

Working Under The New Rules On Multidisciplinary Practice

BY GARY A. MUNNEKE

New York has become the first American jurisdiction to adopt a regulatory scheme for multidisciplinary practice. In the September issue of NYPRR, Professor Roy Simon provided a section-by-section overview of the new rules as adopted by the joint order of the Appellate Divisions. Effective November 1, 2001, these rules (available at <http://www.nysba.org/opinions/mdprules.html>) will become a part of the New York Code of Professional Responsibility. This article describes some of the practical applications of the new rules and comments on their potential impact on New York practitioners.

Looking at the old and new New York rules, what can lawyers do when they provide services that cross professional lines? First, lawyers still may not form a partnership with nonlawyers. This means that lawyer Smith and accountant Jones cannot form a professional services firm by the name of Smith and Jones. Nor may Smith and Jones provide services through an alternative business form such as a Limited Liability Partnership where both share in the decision making.

Second, Smith and Jones may not share fees. If Smith handles a business formation matter for client Acme and Jones sets up Acme's books and financial systems, the two cannot send out one bill for the work and then divide the fee. They can, however, each perform services for Acme and bill Acme separately for their work. Smith and Jones can even maintain an informal relationship where they regularly turn to the other to provide professional services for clients like Acme. Smith and Jones can also refer work to each other regularly on an informal basis as long as Smith does not receive anything of value for the referrals.

If lawyer Smith is also a CPA and provides both the legal and accounting work for Acme, or if Smith employs and pays Jones to do the financial work for his corporate clients, then DR 1-106 (a)(1) makes clear that both the legal services and nonlegal services (the financial work) are subject to the Disciplinary Rules. This is more of a clarification than a change in the Rules, because lawyers who have offered integrated legal and nonlegal services to clients in the past would not get far arguing that they could only be disciplined for conduct related to the legal component of the service.

If lawyer Smith provides services that are distinct from the legal services, then the nonlegal services are not covered by the disciplinary rules unless the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship. Suppose Smith practices real estate law and employs a title surveyor named Green on staff to survey boundaries in conjunction with Smith's real estate practice. If Smith sometimes directs Green to provide such services for landowners on a contract basis unconnected with a particular real estate transaction, confusion about the legal relationship may arise. Smith will understand the difference between the two types of service, but if the client reasonably believes that the attorney-client relationship covers the combined services, the Disciplinary Rules will cover the nonlegal as well as the legal services.

Similarly, when a lawyer or law firm owns (or is affiliated with) an entity that provides nonlegal services, the disciplinary rules apply to the nonlegal entity if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship. Suppose in addition to employing a surveyor, Smith operates an insurance agency out of his law office. A client might be confused as to where the insurance office ended and the law office began. On the other hand, if Smith also operates a restaurant adjoining the law office, Smith's clients are not likely to be confused into thinking that they would be entering into an attorney-client relationship when they order a corned beef on rye at the restaurant counter. Although the requirements for Smith are the same for the restaurant, the surveyor and the insurance agency, DR 1-106 (a)(3) deals with a lawyer's relationships with organizations that provide nonlegal services directly, whereas (a)(2) covers distinct nonlegal services within the law office. The language mentions "an owner, controlling party or agent," but adds "or otherwise affiliated with," which appears to cover just about any relationship with a nonlegal provider, as long as the lawyer knows about the nonlegal services. This section would apply to so-called ancillary businesses, but is not limited to those situations.

Overcoming The Client's Confusion

The language of DR 1-106 (a)(4) creates a presumption that the person receiving the nonlegal services will believe the services to be the subject of an attorney-client relationship. Thus, whenever Smith offers or is connected with the provision of nonlegal services, and provides legal services at the same time to the same clients, it is Smith and not the client who must clarify the relationship. Smith can overcome this presumption by advising the recipient of the nonlegal service in writing that the services are not legal and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Although the rules do not say so, Smith probably should take the same screening measures that would be effective in a conflict situation, such as physical separation of the services, separate files and separate billing procedures. Smith may also rebut the presumption by demonstrating a de minimus interest in the entity providing nonlegal services. By placing the burden on the lawyer, the new rules seem to permit the lawyer to offset a basis for reasonable belief by the client by fully informing the client that the nonlegal services are distinct from the legal services and, thus, not covered by the Code of Professional Responsibility.

Under DR 1-106 (b), Smith may not permit any associated nonlawyer to direct or regulate the professional judgment of the lawyer in providing legal services, or to compromise the duty of confidentiality under DR 4-101. Interestingly, this is not an expansion of the existing rules. Lawyers already are not permitted to allow a third party to influence the lawyer's independent professional judgment or to reveal confidential information acquired in the course of legal representation to any person or entity, unless specific exceptions exist. The new rules reaffirm for Smith and all of us the importance of the two core values: protection of client confidences and exercise of independent judgment. The new rules recognize implicitly the pressures that lawyers may face when working with the accountants, surveyors, insurance agencies and other professionals and entities that provide nonlegal services that lawyers usually call upon. The message is clear: regardless of the ethics, mores or practices of the nonlegal providers, lawyers must protect their core values.

The last section of DR 1-106 (c) notes that the term “nonlegal services” covers service that nonlawyers may lawfully provide that are not prohibited as unauthorized practice of law when provided by a nonlawyer. In other words, Jones (the accountant) and Green (the surveyor) still cannot provide legal services, as already set forth in DR 3-101 on the unauthorized practice of law.

DR 1-107 recognizes that lawyers work with nonlawyer professionals in a variety of ways. There is nothing wrong with Smith’s working with Jones and Green, or running an insurance agency or a restaurant. In this sense, traditional law firms that do not choose to create ancillary businesses, establish formal controlled business arrangements, or form other structured affiliations with nonlegal service providers are likely to become involved with nonlegal service providers.

The first paragraph of DR 1-107 (a) provides a long restatement of the concept of professional independence of the legal profession. In order to assure Smith’s uncompromised loyalty and independent professional judgment to clients, Smith must comply with all the legal and ethical principles governing lawyers in New York. This language does not add anything new to the responsibilities of lawyers. DR 1-107 (a) also states that “multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the profession,” and requires strict separation between lawyers’ services and those provided by nonlawyers. The language uses the term multidisciplinary practice without definition, but seems to refer to professional services firms that provide a variety of services, including legal services, to clients. Thus, Smith, Jones, Green and other professionals cannot create or offer one-stop shopping professional services firm or MDP. In reality, multidisciplinary practice includes a variety of different service delivery systems, only one of which is the integrated one-stop shopping firm. As noted above, the rules specifically permit a variety of affiliations between lawyers and nonlawyers that contain elements of multidisciplinary work.

DR 1-107(a) is where things get sticky. The same paragraph goes on to say that Smith can enter into and maintain a contractual relationship with accountant Jones or surveyor Green, with three provisos: 1) the nonlegal service professional (Jones, the accountant, or Green, the surveyor) must be included in list maintained by the Appellate Divisions under the Joint Appellate Division Rules; 2) Smith may not grant Jones, Green or other nonlawyer professionals an ownership interest in his legal practice, share fees with them or give any tangible benefit to them for referring clients, and 3) the contractual relationship must be disclosed to Smith law clients before referring them to Jones or Green.

Contracts With Other Professionals

This disclosure must take the form of securing the clients’ informed consent in writing after providing them with a copy of the “Statement of Client’s Rights in Cooperative Business Arrangements.” (See pages 9-10, NYPRR, September ’01). The Statement of Rights assures clients that they are entitled to a lawyer’s independent professional judgment and undivided loyalty, uncompromised by conflicts of interests. The Statement warns clients that the attorney-client privilege may not carry over to dealings with a nonlegal service provider. The Statement refers to the lawyer’s independent duty to protect client funds, and notes that the client has a “right to consult with an independent lawyer” before signing the agreement or consenting to the referral.

The rules use the term “cooperative business arrangement,” rather than MDP, to describe contractual relationships between lawyers or law firm and nonlegal professional service firms, when legal and

nonlegal professional services are offered. The rules also define the term “ownership or investment interest,” making clear that the term means any form of debt or equity “accruing to or enjoyed by an owner or investor.” Smith can create a cooperative business arrangement (CBA) with Jones or Green, but may not give to Jones or Green an equity position in the law practice.

Lawyers and nonlawyers can establish a pure reciprocal referral arrangement. Thus, if Smith and Jones refer clients to each other on a regular basis, they do not implicate the restrictive limitations placed on contractual arrangements. Smith and Jones may also share office space and allocate costs and expenses, or Smith may rent space from Jones, or Jones from Smith, as long as the allocation reflects only the costs and expenses and not the income from the services. In other words, Smith and Jones cannot hide a fee-splitting arrangement within the terms of a lease.

Lawyer Smith should be aware that the Appellate Divisions has also modified rules on advertising. Smith may communicate to clients both “legal and nonlegal” information, and permitted arrangements with non-legal service providers. Smith may mention a nonlegal business on business cards, office signs and letterheads, but may not include the name of any affiliated nonlawyer professional or firm in the business name. For example, Smith cannot describe his law firm as Smith and Jones, regardless of the relationship with nonlawyer Jones.

In one sense, the new rules represent a major step forward in recognizing that alternative forms of service delivery exist, and that affiliations between legal and nonlegal professional services providers are here to stay. In this, proponents of MDP should be happy. At the same time, the rules prohibit certain types of MDPs (the one-stop shopping centers) and reaffirm the core values of the profession. In this, the opponents of MDP should be pleased.

What remains uncertain is how all of this will play out. The regulations are long, convoluted and in places inartfully drafted. For example, definitions are tacked like post-its throughout the rules, and critical terms such as multidisciplinary practice are not defined at all. The language suffers from an excess of verbiage and repetitiveness. Their very length may prove daunting to practitioners, and problematic for enforcers.

Perhaps the most significant changes that will impact the everyday lives of lawyers are requirements to reduce relationships with nonlawyer providers to contractual arrangements, to obtain written informed consent from clients, to provide clients with a Statement of Rights, and to inform clients in writing if services are not privileged or covered by lawyers’ ethical codes. Whether lawyers will consider such requirements burdensome disincentives to arrangements with nonlawyers remains to be seen, as well as whether lawyers will simply ignore the requirements, and whether the disciplinary authorities will attempt to prosecute the scofflaws.

Finally, the question remains unanswered as to whether the movement toward multidisciplinary services outside New York and the United States will continue to erode the professional monopoly of lawyers. Will lawyers who want to provide services in conjunction with nonlawyers, simply go to work for banks, accounting firms and other organizations, and characterize their work as consulting, advising or something other than legal services? Will lawyers who remain in traditional practices find that these new regulations are too restrictive as they try to remain competitive in the marketplace? Will bar associations, courts and disciplinary authorities achieve a national consensus on how to respond to these and other

changes in the way law is practiced? Will New York be remembered as the state that lead the way to a new era of regulation, or as the little Dutch boy who tried to stop the sea by sticking his finger in a hole in the dike? Only time will tell. In the meantime, lawyers will continue to practice law under these new rules the best way they can.

Gary A. Munneke is Professor of Law at Pace University School of Law. He is a member of the ABA House of Delegates.