

# Three NYSBA Ethics Opinions Interpret New MDP Rules

BY MARY C. DALY

**Y**ou have identified a nonlegal service that you want to extend to your clients and to others. For the purposes of this article, let's say that the service will consist of mortgage brokerage. You organize a new corporation called New York Mortgage Corp. and are ready to launch your first advertising campaign. You are fully conversant with the issues surrounding MDPs and with DRs 1-106 and 1-107 that went into effect in November 2001. You have read Professor Simon's excellent analysis that appeared in prior issues of NYPRR. You're confident that your new MDP complies with the new rules. Ready? Set? Go?

Not so fast. Three new opinions issued by the New York State Bar Association Committee on Professional Ethics stand for the proposition that compliance with DRs 1-106 and 1-107 does not automatically assure that a lawyer's conduct in operating an MDP will conform to the New York Lawyer's Code of Professional Responsibility (Code). Other Code provisions must be taken into consideration. The other Code provisions may, as a practical matter, constrain activities that DRs 1-106 and 1-107 seemingly permit. This article examines the three opinions and offers practical suggestions to help lawyers avoid transgressing the other Code provisions in organizing and maintaining an MDP. [Editor's Note: The three NYSBA Opinions are Opinion 752, Opinion 753, and Opinion 755, all issued in 2002. The full text of these opinions may be found at [www.nysba.org](http://www.nysba.org).]

## Focus of Opinions Is DR 1-106

All three opinions focus principally on DR 1-106, the disciplinary rule that deals with a lawyer's provision of nonlegal services to clients and other persons. (DR 1-107 regulates contractual relationships between lawyers and nonlawyer professionals.) Subsection A of DR 1-106 draws a distinction between nonlegal services that are "distinct" from the legal services being rendered by the lawyer and those that are not. If the nonlegal services are not distinct, the Code governs the lawyer's conduct in every aspect. If they are distinct, the Code governs "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship." The Code also governs if the nonlegal services are being supplied by an entity affiliated with the lawyer and "if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship."

Subdivision (A)(4) provides an escape hatch from the Code's application to the delivery of nonlegal services. Although it initially creates a presumption that "the person receiving nonlegal services believes the services to be the subject of an attorney-client relationship," the presumption does not apply, if the lawyer "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." (If the lawyer's interest in the entity providing the nonlegal services is *de minimis*, the presumption also does not arise.)

Given the clarity of the language in Subdivision (A)(4), it is easy to understand why a lawyer who proposes to offer nonlegal services to clients or other persons might conclude that all she has to do to escape scrutiny under the Code is provide the described written notice. True, EC 1-12 does caution that "the scope of the [written notice] exemption is not absolute." It states unambiguously that the lawyer remains subject to other Code provisions, such as those banning illegal, dishonest, fraudulent or deceptive conduct; mandating that a lawyer report another lawyer's misconduct; and barring a lawyer from misusing the confidences or secrets of a former client. *See, e.g.*, DRs 1-102, 1-103, and 4-101(B). That these rules continue to govern a lawyer's conduct even though the lawyer is otherwise exempt from the Code is hardly startling. EC 1-12 gives no hint, however, that other provisions of the Code may also apply.

### **Exercising Sound Professional Judgment**

The three opinions of the NYSBA Committee on Professional Ethics focus on a very different set of disciplinary rules, principally DRs 5-101, 2-103(A) and 5-104. DR 5-101 addresses conflicts of interest that may exist between a lawyer and her client. The Rule serves the public policy of assuring that "the lawyer's own financial, business, property, or personal interests" do not interfere with the lawyer's exercise of professional judgment on behalf of the client. Prior to the adoption of DR 1-106 on MDPs, the ethics committees of state and local bar associations had considered whether and to what extent a lawyer who owned or operated an ancillary business could simultaneously provide legal and nonlegal services to a client in connection with the same transaction. Typical ancillary businesses include our hypothetical mortgage company, real estate brokerage services, abstract title examinations, and the sale of insurance and securities products. *E.g.*, N.Y. Op. 738 (2001) (spouse's title abstract company); N.Y. Op. 711 (1999) (long-term insurance products). Generally speaking, these committees frowned on the joint provision of these nonlegal services and the lawyer's legal services, expressing the view that the lawyer's interest in being paid for providing the ancillary business service would interfere with her exercise of professional judgment in the client's behalf.

Following the adoption of the new MDP rules, the question arose whether the reasoning and conclusions of these earlier committees were still valid. The NYSBA Committee on Professional Ethics has now answered that question with a resounding "yes." In Opinion 752, it concluded that 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...." N.Y. Op. 752 (2002).

In Opinion 753, it elaborated further on that conclusion, applying DR 5-101 to a lawyer's hypothetical representation of a buyer, seller, or lender in a transaction in which the ancillary business controlled by the lawyer was also providing mortgage brokerage or title abstract services to one of the parties. Opinion 753 generally disapproved of the joint provision of services even with the client's consent, except under very limited circumstances (*e.g.*, performing ministerial functions.).

Finally, in Opinion 755, the NYSBA Committee explored the relationship between the new MDP rules and DRs 2-103(A) and 5-104. DR 2-103(A) prohibits a lawyer from soliciting employment by "in-person or telephone contact" excepting only the solicitation of "a close friend, relative, former client or current client." The Committee concluded that this bar did not prevent the affiliated business from referring a customer to the lawyer by in-person or telephone contact. It reasoned that a contrary interpretation

would have been "anomalous," especially in view of "the close relationships contemplated by the new rules." The Opinion did not give a blanket approval to all forms of contact, however. It pointed to the possibility (which it did not address) that lawyers might not be free to solicit employment for legal services from current or former customers of the affiliated firm by in-person or telephone contact.

### **Referring a Client for Nonlegal Services**

DR 5-104 strictly controls the conduct of a lawyer who proposes to enter into a business transaction with a client. A lawyer's referral of a client to an affiliated firm that provides nonlegal services is arguably a transaction subject to DR 5-104. If that proposition is correct, a lawyer would be required, for example, to insure that the transaction was "fair and reasonable to the client" and to provide a writing disclosing the transaction's terms "in a manner that can be reasonably understood by the client."

While these conditions make a great deal of sense in most situations in which a lawyer and a client enter into a business transaction, they seem less sensible in the context of the activities governed by DRs 1-106 and 1-107. It is not surprising; therefore, that Opinion 755 concludes that a lawyer may ethically refer a client to an affiliated nonlegal business without complying with DR 5-104. That approval is conditioned, however, on compliance with DR 1-106. (*E.g.*, the lawyer has given the required disclaimer in writing). The Opinion specifically cautions, moreover, that the lawyer "must ensure that the client is fully informed of the lawyer's interest in the non-legal business and of the availability of alternatives." N.Y. Op. 755 (2002). It expressly prohibits the lawyer from paying a referral fee to the nonlegal business.

Lawyers who propose to establish an MDP pursuant to DRs 1-106 and 1-107 should pay close attention to Opinions 752, 753, and 755. The Opinions are obviously important for the instruction they provide on the relationship between the new MDP rules and DRs 2-103(A), 5-101, and 5-104. Opinion 755, for example, shows a particular sensitivity to the commercial reality that prompted the rules' adoption, refusing to apply blindly other Code provisions to MDP practice in a way that would thwart permissible affiliations between lawyers and nonlawyers. A lawyer who is uncertain of the relationship between other rules and DRs 1-106 and 1-107 should seek the guidance of an ethics committee or expert. A mistake in judgment may lead to disciplinary sanctions and, depending on the circumstances, to civil liability.

Especially important is the Committee's insistence in Opinions 752 and 753 that the adoption of DRs 1-106 and 1-107 did not weaken in any way the obligation to exercise the sound professional judgment on the client's behalf that is called for by DR 5-101. In practical terms, what this insistence means is that a lawyer's assumption of dual roles in the same transaction remains highly questionable. It suggests, moreover, that a lawyer who conducts an MDP practice must constantly guard against an erosion of professional judgment in her function as lawyer. That erosion is likely to occur whenever maintaining a productive and financially remunerative relationship with a provider of nonlegal services becomes more important to a lawyer than the client's interests. A lawyer who conducts an MDP practice should monitor that practice for conflicts of interest arising from the lawyer's own financial, business, property, or personal interests, no differently than a lawyer in a traditional, non-MDP practice.

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