

# A Lawyer's Business Offers Non-Legal Services To A Client

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In N.Y. State Opinion 784, 1/12/05, the NYSBA Committee on Professional Ethics considered the question: Under what circumstances may a lawyer in an entertainment law firm offer legal services to a client who is also a client of an entertainment management company in which the lawyer is a principal? The management company offers management services to celebrities and entertainers.

The Committee outlined two scenarios: (1) a client of the law firm contracts with the management company for management services and pays a standard fee; and (2) a client's business entity combines with the management company to form a separate business entity for profit.

In both scenarios, the lawyer must ensure that no nonlawyer employee of the management company shall offer legal advice to clients of the law firm, as required by DR 3101 (A); and that the law firm and the management firm will not share legal fees, in accordance with DR 3102.

The controlling Disciplinary Rules are DR 1106 (A)(3) and DR 1106(A)(4). Both rules were adopted in 2001 following the introduction of new Appellate Division rules on multidisciplinary practice. The Rules recognized that law firms sought to combine with other professions and businesses to organize companies to provide nonlegal services to clients. The purpose of both Rules was to enable clients to delineate the difference between legal services and nonlegal services.

Thus, DR 1106 (A)(3) provides that a lawyer who is the owner or principal of a an entity which the lawyer knows to be furnishing nonlegal services to a client distinct from the legal services the lawyer provides to the same client, is subject to the Disciplinary Rules with respect to the nonlegal services if the client receiving the nonlegal services "could reasonably believe that the nonlegal services are the subject of an attorney client relationship." DR 1106 (A)(4) creates a presumption that the client receiving the nonlegal services believes them to be the subject of an attorney client relationship unless the lawyer in his capacity as lawyer has advised the client in writing that "the services are not legal services and that the protection of the attorney client relationship does not exist with respect to the nonlegal services..."

In construing DR 1106(A)(3) and DR 1106(A)(4), the Committee had earlier advised that written notice by the lawyer to the person receiving the nonlegal services waived application of the disciplinary rules as to the nonlegal services. N.Y. State 752, 753 and 755 (all in 2002). But the Committee warned that the provisions of 5101 (A) continue to apply to all relationships between lawyer and client and that a lawyer is prevented from rendering nonlegal services to a client if the nonlegal services create an impermissible conflict with the legal representation.

Applying DR 5101 (A), a lawyer may permit his management company to supply nonlegal services to his law client only if a disinterested lawyer would believe that the legal representation of the client would

not be adversely affected by the nonlegal services and if the law client consents to the representation after “full disclosure of the implications of the lawyer’s interest.”

In N.Y. State 784, the Committee reiterated its conclusion (announced in N.Y. State 752, *supra*) that under certain circumstances, a lawyer engaged in nonlegal services cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. One such impermissible circumstance would apply to the lawyer who was also the broker in a real estate transaction. “[t]he rationale [under DR 5101(A)] 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.”

Similarly, there may be other transactions in which it would be improper under DR 5101 (A) for the lawyer’s management company to offer or render nonlegal services to a client of the lawyer. Whether any one transaction is improper may depend on the value of the nonlegal services as well as on the method of payment.

For example, it would be improper for the law firm to represent the client in connection with a valuable endorsement agreement being negotiated by the management company if compensation of the management company will turn on the legal advice to be rendered. The commission payable to the management company might be ten percent of millions of dollars payable to the client under the endorsement contract, while the legal fees in connection with negotiating and drafting the agreement may be only several thousand dollars. In the eyes of a disinterested lawyer, the management company’s interest in closing the transaction would interfere with the law firm’s ability to render independent legal advice with respect to the transaction.

Examples of legal services for clients of the management company which would not violate DR 5101 (A) would be estate planning, real estate transactions (except when the lawyer or the management company is the broker), and tax services.

DR 5104 (A) prohibits a lawyer from entering into a business transaction with a client if the two have differing interests therein and if the client expects the lawyer to exercise professional judgment for the client’s protection, unless the terms of the transaction are fully disclosed in writing, the lawyer advises the client to seek independent counsel, and the client consents in writing after full disclosure. This rule would apply to a transaction in which the lawyer’s management company and a client’s business entity combined to form a separate business entity (scenario (2), *supra*).