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To: ATILS Task Force  
From: Kevin Mohr and Randall Difuntorum  
Date: December 26, 2019  
Re: Revised Rule 5.4 (Financial and Similar Arrangements with Nonlawyers)

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You will find a revised proposed rule 5.4 Alternative 1 in accordance with the Task Force's December 2019 meeting discussion and comments provided by Prof. Giller's in his public comment testimony. This is a redline version to the draft previously circulated for public comment. Please note the drafters' comments that appear in the footnotes.

#### **Rule 5.4 Financial and Similar Arrangements with Nonlawyers**

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services;
  - (5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter, [including but not limited to qualified legal services projects, qualified support centers and law school programs that receive funding distributed pursuant to Article 14 of the State Bar Act](#)

Business and Professions Code and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code;<sup>1</sup> or

- (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b) [and written notice of the nonlawyers' responsibilities within the law firm is provided to the State Bar].<sup>2</sup>
- (b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold ~~a financial~~ an ownership interest in the firm unless each of the following requirements is satisfied:<sup>3</sup>
- (1) the firm's sole purpose is providing legal services to clients;
  - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
  - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer and the ownership and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest ownership and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the ownership and voting interests of all lawyers in the

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<sup>1</sup> Reference to 501(c)(3) has been retained for the reasons previously given, i.e., broadening the exception to include sharing of fees w/o the "court-awarded" limitation presents the potential for abuse. See D.C. Rule 5.4, Cmt. [11] ("To prevent abuse of this broader exception [i.e., fees to be shared not limited to court-awarded fees], it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.") The 501(c)(3) limitation should still permit fee-sharing with nearly all groups that refer matters to lawyers or retain lawyers to handle matters. For example, the ACLU of Southern California is two entities, the main entity that might engage in activities such as lobbying which preclude it from claiming 501(c)(3) status and the ACLU Foundation of Southern California, which is a 501(c)(3) entity.

<sup>2</sup> This bracketed clause is added at the suggestion of Staff. It is modeled on a similar notice provision in CRPC 5.3.1(d) and is intended to provide an added assurance that the nonlawyers' conduct conforms to the requirements of the rule.

<sup>3</sup> Substitute "an ownership interest in the firm" for "a financial interest" to clarify that nonlawyers could be owners in the firm and not just have a financial interest, such as a profit sharing arrangement as is permitted under the current rule 5.4. See CRPC 5.4(a)(3) & Cmt. [1].

**Pro:** The intent of the paragraph (a)(6) exception is clarified.

**Con:** None determined.

firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;<sup>4</sup>

- (4) the nonlawyers have each satisfactorily demonstrated that they are of good moral character as determined by the State Bar;<sup>5</sup>
- (45) the nonlawyers (i) satisfactorily complete a class of legal education approved by the State Bar or offered by a State Bar-approved provider on the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct,<sup>6</sup> (ii) state in writing that they ~~have read and~~ understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct, and (iii) agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

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<sup>4</sup> This added language, taken verbatim from the Ethics 20/20 Commission proposal except that the word “ownership” has been substituted for “financial.” This provision engendered substantial debate in the Rules Subcommittee and was eventually deleted. The rationale was that regardless of ownership interest of the nonlawyers, they would never be able to direct or control the professional judgment of the lawyers in the firm.

In addition to the added language, Ethics 20/20 included the following comment:

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

<sup>5</sup> This language has been added at the suggestion of Prof. Stephen Gillers.

**Pro:** It is appropriate that a nonlawyer owner of a law firm that has as its sole purpose the provision of legal services must demonstrate good moral character as is required for any lawyer owners of the firm.

**Con:** None determined.

Although Prof. Gillers also suggested that the cost of the moral character review should be assumed by the nonlawyer, that requirement should be left to a State Bar rule.

<sup>6</sup> This language has also been added at the suggestion of Prof. Gillers, to ensure that the nonlawyers are familiar with the duties owed by lawyers to their clients and to the justice system. Prof. Gillers did not believe that a simple written statement that the nonlawyers had read the Rules and State Bar Act would provide the necessary assurance that the nonlawyers were familiar with the duties lawyers owe.

This provision would be supplemented by a requirement that the nonlawyers fulfill continuing legal education requirements just as lawyers are required. See proposed new paragraph (b)(5). [KEM: I think it would be beneficial to set out the minimum initial education requirements and any continuing education requirements in separate paragraphs to emphasize they are separate requirements. However, I’m not opposed to putting all the requirements in a single paragraph.]

- (6) The nonlawyers must annually complete at least [X] hours of legal education approved by the State Bar or offered by a State Bar-approved provider on the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct. Each nonlawyer must report his or her compliance to the State Bar under rules adopted by the Board of Trustees of the State Bar.<sup>7</sup>
- ~~(57)~~ the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;
- ~~(68)~~ compliance with the foregoing conditions is set forth in writing.
- (c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable\* time during administration.

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<sup>7</sup> Paragraph (b)(6)'s language is based roughly on Cal. Rule of Court 9.31(c), which sets forth continuing legal education requirements.

Rule 9.31 itself is authorized by Bus. & Prof. C. § 6070(a), which provides:

(a) The State Bar shall request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that, within designated 36-month periods, all active licensees of the State Bar shall complete at least 25 hours of legal education activities approved by the State Bar or offered by a State Bar-approved provider, with four of those hours in legal ethics. The legal education activities shall focus on California law and practice and federal law as relevant to its practice in California or tribal law. A licensee of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive licensee pursuant to rules adopted by the Board of Trustees of the State Bar.

The nonlawyers' requirement should probably not amount to 25 hours. Moreover, because those lawyers presumably would not be practicing law, legal ethics should be the primary, if not the exclusive focus of any such education. Another possibility for (b)(6) that I would not favor would more closely adhere to rule 9.31 and would provide:

(6) The nonlawyers must, within 36-month periods designated by the State Bar, complete at least [X] hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Four of those hours must address legal ethics. Nonlawyers may be required to complete legal education in other specified areas within the [X]-hour requirement under rules adopted by the State Bar. Each nonlawyer must report his or her compliance to the State Bar under rules adopted by the Board of Trustees of the State Bar.

- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[\[5\] Notwithstanding paragraph \(b\)\(1\), a nonlawyer may provide law-related services to a client for whom the firm has provided legal services. For example, subject to rules 1.7 and 1.8.1, a nonlawyer financial advisor could provide investment advice to a firm client who has received a judgment in a personal injury action.<sup>8</sup> \[See also rule 5.7\]<sup>9</sup>\[d1\]](#)

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<sup>8</sup> [Prof. Gillers also recommended that nonlawyers should be able to provide law-related services to firm clients. The intent of his recommendation was that services should have a nexus to the legal representation as the example indicates.](#)

[56] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[67] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).

[8] This rule is not intended to abrogate the law governing lawyer referral services, or the law prohibiting running and capping. See Business and Professions Code sections 6151-6155. A runner or capper would not be deemed to "assist" a lawyer or law firm in providing legal services to a client within the meaning of paragraph (b)(2). Similarly, a lawyer referral service would not be deemed to "assist" a lawyer or law firm in providing legal services to a client under that paragraph.<sup>10</sup>

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<sup>9</sup> The reference to rule 5.7 is bracketed pending a recommendation that a California rule counterpart to ABA Model Rule 5.7 should be adopted. [KEM: I still believe that it would be cleaner to have a rule 5.7 but, even if there is a 5.7, I think a clarifying comment would be appropriate.]

Note that the following comment was included in the Ethics 20/20 Commission's proposed draft of MR 5.5:

[5] Paragraph (b) does not preclude a lawyer from providing "law-related services", as defined in Rule 5.7, whether through a law firm or other organization. A lawyer shall remain subject to the Rules of Professional Conduct with respect to his or her provision of law-related services pursuant to Rule 5.7 whether or not the entity through which the lawyer provides such services is a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule.

<sup>10</sup> This comment has been added to address concerns raised in the public comment received that this rule would provide a means to avoid the application of the lawyer referral service and runner/capper restrictions.



# The State Bar of California

ATILS Agenda Item B.2.  
[Rec. 3.3] Rule 5.7  
01-20-20 Meeting

## Task Force on Access Through Innovation of Legal Services

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To: ATILS Task Force  
From: Kevin Mohr and Mark Tuft  
Date: December 23, 2019  
Re: Efficacy of a California Rule of Professional Conduct 5.7 counterpart to Model Rule 5.7 (Responsibilities Regarding Law-related Services) with Attachments:

- February 12, 2019 Mohr/Arruda Memo re Possible Rule 5.7 (ATT1)
- State Bar Interim Formal Op. 16-0003 (Ancillary Business Services) (ATT2)
- Comment of Office of Chief Trial Counsel on Interim Op. 16-0003 (ATT3)

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### **Introduction**

This memo provides a brief overview of the Task Force's study of a proposed California Rule 5.7 counterpart to ABA Model Rule 5.7, as well as a recent proposed ethics opinion by the State Bar's ethics committee, the Committee on Professional Responsibility and Conduct ("COPRAC"), together with a comment from the State Bar's Office of Chief Trial Counsel ("OCTC"). We are not recommending a specific version of the rule. The Task Force does not have sufficient time to study and evaluate a specific proposed draft of a rule 5.7 and the nuances of California law in this area. Instead, the authors conclude that a version of a rule of professional conduct that addresses the provision of ancillary services provided by a lawyer or law firm will necessarily diverge significantly from ABA Model Rule 5.7 for several reasons: first, California already has significant case law and ethics opinions that address the issues raised by this rule, and any Model Rule 5.7 counterpart would need to be carefully drafted to reflect the nuances of lawyer duties recognized in case law and ethics opinions. Second, any such rule should be drafted with the objective of enhancing access to legal and law-related services. Third, the rule would need to be updated to reflect modern delivery systems through the use of existing and foreseeable technologies.

### **February 12, 2019 Mohr/Arruda Memo on Rule 5.7**

The February 12, 2019 memo is attached as Attachment 1. Rather than provide a comprehensive summary of the 2/12/19 memo on a proposed rule 5.7, we attach that memo for your consideration. We note that the primary purpose of rule 5.7 is to avoid client confusion regarding the protections a client can expect when a lawyer, whether through the lawyer's law firm or a separate entity, provides ancillary services. The concern is that the client might assume that these services afford the same ethical protections as the client would expect from services delivered in a lawyer-client relationship. Model Rule 5.7 places the burden on the lawyer to inform the client and clarify that such services do not provide those protections. If the burden is not met, then the Rules of Professional Conduct apply to the lawyer's provision of the services, i.e., the lawyer would be required to perform the same fiduciary

duties a lawyer owes a client being provided legal services and advice, including the duties of competence, confidentiality, communication, exercise of independent judgment and loyalty.

ABA Model Rule 5.7 provides a mechanism for avoiding client confusion, i.e., by requiring that the lawyer make disclosures to the client sufficient to apprise the client that the traditional protections of a lawyer-client relationship, e.g., confidentiality, will not attach to the services being provided. The problem in light of California law is that such disclosures might not be sufficient, or arguably might be contrary to case law and previously-issued ethics opinions.

The 2/12/19 memo considered the history of Model Rule 5.7 and state variations of the rule. See pages 2-5 of memo. The memo also provided great detail regarding the history of the two Rules Revision Commissions' consideration of a proposed rule 5.7, as well as the case law on the topic. See pages 5-9. Further, the memo explained in some detail why it is difficult to pattern a rule simply on ABA Model Rule 5.7's approach where the lawyer, by appropriate disclosures, essentially opts out of being regulated by the rules of professional conduct. See pages 9-10.

The final section of the memo discusses the advantages and disadvantages of addressing ancillary business or law-related services by way of an ethics opinion or a rule of professional conduct. See pages 11-12. The authors of the memo did not make a specific recommendation as to which approach was preferable. However, as discussed in the next section, the ethics opinion approach has recently proven to be problematical.

### **Ethics Opinion: COPRAC Interim Op. 16-0003 & OCTC Comment**

COPRAC issued an interim opinion for public comment with a deadline of 8/30/19 for submission of comments. See Attachment 2. The opinion summarized its conclusion:

Although non-legal services are, by definition, not the practice of law, their provision by a lawyer or lawyer-controlled entity is presumptively subject to the Rules of Professional Conduct if they are conducted in a manner that is not distinct from activities constituting the practice of law or if they are sufficiently law-related to give rise to a reasonable risk that the customer may understand that legal services are being provided or that a lawyer-client relationship has been formed. However, where appropriate steps have been taken to distinguish non-legal from legal services and to clarify that no legal services are being provided and that no lawyer-client relationship has been formed, the Rules of Professional Conduct will not apply to the services provided.

OCTC submitted a 17-page comment that is highly-critical of the opinion on September 3, 2019. OCTC summarized its concerns on the first page of its letter:

COPRAC Opinion 16-0003 attempts to address an attorney's ethical and professional responsibilities when engaging in ancillary businesses or services. Specifically, the opinion attempts to address when an attorney can perform "non-legal services" and be exempt

from most of the rules and statutes governing attorney conduct. As discussed in this comment, OCTC believes COPRAC Opinion 16-0003 is extremely problematic and could confuse attorneys and the public as to the obligations of attorneys when performing ancillary or fiduciary services.

OCTC went on to explain its concern that the COPRAC opinion failed to address the substantial case law on this issue, thus placing its conclusions in question.

We understand that at present there are no plans to pursue the foregoing opinion. Consequently, we believe that the implementation committee that is charged, among other things, with working through the regulatory details of the recommendations of the Task Force, might best focus its resources on a rule of professional conduct.

### **California Rule of Professional Conduct 5.7**

As noted above, we believe a California version of rule 5.7 will necessarily diverge substantially from ABA Model Rule 5.7 because of (i) California's extensive case law and ethics opinions on this issue; (ii) the need to focus the rule on providing increased access to legal services and (iii) the need for the rule to reflect modern delivery systems through the use of available and foreseeable technologies. We also believe that ABA Model Rule might be unnecessarily restrictive in focusing on "law-related" services. We note that some jurisdictions have instead focused on "nonlegal" services. See Fla. Rule 5.7; N.Y. Rule 5.7; Penn. Rule 5.7. Restricting the rule to the regulation of "law-related" services might inadvertently result in the rule being underinclusive in covering services that might cause client confusion where they are provided by lawyers. Defining either "law-related" or "non-legal" services will be influenced by any changes to rules and statutes authorizing the practice of law by non-lawyers. Consequently, the implementation committee should address the following issues in the event it pursues a California version of Model Rule 5.7:

1. Consider defining "nonlegal services" rather than "law-related services," thus extending the scope of the rule.
2. Specifically address the case law regarding a lawyer's provision of fiduciary services that can also be provided by nonlawyers. This issue provided the greatest stumbling block for the two Rules Revisions Commissions that considered the rule.
3. Focus on how the rule can provide increased access to cost-effective legal services.
4. Evaluate the utility of the rule in view of modern delivery systems through the use of technology.





# The State Bar of California

## Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittees on Alternative Business Structures/Multi-Disciplinary Practices and Rules and Ethics Opinions  
From: Kevin Mohr and Andrew Arruda  
Date: February 12, 2019  
Re: Discussion of Research Assignments – Consideration of a Rule of Professional Conduct Patterned on ABA Model Rule 5.7 or, in the Alternative, a State Bar Ethics Opinion

### **Introduction**

During breakout session of the January 18, 2019, two of the Task Force’s subcommittees, the ABS/MDP and Rules/Opinion subcommittees, raised the issue of whether a rule of professional conduct similar to ABA Model Rule 5.7 should be considered as providing a potential means to increase access to justice. In the ABS/MDP subcommittee, the issue arose during a discussion of the meaning of “law-related services.” In the Rules/Opinion, the issue arose during a discussion exploring the means by which a lawyer could supplement the provisions of traditional legal services with technology. Specifically, a question was asked about a lawyer’s ability to supplement legal services provided through the lawyer’s firm with law-related services provided by a separate entity owned in whole or in part by the lawyer.

During the plenary session, the oral subcommittee reports revealed that the two subcommittees had broached the subject of ABA Model Rule 5.7. The subcommittees agreed to explore the issue further. In a sidebar discussion, Kevin Mohr of the Rules subcommittee informed Andrew Arruda of the ABS/MDP subcommittee that the first Rules Revision Commission had done a substantial amount of work on drafting a rule patterned on Model Rule 5.7 and that the materials should provide a basis for a memo to the entire Task Force. Using those materials and engaging in further independent research, the authors prepared this memo. In addition to considering a rule of professional conduct, the memo also discusses

This memo does not make a specific recommendation as to whether the Task Force should recommend the adoption of a rule patterned on Model Rule 5.7, nor does it making an explicit finding that such a rule, if adopted in California, would likely enhance access to justice. Rather, the memo is informational in nature. It provides a brief background of the adoption of ABA Model Rule 5.7, (Part 0), the previous studies of the feasibility of adopting a California rule 5.7 counterpart, (Part 0), and the case law addressing a lawyer’s provision of non-legal or law-related services that currently exists in California, (Part 0). Finally, in Part 0, the memo explores the benefits and disadvantages of addressing the issue of a lawyer’s provision of law-related services by rule of professional conduct or ethics opinion.

### **ABA Model Rule 5.7**

#### **Purpose**

Model Rule 5.7 addresses the duties of lawyers who provide “law-related” services as opposed to “legal” services. The rule is intended to avoid client confusion regarding the protections a client can expect when a lawyer, whether through the lawyer’s law firm or a separate entity, provides ancillary services. The concern is that the client might assume that these services afford the same ethical protections as the client would expect from services delivered in a lawyer-client relationship. Model Rule 5.7 places the burden on the lawyer to inform the client and clarify that such services do not provide those protections. If the burden is not met, then the Rules of Professional Conduct will apply to the lawyer’s

provision of the services, i.e., the lawyer is required to perform the same duties a lawyer owes a client being provided legal services and advice, including the duties of competence, confidentiality, exercise of independent judgment and loyalty.

### **Model Rule 5.7 Overview**

The text of Model Rule 5.7 provides:

#### **Rule 5.7: Responsibilities Regarding Law-related Services**

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

In addition to the rule text, the rule includes 11 comments. See Attachment 1.

*The introductory paragraph of paragraph (a)* sets forth the rule’s operative language, i.e., that a lawyer who is providing law-related services is still subject to discipline under the rules of professional conduct if the law-related services are provided in the manner described in either subparagraph (a)(1) or (a)(2).

*Subparagraph (a)(1)* involves a situation where the lawyer is providing law-related services that are “not distinct” from the lawyer’s provision of legal services to a client. Such services, when provided by the lawyer or the lawyer’s firm to a client who has or had also retained the lawyer for legal services, might include a tax preparation business, e.g., [N.D. Ethics Op. 01-03 \(5/4/2001\)](#) or financial planning services, e.g., [Ind. Ethics Op. 02-01](#), at least when they are provided in a way that the services are “not distinct” from the lawyer’s legal services.

*Subparagraph (a)(2)* involves a situation where the law-related services are provided either directly by the lawyer or lawyer’s law firm, or by a separate entity controlled by the lawyer or firm, but the lawyer has not taken “reasonable measures” to assure that the person who is to receive the law-related services knows the services are not legal services and that the protections afforded by a lawyer-client relationship do not attach. The practical effect of subparagraph (a)(2) is to permit a lawyer who provides such ancillary services to opt-out of being regulated under the Rules. So long as the lawyer takes “reasonable measures,” e.g., provides the person using the ancillary services with a sufficient explanation that the services do not afford the protections available from the lawyer-client relationship, e.g., duty of confidentiality, then the lawyer will not be subject to the Rules when providing those services. As to what those “reasonable measures” should include, Comment [6] provides some guidance:

“[T]he lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should

be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.”

In one case, it was held that the lawyer advising his former legal clients that he was retired and now offering accounting and “business advice” services did not constitute “reasonable measures” to opt out of the Rules. See *In re Matter of Rost*, 211 P.3d 145 (Kan. 2009), discussed more fully in section 0, below.

*Concerning paragraph (b)*, Comment [8] provides guidance on the kinds of activities that might constitute “law-related” services:

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

## History

A version of Model Rule 5.7 was adopted by the ABA House of Delegates in August 1991, but was rescinded by the same body in August 1992. After further study, a different, less-controversial version of the rule was adopted in February 1993. That rule was amended in February 2002 as part of the comprehensive revisions of the Model Rules recommended by the ABA Ethics 2000 Commission. Those revisions to paragraph (a)(2) and Comments [2] and [3] were intended to clarify that:

“(1) there can be situations in which a law firm’s provision of law-related services will be distinct from the firm’s provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2).”

The change eliminated an unintended gap in the coverage of the Model Rule. [Reporter’s Explanation of Changes, Rule 5.7](#). Put another way, the rule clarified that under certain circumstances, a lawyer will be able to opt out of the Rules even when the ancillary services are being provided directly by the lawyer or the lawyer’s firm, as opposed to by a completely separate entity.

## State Adoptions of Model Rule 5.7

According to the ABA, the rule has been adopted in most jurisdictions, with 29 jurisdictions having adopted a rule identical to Model Rule 5.7.<sup>1</sup> Five jurisdictions have adopted a rule that is substantially similar to Model Rule 5.7.<sup>2</sup> Five jurisdictions have adopted a version of the rule with substantial variations from the organization or substance of the Model Rule.<sup>3</sup> Twelve jurisdictions, including California, have not

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<sup>1</sup> The 29 jurisdictions are: Alaska, Arkansas, Colorado, Delaware, District of Columbia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

<sup>2</sup> The five jurisdictions are: Georgia, Idaho, Massachusetts, North Carolina and Wisconsin.

<sup>3</sup> The five jurisdictions are: Arizona, Florida, New York, Ohio and Pennsylvania.

adopted any version of Model Rule 5.7.<sup>4</sup> [ABA, Variations of the Model Rules of Professional Conduct, Rule 5.7 \(9/29/17\)](#).

### **Discipline Actions**

Although a substantial majority of jurisdictions have adopted a version of Model Rule 5.7, there are few reports of discipline imposed for violation of the rule. In some instances, the court accepted the respondent lawyer's stipulation that he or she had violated the jurisdiction's version of Model Rule 5.7 without reciting the facts that supported the concession. See, e.g., *In re Matter of Emery*, 799 S.E.2d 295 (S.C. 2017) (lawyer receives public reprimand after conceding that her loan modification services subjected her to rule 5.7); *In re Matter of Peper*, 763 S.E.2d 205 (S.C. 2014) (lawyer publicly reprimanded following concession that services lawyer provided as trustee of a trust were "law-related," subjecting him to discipline under rule 5.7). In one case, the lawyer was not charged with a violation of rule 5.7 but instead asserted that the rule provided him with a "safe harbor" from multiple violations of the Kansas Rules of Professional Conduct arising from the lawyer's representation of a financially distressed company. See *Matter of Hodge*, 407 P.3d 613 (Kan. 2017) (lawyer disbarred for multiple violations of the Kansas Rules, including a concurrent conflict of interest, business transaction with a client and conduct adversely affecting lawyer's fitness to practice law, the court having rejected the lawyer's "safe harbor" defense.) In some cases, the lawyer's violation of rule 5.7 was one among many violations of the jurisdiction's Rules. See, e.g., *In re Matter of Williams*, 755 S.E.2d 107 (S.C. 2014) (lawyer disbarred for multiple violations, including violation of rule 5.7). Finally, in one case, a lawyer who had retired from the practice of law was held to be still subject to the Rules of Professional Conduct for his provision of law-related services (accounting and "business advice"), his announcement to his pre-retirement law clients that he had retired found not to be sufficient to satisfy rule 5.7(a)(2)'s requirement that he take "reasonable measures" to insure those clients understood that he could not longer practice law and his provision of law-related services would not provide them with the protections of the lawyer-client relationship. See *In re Matter of Rost*, 211 P.3d 145 (Kan. 2009) (lawyer disbarred for engaging in the unauthorized practice of law).

### **California Law Concerning Law-related Services**

California is one of the twelve jurisdictions that has not adopted any version of Model Rule 5.7 or any rule that expressly addresses a lawyer's provision of law-related or non-legal services. See section 0, above. The only mention in the California Rules of Professional Conduct of a lawyer being subject to discipline for conduct outside the practice of law is Comment [2] to Rule 1.0, which states: "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity." Although no rule that might be violated when a lawyer is not practicing law or acting in a professional capacity is identified, several provisions of Rule 8.4 ("Misconduct") could be violated in such situations. For example, Rule 8.4(b) and (c) are not limited to a lawyer's conduct as a lawyer.<sup>5</sup> See further discussion at section 0 & note 7, below.

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<sup>4</sup> The twelve jurisdictions are: Alabama, California, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Montana, Nevada, New Jersey, Oregon, Texas.

<sup>5</sup> Cal. Rule 8.4(b) and (c) provide it is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

It is helpful to briefly review the work of the State Bar's Rules Revision Commissions empaneled after 2001, both of which considered the adoption of a version of Model Rule 5.7 and recommended that the rule *not* be adopted.

### **First and Second Rules Revision Commissions**

#### **First Commission**

The First Commission was in session from 2001 until 2010. Although the Supreme Court ultimately rejected the First Commission's work product in favor of a set of rules that more closely hewed to California's traditional approach of enacting disciplinary rules, the First Commission was charged with seeking to draft rules that would eliminate unnecessary differences between the California Rules and the rules in other jurisdictions, nearly all of which had adopted rules based on the ABA Model Rules. The subcommittee that was appointed to study the possible adoption of Model Rule 5.7 submitted four separate memos and proposed several different versions of a proposed California Rule 5.7. However, the Commission ultimately recommended that the rule not be adopted in California:

"The Commission is not recommending adoption of Model Rule 5.7 because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection. Generally, the Commission agrees with the concept of Model Rule 5.7 but has determined that there are certain specific terms and standards provided for in the rule that are materially inconsistent with existing California authorities. The Commission reviewed the existing California authorities and concluded that adoption of any California counterpart to Model Rule 5.7 might undermine existing law and guidance." First Commission, *Rules and Concepts That Were Considered, But Are Not Recommended For Adoption* (July 2010) ("Rules and Concepts Not Adopted"), at p. 30.

A minority of the Commission dissented from the First Commission's recommendation:

"A minority of the Commission disagrees with the decision not to adopt a California version of Model Rule 5.7. The minority notes that many law firms, both inside and outside of California today own, operate or are otherwise affiliated with ancillary businesses, including: lobbying; financial counseling and planning; client asset management through registered investment companies; human resources and benefits; consulting and training; international trade; education; environmental and health care consulting; ADR; and litigation support services. In addition, law firms are restructuring due to the impact of technology and globalization and this will cause inevitable confusion among lawyers and the public about how the rules apply to law related services, particularly where the services are offered by a "law firm." The minority contends that, if the proposed new California rules are to remain viable for the foreseeable future, a version of Model Rule 5.7 is critical." *Id.* at pp. 30-31.

In addition, a public comment letter submitted by 30 California legal ethics professors requested that the First Commission reconsider its recommendation:

"The group asserted that Model Rule 5.7 simply makes it clear that when lawyers engage in multi-disciplinary work and are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct. The group disagreed with the Commission's view that California case

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(c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation;

law provides “broader and more nuanced guidance,” such as to make the rule unnecessary. The group stated that adopting Model Rule 5.7 would in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance and that nuanced court adjudication might not be needed if the rule were adopted in California.” *Id.* at p. 31.

As recounted in *Rules and Concepts Not Adopted*, the First Commission remained unpersuaded:

“The Commission noted its extensive effort to capture, in rule format, the principles embodied in the many reported California appellate decisions. It made this effort, not because doing so is needed for discipline as lawyers have been disciplined many times without the existence of a rule comparable to Model Rule 5.7, but in order to help guide lawyers. The Commission finally concluded that this effort was not successful, that any iteration of the rule likely would be inaccurate and misleading, and that it would be better for lawyers to refer to case law in this area. Like a number of other states, the Commission decided not to recommend adoption of the rule.” *Id.* at p. 31.<sup>6</sup>

Although the First Commission decided not to recommend the adoption of a rule counterpart to ABA Model Rule 5.7, a copy of its last rule draft is attached as Attachment 2.

## **Second Commission**

The drafting team of the Second Commission recommended a version of Model Rule 5.7 in California not be adopted because “[a]ppropriate guidance is currently provided by other California authorities, including case law and ethics opinions, and there appears no reason to supplement that authority.” Memorandum from Rule 5.7 Drafting Team to Commission dated May 16, 2016, at pp. 4-5. The drafting team also considered Comment [2] to rule 1.0, which provides in part that “a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity,” in reaching a decision to recommend that no rule need be adopted. The full Commission accepted the drafting team’s recommendation and the Board of Trustees adopted that recommendation in its submission to the Supreme Court. The authorities referenced in the aforementioned memorandum is discussed in section 0, below.

## **California Case Law and Other Authority**

There is a substantial amount of California case law and other authority that addresses the application of the Rules of Professional Conduct when a lawyer is providing services that would not be considered

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<sup>6</sup> The First Commission’s concern that “any iteration of the rule likely would be inaccurate and misleading” and not be able to capture the “nuanced guidance” of the case law appears to be based on the cases’ treatment of services that impose a fiduciary duty. In some instances, the fiduciary duties would include all of the duties attendant upon the existence of a lawyer-client relationship. See, e.g., *Beery v. State Bar*, 43 Cal.3d 802, 811-814 (1987); *Sodikoff v. State Bar*, 14 Cal.3d 422, 428-429 (1975). In other situations, the duties imposed would be more limited in nature. See, e.g., *William H. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 1047-1048 (1983) (lawyer serving as corporate director would owe duty of confidentiality and be subject to the rules regarding conflicts of interest and trust accounts). In the former situation, a lawyer does not appear to have the ability to disclaim the application of rules of professional conduct. In the latter situation, the lawyer would appear to have a somewhat circumscribed ability to disclaim. See sections 0 and 0, below.

the unauthorized practice of law if provided by a nonlawyer. As noted, the First Rules Revision Commission recommended that a version of Model Rule 5.7 not be adopted “because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection,” and that certain terms and standards in the Model Rule “are materially inconsistent with existing California authorities.” *Rules and Standards Not Adopted*, p. 30, and the Second Rules Revision Commission reasoned that “[a]ppropriate guidance is currently provided by other California authorities.”

#### **“Law-related” or “non-legal” services defined.**

Under California law, the concept of a “non-legal service” has been defined as “services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law.” [Cal. State Bar Formal Op. 1995-141](#). This differs from the term “law-related services,” which as defined by Model Rule 5.7, means “services that might reasonably be performed *in conjunction with and in substance are related to the provision of legal services*, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” (Emphasis added)

*Functional approach.* The State Bar Committee subsequently clarified that the appropriate inquiry should be “functional,” i.e., “is the lawyer performing a service that is performed as part of the practice of law and would constitute the [unauthorized] practice of law if performed by a non-lawyer?” [Cal. State Bar Formal Op. 1999-154](#), at n. 4 & accompanying text.

#### **Categories of Non-legal Services a Lawyer Might Provide**

Applying the aforementioned “functional” approach, there appear to be four categories of non-legal services recognized in the California authorities.

##### ***Non-legal services provided in circumstances “Not Distinct” from the provision of legal services.***

There is a line of cases that recognize that when a lawyer provides non-legal services that are “not distinct” from the provision of legal services, the lawyer is subject to the Rules of Professional Conduct. See, e.g., *Layton v. State Bar*, 50 Cal.3d 888, 904 (1990) (“Where an attorney occupies a dual capacity, performing for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”)

Other cases in this line include *Kelly v. State Bar*, 53 Cal.3d 509, 514-17 (1991) (lawyer disciplined for failing to deposit funds in trust account although the lawyer served only as client's agent, and not as the client's lawyer, and in the sale of client's airplane); *Libarian v. State Bar*, 21 Cal.2d 862, 865-66 (1943) (the professional services performed by a lawyer “... are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession...” and whether or not the conduct would be acceptable in any other profession that might permit the performance of some of those services); *Alkow v. State Bar*, 38 Cal.2d 257, 263 (1952) (lawyer's provided collection services through a licensed collection agency that he controlled; all his activities were treated as being the practice of law); *Libarian v. State Bar*, 25 Cal.2d 314, 317-18 (1944) (lawyer provided services of a tax preparer, notary, and lawyer; lawyer's advertising in all three capacities treated without distinction as violations of the then-existing advertising prohibition); *Jacobs v. State Bar*,

219 Cal. 59 (1933) (lawyer acting as escrow holder disciplined for mishandling of money held in that capacity).

These cases all appear to track the scope of Model Rule 5.7(a)(1) as involving a lawyer's provision of non-legal services that are not distinct from the practice of law.

#### *Non-legal services related to the practice of law.*

Even when a lawyer is offering services that are “distinct from” the lawyer's practice of law, the lawyer might still be subject to the Rules of Professional Conduct if a recipient or potential recipient of the non-legal services reasonably might be confused as to the nature of services that the recipient is obtaining from the lawyer. See, e.g., [Cal. State Bar Op. 1999-154](#) (Where lawyer is seeking employment as an investment adviser, and uses the title “Esq.” on her stationery and promotional materials, refers to her experience in estate and tax planning law and that she is a “Certified Tax Specialist,” such advertising could lead potential customers to “misperceive the nature of the services being offered,” and thus subject the lawyer to the requirements of the lawyer advertising rules.) That same ethics opinion, however, suggested that such a result could be avoided if the promotional materials included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

Situations that fall into this category appear to be analogous to the situations described in Model Rule 5.7(a)(2).

#### *Non-legal services requiring the exercise of fiduciary duties.*

Aside from the provision of non-legal services “not distinct” from the provision of legal services and non-legal services that are related to the practice of law, California law also applies the Rules of Professional Conduct to a lawyer who provides non-legal professional services that are fiduciary in nature – even in the absence of a lawyer-client relationship. The State Bar summarized the law in a formal opinion:

As the Committee noted in California State Bar Formal Opinion Number 1995-141, even in the absence of a lawyer-client relationship, a California State Bar member must conform to the professional standards of a lawyer when rendering nonlegal professional services that involve a fiduciary relationship. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-814 [239 Cal.Rptr. 121] [“[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity as an attorney.” [Citation.]”]; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 428-429 [121 Cal.Rptr. 467] [attorney who assumes fiduciary relationship and breaches fiduciary duties in a manner that would justify discipline if the relationship had been that of attorney and client may be subject to discipline even if no formal attorney-client relationship existed].)

When [a lawyer's] relationship with a client in the course of rendering a purely non-legal service creates an expectation that she owes a duty of fidelity or she is exposed to a client's confidential information in the course of rendering the non-legal professional service, [the lawyer] may be subject to the same duties to avoid the representation of adverse interests under rule 3-310 [now rule 1.7] with respect to that client as she would if there had been a lawyer-client relationship. (See Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232]; *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785.)

The situations in this category do not appear to be fit neatly into either the Model Rule 5.7(a)(1) or (a)(2) category, and appear to be the kind of services that the First Commission concluded required “nuanced guidance.” See section 0, above.

### *Non-legal services completely unrelated to the practice of law.*

There is a final category of non-legal services that a lawyer might provide that bear no relation to the practice of law, for example, a lawyer-owned restaurant, antiques store, body shop, dry cleaner or other business that provides goods or services that are completely unrelated to the practice of law. Even in situations where the customers of such establishments knew that a lawyer was an owner or even if the lawyer actively participated in its operation, it would not be reasonable for the customer to expect or misperceive the kinds of goods or services being provided as being related to the practice of law. As already noted, lawyers could still be subject to discipline under the Rules of Professional Conduct even when not acting as a lawyer or in a professional capacity.<sup>7</sup>

### **Opting Out of the California Rules of Professional Conduct When Providing Non-legal Services**

An essential feature of Model Rule 5.7 is the ability of a lawyer who provides non-legal services to in effect opt out of being subject to the Rules by taking “reasonable measures” to assure that the recipient of the non-legal services knows that those services are not legal services with the protections of the lawyer-client relationship. Model Rule 5.7(a)(2). Despite the extensive California authority addressing a lawyer’s provision of non-legal services, there is scant authority that explicitly addresses the extent to which a lawyer in California might be able to take “reasonable measures” to “assure” that the recipients of the lawyer’s non-legal services are not confused about the nature of the services being provided, thus removing the application of the Rules to the lawyer’s conduct, i.e., opt out of the Rules. As noted, Cal. State Bar Formal Op. 1999-154 suggested that application of the Rules could be avoided if the promotional materials the lawyer used to advertise her non-legal services included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

There are at least two reasons why the concept of opting out has not been sanctioned by California authorities. First, the procedural posture of the court cases that have considered a lawyer’s provision of non-legal services has not been amenable to such a discussion. Nearly all of the cases have involved situations where the lawyer was charged with a disciplinary rule violation or a breach of fiduciary duty. The lawyers had not taken any measures to educate the clients that the services being provided might not come with the protections of the lawyer-client relationship. A court addressing such a neglect of duty would not discuss how a lawyer might have avoided being subject to those duties. Second, California traditionally has had a special focus on client protection. Model Rule 5.7(a)(2) applies not only to law-related services that are provided by a separate entity (as was true with the original version of Model Rule 5.7) but also to services that are provided directly by the lawyer or the lawyer’s law firm.

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<sup>7</sup> See discussion at the beginning of section 0. In addition to violations of the cited provisions of Cal. Rule 8.4, lawyers are also subject to discipline for violations of the State Bar Act, including [Bus. & Prof. Code § 6106](#), which provides “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

This latter situation would likely be viewed as more likely than not to cause a client or potential client to misperceive the nature of the services being provided. A court considering imposing discipline or a civil penalty on a lawyer would be unlikely to include dicta in its opinion that would explain how the lawyer might have avoided disciplinary sanctions. In addition, concern with this latter situation of client confusion might have also contributed to the rejection of a rule derived from Model Rules by both Rules Revision Commissions.

Nevertheless, the focus of Model Rule 5.7(a)(2) is on avoiding the confusion of the recipient of the non-legal services that the services come with the protections of the lawyer-client relationship, including the duty of confidentiality and lawyer-client privilege. There is California authority that recognizes a lawyer's ability to disclaim the lawyer-client relationship. For example, in [Cal. State Bar Formal Op. 2003-161](#), the Committee concluded that a lawyer could avoid the formation of a lawyer-client relationship by "express actions or words." *Id.* at p. 4 n. 1. In particular, the Committee cited to a California Supreme Court opinion, *People v. Gionis*, 9 Cal.4th 1196 (1995), in which the court held that a lawyer had effectively disclaimed the existence of a lawyer-client relationship before the lawyer had engaged in a discussion with the purported client, thus precluding the application of the attorney-client privilege.) See also *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651-52 (N.D. Cal. 1993) (applying California law).

In [Cal. State Bar Formal Op. 2004-168](#), the Committee concluded that a lawyer, who provides visitors to the lawyer's web site a means of communicating with the lawyer to obtain legal services or advice, can effectively disclaim either the formation of a lawyer-client relationship or the duty of confidentiality, but emphasized that the disclaimer would not be effective unless the lawyer explained the legal consequences that would result from no lawyer-client relationship being formed or a duty of confidentiality being owed (e.g., the lawyer would be under no obligation to keep the discussion with the web site visitor confidential). *Id.* at 4. The effectiveness of the disclaimer will generally in part depend upon the sophistication of the client. In essence, the opinion appears to require that only "reasonable measures" to remove any misunderstanding by a potential client of what protections are available when communicating on the web site will be effective.

It appears that notwithstanding the lack of explicit authority in the context of providing non-legal services that would permit a lawyer to opt out of the Rules similar to Model Rule 5.7(a)(2), lawyers have some ability to disclaim the formation of a lawyer-client relationship or duty of confidentiality, thus removing the primary concern with lawyers providing such services: that the client might be confused as to the protections to which the client is entitled. Further, the recipient of those services would likely also be protected because the lawyer would be subject to the regulatory scheme that governs the particular services – and thus to discipline for violation of those regulations. See, e.g., Bus. & Prof. Code §§ 6009 [attorney-lobbyists], 6009.3 [attorney-tax preparers], 6067 [lawyer's oath], 6068 [lawyers duties], 6090.5 and 6100-6107 [various disciplinary provisions], 6131 [former prosecutors], 6175-6177 [lawyers selling financial products], and 18895, et seq. [attorney-athlete agents], 16, U.S.C. §§ 1592 et seq. [Fair Debt Collections Practices Act].

## **Summary**

Although California has not adopted a version of Model Rule 5.7, there is extensive California authority addressing the concerns of the rule. There even appears to be authority that might at least to some extent permit a lawyer the same opportunity to opt out of the application of the Rules of Professional Conduct that is provided under Model Rule 5.7(a)(2). The California authority, however, is not necessarily common knowledge to lawyers or the public, nor is it definitive.

The next section of this memorandum discusses whether a rule of professional conduct or an ethics opinion might be more effective in apprising lawyers of the law.

### **The Benefits and Disadvantages of Employing a Rule of Professional Conduct or an Ethics Opinion to Expand the Availability of Law-related Services Provided by Lawyers?**

The charge of the ATILS Task Force includes (i) reviewing “the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public,” (ii) evaluating “existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need,” and (iii) “[w]ith a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.”

Adding a new rule of professional conduct that could provide lawyers or lawyers with an ability to provide ancillary services without being subject to the Rules might not appear to be in keeping with the Task Force’s charter and its emphasis on client protection, or its charge to explore means that might increase access to justice through innovation. This section of the memorandum is not intended to decide that issue but rather to simply determine whether, if a clarification of the availability of a lawyer providing non-legal services without being subject to the Rules of Professional Conduct is amenable to the charter, which approach would be best suited to providing that clarification given the current state of California law: a rule of professional conduct or an ethics opinion promulgated by the State Bar.

### **Rule of Professional Conduct**

There are several advantages to a Rule of Professional Conduct patterned after Model Rule 5.7. First, the rule would be mandatory in nature as part of a set of disciplinary rules. A lawyer who seeks to engage in providing law-related services would have to comply with the rule to receive any of its benefits and be subject to discipline for non-compliance. Public protection should be enhanced. Second, because all lawyers are aware of the Rules of Professional Conduct, knowledge of what the lawyer’s obligations are with respect to the provision of law-related services would be more readily available and compliance with the law enhanced, as well as any benefits to the public more likely ensured. Third, related to the second advantage, to the extent the extensive law concerning law-related services can be reduced to a straightforward disciplinary rule, compliance will be enhanced and public protection fostered. Fourth, adopting a version of Model Rule 5.7, even if it were to diverge substantially from the substance of the model rule, would nevertheless remove an unnecessary difference between the law governing lawyers in California and the law governing lawyers in the substantial majority of other jurisdictions. Fifth, a rule approved by the California Supreme Court would clarify the current law and, to the extent that law might be inconsistent with the objectives of the rule or the goal of increasing access to justice, overrule the inconsistent law.

To be sure, there are disadvantages with a rule approach. First, as noted by the First Rules Revision Commission, a rule might not be able to capture the “nuanced guidance” of the case law. Second, because such a rule would necessarily be simplistic, “any iteration of the rule likely would be inaccurate and misleading.” Third, the California Rules are narrowly tailored to be disciplinary rules; they are mandatory and permissive or aspirational, nor intended to provide general guidance on a topic of concern to lawyers. The complexities of California law reduced to a rule might not fit within that paradigm. Fourth, California has been without a rule of professional conduct in this area for over a century without there having been a multitude of lawyers who have taken advantage of clients through the delivery of non-legal services; to the extent lawyers have violated the law, there are already rules available to discipline them. There is no compelling need for such a rule.

As noted, it is not certain to what extent, if any, a rule that is patterned on Model Rule 5.7 would promote innovation that would operate to increase access to justice. The adoption of such a rule in California could increase knowledge of and incentives to lawyers to provide law-related services, and thus increase opportunities for lawyers to expand the services they provide either directly or indirectly their clients or the general public, but whether such a rule will contribute to access to justice is not at present established.

### **Ethics Opinion Promulgated by the State Bar**

There are several advantages to addressing by ethics opinion the matters regulated in other jurisdictions through a rule derived from Model Rule 5.7. First, an ethics opinion is generally a better vehicle than a disciplinary rule for providing the “nuanced guidance” that the First Commission concluded is necessary to understand and apply the current law in California. Second, by providing that “nuanced guidance,” the ethics opinion should enhance compliance with the law and thereby promote public protection. Third, an ethics opinion would be a better medium for identifying the different kinds of law-related services that lawyers could provide, describing the benefits and disadvantages of each, and even focusing on the kinds of services that might provide better access to justice.

The major disadvantage of an ethics opinion is the fact that such opinions are only advisory in nature. They are not mandatory and might not be viewed as carrying the weight of authority of a court opinion or rule of professional conduct. Further, although they are readily available on the State Bar’s web site, there is no assurance that a lawyer would review such an opinion before embarking on providing law-related services. Ethics opinions, although a valuable resource in applying the law and rules as they relate to a lawyer’s duties, are not controlling law, nor would the violation of a conclusion in an ethics opinion necessarily result in a lawyer’s discipline.

### **Summary**

ABA Model Rule 5.7 has been adopted in a substantial majority of United States jurisdictions with little variation. California is one of twelve jurisdictions that have not adopted a similar rule. During the lengthy process to revise the California Rules of Professional Conduct, two separate Rules Revision Commissions studied the feasibility of California adopting a rule 5.7 counterpart to Model Rule 5.7. Both Commissions concluded that the provision of law-related services by a lawyer was adequately addressed in California case law and other authorities and, in the event, a rule of professional conduct would likely not capture the nuanced guidance provided by the case law. Nevertheless, should the Task Force determine that promoting law-related services might enhance access to justice and decide to further investigate its regulation to protect the public, there are two potential means to do so: by rule of professional conduct or by an ethics opinion.

**Attachment 1**  
**[ABA Model Rule 5.7, revised and adopted (Feb. 2002)]**

**ABA Model Rule 5.7 Responsibilities Regarding Law-related Services**

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

**Comment**

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of

confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

**Attachment 2**  
**[First Rules Revision Commission Draft (10/31/2005)]**

**Rule 5.7 Responsibilities Regarding Law-Related Services**

A lawyer may provide to clients and to others law-related services, as defined in paragraph (a), subject to the requirements of this Rule:

(a) The Meaning of "Law-Related Services"

As used in this Rule, the term "law-related services" means services that a lawyer reasonably would be expected to perform in conjunction with or as part of the practice of law, even if the services might lawfully have been performed by non-lawyers.

(b) When Both Legal and Law-Related Services Are Provided by the Lawyer.

A lawyer is subject to these Rules with respect to all legal services and law-related services the lawyer provides at the same time to a recipient.

(c) When Only Law-Related Services Are Provided by the Lawyer.

If a lawyer provides law-related services, but is not providing legal services to the recipient, the lawyer is subject to these Rules with respect to all law-related services the recipient reasonably believes are being provided subject to the protections of a client-lawyer relationship with the lawyer.

(d) When Law-Related Services Are Provided by a Nonlegal Organization.

A lawyer is subject to these Rules, with respect to law-related services provided to a recipient by an organization with which the lawyer is affiliated in any way, if the recipient reasonably believes the services are being provided subject to the protections of a client-lawyer relationship with the lawyer.

(e) Avoiding the Duties of a Lawyer.

Paragraphs (c) and (d) do not apply if the lawyer makes efforts that are reasonable in the circumstances to avoid the recipient's belief that the protections of a client-lawyer relationship apply. Those efforts must include advising the recipient in writing both that the services are not legal services, and that the recipient will not have the protection of a client-lawyer relationship with respect to the law-related services being provided.

**Comment**

[1] When a lawyer performs law-related services, or is affiliated with an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed will not understand that the services might not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services might expect, for example, that the services are provided subject to the

obligation of lawyers to protect confidential information, to avoid conflicting representations, and to act with undivided loyalty.

[2] Paragraph (a) defines “law-related” services based on the reasonable belief of the recipient of the services. That belief can be based on what the lawyer says or fails to say about the nature of the services being provided. This belief also can be based on the nature of the services, that is, if they call upon the lawyer to give legal advice or counsel, to examine the law, or to pass upon the legal effect of any act, document, or law. Examples of law-related services include serving as the agent for a client in the sale of an airplane (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 514-17), acting as the Executor of a Will (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904), providing real estate title and brokerage services (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 668), providing debt collection services (*Alkow v. State Bar* (1952) 38 Cal.2d 257, 263), and providing tax preparation services (*Libarian v. State Bar* (1944) 25 Cal.2d 314, 317-18).

[3] The Rules of Professional Conduct apply to all legal and law-related services the lawyer provides at the same time to a recipient. Without regard to the sophistication of the recipient, any attempted distinction between legal and law-related services being provided at the same time would be too vague to be reliable. For example, if a lawyer provides advice on business transactions while providing real estate brokerage services to the same recipient, paragraph (b) conclusively presumes the lawyer could not make clear to the recipient of the services which services are given as a lawyer and which are not. Under paragraph (b), these Rules will apply when a lawyer provides law-related services in the general course of also providing legal services, even if the two are not provided simultaneously or as part of a single project. Under paragraph (c), these Rules will not apply when the provision of legal and law-related services are clearly distinct, as when the lawyer never has provided legal services to the recipient or did so in a matter that clearly has been concluded.

[4] This Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services by a lawyer. In addition, lawyers can be subject to discipline for conduct that might not amount to the practice of law. See, for example, B&P C '6009 [attorney-lobbyists], 6009.3 [attorney-tax preparers], 6067 [lawyer’s oath], 6068 [lawyer’s duties], 6090.5 and 6100-6107 [various disciplinary provisions], 6131 [former prosecutors], 6175-6177 [lawyers selling financial products], and 18895, *et seq.* [attorney-athlete agents], 16, U.S.C. '1592, *et seq.* [Fair Debt Collections Practices Act], Welfare & Institutions C '14124.76 [obligation to notify Department of Health Services regarding receipt of personal injury judgment, award, or settlement], [and Rule 8.4].

[5] Law-related services may be provided through an organization that is distinct from that through which the lawyer provides legal services. If a lawyer is affiliated with that organization in any way, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the organization knows that the services provided by the organization are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. There will be many situations in which the lawyer’s involvement with the organization will be unknown to the recipients of its services, and for that or other reasons there will be no reasonable basis on which the recipient could think the services are provided subject to the protections of the lawyer-client relationship; in these situations this Rule does not obligate the lawyer to communicate with the recipient about the lawyer’s role.

[6] The communication required by paragraph (e) should be made before entering into an agreement to provide or providing law-related services.

[7] Under paragraph (e), the lawyer has the burden of showing that the lawyer has communicated to the recipient, in a manner that reasonably should have been understood by the recipient, that the law-related services are provided without the protections of a client-lawyer relationship. For instance, a sophisticated user of law-related services, such as a publicly held corporation, might require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an unsophisticated individual seeking real estate brokerage services or investment advice from someone he or she knows to be a lawyer.

[8] When a lawyer is obliged to accord the recipients of services all the protections of these Rules, the lawyer must take special care to heed the Rules addressing conflicts of interest [(Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f))] and the requirements of [Rule 1.6] relating to disclosure of confidential information. The promotion of the law-related services also must comply in all respects with [Rules 7.1 through 7.3], dealing with advertising and solicitation. Lawyers also should take special care to identify all obligations imposed by case law.

[9] When the protections of these Rules do not apply to the provision of law-related services, the services are governed by principles of law external to these Rules, such as the law of principal and agent or the rules of another profession in which the lawyer is licensed. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. When the protections of the Rules do apply, the lawyer is obligated to provide services subject to the higher of the standard of the Rules and the external standard.

[10] Some doctrines of law not related specifically to lawyers can impose fiduciary duties on lawyers. This can occur when a lawyer acts in a role that is fiduciary in nature. See, e.g., *William H. Raley Co. v. Superior Court* (1983) 149 Cal. App.3d 1042 [lawyer served as corporate director], *Huston v. Imperial Credit Commercial Mortgage Investment Corp.* (C.D. Cal. 2001) 179 F. Supp.2d 1157 [lawyer served as corporate officer], *In re Mortgage & Realty Trust v. Zim Co.* (C.D. Cal. 1996) 195 B.R. 740 [lawyer served as trustee]. A lawyer who is obligated under principles outside these Rules to act in a fiduciary capacity is required to satisfy all of the duties of honesty and integrity imposed by law on fiduciaries and the duties of honesty and obedience to fiduciary duty imposed on lawyers. See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 and *In the Matter of Wyshak* (1999) 4 Cal. State Bar Cit. Rptr. 70, 80. A lawyer's obligation to act subject to fiduciary duties also can require the lawyer to act in accordance with particular requirements of these Rules. This could include the confidentiality and conflicts of interests provisions of these Rules and the trust account rules with regard to funds the lawyer receives in a fiduciary capacity. See, e.g., *William H. Raley Co. v. Superior Court*, *supra* at 1047-48 and *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 and *Matter of Hertz*, (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469-70. See [Rule 4-100]. [See Rule 2.4 with regard to lawyers acting as third-party neutrals.]

**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION INTERIM NO. 16-0003**

**ISSUES:** Under what circumstances is a lawyer’s conduct or provision of services in connection with a non-law business potentially subject to regulation under the California Rules of Professional Conduct and, what steps, if any, can a lawyer take to ensure that the provision of non-legal services is not subject to those rules? How do rules governing partnership with non-lawyers, sharing of legal fees, solicitation, conflicts of interest and lawyer-client business transactions apply to a lawyer’s dealings with a non-law business in which the lawyer is involved?

**DIGEST:** Although non-legal services are, by definition, not the practice of law, their provision by a lawyer or lawyer-controlled entity is presumptively subject to the Rules of Professional Conduct if they are conducted in a manner that is not distinct from activities constituting the practice of law or if they are sufficiently law-related to give rise to a reasonable risk that the customer may understand that legal services are being provided or that a lawyer-client relationship has been formed. However, where appropriate steps have been taken to distinguish non-legal from legal services and to clarify that no legal services are being provided and that no lawyer-client relationship has been formed, the Rules of Professional Conduct will not apply to the services provided. The rules governing the lawyer’s separate practice of law, including rules pertaining to solicitation, conflict of interest, and lawyer-client business transactions will, however, remain applicable to the lawyer’s dealings with the non-legal entity in the course of the lawyer’s practice. In addition, a lawyer is always subject to professional discipline for acts involving moral turpitude, dishonesty, or corruption, whether or not those acts occur in connection with the practice of law. Accordingly, the fact that a lawyer has made clear that her distinct non-legal business does not involve the practice of law or the formation of an attorney-client relationship is not a bar to such discipline.

**AUTHORITIES**

**INTERPRETED:** Rules 1.7, 1.8.1, 5.4, 7.2, 7.3 and 8.4 of the Rules of Professional Conduct of the State Bar of California.<sup>1/</sup>

Business and Professions Code sections 6068(e)(1) and 6106.

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<sup>1/</sup> Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

## INTRODUCTION

In today's economic environment, many lawyers and law firms are interested in pursuing business opportunities that do not involve the provision of legal services. Those activities may draw on the lawyer or law firm's own non-legal background and skills or they may involve investing in or partnering with non-lawyers. This opinion addresses the circumstances under which those Rules of Professional Conduct that apply to lawyers in the practice of law may also apply to lawyers' conduct providing non-legal services individually or through a lawyer-controlled business.<sup>2/</sup> It also addresses ethical issues that may arise for a lawyer in the practice of law arising from her relationship with a separate non-law business.

## STATEMENT OF FACTS

A law firm is considering seeking to capitalize on capacities developed over time by marketing those capacities through businesses that do not involve the representation of clients in legal matters. The firm is considering a variety of options.

In Scenario 1, the firm would provide back office services for law firms who wish to contract out for those services. The law firm would like to provide those services to other law firms pursuant to contracts that, while fully compliant with the standards governing non-lawyer entities providing such services, avoid the complexities and compliance costs associated with the Rules of Professional Conduct relating to, among other things, conflicts of interest, lawyer trust accounts, and similar issues. The services would be provided through a separate entity, which would in turn seek investments from non-lawyer sources of funding.

In Scenario 2, the firm would provide services as a professional fiduciary, specializing in the problems of beneficiaries and conservatees whose welfare is threatened by diminished or declining capacity. The services would be provided through a separate entity. Services at the professional fiduciary firm would be provided by lawyers from the firm and by some non-lawyers trained as professional fiduciaries and the entity would be jointly owned by the law firm and the non-lawyer fiduciaries working there. In California, professional fiduciaries are subject to their own regulatory scheme. Business and Professions Code sections 6500-6592, Probate Code sections 2340 and 2341, and California Code of Regulations sections 4400-4622. From the perspective of the new business, an important and attractive feature of that separate scheme is that the applicable confidentiality rules grant a professional fiduciary implied authority to disclose an incompetent beneficiary's confidential information in the beneficiary's interest when necessary to prevent the beneficiary from suffering or inflicting harm. In contrast, the rules of lawyer-client confidentiality do not recognize such authority except in the rare case where the client intends to commit a violent crime. Business and Professions Code section 6068 (e)(1) and rule 1.6.

With respect to each of the proposed options, the firm would like to know first, whether, and under what circumstances, the provision of the services would be subject to the Rules of Professional Conduct. In addition, the firm wants to know: (a) how the rules barring partnerships or fee-splitting with non-lawyers might apply to such arrangements and (b) how the rules regarding solicitation, conflict of

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<sup>2/</sup> This opinion supplements and updates important earlier opinions on this topic, including Cal. State Bar Formal Opn. Nos. 1982-69, 1995-141, and 1999-154.

interest and lawyer-client business transactions might apply to the relations between the law firm and the separate entity that provides non-legal services.

## BACKGROUND

### 1. The Definition of Non-Legal Services

This Committee's prior opinions have defined non-legal services as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." Cal. State Bar Formal Opn. No. 1995-141.<sup>3/</sup> It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing Charles W. Wolfram, *Modern Legal Ethics* (1986) pp. 897-898). A lawyer or law firm may engage in the provision of non-legal services either directly from the lawyer or the law firm's own offices<sup>4/</sup> or through a separate entity in which the lawyer or law firm has an ownership interest. Such services may be delivered by lawyers or by non-lawyers.

The fact that a lawyer is providing services that are not part of the practice of law and that could lawfully be provided by a layperson does not mean that professional discipline and professional rules have no role to play.<sup>5/</sup> Even when a lawyer's sole business is the provision of non-legal services, she is subject to professional discipline for "the commission of any act involving moral turpitude, dishonesty or corruption." Business and Professions Code section 6106 and Cal. State Bar Formal Opn. No. 1995-141 at p. 2. In addition, certain provisions of rule 8.4 clearly apply to conduct outside the practice of law. There are many reported cases of professional discipline being imposed under Business and Professions Code section 6106 for conduct occurring outside of the lawyer-client relationship.<sup>6/</sup>

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<sup>3/</sup> Consistent with the Committee's longstanding practice, this opinion is not intended to address or opine upon the issue of the unauthorized practice of law. The prohibition against engaging in the unauthorized practice of law is set forth in statute under the California Business and Professions Code sections 6125 to 6127. Regarding what constitutes the practice of law in California, lawyers should consider the following cases: *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858]; *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corp.* (1922) 189 Cal. 531; *Estate of Condon* (1998) 65 Cal.App.4th 1138 [76 Cal.Rptr.2d 922]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].

<sup>4/</sup> The former rule forbidding the provision of legal and non-legal services from the same office has long since been disapproved. See Los Angeles County Bar Assn. Opn. Nos. 384 and 413.

<sup>5/</sup> The question of whether a lawyer's performance of non-legal services is subject to professional discipline or to the Rules of Professional Conduct is related to, but distinct from, the question whether those services are "professional services" for purposes of the application of the malpractice statute of limitations in Code of Civil Procedure section 340.6. See *Lee v. Hanley* (2015) 61 Cal.4th 1226 [191 Cal.Rptr.3d 536]. We express no opinion on that issue of statutory construction here.

<sup>6/</sup> Examples, several of which are discussed in more detail below, include *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298] (agent's willful misappropriation of funds); *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467] (fraud by lawyer-fiduciary); *Lewis v. State Bar* (1973) 9 Cal.3d

In addition, under certain circumstances lawyer or law firm involvement in a business providing non-legal services can trigger the application of other Rules of Professional Conduct applicable in the practice of law.<sup>7/</sup> Comments to the rules note that “a violation of a rule can occur... when a lawyer is not practicing law or acting in a professional capacity.” Rule 1.0, Comment [2] and rule 8.4, Comment [1]. But with the exception of rule 8.4, the rules do not themselves specify when they apply to non-legal services, leaving that question to be resolved under other California authorities, including case law and ethics opinions.<sup>8/</sup>

## **2. Non-Legal Services Provided in Circumstances Not Distinct from the Practice of Law**

One way that services not constituting the practice of law can become subject to the Rules of Professional Conduct is when they are rendered in circumstances that are not sufficiently distinct from the provision of legal services. The authorities all involve situations where a sole practitioner offered to provide both legal and non-legal services in the same matter, from the same office, without any efforts to distinguish the two services. See, for example: *Layton v. State Bar* (1990) 50 Cal.3d 888, 904 [268 Cal.Rptr. 802] (serving as lawyer for the estate and executor in the same matter); Cal. State Bar Formal Opn. No. 1982-69 (serving as lawyer and broker with respect to the same real estate transaction); and *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321] (lawyer and notary). This principle may apply even if the non-legal services are provided through a separate entity devoted primarily to the provision of such services. For example, a lawyer who establishes a separate entity through which she primarily intends to provide investment advice (a non-legal service) is nevertheless subject to the Rules of Professional Conduct if she also provides legal advice to her investment advisees as part of the separate business. Cal. State Bar Formal Opn. No. 1999-154.

## **3. Non-Legal Services “Related to the Practice of Law”**

Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the Rules of Professional Conduct can still apply if the non-legal services are sufficiently related to the practice of law that the lawyer’s involvement in them could “reasonably lead prospective clients to misperceive the nature of the services being offered.” Cal. State Bar Formal Opn. No. 1999-

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704, 712-13 [170 Cal.Rptr. 634] (same); *Alkow v. State Bar* (1952) 38 Cal.2d 257 [239 P.2d 871] (misrepresentation and misappropriation); *Jacobs v. State Bar* (1933) 219 Cal. 59, 63-64 [25 P.2d 401] (deception by lawyer escrow holder).

<sup>7/</sup> Several independent statutory provisions govern lawyer’s provision of certain products and services ancillary to the practice of law. (E.g., Bus. & Prof. Code, §§ 6009.3 (tax preparation), 6009 (lobbyists), 6077.5 (consumer debt collection), 6175 (financial products), and 18895 (athlete agents). All are beyond the scope of this opinion.)

<sup>8/</sup> Many American jurisdictions have addressed the issue of the application of professional rules to non-legal businesses by adopting a version of American Bar Association Model Rule 5.7. A drafting team of the Commission for the Revision of the Rules of Professional Conduct recommended against adoption of Rule 5.7 in California “because appropriate guidance is currently provided by other California authorities.” Memorandum from Rule 5.7 Drafting Team to Members, Commission for the Revisions of the Rules of Professional Conduct, May 16, 2016 at p. 4-5. The full Commission voted to accept that recommendation.

154. Thus, we have previously opined that an advertisement for an attorney's separate investment advisory business that lists the attorney's professional credentials as a lawyer is a "communication with respect to professional employment" within the meaning of former rule 1-400, because investment advising is an activity related to the practice of law and the use of the lawyer's legal credentials to advertise that service could therefore lead the client to misperceive the nature of the service being provided. *Id.*

At the same time, there are some forms of non-legal services that are so clearly unrelated to the practice of law that there is no risk of customer confusion between the lawyer's legal and non-legal activities. Thus, it is settled that lawyer-owned retail service businesses like a restaurant or dry cleaner that are distinct from the lawyer's practice are so clearly non-related to the practice of law that the Rules of Professional Conduct do not apply to relations with their customers. Cal. State Bar Formal Opn. No. 1995-141.

#### **4. Types of Law Related Services Potentially Subject to the Rules of Professional Conduct**

The California authorities do not provide a comprehensive listing of "law-related" non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. See Cal. State Bar Formal Opn. No. 1995-141 (fiduciary) and Cal. State Bar Formal Opn. No. 1999-154 (investment advisor). Beyond that, however, there is little relevant authority. Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct.<sup>9/</sup> American Bar Association Model Rule 5.7 defines "law-related services" subject to the Rules of Professional Conduct as those "that might reasonably be performed in connection with legal services and in substance are related to the provision of legal services." This definition reflects the same concern as California law: the risk of client confusion concerning the nature of the services being provided.

The Comments to Model Rule 5.7 suggest a further non-exhaustive list of "law-related" activities that are potentially subject to professional rules, including "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." ABA Model Rule 5.7, Comment [8]. Some of these activities overlap with those already recognized under California law as potentially subject to regulation under the Rules of Professional Conduct. To the extent that the list extends beyond those activities, the Committee does not opine here on whether a lawyer's provision of any of the listed services, in circumstances distinct from her practice, would be subject to the Rules of Professional Conduct. Specific circumstances may matter greatly in assessing the risk of client misunderstanding. In addition, the relationship of the non-legal business activity to activities defined as the practice of law is context-dependent and could change over time. The Committee believes, however, that this broader list may provide useful guidance to lawyers seeking to determine whether a non-law business is potentially subject to the Rules of Professional Conduct.

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<sup>9/</sup> See, Rule 1.0, Comment [4]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 642, 655-656 [82 Cal.Rptr.2d 799]; and Cal. State Bar Formal Opn. No. 2010-180 n.7.

## 5. Affirmative Steps May Avoid the Application of the Rules of Professional Conduct

The question remains whether the application of the Rules of Professional Conduct governing the practice of law to “law-related” non-legal services is automatic and inescapable, or instead can be avoided through appropriate clarifying measures that eliminate the reasons for applying those rules. No California authority directly addresses this question. It is settled, however, that a lawyer providing non-legal services has a duty to clarify whether and to what extent a lawyer-client relationship exists, at least when a lawyer knows or reasonably should know that the customer believes that such a relationship exists. Cal. State Bar Formal Opn. No. 1995-141; *compare Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; rule 1.13(f) and rule 4.3(a). It is also settled that: (1) a lawyer can avoid the formation of an implied lawyer-client relationship through words or actions making it unreasonable for the putative client to infer that such a relationship exists and (2) the sophistication of the client is relevant in assessing the reasonableness of the client’s belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 651-52 [applying California law]; see also *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] and Cal State Bar Formal Opn. No. 2003-161 n.1. These principles suggest that appropriate efforts to distinguish legal and non-legal services, coupled with appropriate warnings that no attorney-client relationship exists and that no legal services are being provided, can be effective to take law-related non-legal services outside the coverage of the Rules of Professional Conduct.<sup>10/</sup>

Allowing lawyers and law firms providing non-legal services that take appropriate clarifying measures to avoid the application of the Rules of Professional Conduct also represents sound policy, for multiple reasons. First, the primary rationales for applying the Rules of Professional Conduct to non-legal services are the risk of overlap with legal services and the risk of client confusion concerning whether the protections of the lawyer-client relationship exist. When those risks are not present, the reasons for applying the Professional Rules are also no longer present. Second, allowing such disclaimers to be effective may benefit both customers and service providers. The fact that the Rules of Professional Conduct do not apply does not mean that the relevant conduct will go unregulated. Apart from the residual power to discipline attorneys described above, the non-law business will very often be subject to regulation under an alternative regulatory or licensing scheme, such as those governing investment advisors or professional fiduciaries. There is no reason to think that the Rules of Professional Conduct, designed to regulate the practice of law, provide a superior regulatory framework for such activities. Instead, when the provision of a non-legal service is subject to its own regulatory or contractual scheme, the lawyer provider and the customer may have multiple shared reasons, including clarity, consistency and efficiency, for having the services regulated under that scheme alone. For example, in the professional fiduciary scenario described above, the parties could well conclude that a regime in which a fiduciary has implied authority to disclose confidential information for the beneficiary’s protection is superior to one in which the fiduciary does not have such authority. Third, where California policy

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<sup>10/</sup> The leading California ethics authorities do not consider whether such clarifying measures are available or would be effective. See, e.g., M. Tuft & E. Peck, *California Practice Guide: Professional Responsibility* (The Rutter Group [2018]) §1:324 (a lawyer or law firm that directly or indirectly provides law related services, whether to clients or non-clients, “must comply” with the Rules of Professional Conduct and the State Bar Act in the provision of those non-legal services). The authors do not, however, consider the possibility of effective clarifying measures or the authorities or reasons of policy cited in text that support their recognition.

permits, it is desirable to align California’s approach with that taken in other jurisdictions. The approach outlined here, which treats the application of the Rules of Professional Conduct to law-related services as presumptive only, advances national uniformity because it aligns with the approach taken in ABA Model Rule 5.7, which states that professional rules do not apply to law-related services if the lawyer has established that those services are distinct from legal services and that reasonable measures have been taken to ensure that the customer understands both that the services are not legal services and that the protections of the lawyer client relationship do not exist. ABA Model Rule 5.7, Comments [6] - [8]. In an era when many lawyers and law firms practice (and potentially offer non-legal services) in multiple jurisdictions, having a standard that advances national uniformity is a substantial advantage.

The effectiveness of measures taken to distinguish non-legal services from legal services and to clarify the nature of the services provided and the absence of a lawyer-client relationship will depend on the circumstances, including the clarity of the measures taken, the sophistication of the customer, whether the customer is a client or former client of the lawyer,<sup>11/</sup> whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. We discuss these issues in more detail below. In some situations, particularly those involving the provision of legal and non-legal services in the same matter or to unsophisticated customers, the legal and non-legal services may be “so closely entwined” that even a very clear disclaimer may not be effective. See ABA Model Rule 5.7, Comment [8]. But where non-legal services are clearly distinguished as such, and the lawyer has taken reasonable clarifying measures, there is no reason why the business cannot be conducted under the baseline legal rules governing non-lawyers who engage in it.

## DISCUSSION

### 1. Applicability of the Rules of Professional Conduct

For purposes of discussion, we assume, without deciding, that the businesses contemplated in Scenarios 1 and 2, if conducted by non-lawyers, would not constitute the unauthorized practice of law.<sup>12/</sup> If conducted by a lawyer or law firm, however, both would be sufficiently law-related to be presumptively subject to the Rules of Professional Conduct. In Scenario 1, back office services for law firms are frequently provided in connection with, and are substantively related to, the practice of law. The same is true of fiduciary services, where the conclusion is also supported by the case law and ethics opinions. See Cal. State Bar Formal Opn. No. 1995-141. In both Scenarios 1 and 2, there is a significant risk that

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<sup>11/</sup> It has been suggested that the Rules of Professional Conduct should always apply to services provided by a separate non-law business to a lawyer or law firm’s present or former client. No California authority supports this result, however, and we think it goes too far. While there may be some situations where the present or former client status of a customer, either individually or in combination with other factors, could render clarifying measures ineffective, there may well be others where such measures can still be effective, particularly when the non-legal services are being provided in a separate, unrelated matter and the client or former client is sophisticated and represented by separate counsel. The existence of a present or former client relationship may, of course, also trigger obligations stemming from that relationship, rather than from the nature of the non-legal services being provided. Those obligations are treated further in Section 4 of the Discussion below.

<sup>12/</sup> See the discussion, *supra*, at note 2.

the customer could misunderstand the nature of the services being provided and construe them as legal services.

Because the proposed activities are law related, they will be subject to the Rules of Professional Conduct unless they are distinct from the firm's provision of legal services and the firm has taken reasonable steps to ensure that the customer for the services understands that the firm's involvement in providing them does not mean that the services involve the practice of law and is not intended to give rise to an attorney-client relationship.

To avoid the application of the Rules of Professional Conduct to law-related services the provision of those services must be distinct from the law firm's practice of law. If a single lawyer is offering both legal and non-legal services in the same matter, from the same office, the activities ordinarily will not be distinct and the Rules of Professional Conduct will apply. Conversely, if the services are being offered in different matters and by separate entities, they will normally be distinct. In between these extremes, the answer will depend on circumstances. For example, there may be circumstances where distinctness may be achieved even if the services are provided through the same entity—for example if the law firm provides legal and non-legal services through separate units of the firm that are organizationally and functionally distinct. See Model Rule 5.7 (suggesting that distinctness may be shown by using different support staff for legal and non-legal services). Similarly, there may also be occasions where even though services are being provided in the same matter, for example, by the law firm and a separate entity controlled by the law firm, the relationship between the two types of services, in terms of organizational structure, designated responsibilities, personnel, compensation and related issues, could still permit a finding that the services are distinct.

## **2. Effectiveness of Clarifying Measures**

Assuming the provision of non-legal services is distinct from the provision of legal services, the question remains whether the law firm can avoid the application of the Rules of Professional Conduct by taking appropriate measures to clarify the nature of the services being provided and the absence of any lawyer-client relationship. With respect to Scenario 1, we think the answer is clearly yes. With respect to Scenario 2, involving the provision of professional fiduciary services, the question is closer, but we conclude that the ultimate answer is also affirmative.

The issue in connection with Scenario 2 arises from statements like those in Cal. State Bar Formal Opn. No. 1995-141, which states that, "when rendering professional services that involve a fiduciary relationship, a member of the State Bar must conform to the professional standards of a lawyer." This language—and, more important, that in the Supreme Court cases on which it relies—could be read as suggesting that a lawyer engaged in a separate non-legal business that involves any assumption of fiduciary duties is always subject to the Rules of Professional Conduct, even if the lawyer has made clear that she is not engaged in the practice of law or entering into a lawyer client relationship, and even if the Rules of Professional Conduct are inconsistent with other regulatory provisions applicable to that non-law business. Given the great range of non-legal settings in which lawyers assume fiduciary duties, the sweep of such a rule would be broad indeed. But we do not think that such a broad reading is warranted, for multiple reasons.

First, in many of the decided cases, the language concerning the fiduciary status of the lawyer was dictum, because other recognized bases for professional discipline were present.<sup>13/</sup> Second, no case explicitly considers, let alone explicitly rejects, the use of clarifying measures for a distinct non-law business providing fiduciary services. Third, the facts of the decided cases do not implicitly reject that approach; in fact they are fully consistent with it.<sup>14/</sup> Because the decided cases provide no explicit or implicit support for applying the Rules of Professional Conduct to non-legal work that is distinct from the lawyer's practice and clearly identified as non-legal, we do not think that they alter the conclusion that California law does and should give effect to such clarifying measures for all types of distinct non-legal businesses. Put simply, once appropriate measures have been taken to avoid consumer confusion, there does not appear to be any good reason why a lawyer who has a separate non-legal business as, for example, a professional fiduciary, should be required to comply with rules that are unique to the legal profession, rather than those that govern the conduct of non-lawyers who conduct such businesses.

Accordingly, we believe that in both Scenario 1 and Scenario 2 a lawyer who is providing non-legal services that are distinct from his or her law practice can avoid the application of the Rules of Professional Conduct to those services if she provides the customer with reasonable notice that: (1) no legal advice or services are being provided, (2) no attorney-client relationship has been formed, and (3) the protections associated with the attorney-client relationship, including the attorney-client privilege and the duty of confidentiality, will not be available. Such clarifying measures are more likely to be effective if the notice is in writing and if prospective customers of the law firm are sophisticated or represented by counsel. This will very likely be the case for the customers of an entity providing back office services for law firms, perhaps less so for a firm serving as a professional fiduciary. Where the customer is not sophisticated, it may be relevant whether the customer had, or was advised to retain, separate legal counsel in the matter.

In Scenario 2, the law firm proposes to have one or more of its lawyers take an active role in directing, performing, or delivering the services in question, as opposed to simply being a passive investor in the entity. Lawyers may be fully as capable of providing non-legal services as their non-lawyer counterparts. The direct involvement of lawyers in providing such services may, however, increase the risk that the customer may believe the services entail the formation of an attorney-client relationship. Still, where the non-legal services are clearly distinct from any legal services provided by the lawyer, the relevant disclaimers are clear, and the client is sophisticated, there is no categorical reason why the lawyer's

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<sup>13/</sup> In some cases, there was a lawyer-client relationship, *Priamos v. State Bar* (1987) 3 Cal. State Bar Ct. Rptr. 824; *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Jacobs v. State Bar* (1933) 219 Cal. 59 [25 P.2d 401]. In others, there was conduct involving moral turpitude. See cases cited in note 5 above.

<sup>14/</sup> The reported cases all involve individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services. See, e.g., *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321]; *Jacobs v. State Bar*, *supra*; Cal. State Bar Formal Opn. No. 1982-69, or the lawyer's affirmative use of his professional status to invite the injured person's trust and confidence, *Priamos v. State Bar*, *supra*; *Beery v. State Bar*, *supra*; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467]; *Lewis v. State Bar*, *supra*; *Jacobs v. State Bar*, *supra*, or both. Because none of the decided cases involved distinct non-law businesses and appropriate clarifying measures, all would be decided the same way under the approach proposed here.

involvement should give rise to a risk of misunderstanding sufficient to require the application of the Rules of Professional Conduct.

A similar point applies to the degree of lawyer control of the non-legal business. For purposes of determining whether the Rules of Professional Conduct apply, the degree to which the lawyer or law firm controls the business is important principally insofar as it may indicate to customers of the business that the services being provided are legal in nature. Accordingly, if the degree of lawyer control is not apparent to the customer, it is unlikely to support a finding that the professional rules apply. And even if that degree of control is apparent, it is unlikely, standing alone, to lead to a finding that the Rules of Professional Conduct apply if the non-legal business has properly disclaimed the provision of legal services and the formation of a lawyer client relationship.

### **3. Partnership and Sharing of Income with Non-Lawyer Partners or Investors**

In this section and the following section, we assume, unless otherwise stated, that the lawyer or law firm is subject to the Rules of Professional Conduct, but that the non-legal service provider has taken sufficient steps to ensure that it is not.

A lawyer or law firm may well want to share income from a non-legal business with non-lawyer partners, employees, or investors. Under the Rules of Professional Conduct, a lawyer may not form a partnership or other organization with a non-lawyer if any of the activities of that partnership consist of the practice of law, rule 5.4(b), and, except in certain limited circumstances, may not directly or indirectly share legal fees with a non-lawyer. Rule 5.4(a).

A separate entity providing exclusively non-legal services is, by definition, not engaged in the practice of law. Accordingly, rule 5.4(b) does not bar a lawyer from forming a partnership or other organization with non-lawyers to conduct such a business, or from accepting investment in such a business from non-lawyers. Moreover, fees that are derived exclusively from the provision of non-legal services are not legal fees. Thus, rule 5.4(a) does not bar the direct or indirect sharing of non-legal fees with non-lawyers who work or invest in a separate non-law business. See Cal. State Bar Formal Opn. No. 1995-141.

### **4. Solicitation, Conflict of Interest and Lawyer-Client Business Transactions**

A law firm that practices law and a separate lawyer-controlled business that provides non-legal services may each want to pursue business on the other business's behalf or refer potential clients or customers to the other business. The two businesses may also want to make compensation for such referrals part of the relationship between them, whether in the form of referral fees or otherwise. These issues have been largely covered in earlier opinions. We discuss them below under the headings of solicitation, conflict of interest, and lawyer-client business transactions.

*Solicitation.* The law of solicitation governs oral or written targeted communications by or on behalf of a lawyer that are directed to a specific person and that offer to provide, or can reasonably be understood as offering to provide, legal services. Rule 7.3(e). A lawyer or law firm that solicits non-client third persons for a distinct non-legal business is not covered by this rule because the communication cannot reasonably be understood as offering legal services. See, Cal. State Bar Formal Opn. No. 1995-141 (construing former rule 1-400). For the same reasons, the solicitation rules do not apply when a lawyer-controlled entity that provides solely non-legal services is soliciting on its own behalf.

When the separate entity is engaged in efforts to obtain clients for the law firm, however, the solicitation rules that govern the law firm's conduct will apply to those efforts, because such communications are "on behalf of" the law firm and can be understood as offering to provide legal services. Moreover, any compensation, gift or promise by the lawyer given in consideration of a recommendation by the non-lawyer entity would be prohibited by rule 7.2(b), and would subject a lawyer to discipline. See Cal. State Bar Formal Opn. No. 1995-141.

*Conflict of Interest.* A lawyer who refers an existing client to a non-legal business in which the lawyer has an economic interest, with the expectation or intention that the client will purchase non-legal services from the entity, may be obliged to comply with rule 1.7, governing conflicts of interest. Rule 1.7(b) requires informed written consent of the affected client and compliance with rule 1.7(d), "if there is a significant risk the lawyer's representation of the client will be materially limited" by the lawyer's own interests. Rule 1.7(b). Whether the lawyer's referral to a business in which she has an interest will trigger rule 1.7(b) will depend on, among other things, the connection of the non-legal services to the representation of the client, the degree to which the choice of provider could affect the outcome or cost of the representation, and the degree to which the lawyer or law firm will benefit economically from the referral. Compare Cal. State Bar Formal Opn No. 1995-140 (construing the requirement of written disclosure of interests under former rule 3-310(B)(4)). Where the non-legal services are connected to the representation and the lawyer receives compensation for his referral, compliance with rule 1.7 is normally required, because of the risk that the lawyer's exercise of judgment in conducting the representation will be adversely affected by her economic interest. Cal. State Bar Formal Opn. No. 1995-140. Conversely, if the referral is for services unrelated to the representation or if the lawyer's economic benefit from the transaction is immaterial, compliance may not be required. Compare Cal. State Bar Formal Opn No. 2002-159, section III (discussing written disclosure requirements under former rule 3-310(B)(4)).

*Lawyer-Client Business Transactions.* Transactions by an existing client (and in certain circumstances, a former client) of a lawyer or law firm with an entity providing non-legal services may also be subject to rule 1.8.1, governing lawyer-client business transactions.<sup>15/</sup> That rule applies not only to transactions between client and lawyer directly, but also potentially to transactions between the client and an entity in which the lawyer has a controlling interest. Cal. State Bar Formal Opn No. 1995-141.

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<sup>15/</sup> Rule 1.8.1 provides that:

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;
- (b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the transaction or acquisition, and to the lawyer's role in it.

The test for determining the applicability of rule 1.8.1 to a transaction between a lawyer's client and a non-legal business in which the lawyer has an interest is "whether the transaction arises out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship." Cal. State Bar Formal Opn No. 1995-141 (applying former rule 3-300); see also *Hunnecutt v. State Bar* (1988) 44 Cal. 3d 362, 370-71 [243 Cal.Rptr. 699] (Rule 5-101 (predecessor to former rule 3-300) applies if the client placed his trust in his former attorney "because of the representation").<sup>16/</sup> When a lawyer advises a client to patronize a non-legal business, and receives a referral fee for doing so, the transaction clearly arises out of the lawyer-client relationship and rule 1.8.1 applies. Cal. State Bar Formal Opn No. 1995-140. The same conclusion should follow in any other case where the lawyer's referral to or involvement in the non-legal business is reasonably likely to cause the client to transfer the trust and confidence reposed in the lawyer to the negotiation of the client's relationship with the non-legal business. *Id.*<sup>17/</sup>

## CONCLUSION

A lawyer engaged in a non-law business is always subject to professional discipline for conduct that violates Business and Professions Code section 6106 or rule 8.4. A lawyer's involvement in a non-law business may also trigger the application of other Rules of Professional Conduct if the business is sufficiently "law-related" that the lawyer's involvement might reasonably lead a customer for those services to believe that an attorney-client relationship was being formed, or that legal services were being provided. Even when a non-law business is "law related" in this sense, however, the rules governing the practice of law do not apply if the non-law business is conducted in a manner distinct from the lawyer's practice of law and if reasonable measures have been taken to ensure that the customer understands that no attorney-client relationship is being formed, that no legal services are being provided, and that the protections of the attorney-client relationship will not apply.

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<sup>16/</sup> There is a suggestion in Cal. State Bar Formal Opn No. 1995-141 that the applicability of rule 1.8.1 to a transaction with a non-legal business is determined by whether the non-legal business is offering services that involve the assumption of a fiduciary duty. If so, then the rule applies. If not, it does not. *Id.* at p.3. To the extent that Cal. State Bar Formal Opn No. 1995-141 takes that view we believe it is incorrect. As the Opinion itself acknowledges, the critical question is whether the transaction with the non-legal business arises out of the attorney-client relationship or the trust and confidence engendered there. But that question is largely independent of the type of non-legal service offered—it turns instead on the degree of risk that the trust and confidence arising from the lawyer-client relationship will influence the customer's approach to the transaction with the non-legal business. Where that risk is present, rule 1.8.1 should apply regardless of the type of law-related service being provided. Where it is not, then the rule should not apply, even if the services being provided are fiduciary in nature. See Probate Code section 16004(c) (presumption of undue influence does not apply to the initial agreement relating to the hiring or compensation of a trustee).

<sup>17/</sup> Sometimes a transaction may involve the potential for exploitation of client trust both because of the lawyer's role in making the referral and the lawyer's role in the negotiation with the separate entity, as when a personal injury lawyer refers a client to a medical facility in which the lawyer practices as a doctor. Los Angeles County Bar Assn. Formal Opn. No. 477.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.





September 3, 2019

Randall Difuntorum  
Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Angela Marlaud  
Office of Professional Competence, Mandatory Fee Arbitration Program  
180 Howard Street  
San Francisco, CA 94105

Re: OCTC's Comment on Proposed COPRAC Formal Opinion 16-0003 [Ancillary Business]

Dear Mr. Difuntorum and Ms. Marlaud:

The Office of Chief Trial Counsel (OCTC) thanks COPRAC for the opportunity to express its comments on proposed COPRAC Formal Opinion 16-0003 (hereinafter "COPRAC Opinion 16-0003").

COPRAC Opinion 16-0003 attempts to address an attorney's ethical and professional responsibilities when engaging in ancillary businesses or services. Specifically, the opinion attempts to address when an attorney can perform "non-legal services" and be exempt from most of the rules and statutes governing attorney conduct. As discussed in this comment, OCTC believes COPRAC Opinion 16-0003 is extremely problematic and could confuse attorneys and the public as to the obligations of attorneys when performing ancillary or fiduciary services.<sup>1</sup>

OCTC certainly agrees that some personal services that are neither directly or indirectly related to the practice of law, the rendition of legal or fiduciary services, or the operation of a law office are usually not governed by some of the specific rules governing the practice of law.<sup>2</sup>

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<sup>1</sup> OCTC's comments are based on the current state of the law and not any changes in the law being considered by the Legislature, the Board of Trustees, or others. To the extent others are debating changes in the law, issuing COPRAC Opinion 16-0003 might be premature.

<sup>2</sup> For example, generally the rules will not apply if an attorney, who is also an artist, contracts to paint a person's portrait. But even personal services unrelated to the practice of law or fiduciary duties may at times come within the rules if they are part of other services that are governed by the rules. Thus, if the attorney agrees to paint a person's

OCTC, however, is unable to determine if Scenario 1 falls within this category because Scenario 1 is too vague as to the services to be marketed or performed and what it means by “back office services.” As will be discussed more fully later, given that the lawyer or law firm in Scenario 1 is proposing to market and provide services and capacities developed over time from the lawyer or law firm’s practice of law to other lawyers and law firms it is highly likely that the services directly or indirectly involve some aspect of the practice of law or rendering of legal services to clients and it is likely that these services are governed by many of the rules in the Rules of Professional Conduct and the State Bar Act.

Also, OCTC disagrees with COPRAC Opinion 16-0003 to the extent the opinion asserts that when an attorney is acting as a fiduciary, a role that non-attorneys can also perform, the Rules of Professional Conduct and the State Bar Act do not apply. The fact that other regulatory schemes apply for such fiduciaries does not abrogate an attorney’s duty to comply with the Rules of Professional Conduct and the State Bar Act when performing those services. Attorneys are held to a higher standard than others. Moreover, people hire attorneys for such services because they 1) expect legal advice, 2) trust the attorneys as a result of the attorney or law firm having formally represented them, or 3) want to rely on the high ethical standards required of attorneys. When an attorney performs fiduciary duties, the rules governing attorneys still govern the attorney’s conduct.

OCTC is particularly concerned with COPRAC Opinion 16-0003’s assertion that an attorney can avoid the rules governing attorneys by simply “explaining” to clients that they are not performing legal services or engaging in an attorney-client relationship. There is no authority for this novel and unprecedented proposition and it appears to be contrary to the rulings of the Supreme Court and the State Bar Court. Of course, the actual services performed or contracted to be performed will determine which, if any, rules are applicable.

Thus, in OCTC’s opinion, COPRAC Opinion 16-0003 and its analysis is incomplete, problematic, contrary to the positions taken by OCTC, and, most importantly, appears to be in conflict with the holdings of the Supreme Court and the State Bar Court about when ancillary and fiduciary services that can be performed by non-lawyers constitute the practice of law or involve legal services. (See e.g. *In the Matter of Gordon* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. \_\_\_, 2018 WL 5801495; *Crawford v. State Bar* (1960) 54 Cal.2d 659.) Moreover, the opinion appears to be

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portrait in lieu of refunding unearned fees or as part of an overall attorney-client fee agreement several of the Rules of Professional Conduct would still apply.

Moreover, as COPRAC Opinion 16-0003 recognizes, some rules govern the conduct of an attorney, even if unrelated to the practice of law or the providing of fiduciary services. For instance, Business and Professions Code sections 6106, 6101 and 6102 and rules 8.4(b), (c), and (f) apply even to conduct involving purely personal services or personal behavior unrelated to the practice of law. Thus, an attorney can be disciplined for conduct involving fraud, theft, misrepresentation, moral turpitude or criminal conduct even if the conduct does not involve the practice of law or an attorney’s services as a fiduciary. See also Business and Profession Code sections 6103.6, 6103.7, 6106.1, 6106.2, and 6106.5. This is not an exhaustive list.

making policy arguments about what the law should be instead of interpreting the current law and case precedents on these issues.<sup>3</sup> Further, the two stated scenarios that COPRAC Opinion 16-0003 is attempting to address are too factually vague to allow for an accurate and complete analysis of whether the attorneys and law firm in those scenarios may engage in the proposed ancillary services without being governed by or running afoul of the Rules of Professional Conduct and the State Bar Act.

Consequently, COPRAC Formal Opinion 16-0003 is likely to lead to a misunderstanding and misapplication of an attorney's obligations when performing ancillary services, including services as a fiduciary. This could lead attorneys to engage in disciplinable conduct.

#### **I. THE TWO SCENARIOS ARE TOO VAGUE FOR AN ACCURATE AND COMPLETE ANALYSIS OF AND OPINION ABOUT THOSE SCENARIOS**

The two Scenarios addressed in COPRAC Opinion 16-0003 are too vague for an understanding of what services are actually being proposed and, thus it is difficult, if not impossible, to determine whether the Rules of Professional Conduct apply to those scenarios.

Scenario 1 states a law office wants to "provide back office services for law firms who wish to contract out those services." The opinion never addresses what services it is referring to, or whether the claim that the services do not involve the representation of clients or legal matters is factually or legally accurate. Back office services could be paralegal work, insurance adjuster work, secretarial work, accounting services, sales, preparation of legal documents, or other services that directly or indirectly would involve legal services or the representation of clients and the duty of confidence, or could be a conduit for soliciting legal work.<sup>4</sup> These services may

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<sup>3</sup> OCTC notes that most of the citations in support of COPRAC Opinion 16-0003 are to other ethics opinions and not case law.

<sup>4</sup> Prior to addressing the two scenarios presented in the Opinion, the Opinion states "a law firm is considering seeking to capitalize on capacities developed over time by marketing those capacities through businesses that do not involve the representation of clients in legal matters. The firm is considering a variety of options." There is, however, no description of what "services" the firm is intending to market and, therefore, it is impossible to determine if they involve the representation of clients, or are related to an attorney or law firm's representation of clients or their fiduciaries duties. Further, attorneys are required to keep adequate financial and non-financial client files and records as part of other duties under the Rules of Professional Conduct. At a minimum, they must keep, for each client, an individual file that not only contains the client's name, address, and telephone number, but also other items reasonably necessary to competently represent the clients, such as written fee agreements, correspondence, pleadings, deposition transcripts, exhibits, physical evidence, and expert reports. And an attorney's fiduciary duty also requires that the attorney develop and maintain adequate management and accounting procedures for the proper operation of the law office. This includes proper maintenance and protection of client files, calendaring hearing and filing deadlines, tracking correspondence and client communications, secure handling and accurate accountings, and training staff with respect to these procedures and to employ adequate safeguards to insure staff actually follow the procedures. The development and maintenance of adequate office management and accounting principles are fundamental to fulfilling multiple other duties, including the duties of competence, supervision, communication, protecting client confidences, proper handling of trust accounts, and conflicts of interest. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 521-523, including fn. 29.) Thus, performing "back office

also require those performing the services (and the contracting law firm) to preserve the other law firm's client confidences and honor an attorney's duty of loyalty to the other firm's clients. Scenario 1 also does not provide any information about the proposed or actual terms of the contract for services. Thus, OCTC is unable to determine if the conduct involves the practice of law, legal services, improper fee sharing, or other violations.

Scenario 2 is also problematic . While it states that the lawyers and firm would provide professional fiduciary services, specializing in the problems of beneficiaries and conservatees whose welfare is threatened by diminished or declining capacity, it still does not describe what services it is actually providing or intending to provide. Also, as will be discussed more fully later, Scenario 2 appears address an attorney's obligation to protect client confidences and violate an attorney's duty of loyalty to his client. It also may be an improper partnership and fee sharing with non-attorneys.

Further, on the facts provided, it is impossible to determine if the "back office services" or the "services as a professional fiduciary" involve the application of legal knowledge and technique, which constitutes the practice of law.<sup>5</sup>

Moreover, an attorney's characterization of an agreement to perform services and an attorney's characterization of the services he or she is performing is not conclusive. (See e.g., *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, 625; *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221; *In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296; *In the Matter of Gordon, supra*, 5 Cal. State Bar Ct. Rptr. at \_\_, 2018 WL 5801495.) And given an attorney's superior knowledge about fee agreements, what constitutes the practice of law and legal services, it would be unfair to rely solely on what the lawyer tells the client, or even the client's understanding. "Most lay persons are unfamiliar with the law, with how legal services normally are procured and with typical arrangements between lawyer and client." (*Ohralik v. Ohio State Bar Assoc* (1978) 436 US 447, 465 fn. 24.)

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services" for other lawyers and law firms could involve services and duties governed by the Rules of Professional Conduct and the State Bar Act.

<sup>5</sup> The practice of law embraces a wide range of activities, such as giving legal advice and preparing documents to secure client rights (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535), as well as negotiating a settlement or agreement (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 603-604 [negotiating settlement with opposing counsel constitutes practice of law]). See also *In the Matter of Huang, supra*, 5 Cal. State Bar Ct. Rptr. at 303-304; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543. The courts have at times found that the "practice of law" does not encompass all professional activities, but that usually addresses whether a non-attorney is practicing law, not when a California licensee is performing those professional activities. (See e.g., *Baron v. City of Los Angeles, supra*, 2 Cal.3d at 543; *Birbower, Montabano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 129.) As will be discussed, when an attorney performs services that non-attorneys can also perform it does not follow that when they are rendered by the attorney, or his office, they do not involve the practice of law. Since professional activities will usually involve the practice of law even if non-attorneys can also perform those services, the lawyers' conduct while performing those services is governed by the Rules of Professional Conduct and the State Bar Act.

As will be discussed *infra*, clients often hire attorneys to perform services that non-attorneys can perform because they either expect legal advice or are relying on the trust they have in the attorneys or the high ethical standards for attorneys. The courts will look at the totality of the facts and circumstances, including the services performed, in determining if the attorney's services constitute the practice of law or is related to the practice of law.<sup>6</sup> And, if the attorney is acting in a fiduciary position, that would potentially implicate the Rules of Professional Conduct unless the relevant rules specifically exempt the conduct. Moreover, it is often difficult, if not impossible, to draw any line of demarcation between an attorney's legal services and personal services.<sup>7</sup>

Thus, without knowing exactly what services are being proposed or provided and whether they truly do not involve the representation of clients, or are not directly or indirectly connected with legal or fiduciary services, or the management of a law office, it is not possible to conclude the services here do not involve the representation of clients in legal matters, or require compliance with the Rules of Professional Conduct or the State Bar Act. Any opinion as to whether or not a lawyer or law firm can provide those services without being governed or running afoul of the Rules of Professional Conduct or the State Bar act is, therefore, potentially confusing, inaccurate and unintentionally misleading.

*In the Matter of Gordon, supra*, 5 Cal. State Bar Ct. Rptr. at \_\_, 2018 WL 5801495, is illustrative of the problem with separating ancillary businesses or services from the rules governing the legal profession. It also is illustrative of the problem and challenges in opining about this subject based on vague scenarios. In *Gordon*, the attorney claimed that his and a non-lawyer's business operations were "separate and distinct from one another."<sup>8</sup> He argued that he did not pay sales representatives for his operation, but paid the non-lawyer for "providing him with the infrastructure necessary to run his business." He argued that neither providing infrastructure for the operation nor assisting homeowners with loan modifications is the practice of law. The Review Department rejected the attorney's contentions and found his agreement with the non-attorney to sell loan modification services to clients constituted an improper partnership with a non-attorney. The non-lawyer not only provided "infrastructure" but his efforts were a critical part of the operation and he and Gordon acted with a singular purpose—to obtain advance fees for loan modification services. They agreed to carry out this business as a common enterprise

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<sup>6</sup> In determining whether someone engaged in the practice of law, the courts consider the entire pattern of conduct, although a single act can constitute the practice of law. (*Crawford v. State Bar, supra*, 54 Cal.2d at 669.)

<sup>7</sup> See *In re Guste* (La. 2013) 118 So.3d 1023 1032; *McGregor v. State Bar* (1944) 24 Cal.2d 283, 285 [attorney operated a collection agency and a law practice. Court found the activities of the collection agency and the law firm appeared to be so interwoven with the petitioner's legal business that it was difficult to distinguish between the two in the allocation of services rendered].

<sup>8</sup> Although not mentioned in the Opinion, Gordon also argued that the loan modification operation was separate from his law firm and that he was selling legal products not engaging in the practice of law. At times, the sales and loan modification processors were on different floors of the same building.

while they commingled finances, used common facilities, and shared employees and physical resources. The court found that their business of providing loan modification services constituted the practice of law and Gordon formed a partnership with a non-lawyer, in violation of former rule 1-310, and shared fees with non-lawyers, in violation of former rule 1-320.<sup>9</sup>

COPRAC Opinion 16-0003 seems to suggest that Gordon could do what he did and form a partnership with a non-lawyer to handle loan modification services and the infrastructure necessary to operate the loan modification business, especially if he told the clients he was not performing legal services. OCTC strongly disagrees. As the Review Department found, Gordon was practicing law by handling loan modifications and violating the prohibition on partnerships and fee sharing with non-attorneys and sharing fees. Moreover, even services which may not appear to be the practice of law or the performing of legal services can involve giving legal advice or drafting legal documents or become a conduit for the practice of law or fiduciary services.

## II. BACKGROUND

COPRAC Opinion 16-0003 states that “Although non-legal services are by definition, not the practice of law, their provision by a lawyer or lawyer-controlled entity is presumptively subject to the Rules of Professional Conduct if they are conducted in a manner that is not distinct from activities constituting the practice of law or if they are sufficiently law related to give rise to a reasonable risk that the customer may understand the legal services are being provided or that a lawyer-client relationship has been performed.<sup>10</sup> However, where appropriate steps have been taken to distinguish non-legal services from legal services and to clarify that no legal services are being provided and that no lawyer-client relationship has been formed, the Rules of Professional Conduct will not apply to the services provided.” (Proposed COPRAC Opinion 16-0003, p. 1, DIGEST.)

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<sup>9</sup> See also *In the Matter of Jorgensen* (Review Dept. 2016), unpublished opinion, 2016 WL 3181013; *In the Matter of Huang, supra*, 5 Cal. State Bar Ct. Rptr. at 303-304; *In the Matter of Scheer* (Review Dept. 2014), unpublished opinion, 2014 WL 1217969; *McGregor v. State Bar* (1944) 24 Cal.2d 238. Based on *Gordon* and other cases, it appears that Scenario 2 might violate these same rules. Gordon was also found culpable of improper solicitation, violating the prohibitions on advanced fees in loan modification services, and engaging in moral turpitude by engaging in a nationwide loan modification operation with a non-attorney; by falsely representing to potential clients that the offered services would be performed by licensed attorneys; and by engaging in an aggressive sales and marketing scheme for the purpose of collecting illegal advance attorney fees and exploiting vulnerable, desperate homeowners for personal gain. Gordon also misled consumers to believe that the operation was affiliated with various government entities. He changed the names of the operation and the websites several times to distance himself from past complaints. Further, he failed to identify himself on several websites as the attorney responsible for the solicitations. He aggressively marketed his “custom legal products,” when in fact he was offering loan modification services. Clients had to pay advance fees before any loan modification work was done, in violation of SB 94. These actions demonstrate that Gordon committed misconduct involving moral turpitude.

<sup>10</sup> As discussed *infra*, this is an incomplete statement about what constitutes the practice of law.

OCTC finds this statement and the opinion's subsequent analysis problematic. OCTC is aware of no case law or other authority that has held that an attorney or law firm can avoid the Rules of Professional Conduct or the State Bar Act by claiming or clarifying that "no legal services are being provided and that no lawyer-client relationship has been formed." OCTC is also concerned that the opinion is more akin to a policy statement instead of interpreting existing law.

OCTC does not suggest that all the Rules of Professional Conduct and the State Bar Act apply whenever an attorney or law firm conducts ancillary businesses or services unrelated to the attorney's professional services. But, as discussed, it is often difficult, if not impossible, to draw any clear line of demarcation between an attorney's legal services and personal services. COPRAC Opinion 16-003 does not address or confront the complexity involved in determining if a business or service requires compliance with the Rules of Professional Conduct.

Proposed COPRAC Opinion 16-0003 is, therefore, far too broad and imprecise.

#### **A. THE DEFINITION OF WHAT CONSTITUTES NON-LEGAL SERVICES**

In OCTC's view, COPRAC Opinion 16-0003 creates confusion at the outset because it does not clearly define what it means by non-legal services. The Opinion states that its "prior opinions have defined non-legal services as 'services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law. Cal. State Bar Formal Opn. 1995-141.'" But those prior opinions do not clarify what constitutes non-legal services or define what constitutes the practice of law, especially when attorneys are performing services that non-attorneys can also perform.<sup>11</sup>

Likewise, COPRAC Opinion 16-0003 has an insufficient discussion of what constitutes the practice of law or what it means by non-legal services. As will be discussed later, this could lead many to misunderstand when the rules govern their ancillary or fiduciary conduct.

California law holds that the rules governing attorney conduct in California apply to all attorneys or licensees of the State Bar regardless of the capacity in which they are acting in a particular matter.<sup>12</sup> Moreover, "Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter."<sup>13</sup>

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<sup>11</sup> OCTC appreciates and understands COPRAC's reluctance to opine on the unauthorized practice of law, but it is impossible to assess ancillary businesses and services and the duties attorney must comply with when performing those business and services without some discussion of the principles regarding what constitutes the practice of law when an attorney or law firm is engaging in services that non-attorneys can also perform.

<sup>12</sup> In *Libarian v. State Bar* (1944) 25 Cal.2d 314, 317-318 the Supreme Court disciplined an attorney for violating the then advertising rules in the Rules of Professional Conduct by advertising his services as a notary and tax preparer. The Supreme held: "Although petitioner denies that he committed any act of moral turpitude or willful disobedience, or that he ever intended to advertise himself as either an attorney or an income tax expert, or to otherwise violate the Rules of Professional Conduct, the denial cannot stand in the face of his admission that he read

OCTC is, therefore, concerned that COPRAC Opinion 16-0003's interpretations of the law are confusing and incomplete, could unintentionally mislead attorneys and the public, and are inconsistent with public protection, i.e. excluding attorneys from most of the governing rules and regulation of attorney conduct. Issuing this opinion in its current form could create problems for OCTC's prosecution of matters or lead attorneys to commit misconduct and be subject to discipline. OCTC recommends that the Opinion not be issued, at least in its current form.

What rules, if any, apply will depend on the specific facts of the matter, the specific activities being performed, and the specific language of the rule. The Guidelines for the Operation of Family Law Information Centers and Family Law Facilitators Offices appears to acknowledge this and lists many of the rules that would apply to their facilitator attorneys.

## **B. THE PRACTICE OF LAW INCLUDES SERVICES AN ATTORNEY IS PERFORMING THAT NON-ATTORNEYS CAN ALSO PERFORM**

As previously noted, it is well established that although some of the services performed by an attorney might be performed by non-attorneys, it does not follow that when they are rendered by an attorney, or his office, they do not involve the practice of law.<sup>14</sup>

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the opinion in *Libarian v. State Bar*, *supra*, at least once. The standard of conduct there demanded of him, regardless of whether at the moment he might be acting as notary, income tax expert, or lawyer, is set forth in terms too direct to be susceptible of misunderstanding. 'If the petitioner should choose to continue as a practitioner at the bar of this state,' this court said at page 865, 'he must comply with the standards of the legal profession. He should appreciate that when he is licensed to practice as an attorney at law, the professional services that he thus performs are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession. One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter. (*Jacobs v. State Bar*, 219 Cal. 59 [25 P.2d 401].) As a practicing attorney, he may not solicit employment nor may he advertise contrary to the rules. The restrictions, limitations, and permissible conduct in those respects are familiar both to the lawyer and to the layman. They are published in the Code of Ethics and Rules promulgated by The State Bar, and they do not require reiteration here.'" (See also *Libarian v. State Bar* (1943) 21 Cal.2d 862, 865-866; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1046-1047 ["Professional responsibilities do not turn on whether a member of the State Bar acts as a lawyer.]; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 795 [attorney violated former rule 5-101 (current rule 1.8.1) when acting as trustee].

<sup>13</sup> *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668 ["Although Howard's services might lawfully have been performed by title companies, insurance companies, brokers, and other laymen, it does not follow that when they are rendered by an attorney, or in his office, they do not involve the practice of law. People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel. Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter."'] See also *In the Matter of Huang*, *supra*, 5 Cal. State Bar Ct. Rptr. at 296; *In the Matter of Gordon*, *supra*, 5 Cal. State Bar Ct. Rptr. at \_\_, 2018 WL 5801495.)

<sup>14</sup> *Crawford v. State Bar*, *supra*, 54 Cal.2d at 667-668. And a client who hires an attorney reasonable expects their attorney to call attention to the alternative or additional avenues of relief that might be pursued to obtain redress for the circumstances giving rise to the retention. (*Janik v. Rudy, Exelrod & Zeff* (2004) 119 Cal.App.4th 930, 940-2; *In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. at 551.) That is one of the reasons people hire lawyers, even to perform services non-lawyers could provide.

For instance, “where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”<sup>15</sup> The attorney cannot escape this requirement by spinning off the services to another business or entity that the attorney has an ownership interest in, or performs services for. (See e.g., *In the Matter of Gordon*, *supra*, 5 Cal. State Bar Ct. Rptr. at \_\_, 2018 WL 5801495; See also *In the Matter of Jorgensen* (Review Dept. 2016), unpublished opinion, 2016 WL 3181013; *McGregor v. State Bar*, *supra*, 24 Cal.2d at 283.)

Clients hire and use attorneys although others may perform the same services because 1) they want, expect, or need legal advice, 2) they are relying on the confidence they have in the lawyer as a result of prior dealings with the lawyer, or 3) they are relying on the high ethical standards and trustworthiness of attorneys. For this reason, when attorneys, or their offices, perform loan modification services they are practicing law.<sup>16</sup>

Given the complexity and variability of the practice of law, any definition of legal practice is incapable of universal application, and any opinion will provide only a general guide to whether a particular act or activity is the practice of law. But to restrict or limit the test in the interest of specificity would also limit its applicability to situations in which the public requires protection. (*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609.) Thus, COPRAC Opinion 16-0003's failure to address the law governing what constitutes the practice of law is problematic. Addressing scenarios that are vague only contributes to this problem. That is, discussing issues around performing ancillary services untethered to all the facts about what

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<sup>15</sup> *Layton v. State Bar* (1990) 50 Cal.3d 889, 904. The Court also wrote: “Layton's misconduct, however, is not insulated from scrutiny under the Rules of Professional Conduct merely because much of it was undertaken at least partly in his capacity as executor.... Second, where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.” See also *Crawford v. State Bar*, *supra*, 54 Cal.2d at 667-668 [attorney provided title and brokerage services]; *Alkow v. State Bar* (1952) 38 Cal.2d 257, 263 [attorney provided collection services]; *Crooks v. State Bar* (1970) 3 Cal.3d 346 [escrow agent]; *Kelly v. State Bar* (1991) 53 Cal.3d 509 [“Although petitioner did not act as an attorney in the airplane sale, this circumstance does not insulate him from discipline. We have held that when an attorney serves a single client both as an attorney and as one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services.”]; *In re Shattuck* (1929) 208 Cal. 6 [executrix of estate and attorney and counselor at law].

<sup>16</sup> See *In the Matter of Huang*, *supra*, 5 Cal. State Bar Ct. Rptr. at 303-304. The same is also true for services as executors, trustees, escrow agents, and others. (See *Crawford v. State Bar*, *supra*, 54 Cal.2d at 667-668 [escrow agent]; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 796 [“Rule 5-100, imposes quite independent requirements on attorneys who transact with clients. The mere fact that such a transaction arises in the context of a trust agreement does not exempt an attorney from the rule. The terms of the trust authorizing self-dealing on the part of petitioner clearly comes within the rule and do not supersede it.”]; *Weber v. State Bar* (1988) 47 Cal.3d 492 [executor and attorney]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 759-760 [trustee].)

services are being discussed and the surrounding facts is likely to lead to inaccurate, confusing, and misleading opinions on this subject.

The Rules of Professional Conduct are intended not only to establish ethical standards for members of the bar (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 793; *Ames v. State Bar* (1973) 8 Cal.3d 910, 917), but are also designed to protect the public. (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917; *In re Rothrock* (1940) 16 Cal.2d 449, 454; *Kennedy v. State Bar* (1939) 13 Cal.2d 236, 240 [protection to the public requires that the rules of professional conduct be adhered to]; Business and Professions Code section 6001.1 [protection of the public is the highest priority of the State Bar and the Board of Trustees in exercising their licensing, regulatory, and disciplinary functions]. Thus, it is inconsistent with these purposes to allow an attorney to act as a fiduciary but not be governed by the rules governing attorneys.

### III. SCENARIO 1

OCTC is concerned that COPRAC's Opinion 16-0003 seems to suggest that the lawyers and law firm in Scenario 1 do not need to comply with the rules regulating attorneys except those that apply to an attorney's personal conduct, such as moral turpitude, theft, fraud, misrepresentation.

As discussed, the facts described in Scenario 1 are too vague to offer an informed opinion. Also, as discussed, COPRAC Opinion 16-0003 fails to address the complexities involved in determining if and when the rules apply to personal services. This includes what the services actually are and their relationship to the practice of law or an attorney's assumption of fiduciary duties.

Moreover, as also discussed, it is often difficult, if not impossible, to draw any line of demarcation between an attorney's legal services and personal services.<sup>17</sup> For that reason, OCTC finds COPRAC Opinion 15-0003 to be confusing, imprecise, and potentially misleading as to Scenario 1.

### IV. SCENARIO II

#### A. AN ATTORNEY ACTING AS A FIDUCIARY IS HELD TO THE SAME HIGH STANDARDS OF THE LEGAL PROFESSION WHETHER OR NOT THE ATTORNEY ACTS IN THE CAPACITY OF ATTORNEY

California law establishes that "an attorney who accepts the responsibility of a fiduciary nature is held to the same high standards of the legal profession whether or not he acts in the capacity of an attorney." (*Worth v. State Bar, supra*, 17 Cal.3d at 341; *In the Matter of McCarthy, supra*, 4 Cal. State Bar Ct. Rptr. at 373; *In the Matter of Schooler* (Review Dept. 2016) 5 Cal. State Bar

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<sup>17</sup> See *In re Guste, supra*, 118 So.3d at 1032.

Ct. Rptr. 494, 503 [The law is clear that even if Schooler was not practicing law, she was required to conform to the ethical standards required of attorneys.]

Further, “When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. (*Clark v. State Bar* (1952) 9 Cal.2d 161, 166; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962; *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156; *Worth v. State Bar* (1976) 17 Cal.3d 337, 341; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 810; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373; *Kelly v. State Bar* (1991) 53 Cal.3d 509 [business transaction].)

COPRAC Opinion 16-0003 states “The question remains whether the application of the Rules of Professional Conduct governing the practice of law to “law related” non-legal services is automatic and inescapable, or instead can be avoided through appropriate clarifying measures that eliminate the reasons for applying those rules.”

But the Opinion fails to cite any statute, rule, or case precedent for this novel and unprecedented contention.

OCTC is aware of no statute, rule, or case precedent that allows an attorney to avoid the rules by simply telling or explaining to a client that he or she is not practicing law or performing legal services.<sup>18</sup>

As already shown, lawyers often argue that the services they are performing do not involve the practice of law and the rules, therefore, do not apply. The courts have rejected these arguments. (See e.g., *In the Matter of Gordon, supra*, 5 Cal. State Bar Ct. Rptr. at \_\_, 2018 WL 5801495.) The case law shows that when an attorney is engaging in a fiduciary duty that the rules do apply unless the rules specifically exempt the fiduciary from that conduct.

COPRAC Opinion 16-0003 suggests that other laws regarding those fiduciary duties adequately protect the public. The Opinion provides no case that has stated or suggested that. Moreover, that is a policy decision for the drafters of the rules and the Supreme Court, not a COPRAC opinion that is interpreting existing law.<sup>19</sup>

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<sup>18</sup> In fact, explaining the scope of the representation or the scope of the fiduciary duties appears to be governed and mandated by the Rules of Professional Conduct. Rule 1.4 requires a lawyer to “explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the representation.”

<sup>19</sup> The opinion suggests a fiduciary not representing a client in an attorney-client relationship should be able to breach confidences and the duty of loyalty to reveal that a client is in the attorney’s opinion incapacitated or of diminished capacity even though as an attorney he or she could not do this. OCTC disagrees and, again, this is a policy decision for the Supreme Court to decide, not for an Ethics Opinion. It should also be noted that the only rule the Rules Revision Commission proposed but the Supreme Court rejected when it adopted the new rules was rule

Also, OCTC disagrees that this adequately protects clients. People go to attorneys as fiduciaries because of the high ethical standards required of attorneys and the rules governing attorneys. Excluding the Rules of Professional Conduct in these situations would result in clients not receiving the protections other clients receive or what they believed they were getting by hiring attorneys to perform these services. Further, the Opinion's positions about this appear to be in conflict with case law.

For instance, in *Schneider v. State Bar* (1987) 43 Cal.3d 784, an attorney who functioned as trustee of two trusts was found culpable of violating former rule 5-101 (current rule 1.8.1) when acting as the trustee of the trusts. The attorney claimed that the transactions involved his work as trustee and the transactions were permitted by the trust and laws governing trusts.<sup>20</sup> The Supreme Court rejected this position and held "the mere fact that such a transaction arises in the context of a trust agreement does not exempt an attorney from the rule. The terms of the trusts authorizing self-dealing on the part of petitioner clearly come within the rule and do not supersede it."<sup>21</sup> (Id. at 796.) Nowhere in *Schneider* does the Court suggest an attorney can escape the rule by "clarifying" to the client that he is not acting as their attorney or in an attorney-client relationship. (See also *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307 [attorney violated former rule 3-300 when acting as trustee]; *In the Matter of Lingwood* (Review Dept. 2019) \_ Cal. State Bar Ct. Rptr. \_, Slip Op.)<sup>22</sup>

Also, an attorney holding funds for a person who is not the attorney's client must still comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979; *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 879; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.) In *Guzzetta*, the Supreme Court found the attorney culpable of violating the predecessor to former rule 4-100, former rule 8-101, when he removed funds that belonged both to his client and his client's former wife without the wife's permission, or a court order. *Guzzetta* obtained

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1.14, which addressed an attorney's duties for clients with diminished capacity, including when the attorney could disclose the clients' diminished capacity to others.

<sup>20</sup> Relying on *Copley v. Copley* (1981) 126 Cal.App.3d 248, 249, *Schneider* noted that California trust law allowed the statutory prohibitions on self-dealing and the duty of loyalty for trusts to give way to the directions of the governing trust instrument. Respondent then argued that this allowed him to self-deal despite the prohibitions in former rule 5-101. He claimed finding otherwise threatens to substantially defeat the trustor's purpose and cause delays that could unnecessarily interfere with opportunities for profitable employment of trust funds.

<sup>21</sup> The attorney also drafted the trust. The Supreme Court found that the attorney violated former rule 5-101 in drafting the trust but found a separate rule 5-101 violation through the attorney's conduct as trustee in managing the trust. The court held "An attorney who abuses the broad management powers conferred upon him by the trust agreement cannot rely on the terms specifying those powers to avoid rule 5-101. To hold otherwise would invite mischief and undermine the rule. Petitioner violated rule 5-101 by failing to fully disclose the terms of the transactions to his clients, by failing to give them an opportunity to seek independent counsel after advising them to do so, and by failing to obtain written consent to the transactions." (Id. at 796-797.)

<sup>22</sup> *Lingwood* was issued on August 27, 2019 and has been designated for publication.

the funds from the sale of community property and assumed the responsibility to hold and disburse the funds as directed by the court or stipulated by both parties. The Supreme Court wrote in *Guzzetta*:

...the nature of the agreement pursuant to which the proceeds from the sale of the restaurant were deposited in petitioner's trust account created a duty to Camila as well as to petitioner's client. As a fiduciary his obligation to account for the funds extended to both parties claiming an interest in them. Having assumed the responsibility to hold and disburse the funds as directed by the court or stipulated by both parties, petitioner owed an obligation to Camila as a 'client' to maintain complete records, 'render appropriate accounts,' and '[p]romptly pay or deliver to the client' on request the funds he held in trust. (*Guzzetta v. State Bar, supra*, 43 Cal.3d at 979.)<sup>23</sup>

Further, new rule 1.15 was amended to clarify that the rule applies to funds received or held for the benefit of a client or "other person to whom the lawyer owes a contractual, statutory, or other legal duty."

**B. THE OPINION'S POLICY ARGUMENTS CANNOT CHANGE OR GUIDE CURRENT LAW. THE POLICY ARGUMENTS ARE BETTER LEFT TO THE SUPREME COURT, THE LEGISLATURE, AND A RULES REVISION COMMISSION**

The proposed opinion states that allowing attorneys to escape the reach of the rules represents sound policy for multiple reasons. OCTC disagrees. Further, as discussed, COPRAC Opinion 16-0003 should be limited to interpreting the law based on case precedent and the current language of the rules. Policy decisions are for the Supreme Court, Rule Revision Commissions, and the Legislature.

Moreover, the Opinion's analysis of policy is problematic at best. The Opinion states: First, the "primary rationales for applying the Rules of Professional Conduct to non-legal services are the risk of overlap with legal services and the risk of client confusion concerning whether the protection of the lawyer-client relationship exist. When those risks are no longer present the reasons for applying the Rules of Professional Conduct are no longer present. The opinion provides no authority for this proposition<sup>24</sup> and OCTC does not agree that the risks are no longer present, or that the rules should not still protect the public in these situations.

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<sup>23</sup> See also *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1153 ["The circumstances under which he took possession of the pledged stock, including full knowledge of the terms of the pledge agreement (i.e., that the stock was not to be sold until the case was concluded), created a duty to Knapton as well as to petitioner's clients."]; *In the Matter of Klugman* (Review Dept. 2017), unpublished Review Department Opinion, 2017 WL 168865.

<sup>24</sup> In fact, COPRAC Opinion 16-0003 notes that the leading California authorities do not consider whether clarifying measures are available. (See Opinion, p. 6, fn. 10.) The treatise it cites to reads: "If you or your law firm provide law-related services to clients and/or nonclients of the firm, either directly through your law practice or through

No case has stated that the purpose of requiring attorneys performing ancillary businesses or fiduciary services, to abide by the Rules of Professional Conduct is due solely to the risk of client confusion. Rather, the purpose is to protect the public; ensure attorney independence and loyalty to the client only; and ensure the highest professional standards when attorneys perform those services.

As discussed, clients often choose a lawyer to perform services that non-lawyers could perform because they trust in the high ethical standards of the attorney.<sup>25</sup>

Moreover, “The Rules of Professional Conduct are intended not only to establish ethical standards for members of the bar (cases omitted) but are also designed to protect the public. Accordingly we believe that, absent an express provision in the pertinent rule, it would be inconsistent with the purposes of the rules to conclude that the consent of the client or the fairness of the attorney-client transaction renders the rule inoperative.” (*Ames v. State Bar* (1973) 8 Cal.3d 910, 917. See also *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 278 [client cannot waive MICRA limits]; *In re Sinnotti* (Vt. 2004) 845 A.2d 373, 379 [“lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands.”].<sup>26</sup> Holding an attorney to the higher obligations protects the public.

Except where the rules permit disclaimers, such as in the conflict rules, the rules do not permit an attorney to get the client to waive the rules governing lawyer conduct. Even when allowed, to be informed, the client's consent must be based on disclosure of all material facts the

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another subsidiary or business controlled by you or the law firm, you must comply with the CRPC [California Rules of Professional Conduct] and the State Bar Act in the provision of those services. This includes all of your communications to former, present or prospective clients concerning those services.”

<sup>25</sup> See e.g., *In re Guste, supra*, 118 So.3d at 1031 [“It is clearly apparent from a reading of the record that Mr. Perniciaro came to rely upon respondent because of her position as a lawyer and that this confidence did not dissipate simply because she had concluded a court case. Thus, respondent's ability to charge her legal rate of \$125 for services which were nominally personal stemmed from Mr. Perniciaro's implicit trust of her as a lawyer.”] See also *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 370 [“a client who receives the proceeds of a judgement or settlement will often place great trust in the investment advice of the attorney who represented him in the matter. This is especially likely when the client is unsophisticated and a large amount of money is involved. This trust arises directly from the attorney-client relationship and abuse of the trust is precisely the type of overreaching that rule 5-101 is designed to prevent.”] The court also noted “One of the purposes of the rule is to protect clients' from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship.” (*Id.* at 370.) This is also true of fiduciary relationships between attorneys and others. The nature of a fiduciary relationship is the parties do not deal on equal footing.

<sup>26</sup> The Rules of Professional Conduct have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 156; *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 74. See also *Heavy v. State Bar* (1976) 17 Cal.3d 553, 558 [the purpose of a disciplinary proceeding is to determine not the extent of the damage caused but whether the conduct was unprofessional]).

attorney knows and can reveal. Absent such advice, no waiver could have been knowing and intelligent. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 84, 425 P3d. 1, 16.

COPRAC Opinion 16-0003's reliance on ABA Model Rule 5.7 is misplaced. California specifically choose not to adopt rule 5.7 when it recently adopted its new rules.<sup>27</sup> Also, as discussed, California recently revised its trust accounting rules to clarify that they apply when a lawyer also owes a third party a contractual, statutory or other legal duty. (See current rule 1.15.)<sup>28</sup>

**C. AN ATTORNEY CANNOT AVOID THE RULES SIMPLY BY TELLING THE CLIENT THAT HIS OR HER SERVICES DO NOT INVOLVE THE PRACTICE OF LAW OR THE RENDERING OF LEGAL SERVICES**

As discussed, COPRAC Opinion 16-0003 contends that an attorney can perform fiduciary duties without being governed by Rules of Professional Conduct if it provides sufficient clarification. It references Cal. State Bar Formal Opn. 1995-141, but acknowledges Cal. State Bar Formal Opn. No. 1995-141 could be read to require compliance with the Rules of Professional Conduct even with clarification. The Opinion cites no case that agrees with its position, or holds that a "clarification" that an attorney is not performing legal services and no attorney-client relationship has formed can exempt an attorney's fiduciary services from the ambit of the Rules of Professional Conduct. Moreover, an ethics opinion is not authority and cannot overrule case precedent.

As discussed, "an attorney who accepts the responsibility of a fiduciary nature is held to the same high standards of the legal profession whether or not he acts in the capacity of an attorney." (*Worth v. State Bar, supra*, 17 Cal.3d at 341; *In the Matter of McCarthy, supra*, 4 Cal. State Bar Ct. Rptr. at 373; *In the Matter of Schooler, supra*, 5 Cal. State Bar Ct. Rptr. at 503.) Further, "When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. (*Clark v. State Bar* (1952) 9 Cal.2d 161, 166; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962; *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156; *Worth v. State Bar* (1976) 17 Cal.3d 337, 341; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 810; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar

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<sup>27</sup> The Supreme Court and the Rules Revision Commission rejected adopting rule 5.7.

<sup>28</sup> In a recent Review Department Opinion, the Review Department found that former rule 4-100 by its specific language did not apply to a pure escrow agent because he was not acting as an attorney. OCTC disagrees with that position as being contrary to *Guzzetta v. State Bar*, which was not discussed in the opinion. OCTC did not petition to the Supreme Court because the Review Department recommended disbarment. Moreover, any question the rule applies has been resolved by the amendment to the trust rules (Rule 1.15) which specifically provides "All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty ..."

Ct. Rptr. 297, 307; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373; *Kelly v. State Bar* (1991) 53 Cal.3d 509 [business transaction].)

COPRAC Opinion 16-0003 minimizes the existing case law by claiming, first, that the language concerning the application of the rules to fiduciaries is *dicta*. The Opinion provides no authority that the court's holding and statements on these issues were *dicta*. OCTC vigorously disagrees and sees no basis for stating that the holdings are *dicta* or limited. Even if the language is *dicta* it is *dicta* from the California Supreme Court and thus, should be given significant weight.

Second, COPRAC Opinion 16-0003 claims no case explicitly considers, let alone, explicitly rejects, the use of clarifying measures of a distinct non-lawyer business engaging in fiduciary duties. But the cases have held that the rules apply to attorneys engaging in fiduciary services. And, as previously discussed, no case has stated that clarifying measures can void or limit the Rules of Professional Conduct or the State Bar Act, unless specifically provided for in the rule. As also discussed, when confronted with claims that the Rules of Professional Conduct do not apply to fiduciary duties the courts have rejected this contention.

COPRAC Opinion 16-0003 states thirdly that the decided cases do not explicitly or implicitly reject the Opinion's approach but are consistent with the COPRAC Opinion. OCTC disagrees and believes the decisions clearly mandate that attorneys acting as fiduciaries are governed by the Rules of Professional Conduct as they are relevant to the conduct being performed by the attorneys. Further, the Opinion provides no case or authority that agrees with the opinion in COPRAC Opinion 16-0003.

COPRAC Opinion 16-0003 asserts that the case precedents are not inconsistent with the opinion's position because all the cases on this subject involved individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services.

This is understandable because it is extremely rare that an attorney is hired as a fiduciary that does not arise from, within, or related to the attorney's law practice. Clients hire attorneys as fiduciaries because they trust the attorneys as a result of them being attorneys and expect the attorneys to be held to the high standards for attorneys. Moreover, while these fiduciary services often overlap with the practice of law or the rendering of legal services, that does not mean this is required. Yet when an attorney is acting as a fiduciary he or she is held to the same high standards as if there was an attorney-client relationship and the rules apply unless the relevant rule specifically states otherwise.

The holdings of the Supreme Court should be accepted as written. They were enunciating principles of law, not principles for individual cases only. Moreover, COPRAC Opinion 16-0003's new theory would be inconsistent with the courts and OCTC's long held approach on this issue.

It could unnecessarily confuse attorneys as to what Rules of Professional Conduct apply, or if they apply, in a given circumstance and their acts may subject them to prosecution by OCTC.<sup>29</sup>

## **V. CONCLUSION**

For the reasons stated in this letter, OCTC finds COPRAC Opinion 16-0003 problematic, confusing, and potentially misleading.

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<sup>29</sup> It is well established another attorney's or even a State Bar opinion is not a defense to misconduct. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632; *In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. at 232.)





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To: ATILS Task Force  
From: Mark Tuft and Kevin Mohr  
Date: December 26, 2019  
Re: Lawyer Advertising, Solicitation and Matching Services

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The Task Force's Charter includes evaluating existing rules, statutes and ethics opinions on lawyer advertising, solicitation and client referrals. This memo provides a brief background and recommendations for consideration at the next meeting.

### Regulation of Lawyer Advertising and Solicitation

The primary sources of regulation of lawyer advertising and solicitation in California are the State Bar Act, particularly Business and Professions Code §6150-6159.2, and the California Rules of Professional Conduct 7.1 – 7.5. However, there are numerous other federal and state statutes that also regulate lawyer advertising and solicitation.<sup>1</sup> The overarching constitutional protection of commercial speech in lawyer advertising is found in the U.S. Constitution, Art. 1 and Art 1 §2 of the California Constitution.

California's rules were amended effective November 1, 2018 to follow the then existing ABA Model Rule formulation on regulating lawyer advertising and solicitation. The rules basically prohibit any communication or solicitation that is false, misleading or likely to result in overreaching:

Rule 7.1 prohibits false or misleading communications concerning a lawyer or a lawyer's services and defines what is meant by a false or misleading communication.

Rule 7.2(a) permits lawyer advertising through any written, recorded or electronic means including public media.

Rule 7.2(b) prohibits compensating, promising or giving anything of value to any person for the purpose of recommending or securing the services of lawyer or law firm with five enumerated exceptions. The exceptions include paying (i) the reasonable costs of advertising, (ii) the usual charges of a qualified lawyer referral service, and paying for the purchase of a law practice. Rule 7.2(b)(1) – (3).

The exceptions also permit a lawyer to have a non-exclusive reciprocal arrangement for referring clients to another lawyer or a non-lawyer professional, provided the client is informed of the existence and nature of the arrangement. Rule 7.2(b)(4).

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<sup>1</sup> The Rutter Group Practice Guide on Professional Responsibility (Thomson Reuters 2018) ¶12.4 provides a list of most of these federal and state statutes. These include, for example, the California Unfair Practices Act, [Bus. & Prof. C. §17000 et seq.](#) and the federal Lanham Act regarding limitations on advertising, [15 USC §1125\(a\)](#).

A lawyer is also permitted to offer or give a gift or gratuity to a person whose recommendation resulted in the employment of the lawyer or the lawyer's law firm so long as the gift or gratuity is not offered or given as consideration for the referral or any promise, agreement or understanding that it would be forthcoming for any referrals in the future. Rule 7.2(b)(5).<sup>2</sup>

Rule 7.2(c) provides that communications permitted by the rule must identify by name and address at least one lawyer or law firm responsible for its content.

Rule 7.3(a) prohibits in-person, live telephone and real time electronic contacts soliciting professional employment where a significant motive for doing so is the lawyer's pecuniary gain. The rule does not prohibit direct contact with persons with whom the lawyer has a family, close personal or prior professional relationship.

The terms "solicitation" and "solicit" refer to a targeted communication initiated by or on behalf of a lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. Rule 7.3(e).

While direct in-person, live telephone and real-time electronic solicitation as provided in Rule 7.3(a) are prohibited, targeted written solicitations, i.e., written solicitations that are sent to persons who are known to have a specific legal need, are constitutionally protected. However, under Rule 7.3(b) the content of such communications must be truthful and not deceptive and the transmission of the communication must not be overly intrusive or invasive of a person's rights. Thus, Rule 7.3(b) prohibits any form of solicitation, whether or not in-person or in real-time, if the person being solicited makes it known they do not want to be solicited or if the solicitation is transmitted in any manner that involves intrusion, coercion, duress or harassment.

Rule 7.3(c) requires labeling communications under the rule as "advertisement" or words of similar import unless the recipient is a person specified under rule 7.3(a) or unless it is apparent from the context that the communication is an advertisement.

Rule 7.3(d) exempts from the ban on direct solicitations in Rule 7.3(a) lawyers who participate in prepaid or group legal service plans operated by an organization not owned or directed by the lawyer.<sup>3</sup>

Rule 7.4 deals with communications of fields of practice and specialization.

Rule 7.5 regulates a lawyer's use of a firm name, trade name or other professional designation.

### **Recent Amendments to the ABA Model Rules**

Beginning in 2013, the Association of Professional Responsibility Lawyers (APRL) undertook a comprehensive study of state regulation of lawyer advertising rules. The project resulted in recommendations for revising the ABA Model Rules on lawyer advertising to reflect modern practice and the unmet need for consumers to receive accurate and useful information regarding the availability of lawyers and legal services. APRL's study including a survey of the lack of utility and

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<sup>2</sup> The provisions of Rule 7.2(b) have particular relevance to the Task Force's study of lawyer referrals and matching services.

<sup>3</sup> The provisions of this rule are relevant to the Task Force's study of matching services such as LegalZoom.

concomitant ineffective enforcement of lawyer advertising rules in the 51 jurisdictions. APRL's initial report, dated June 2015 addressed concerns about the overly restrictive and inconsistent state regulations, particularly in relation to today's diverse and innovative forms of Internet and electronic media advertising. APRL proposed replacing ABA Model Rules 7.1, 7.2, 7.4 and 7.5 with a new rule 7.1 that simply prohibited false and misleading communications in all forms of electronic and social media.

APRL issued a second report on April 26, 2016 addressing the regulation of solicitation of clients, client referrals, and the effect of certain forms of lawyer advertising on the regulation of lawyer referral services and group legal service plans. APRL recommended that the legitimate regulatory objectives in preventing overreaching and coercion by lawyers using these forms of client development tools could be best achieved by combining provisions of Model Rules 7.2 and 7.3 in a single rule.

The ABA Standing Committee on Ethics and Professional Responsibility took up APRL's reports and recommendations in 2016. After conducting a separate review and holding several public hearings the Standing Committee recommended replacing the then current model rules with three new rules patterned on APRL's reports: These recommendations were presented to the ABA House of Delegates in August 2017 and were adopted unanimously.

The California Rules Revision Commission's report and recommendation on amending California's lawyer advertising rules had been submitted to the State Bar Board of Trustees in March, 2017 prior to the adoption of the current ABA Model Rules.

The ATILS Task Force should consider including a recommendation in its report to the Board of Trustees that the State Bar appoint an implementation committee to study the current ABA Model Rules and the rules and regulations of various jurisdictions, including Virginia, Oregon and the District of Columbia, all of which have modernized their lawyer advertising rules, and states such as Washington and Arizona, which have recommended or are in the process of recommending changes to their rules to accommodate all forms of electronic and social media communications to afford better access by information regarding the availability of legal services. The implementation committee should include the following issues in studying and recommending changes to the regulation of lawyer advertising in the California rules and the State Bar Act:

1. Whether the definition of client referrals should be changed. This would involve changes to both Bus. & Prof. C. § 6155 (lawyer referral services) and Rule 7.2. See [Jackson v. Legalmatch.com](#), Cal.App.5th, 2019 WL 6334544, No. A152442 (Cal.App. 11/26/19).
2. Whether the ban on in-person solicitation should continue to include "real time" electronic communications. The 2018 revisions to the ABA Model Rules removed this limitation.
3. Clarify whether law firms that function as "feeders" of clients to other lawyers should be viewed as lawyer referral services and subject to their requirements and regulation.
4. Whether California should adopt the structure of ABA Model Rules on advertising and solicitation by streamlining the rules, i.e., moving: (i) the substance of rule 7.4 (fields of practice and specialization, both of which relate to advertising) into rule 7.2, and (ii) the substance of rule 7.5 (firm names and trade names, a form of communication) into rule 7.1.