New York State Bar Association

Committee on Professional Ethics

Opinion 752 – 2/22/02

Topics: Ancillary business organizations; conflict of interest

Digest: In certain circumstances, a lawyer owning or operating an ancillary business continues to be barred after the promulgation of DR 1-106 from providing legal and nonlegal services in the same transaction even with the consent of the client.

Code: DR 1-106; DR 1-107; DR 5-101(A); EC 1-12.

QUESTION

New York recently adopted a new disciplinary rule, DR 1-106, addressing the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons. The rule provides, among other things, that in certain circumstances the law firm or lawyer may not be subject to the disciplinary rules of the Code with respect to the provision of nonlegal services. This Committee has previously held that in some transactions – notably real estate transactions – a lawyer who also operates certain ancillary businesses may not provide both legal and nonlegal services in the same transaction, even with the informed consent of the client. The question considered in this opinion is the extent to which those earlier opinions, and the disciplinary rules on which they were based, apply after the promulgation of the new rule.

OPINION

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001. One of those rules, DR 1-106 (22 NYCRR §1200.5-b), addresses the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control an entity providing nonlegal services to clients of the lawyer or law firm, or themselves operate a business providing nonlegal services that are distinct from the legal services they provide. That rule provides, in pertinent part, that in such circumstances the lawyer or law firm is

subject to the disciplinary rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship. DR 1-106(A)(3). The rule goes on to state that

> it will be presumed that the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing 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, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

DR 1-106(A)(4). In short, the rule suggests that the disciplinary rules, or at least certain of them, presumptively will not apply to the lawyer's rendition of nonlegal services if they are distinct from the legal services rendered and if the client is informed in writing that the protections of the attorney-client relationship do not apply.

In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981); N.Y. State 619 (1991). *But see* N.Y. State 687 (1997) (lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation); N.Y. State 711 (1998) (same). *See also* N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

These decisions, and others like them, were based largely on DR 5-101(A), which currently provides that a lawyer is barred from accepting or continuing employment if the exercise of professional judgment on behalf of a client

> will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

See, e.g., N.Y. State 711 (1998).

The question is whether the application of this conflict rule to the dual roles discussed in our earlier opinions survives the promulgation of DR 1-106. We conclude that it does.

Compliance with DR 1-106(A)(4) does not mean that no rules apply to the relationship between a lawyer and an affiliated business. *See* EC 1-12 ("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"). DR 1-106 only relieves the lawyer or law firm from the application of the disciplinary rules to nonlegal services. The application of DR 5-101(A) that resulted in the prohibitions on dual roles that are discussed above (and others like them) resulted from the application of that rule to the provision of legal services. In some circumstances, that rule will bar a lawyer from offering nonlegal services because the nonlegal business activity would create a conflict with the representation of the client. In the case of the brokerage businesses noted above, the existence of the personal interest created by the prospect of earning fees from the nonlegal business was held to affect the exercise of independent *legal* judgment. It was the effect on the exercise of legal judgment that was the concern, just as with any other personal conflict created by the lawyer's own financial, business or personal interests under DR 5-101(A). That interest could be created by activities or relationships totally unrelated to any business services provided to the client – such as a fervent political belief or personal relationship with a lawyer representing the adversary. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 125 comment c (2000). Thus, the promulgation of DR 1-106 does not alter the application of DR 5-101(A) just because the personal interest that is at issue is the lawyer's participation in a nonlegal business offering services to the client. *See also* EC 1-14 (contractual relationship with nonlegal professional firm under DR 1-107 "might, in certain circumstances, adversely affect the independent professional judgment of the law firm creating a conflict of interest" under DR 5-101[A]).

CONCLUSION

The prohibitions on acting as a broker and a lawyer in the same transaction and other similar bars on dual roles for lawyers owning or operating ancillary businesses continue to apply after the promulgation of DR 1-106.

(43A-01)