on a panel with all of these people who devote so much of their professional lives to improving the legal profession.

I will focus tonight only on the 1999 Amendments to the Ethical Considerations ("ECs") in New York's Code of Professional Responsibility. There has not been a lot of attention paid to these Amendments, partly because the ECs are adopted only by the New York State Bar Association.¹ They are not adopted by the courts.² As such, they do not have Part 1200 numbers and are not part of the official compilation of New York Codes, Rules and Regulations ("NYCRR"). Therefore, when the stories came out in mid-July about the Amendments to the Code of Professional Responsibility, they generally did not cover anything about the ECs.³ Although, as Steve Krane mentioned, the ECs are formally considered aspirational and are not mandatory, they are very influential nevertheless. The courts like to look at them to interpret what the Disciplinary Rules ("DRs") mean and to give a little more

² See id.
“pizzazz” and a little more of a lofty feeling to opinions in cases about malpractice, breach of fiduciary duty, and motions to disqualify counsel. I do not know how many lawyers have ever been the target of a motion to disqualify but it is very disconcerting. Essentially, a lawyer is being told that he is unethical. A great deal of guidance on conflicts of interest can be found in the ECs.

II. THE 1999 AMENDMENTS TO THE ECs

There are nine Canons in the Code of Professional Responsibility. In Canons 1, 4, 8, and 9, there are no changes whatsoever to the ECs. In Canons 3 and 6 there are only small changes. In Canon 3, EC 3-8 was slightly amended to include the word “compensation” to the non-lawyer employee payment exception contained in DR 3-102(A)(3). The amendments to the ECs in Canon 6 basically say that lawyers can practice in limited liability partnerships (“LLPs”) or limited liability companies (“LLCs”) without violating DR 6-102 by prospectively limiting liability to clients for legal malpractice. A lawyer’s retainer agreement cannot ethically contain a covenant stating that the client will not sue the lawyer if the lawyer commits malpractice. And EC 6-6 has been amended to take into account the fact that a lot of lawyers now practice in LLPs and LLCs, which is okay because, as EC 6-6 now explains, lawyers may ethically limit their liability that way to the extent permitted by law.

Notice that in less than two pages I have covered more than half of the Code. I will now discuss a number of the recent amendments to the ECs contained in Canons 2, 5, and 7.

A. Canon 2—“A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available”

In Canon 2, there are a couple of very interesting changes. DR 2-101(B), the basic rule on advertising, used to explicitly prohibit a lawyer from engaging in the use of advertisements that contained puffery or self-laudation. The 1999 Amendments eliminated the explicit prohibition, but a new EC 2-10 explains that communications involving puffery are “prohibited to the extent that they are false, deceptive, or

4. See SIMON, supra note 1, at 11, 243, 495, 502-03.
5. See id. at 239.
6. See id. at 422.
7. See id.
8. See id.
misleading."

But have you ever seen an advertisement that does not laud the lawyer? Have you ever seen a lawyer advertise by stating that he is not such a good lawyer, but that you should call him because he needs the business? Yet I do not think anybody was ever disciplined for self-laudation, so perhaps that is why the old ban on puffery and self-laudation is gone, but in its place there is a new sentence in EC 2-10 which provides: "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." So be careful if you say, for example, that your law firm is the best in Nassau County, the most experienced in Suffolk County, or the preeminent law firm in a particular field. These examples would still be considered "deceptive or misleading" because the examples cannot be verified.

Another new sentence at the end of EC 2-10 states: "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."

What about web pages? The advertising rules were the first ones to be worked on. There was a special commission on advertising that was superseded by the Krane Committee. I am willing to bet that at the time this was first thought about, nobody was thinking about the Internet. I am not sure how Internet advertising issues will be handled, but there are a number of ethics opinions on the subject by the New York City Bar Ethics Committee, the New York State Bar Ethics Committee, and the Nassau County Bar Ethics Committee. I think that if a lawyer targets specific print advertising or buys radio time in another jurisdiction, then he is supposed to comply with this EC, but of course the ECs are not mandatory so I wonder whether there is any real meaning to it. Certainly we will have to think hard about the regulation of lawyer advertising in the context of the Web.

9. Id. at 76.
10. See id.
11. Id. at 75.
12. Id.
13. See Special Committee on Lawyer Advertising and Referral Services, New York State Bar Ass'n, Attorney Advertising Committee Report, Sept. 1995, at 1 ("The New York State Bar Association's Special Committee on Lawyer Advertising and Lawyer Referral Service Regulation . . . was appointed by President John Bracken in the spring of 1993 . . . .").
15. See SIMON, supra note 1, at 78.
16. See id. at 80.
Another change can be found in EC 2-14. This is an amusing EC because it fills out in fairly graphic detail what is meant by false, deceptive, or misleading communications. EC 2-14 was a vacant lot. It had been repealed some years ago, but now something has been put in its place which says: "The following, if used in public communications or communications to a prospective client, are likely to be false, deceptive or misleading." I think the word "public" means communications through the media. But how does the new language apply to a "prospective client?" Does it mean that a lawyer cannot say the items listed in EC 2-14 when somebody comes to that lawyer's private office for an interview? In any event, it would likely be deceptive and misleading if an attorney promised the outcome in any legal matter. I recently came across a case from South Carolina where a client sued the lawyer for failing to live up to a promise, and I tell my students never to promise the client a certain outcome because the client can sue if the lawyer does not live up to the promise. Now EC 2-14 provides another reason for not promising the outcome, stating explicitly that "a communication that promises the outcome of any legal matter" is likely to be deemed "false, deceptive or misleading," which is unethical.

It is also unethical to have "a communication that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official." Do not say to a client: "I know Bob the court clerk, so I will get this case handled right away." Do not drop names about court personnel or judges. Also improper is "a letter or other written communication made to appear as a legal document." There actually are some lawyers who send out advertisements that look like court documents. This is not permitted, but targeted mail in general is permitted because an attorney has had a First Amendment right to do so since 1988. In addition, the following are likely to be considered false, deceptive, or misleading:

[T]he inclusion of names, addresses and telephone numbers as required by DR 2-101(K) in a manner that is too small or too fast for an average

17. See id. at 75-76.
18. See id. at 75.
19. Id.
20. See id.
22. SIMON, supra note 1, at 75.
23. Id.
24. Id.
viewer to receive the information in a meaningful fashion; ... the use of dollar signs, the terms “most cash” or “maximum dollars,” or like terms that suggest the outcome of the legal matter; ... the use of an actor to portray the lawyer or another representative of the lawyer’s firm; or ... any other use of an actor or use of a dramatization without meaningful disclosure thereof. 26

I wish the disciplinary committee had the money to hire more staff attorneys so that these problems could be dealt with more systematically. Advertising is the most public of all the actions by lawyers and yet, realistically, the disciplinary authorities would rather go after an embezzler than after somebody who advertises deceptively.

Now, I come to a very interesting issue. There was a lawyer who had copies of settlement checks on the desk under a glass desktop. The checks had dollar signs, of course. Is that prohibited under EC 2-14? Literally, yes.

B. Canon 5—“A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”

Canon 5 has some changes that are highly significant. In EC 5-4, the entire first paragraph is new 27 and it makes two major points. One point is that an attorney cannot use information obtained from a client to make an investment that damages the client. 28 For example, if the client is buying up vacant lots in order to develop a housing site or strip mall, the attorney cannot buy one of those vacant lots in the hopes of making a profit by selling it to the client. Another point is that if a client is a dentist or an accountant, for example, it is permissible for the attorney to enter into “standard commercial transactions” with those clients (i.e., to use those clients for dentistry or accounting) because those services are marketed on the same terms to others. 29

The changes in EC 5-15 are much more significant. The last three sentences of EC 5-15 are new. 30 The changes begin with the word “simultaneous” and provide that “[s]imultaneous representation in unrelated matters of clients whose interests are only generally diverse, such as competing economic enterprises, does not by itself require consent of the respective clients.” 31 So if an attorney represents one

26. SIMON, supra note 1, at 75-76.
27. See id. at 317.
28. See id.
29. See id.
30. See id. at 330.
31. Id. (underscoring omitted).
music store and then a second client who owns a music store hires the lawyer, this does not necessarily mean that the lawyer has a conflict, even though it may seem so.

In some cases, such as a zoning variation, representing competing enterprises is not advisable because one client may want the variance and the competitor may oppose it. However, just because an attorney represents two companies in the same industry does not automatically mean that there is a conflict. Similarly, and this is one of the most vexing issues for lawyers, suppose an attorney is arguing one position about the law on behalf of one client and the opposite position on behalf of another client in two unrelated matters, with one pending in Nassau Supreme Court and the other in Suffolk Supreme Court. This is ordinarily considered permissible and is not considered a conflict.\(^{32}\) There is a caveat to this, however, where the representation of either client would be adversely affected.\(^{33}\)

EC 5-16 contains a very important change.\(^{34}\) The second sentence now states:

before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing.\(^{35}\)

The phrase "giving due regard to the sophistication of the client" is tremendously important. Not all clients are the same. A sophisticated business client will not require as much disclosure as a new personal injury client. A lawyer with a personal injury or matrimonial practice will have to explain possible conflicts to clients in some detail because personal injury and divorce clients are not—we hope—repeat players in the legal system. A lawyer dealing with sophisticated business people who have a lot of experience, on the other hand, will not have to make such detailed disclosures, particularly if dealing with in-house counsel,

\(^{32}\) See id. (quoting the second amendment to Ethical Consideration 5-15 and stating that "a lawyer may generally represent parties having antagonistic positions on a legal question that has arisen in different cases. . . . Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts").

\(^{33}\) See id. (limiting the permissibility of this practice in situations where "either client would be adversely affected").

\(^{34}\) See id. at 345-46.

\(^{35}\) Id. (underscoring omitted).
as opposed to dealing with just an ordinary client. The purpose of disclosure is to permit the client to appreciate the significance of the potential conflict. People with a lot of experience with lawyers are going to appreciate potential conflicts a lot faster than people with less experience. And I think that it is right to have this EC because there is no reason to mandate that clients pay lawyers by the hour—or that lawyers waste clients’ time—to explain boilerplate information that clients already know. Simply put, if the client already knows it, it is not necessary to say it.

However, be careful of the last sentence in the next full paragraph of EC 5-16, which states: “In all cases in which the fact, validity or propriety of client consent is called into question, the lawyer must bear the burden of establishing that consent was properly obtained and relied upon by the lawyer.” So if the client later says that “the lawyer never told me this” or that “the lawyer explained this conflict but did not say how it might play out,” the burden will be on the attorney to show that he made a reasonable disclosure under the circumstances. I would go back to Grace Moran’s statement that you ought to have a writing and, relating her advice to the language in EC 5-15, not only does each client have to consent, but preferably each client’s consent should be in writing. It does not take very much effort to get a written disclosure and it will save you a lot of time in the long run. So please take the time to put the conflict disclosure in writing and, if you can do so, get it signed by the client. If you cannot get a client to sign a disclosure letter, send the client a letter reciting the potential conflicts and the implications that you have explained orally and confirming the client’s oral consent.

The next full paragraph is vitally important. There is such a thing as a non-consentable conflict. There are conflicts that are so serious that even if a client is willing to consent to them, the attorney cannot accept that consent. It is impossible to draw a bright black and white line that can clearly divide consentable from non-consentable conflicts, but EC 5-16 gives a lot of guidance. It provides, in pertinent part, that “[i]f a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the

36. See id. at 338.
37. Id. at 346 (underscoring omitted).
38. See id.
39. See id. at 345-46.
40. See id. at 330.
lawyer involved should not [even] ask for . . . [the client’s consent and should not] provide representation on the basis of the client’s consent.”

What is a “disinterested lawyer?” It is not an actual lawyer. It is a fictional lawyer who has no financial interest in whether or not the real lawyer accepts or continues the representation. A disinterested lawyer is a fictional lawyer whose only role is to advise the client whether or not to consent to a conflict. And if a disinterested lawyer would advise a client not to consent—if a disinterested lawyer would say, for example, “this conflict is so serious that no client should consent to it,”—then even if the client offers her consent and urges the lawyer to accept or continue the representation, the lawyer still cannot accept or rely on that consent.

In order to make full disclosure, of course, sometimes a lawyer has to tell his client the details about another client’s plan. For example, if one client wants to open up a store in a strip mall, that client should know that his lawyer has another client that also wants to open up a store nearby. But the lawyer cannot tell one client about the other client unless the other client gives that lawyer permission to tell him. But as my father always asked, “Does Macy tell Gimbal?” Sometimes the attorney is not going to be able to get the consent to disclose the confidences that he would need to disclose in order to obtain informed consent, but he cannot take on the representation if he cannot make a full disclosure. It is not going to be a valid excuse for the attorney to say that he wanted to tell his client but could not do it. If the attorney cannot tell him, the attorney cannot get consent.

EC 5-18 is partly new, partly old, and partly just moved around. I think of it as mostly a rule for lawyers who represent large organizations. It is not really a small business type of rule. The first sentence of EC 5-18 says that if an attorney represents an organization, then he only represents the organization itself and does not, unless he has a separate agreement, represent the directors, officers, shareholders, or others noted in the EC. When an attorney represents a small business, it is tough to draw the line. There are even cases in New York that say that if the attorney does not expressly disclaim representation of the individuals when he represents a fifty-fifty corporation, he automatically is considered to represent the individuals. I do not think that it is a great business getter for an attorney to say that he does not

41. Id. at 346 (emphasis added) (underscoring omitted).
42. See id. at 341.
43. See id. at 396.
44. See id. at 332-33.
represent the individuals who founded and now run the business, but rather represents only the corporation, and that he really does not care about the individuals. But EC 5-18 demands that the lawyer for an organization put the interests of the organization ahead of the individuals who run it. 45

C. Canon 7—"A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"

EC 7-18 has been substantially expanded. 46 Much of it is entirely new. The new material says that "[A] lawyer may properly advise a client to communicate directly with a represented person." 47 DR 7-104 is the so-called "no contact rule." 48 A lawyer cannot communicate with a party represented by counsel on the subject matter of the representation without the consent of the opposing lawyer unless authorized by law. 49 Inasmuch as a lawyer usually does not get consent, this requirement is usually insurmountable unless he is authorized by law, and if the lawyer is not a district attorney in a criminal case and is not taking a deposition in a civil case, then he is not authorized by law. 50 So essentially, the no contact rule provides that a lawyer cannot communicate with a party represented by counsel. It also provides that the lawyer cannot cause another to communicate if the lawyer personally would not be allowed to do so. 51 But what about the lawyer's own client? Can a lawyer ask his own client if he wants to save some hassle and some legal fees, and get around that obstreperous lawyer on the other side by talking directly with the opposing party? Can the lawyer suggest to his client that the client just approach the other side and see if the dispute or the deal can be worked out? Would that violate DR 7-104? The lawyer is, after all, causing another to communicate. Before the 1999 Amendments, there was a debate about this question. Some people thought yes, some people thought no. The Professional Responsibility Committee of the New York City Bar said that if it is the client's idea, then the lawyer can tell the client that it is okay. 52 The lawyer can also tell the client that he has

45. See id. at 396.
46. See id. at 458-59.
47. Id. at 458 (alteration in original) (underscoring omitted).
48. Id. at 448.
49. See id. at 447.
50. See id. at 449.
51. See id. at 447.
52. See id. at 458.
the right to do this, but the lawyer could not tell the client what to say. That would be improper.

Now, DR 7-104(B) has settled the debate. It rejects the New York City Bar approach. It says that “a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party’s counsel that such communications will be taking place.” Reasonable advance notice is notice that provides the opposing lawyer with enough time to advise his client. The result of DR 7-104(B) is that the lawyer does not need the other lawyer’s consent to have his client talk to the other side, and under EC 7-18 the lawyer can also advise a client with respect to those communications. Just remember that the lawyer must provide the other party’s lawyer with reasonable advance notice before doing so.

What does “reasonable advance notice” mean? There is a specific line in both EC 7-18 and DR 7-104 that permits a lawyer to encourage client-to-client communications “provided the lawyer gives reasonable advance notice to the represented party’s counsel that such communications will be taking place.” My idea is that reasonable advance notice is a flexible concept. I think that it means at least long enough for the opposing lawyer to get in touch with her client. In most situations, therefore, I would think at least one business day would be the minimum amount of advance notice that would be reasonable. If direct client-to-client communications take place and the other lawyer says she was never able to get in touch with her client before they went forward, then the lawyer who initiated the client-to-client communication might be in trouble. I also think that if the lawyer has already scheduled the meeting three weeks in advance, he could not wait until the day before to tell the other lawyer. While I do not think the lawyer has to notify the opposing lawyer the minute she finds out that her client is going to be meeting with the opposing client, I do believe that last minute notice is not “reasonable.” Reasonable advance notice, according to EC 7-18, “means notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person’s lawyer has an opportunity to advise his or

53. Id. at 447.
54. See id. at 456.
55. See id. at 455-56.
56. See id. at 456.
57. Id. at 447.
III. CONCLUSION

This basically completes my discussion of the amendments to the ECs. I think the amendments are helpful but I hope that in the future some additional ECs will emerge to explain rules such as DR 1-105,\textsuperscript{63} DR 2-111,\textsuperscript{64} and DR 5-111.\textsuperscript{65} These are new rules that really could use some additional explanation.

\textsuperscript{63} See id. at 51-52.
\textsuperscript{64} See id. at 202-03.
\textsuperscript{65} See id. at 406-07.
her own client with respect to the client-to-client communications before they take place.\footnote{58} I think if the lawyer is sending papers, he has to send those papers to the opposing lawyer also.

The lawyer also has to advise the client against engaging in abusive, harassing, or unfair conduct.\footnote{59} Observe that this is an affirmative obligation. It is not enough that the lawyer did not encourage the client to engage in abusive, harassing, or unfair conduct. The lawyer has to affirmatively say to the client that the client cannot engage in abusive, harassing, or unfair conduct when talking to the other side. How much the lawyer has to fill that out probably depends on how well the lawyer knows his client. Grace Moran pointed out that in matrimonial cases, improper conduct by clients is going to be a problem. If the lawyer has a problem client, I think he ought to warn that client more sternly.

Finally, for those who go into their own litigation, there is a thoughtful, yet opaque sentence in EC 7-18 which reads that “[a] lawyer who is a party or who is otherwise personally involved in a legal matter or transaction, whether appearing pro se or represented by counsel, may communicate with a represented person on the subject matter of the representation pursuant to the provisions of DR 7-104(A) and (B).”\footnote{60} I am not sure what this means. If it means pursuant to provisions of DR 7-104(A), what good does this do? One has always been able to communicate subject to DR 7-104(A) so what is the meaning of this sentence? I think it means that the lawyer-party, whether represented or pro se, may communicate directly with the other party either with the consent of the represented party’s lawyer pursuant to DR 7-104(A), or upon reasonable advance notice to the represented party’s lawyer pursuant to DR 7-104(B).\footnote{61} With a non-lawyer client, if the client wants to talk to the opposing party without the opposing lawyer’s knowledge or consent, that client may do so. But if the client is both a lawyer and a litigant, he has to give advance notice to the opposing lawyer before he can undertake his own communication.\footnote{62}

\footnote{58. \textit{Id.} at 459 (underscoring omitted).}
\footnote{59. \textit{See id.}}
\footnote{60. \textit{Id.} (underscoring omitted).}
\footnote{61. \textit{See id.} at 458.}
\footnote{62. \textit{See id.}}