



To: ATILS Task Force
From: Kevin Mohr and Mark Tuft
Date: January 29, 2020
Re: Proposed Rule 5.7 (Responsibilities Regarding Non-Legal Services) and Proposed Rule 5.7.1 (Alternative Legal Service Arrangements)

Assignment

- (1) Explain how the rule would promote innovation and collaboration in non-legal services and how it would promote access to legal services.
 - (2) Prepare the recommendation report. Format should include: Recommendation, How it responds to the Task Force Charge, Pros and Cons, Major Themes in Public Comments Received, Alternatives considered, including recommendations made by public commenters.
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Mr. Tuft's Initial Draft: Attached for your consideration and comment is a draft of a proposed rule 5.7 that is intended to address when the provision of non-legal services by lawyers and law firms would be governed by the CRPC and when such services provided by a separate organization owned or operated by lawyers and nonlawyers would not be governed by the CRPC.

There are numerous issues and explanations that would have to be set out in memorandum accompanying the proposed rule. But for now, I would like to know if this is something that is worth presented to the task force.

The overriding objective the attached draft seeks to achieve is greater access to services through emerging technologies on a "one to many" basis rather than the traditional "one to one" attorney-client relationship.

Proposed Rule 5.7 Responsibilities Regarding Non-Legal Services

- (a) A lawyer is subject to these rules and the State Bar Act with respect to the provision of non-legal services, as defined in paragraph (c)(1), if the non-legal services are provided by the lawyer [or the lawyer's law firm*]:
 - (1) in circumstances that are not distinct from the lawyer's [or the firm's] provision of legal services to clients; or
 - (2) in other circumstances by an organization other than a law firm* that is (i) owned [controlled] separately by the lawyer [or the lawyer's firm*] or (ii) owned [controlled] with others unless written disclosure as defined in paragraph (c)(2) is provided to the recipient of the services that (i) the services are not legal services and (ii) that the protections of the lawyer-client relationship do not exist.

- (b) When a lawyer knows* or reasonably should know* that a recipient of non-legal services provided pursuant to paragraph (a)(2) does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role with respect to the provision of non-legal services and the lawyer’s role as one who represents a client.
- (c) For purposes of this rule:
- (1) “Non-legal services” means services that might reasonably be performed in conjunction with the practice of law, including services may be lawfully performed by a person who is not authorized to practice law.
 - (2) “Written disclosure” means advance written notice is communicated to the person receiving the services that explains that the services are not legal services and that the protections of a lawyer-client relationship do not exist with respect to the non-legal services.
- [(d) Notwithstanding any other provision of this rule, a lawyer or law firm is subject to the rules and the State Bar Act when performing a non-legal service that is rendered to the recipient of the non-legal service in any manner that establishes a fiduciary relationship with that recipient as a beneficiary. A fiduciary relationship includes but is not limited to a trustee-beneficiary relationship that is subject to [Probate Code sections 16004 – 16015](#).^{1]}²

¹ **RD:** OCTC’s 9/3/19 comment letter on COPRAC’s proposed ethics opinion no. 160003 includes the following:

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.

(OCTC 9/3/19 Comment letter at p. 16.)

² Paragraph (d) is bracketed because it is an open issue for consideration by the Task Force and there was no consensus amongst the drafting team as to whether to include this provision as drafted.

Mr. Tuft's Initial Draft: Included below is a draft of a proposed rule 5.7.1 that would allow lawyers and nonlawyers to associate in the delivery of legal services in the event qualified nonlawyer service providers are authorized by law to render certain defined legal advice or services. The objective of this proposed rule would be to provide greater access to legal services to individual consumers on a "one to many" basis, preferably in identified areas of critical need, as an alternative to the regulatory "sandbox" approach. Innovation and investment in the delivery of defined legal services authorized by statute or rule of court could proceed without having to qualify for and satisfy the regulatory standards for obtaining an exemption to rule 5.4.

Proposed Rule 5.7.1 Alternative Legal Service Arrangements

- (a) To the extent that a nonlawyer is authorized by other law to provide alternative legal services to consumers as defined in paragraph (b), a lawyer is not prohibited by these rules from forming a partnership or other association with the non-lawyer for the provision of such services, provided:
 - (1) the partnership or other association is not a law firm*;
 - (2) the partnership or other association is owned [controlled] by the lawyer separately or with other alternative legal service providers who are authorized by law to perform such services.
 - (3) the recipient of the services is not a current client of the lawyer or the lawyer's firm* and is informed [in writing] that the protections of the attorney-client relationship do not exist with respect to the provision of alternative legal services.
 - (4) [the partnership or other association is registered with [certified by] the State Bar in accordance with applicable State Bar rules of procedure.]
- (b) For purposes of this rule "alternative legal services" means limited legal advice and services a nonlawyer is authorized to performed by statute, rule of court, or other law that would constitute the practice of law if performed by a lawyer.

Rule 5.7.1 Alternative Legal Service³ Arrangements⁴

- (a) To the extent that a nonlawyer is authorized by other law to provide [alternative] legal services⁵ to consumers as defined in paragraph (b), a lawyer is not prohibited by these rules from forming a partnership or other ~~association~~-organization⁶ with the non-lawyer for the provision of such services, provided:
- (1) the partnership or other ~~association~~-organization is not a law firm*;⁷
 - (2) the partnership or other ~~association~~-organization is owned [controlled] by the lawyer separately or with other lawyers and [alternative] legal service providers who are authorized by law to perform such services.
 - (3) the recipient of the services is not a current client of the lawyer or the lawyer's firm* and is informed [in writing] that the protections of the attorney-client relationship do not exist with respect to the provision of alternative legal services.⁸

³ The reference to "Alternative Legal Service" is somewhat misleading. The term is nearly identical to Alternative Legal Service Providers," which has already been recognized as a term of art in the legal services field and is much broader than the concept being proposed here, as it includes individuals and organizations that provide services such as: IT Services, contract management, document review, litigation support, human resources, analytics, contract lawyers and staffing, etc.

It would be better at this discussion stage to refer to "limited legal services," at least in the title.

⁴ Because this rule appears to contemplate the co-ownership between nonlawyers and lawyers of an organization that provides limited legal services and not any other kind of "arrangement," e.g., reciprocal referral, etc., the title should refer to an organization rather than "arrangement" similar to Wash Rule 5.9 ("Business Structures Involving LLLT And Lawyer Ownership"). Perhaps something like: "Organizations Owned By Limited Legal Service Providers and Lawyers"

⁵ See notes 3 and 9.

⁶ I think the broader term used in the California Rules of Professional Conduct (CRPC) is "organization." Is there a reason to limit the type of entity to "partnership or association"?

⁷ Under CRPC 1.0.1(c), a law firm is defined as "a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization."

It seems incongruous to state in a rule that permits the formation of an organization that is intended to provide legal services that the organization cannot be a law firm. I think the better approach would be to change the definition of law firm to include an organization comprised of lawyers and limited legal service providers (or whatever we end up calling these practitioners). See Wash. Rule 1.0(c) ("Firm" or "law firm" denotes a lawyer, lawyers, an LLLT, LLLTs, or any combination thereof in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers or LLLTs employed in a legal services organization or the legal department of a corporation or other organization.)

- (4) [the partnership or other ~~association~~ organization is registered with [certified by] the State Bar in accordance with applicable State Bar rules of procedure.]
- (b)⁹ For purposes of this rule “[alternative] legal services” means limited legal advice and services a nonlawyer is authorized to ~~performed~~ provide by statute, rule of court, or other law that would constitute the practice of law if performed by a lawyer.

⁸ This provision is confusing. It parallels the provision in proposed 5.7 for the provision of *non-legal* services. The rule is required there to ensure that the recipient of the legal services is not confused. Yet this rule 5.7.1 is not so limited by its terms to nonlegal services. What’s the point of a rule that permits the lawyer and limited legal service providers to partner or co-own another organization unless that organization is providing legal services, even if somewhat restricted in scope? And why shouldn’t many of the protections of a lawyer-client relationship apply? I believe that Washington has revised its rules to so provide. I understand the complexities of privilege law but I think this disclaimer of protections is overbroad.

⁹ If the term “alternative legal services” is retained, this definition should appear as paragraph (a) to avoid any confusion with ALSPs. See note 3.

Washington's Rule 5.9 for Consideration

Washington Rule 5.9 Business Structures Involving LLLT and Lawyer Ownership

- (a) Notwithstanding the provisions of Rule 5.4, a lawyer may;
 - (1) share fees with an LLLT who is in the same firm as the lawyer;
 - (2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law; or
 - (3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.
- (b) A lawyer and an LLLT may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this rule only if;
 - (1) LLLTs do not direct or regulate any lawyer's professional judgment in rendering legal services;
 - (2) LLLTs have no direct supervisory authority over any lawyer;
 - (3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and
 - (4) lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1.

[Adopted effective April 14, 2015.]

Comment

[1] This rule authorizes lawyers to enter into some fee-sharing arrangements and for-profit business relationships with LLLTs. It is designed as an exception to the general prohibition stated in Rule 5.4 that lawyers may not share fees or enter into business relationships with individuals other than lawyers.

[2] In addition to expressly authorizing fee-sharing and business structures between LLLTs and lawyers in paragraph (a), paragraph (b) of the rule sets forth limitations on the role of LLLTs in jointly owned firms, specifying that regardless of an LLLT's ownership interest in such a firm, the business may not be structured in a way that permits LLLTs ownership interest in such a firm, the business may not be structured in a way that permits LLLTs directly or indirectly to supervise lawyers or to otherwise direct or regulate a lawyer's independent professional judgment. This includes a limitation on LLLTs possessing a majority ownership interest or controlling managerial authority in a jointly owned firm, a structure that could result indirectly in non-lawyer decision-making affecting the professional independence of lawyers. Lawyer managers, by contract, will be required to undertake responsibility for a firm's LLLT owners by expressly assuming responsibility for their conduct to the same extent as they are responsible for the conduct of firm lawyers. See also Rule 5.10.

[Comments adopted effective April 4, 2015.]

Approved Business Models

Joint LLLT/Lawyer Business Model

- NEW RPC 5.9
- Required a lawyer rule change

Restrictions: LLLTs may *not*

- Direct a lawyer's professional judgment
- Have direct supervisory authority over a lawyer
- Possess a majority interest or exercise controlling managerial authority