
Grace D. Moran
NEW YORK’S AMENDED CODE OF PROFESSIONAL RESPONSIBILITY: A GUIDE TO WHAT’S NEW

Grace D. Moran*

I am proud and privileged to be asked to speak at the first Neil T. Shayne Memorial Lecture. To all the recently admitted attorneys in this room, the best I can wish for you is that you find your Neil Shayne, who will offer you the advice, help, and guidance that Neil gave to me and to so many in this room.

I have been asked to comment on some of the recent amendments to the New York Code of Professional Responsibility ("Code") from the perspective of the Grievance Committee. Many of the changes serve to harmonize the Code with the decisions of the Supreme Court. Some are merely technical corrections, but others are substantive and hold the promise of fundamental change in the practice of law.

The 1999 amendments reflect the evolution of disciplinary rules. Disciplinary Rule ("DR") 1-102 of the Code primarily defines misconduct. The term "moral turpitude" has been dropped in favor of prohibiting "conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer." The term "as a lawyer" has also been added to the language of the former DR 1-102(A)(7). This all-purpose, which is a favorite of the grievance counsel, now prohibits

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3. See id. app. DR 1-102.
6. Id. app. DR 1-102(a)(7).
conduct that adversely reflects on the lawyer's fitness "as a lawyer." The rule was amended to more plainly apply to conduct occurring in the lawyer's personal life—although that was pretty much the way we approached this rule in the past anyway. However, it is now clearer that personal conduct is also subject to scrutiny by a committee.

DR 1-104 refers to the responsibilities of partners, supervising lawyers, and subordinate lawyers. This change has been building for some time. If you practice in a firm, you should review this rule carefully. In the old days, of which I was a part, ethical violations were considered personal to the actor. We did not sanction firms. Now, however, the Grievance Committee does sanction firms in appropriate circumstances. Also, you should be aware that recent decisions by the Appellate Divisions have held partners to a very strict standard. In one case, the partners of a misbehaving lawyer were all sanctioned. In another case involving a two-partner firm, the so-called innocent partner was censured. You really want to investigate this rule with particular care because the behavior of your partner could decide your fate.

The lesson contained in DR 1-104 for associate or subordinate attorneys is that they are responsible for their conduct. Chris McDonough, Assistant Counsel to the Grievance Committee for the Tenth Judicial District, pointed out to me today that the days of apprenticeships and protecting new associates, at least in this area, appear to be over. Subdivision (e) of this rule makes it clear that the excuse, "my boss made me do it" or "my client wanted it done that way" will not be successful defenses to grievance charges.

8. Id.
10. See id. app. DR 1-104.
11. See, e.g., Anthony E. Davis, Professional Discipline of Law Firms—The Emperor Needs New Clothes, 6 PROF. LAW. 1, 1 (Nov. 1994) (discussing the conflict over holding firms accountable for actions of individual attorneys).
12. See, e.g., In re Levey, 711 N.Y.S.2d 372, 372 (App. Div. 2000) (holding that a supervising attorney failed to adequately supervise a subordinate attorney); In re Chaturpaul, 706 N.Y.S.2d 714, 716-17 (App. Div. 2000) (adjudicating a dispute in which an attorney was held responsible for his failure to adequately supervise a non-attorney employee and for having had knowledge that that employee had engaged in misconduct prohibited by the rules); In re Orseck, 692 N.Y.S.2d 766, 768 (App. Div. 1999) (ordering an attorney censured after he was held responsible for the misconduct of his law partner).
13. See In re Levey, 711 N.Y.S.2d at 372.
14. See In re Orseck, 692 N.Y.S.2d at 768.
15. See N.Y. JUD. LAW app. DR 1-104(e) (McKinney Supp. 2000) ("A lawyer shall comply with these Disciplinary Rules notwithstanding that the lawyer acted at the direction of another person.").
Subdivision (f) indicates that there will be no violation of this Rule if the subordinate attorney follows the supervisory lawyer's instructions in areas of "an arguable question of professional duty." This standard confuses me, and perhaps Steve Krane and Professor Simon will clarify why it was included. From a practical point of view, when a grievance committee is presented with a close question of an "arguable duty," there is often heated debate among the members about the right and wrong of the conduct. As many prior members of the Grievance Committee who are here know, including Peter Affatado, a consensus is usually reached, but one thing is certain: there will be no sanction against an attorney for guessing wrong on a close question of conduct where the duty is "arguable."

DR 1-105 is the choice of law provision. This helps grievance committees with a situation that is encountered more and more by lawyers today. Sometimes we seem to be faced with a situation where the penalty in New York is greater than what would be applied in the state wherein the misconduct actually occurred. I think this rule will permit us to be more consistent in our handling of these matters.

DR 2-101—Publicity and Advertising—brings the Code into compliance with Supreme Court decisions. The Code still allows us to target language that is misleading or actually untruthful, but a close reading reveals that the new Disciplinary Rules do not permit any regulation of advertising to insure good taste. Consequently, I think we can expect further deterioration in the advertising in this state.

Solicitation—DR 2-103 is the result of Florida's unsuccessful attempt to enact an absolute thirty-day ban on targeted mail solicitation of accident victims and families.  

16. Id. app. DR 1-104(f).

17. See id. app. DR 1-105.

18. Compare In re Marin, 673 N.Y.S.2d 247, 248 (App. Div. 1998) (suspending a lawyer for six months for having brought a frivolous and vexatious lawsuit in violation of Disciplinary Rule ("DR") 1-102), with In re Hecker, 538 A.2d 354, 359, 361 (N.J. 1988) (suspending an attorney for six months for not only filing a frivolous lawsuit, but additionally, for having engaged in over billing, conflicts of interest, and concealment of assets violations), In re Disciplinary Action Against Selmer, 568 N.W.2d 702, 704-05 (Minn. 1997) (suspending an attorney for twelve months for having engaged in a pattern of harassing and frivolous litigation), and In re Disciplinary Proceedings Against Ratzel, 487 N.W.2d 38, 38, 41 (Wis. 1992) (suspending an attorney for five months as a penalty for having brought frivolous and vexatious actions).


As you know, New York does not recognize any specialties except the traditional ones—patent and trademark. With DR 2-105—Identification of Practice and Specialty—you can now designate yourself as a specialist if you are certified by a recognized organization and if you include the disclaimer set forth in this rule word for word. I have seen several letterheads that refer to someone having been designated as a specialist by a particular organization with the accompanying disclaimer running along the bottom of the page. I think that the whole idea loses its intended effect with this specific required disclaimer.

Canon 5 of the Code contains the conflict section. This is a major revision. This section is important because it is the one most likely to provide a basis for a malpractice action. It is one of the fastest growing areas in the disciplinary field and a letter of caution or admonition issued to an attorney for engaging in a conflict of interest often ends up being offered as evidence in a malpractice action.

There are three basic potential conflicts. The first is between a lawyer’s interest and the client’s interest. For example, a client comes to you for a zoning change application. If successful, your view of the beach will be wiped out. This is a personal conflict. The second is a transaction between a lawyer and a client. An example of this is a loan from a client to a lawyer which is a shockingly common occurrence. The question here is who protects the client’s interests. Who does the credit check on the attorney? Who determines whether the terms are fair? Almost invariably the client is not separately represented. The third type of conflict is simultaneous representation. A lawyer representing a bankrupt debtor and a creditor in the same action is an example of this type of conflict.


22. See app. DR 2-105(c). If certified “by a private organization approved for that purpose by the American Bar Association,” then the lawyer must include the following language: “The (name of the private certifying organization) is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.” Id. app. DR 2-105(c)(1) (emphasis added). If certified “by the authority having jurisdiction over specialization under the laws of another state or territory,” then the lawyer must include the following language: “Certification granted by the (identify state or territory) is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.” Id. app. DR 2-105(c)(2) (emphasis added).

23. See id. app. Canon 5.
The revised rules require consent and disclosure in all these situations.\(^\text{24}\) Sometimes a writing is mandated;\(^\text{25}\) other times it is not.\(^\text{26}\) Forget these distinctions. Do not accept or continue representation involving a conflict of interest without a writing. All disclosures to, and all consents of, clients should be in writing. If the client is unsophisticated or if the conflict presented is particularly involved or severe, you should include in this packet of papers the advice you gave to the client to get legal advice from an independent attorney with respect to the conflict. I urge you to ignore the rule with respect to when you need a writing and when you do not need a writing. You should always use a writing in these situations.

In DR 7-104—Communicating with Represented or Unrepresented Persons—the title was amended to include the word “persons” to indicate that it did not apply only to litigants.\(^\text{27}\) Subsection (b) is the one that I think will generate the most work for a grievance committee.\(^\text{28}\) It permits lawyers to advise clients to engage in discussion with represented persons provided sufficient notice is given to the represented person’s counsel.\(^\text{29}\) This will be a significant tactic in matrimonial actions where one party is the more dominant or controlling. The other problem that is presented by this Rule is discerning what constitutes sufficient notice. This will generate all kinds of mischief.

\(^\text{24}\) See id. app. DR 5-101; DR 5-104; DR 5-105.
\(^\text{25}\) See id. app. DR 5-104(a)(1), (3) (providing that written consent is required for business transactions between lawyers and their clients).
\(^\text{26}\) See id. app. DR 5-101(a) (stating that where there is a conflict of interest between the client and the lawyer’s personal interests, the client must consent after full disclosure); id. app. DR 5-105(c) (providing that “a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interests of each client and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved”).
\(^\text{28}\) See N.Y. Jud. Law app. DR 7-104(b) (McKinney Supp. 2000). This subsection provides: Notwithstanding the prohibitions of section 120035(a) of this Part [DR 7-104(a)], and unless prohibited by law, a lawyer may cause a client to communicate with a represented person, if that person is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.
\(^\text{29}\) See id.
DR 7-107—Trial Publicity—accepts a widespread practice. Lawyers may now make statements that are "required to protect a client from ... [adverse] publicity ... [and] to mitigate ... adverse publicity." Violations will be nearly impossible to prosecute unless the facts were particularly egregious.

I have saved the best for last, which is DR 3-102—Dividing Legal Fees with a Non-Lawyer. There is an innocent explanation for this change, which now permits bonuses for secretaries and paralegals based on a percentage of the profit at the end of the year. However, a literal reading of this rule seems to foreshadow multi-disciplinary practice, or the one-stop shopping law firm. Recently, two partners from King & Spalding, an Atlanta law firm, joined forces with Ernst & Young, the accounting firm, to form McKee, Nelson, Ernst & Young. They will advertise themselves as a one-stop shopping firm for legal advice, accounting, and consulting services. The parties claim that the name McKee, Nelson, Ernst & Young is a trade name, which is permitted in the District of Columbia where they are located. They have not merged their practices but have entered into an "'alliance agreement' [that] states that 'they hope to consummate a marriage someday.'" One expert stated that when the rules against fee sharing between lawyers and non-lawyers change, Ernst & Young will have their foot in the door. They seem to already have. As you know, the ethics rules governing accountants and lawyers are quite different—even contradictory. The one-stop shopping firms on Long Island will be somewhat different from McKee, Nelson, Ernst & Young. I foresee a real estate law firm joining up with a mortgage brokerage, a real estate agency, a title company, a

30. See id. app. DR 7-107 (stating that a lawyer associated with a criminal or civil matter should not make "extrajudicial statements" that are likely to prejudice any proceeding related to that matter).
31. Id. app. DR 7-107(a).
32. See id. app. DR 3-102.
33. Compare N.Y. Jud. Law app. DR 3-102(A)(3) (McKinney 1992) ("A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.") with N.Y. Jud. Law app. DR 3-102(a)(3) (McKinney Supp. 2000) ("A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.").
34. See Anthony E. Davis, Professional Responsibility: Collision Course with Disaster—Changes in 'MDP,' 'MJP' and 'UPL', N.Y. L.J., Mar. 6, 2000, at 3.
36. Siobhan Roth, Inside the Ernst & Young Deal: Law Firm Is Launched with Big 5 Loan; Lawyers Say They Remain Independent, LEGAL TIMES, Nov. 8, 1999, at 1 (quoting the new firm's outside counsel).
37. See id.
general contractor, a landscaper, and an interior decorator. The question, I submit, is whose code of professional responsibility will govern.