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III.O. Rule 5.7
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MEMORANDUM

DATE: May 16, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: Rule 5.7 Drafting Team (Jeffrey Bleich (L), Daniel Eaton, Toby Rothschild)

SUBJECT: Consideration of ABA Model Rule 5.7 (Responsibilities Regarding Law-Related Services)

Summary:

The drafting team assigned to study ABA Model Rule 5.7 ("MR 5.7") recommends that the Commission report to the Board of Trustees that a California version of MR 5.7 was considered by the Commission but is not recommended for adoption.

Background:

At the request of staff, the drafting team was assigned to consider MR 5.7 (responsibilities regarding law-related services), for which there is no direct California counterpart. The drafting team met by teleconference on May 12, 2016. Among the items considered by the team were the following: MR 5.7; RRC1's explanation for not recommending a version of MR 5.7; RRC1 public comment synopsis table summarizing input from the public on RRC1's decision to not recommend a version of MR 5.7; the second Commission's proposed rule 5.4; and an ABA State Adoption Chart for MR 5.7 (dated May 5, 2015) (see Attachment).¹ At the teleconference, the drafting team discussed the apparent purpose of MR 5.7 and the pros and cons of adopting a California version.

Discussion:

In its entirety, MR 5.7 provides that:

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

¹ As indicated in the ABA chart, twenty-six (26) jurisdictions have adopted a rule that is identical to the MR 5.7.

(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).

In consideration of the Commission's Charter,² the drafting team concluded that ABA Model Rule 5.7 is not required. Appropriate guidance is currently provided by other

² The Commission is charged with conducting a comprehensive review of the existing California Rules of Professional Conduct and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017. In conducting its review of the existing Rules and developing proposed amendments to the Rules, the Commission should be guided by the following principles:

1. The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.
3. The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.
4. The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.
5. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

The proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.

California authorities, including case law and ethics opinions, and there appears no reason to supplement that authority.³

In reaching its conclusion, the drafting team also considered proposed rule 1.0, Comment [2] 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.” The drafting team believes this Comment, along with existing California law, provides sufficient guidance to attorneys that they are subject to discipline for conduct in providing law-related services.

Finally, the drafting team is not aware of a problem regarding the inability to discipline lawyers due to the absence of this rule in California.

Conclusion:

For the foregoing reasons, the drafting team is not recommending the adoption of ABA Model Rule 5.7.

³ See, e.g., *Libarian v. State Bar* (1944) 21 Cal.2d 862, 865 (“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.”); *Marquette v. State Bar* (1988) 44 Cal.3d 253, 262 (attorney disciplined for violating Bus. & Prof. Code § 6106 for perjuring himself on a lease application even though application “did not relate to an issue bearing on the conduct of an attorney-client relationship.”); *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 (“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.”); see also, Cal. State Bar Form. Ops. 1982-69, 1995-141, and 1999-154 which address an attorney’s ethical responsibilities when rendering non-legal services to a client. Finally, some Business and Professions Code sections regulate the activities of a lawyer who also provides non-legal ancillary business services to a client, for example: Bus. & Prof. Code § 6009 (attorney lobbyists); Bus. & Prof. Code § 6009.3 (attorney tax preparers); Bus. & Prof. Code § 6077.5 (attorney debt collector); Bus. & Prof. Code § 6106.7 (attorney sports agent); and Bus. & Prof. Code § 6175.3 (attorney selling “financial products”).