



The State Bar *of California*

**Task Force On Access Through Innovation Of Legal Services -
Subcommittee on Rules and Ethics Opinions
Thursday, February 28, 2019
11:00 a.m. – 2:00 p.m.**

**The State Bar of California
845 South Figueroa Street
Board Room, 2nd Floor
Los Angeles, CA 90017-2515
(213) 765-1000**

**Phone: 1-855-520-7605
Pass Code: 253-541-0212#**

Questions regarding any agenda item should be directed to the Committee Coordinator, Randall Difuntorum at 415-538-2161, 180 Howard Street, San Francisco, CA 94105, or Chair, Tara Burd at 415-538-2116. Committee members are requested to notify the Committee Coordinator as early as possible in advance of the meeting if they wish to remove any item/s from the consent agenda.

Committee Members: Johann Drolshagen, Lori Gonzalez, Andrew Kucera, Kevin Mohr, Daniel Rice, Allen Rodriguez.

The order of business is approximate and subject to change.

NOTICE AND AGENDA

- A.** Chair's Report
 - 1. Roll Call
 - 2. Call for Public Comment
 - 3. Chair's Report
 - 4. Staff Report
 - 5. Approval of Action Summary from the January 18, 2019 Meeting

B. Action / Report and Recommendation

1. Review and discussion of revisions to the Rules Sub-Committee's December 31, 2018 memo.
2. Review and discussion of the memo analyzing Rules of Professional Conduct, rule 5.7.
3. Review and discussion of case law concerning attorney competency (Rule of Professional Conduct, rule 1.1) as it relates to technology and innovation.
 - a. Are these cases applicable to new technology?
 - b. Should attorneys offer "do-it-yourself" products to clients, without personally speaking with each client?
4. Discussion of Next Steps and Research Assignments for April Meeting

ADJOURN

In compliance with the Americans with Disabilities Act, those requiring accommodations at this meeting should notify Lauren McCurdy at (415) 538-2107. Please provide notification at least 72 hours prior to the meeting to allow sufficient time to make arrangements for accommodations at this meeting.

The notice and agenda is available at: <http://board.calbar.ca.gov/Committees.aspx>.



The State Bar of California

ACTION SUMMARY

**Task Force on Access Through Innovation of Legal Services
Subcommittee on Rules and Ethics Opinions
January 18, 2019
11:00 a.m. – 2:00 p.m.**

**The State Bar of California
845 South Figueroa St.
Los Angeles, California 90017**

Phone: 855-520-7605
Pass Code: 2535410212#

Members Present: Tara Burd (Chair), Kevin Mohr (Vice-Chair), Barbara Arsedo, Lori Gonzalez, Andrew Kucera, and Allen Rodriguez.

Not Present: Daniel Rice

Others Present: Mia Ellis, Toby Rothschild (ATILS Co-Vice Chair), Donna Hershkowitz

ACTION SUMMARY

A. Chair's Report

1. **Roll Call**

The Chair called the meeting to order and asked staff to take a roll call of the task force members.

2. **Call for Public Comment**

There was no one present to provide public comment.

3. **Chair's Report**

The Chair solicited comments about the memo prepared by Allen Rodriguez and Lori Gonzalez and additions to the memo prepared by Professor Kevin Mohr.

4. **Staff Report**

No formal staff report.

5. **Approval of Action Summary from the December 5, 2018 Meeting**

No action summary from prior meeting.

B. Action / Report and Recommendation

1. Rules and Ethics Opinions

The subcommittee met and held a general discussion. No action was taken.

ADJOURN

In compliance with the Americans with Disabilities Act, those requiring accommodations at this meeting should notify Lauren McCurdy at (415) 538-2107. Please provide notification at least 72 hours prior to the meeting to allow sufficient time to make arrangements for accommodations at this meeting.

The notice and agenda is available at: <http://board.calbar.ca.gov/Committees.aspx>.



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Subcommittee on Rules and Ethics Opinions
From: Tara Burd
Date: February 10, 2019
Re: Revisions to the Rules Subcommittee's December 31, 2018 Memo

The following memorandum serves as a draft summary of the assignment directed to the Rules and Ethics Opinions Subcommittee. After initially identifying existing legal and law related services that are believe to be constrained by the professional rules of conduct and other lawyer conducts laws, we now move towards identifying those constraining rules and laws.

As to each rule, the following is a summary that identifies a) the public policy concerns, b) whether the rule possibly constrains attorney-driven innovation, and c) initial considerations concerning alternative business structures and changes to the unauthorized practice of law. The responses are largely based on our committee's discussions and that of the task force in which we participated.

This is a draft may be built upon and revised as the ATILS task force continues its discussion and ultimately prepares its proposal.

SUMMARY OF EXISTING LEGAL AND LAW RELATED SERVICES THAT ARE BELIEVED TO BE CONSTRAINED BY THE PROFESSIONAL RULES OF CONDUCT AND OTHER LAWYER CONDUCT LAWS

The following summary of existing legal and law related services was drawn from the more extensive memorandum prepared by Allen Rodriguez and Lori Gonzalez; Kevin Mohr for the January 2019 meeting:

1. Paraprofessionals – Would be particularly helpful in the areas of family law, estate planning, veteran's benefits, small claims and low-value claims, welfare benefits assistance, veterans benefits assistance, school discipline issues, minors in group homes, and disputes involving administrative discretion.
 - a. Limited Scope Services
 - b. Form Specific or Process Specific Certifications
2. Software Services
 - a. Fastcase BK (formerly TopForms) – This is a bankruptcy form subscription model sold to lawyers.
 - b. WealthCounsel and Fore! – like Fastcase BK, WealthCounsel and Fore! provide document automation for estate planning documents to lawyers.
 - c. Online service providers like LegalZoom could be expanded to incorporate additional but basic legal advice.

- d. LegallInc - Business formation services sold directly to lawyers. The form generation and services provided by LegallInc. are then sold to the public at a markup by the lawyers.
 - e. SmartLien – This service assists construction professionals with filing a lien for unpaid services. The company is owned and operated by attorneys, so while providing legal services, the funding options for this startup - which is consumer facing - is limited and affected by ethical rules around fee sharing.
 - f. ZLien.com – In contrast to SmartLien, Zlien.com is a very well-funded legal tech company that provides similar services related to the generation of liens but cannot provide legal advice. UPL restrictions limit the ability of both consumer facing solutions in ways that minimize their effect on access to justice for these smaller construction claims.
 - g. AI Powered Website Bots –AI powered chatbots could be built that help people navigate and prepare various claims in areas such as family law, consumer debt, small claims courts or claims under certain amounts for which getting legal assistance may not be cost effective.
 - h. Models like tax preparation software (such as Turbo Tax) could be created for the legal field.
- 3. Expanded Lawyer Referral Services.
 - 4. Full Service (Multidisciplinary) Businesses.
 - 5. Incubator Models for Law Firms – The creation of franchise style law firms wherein less experienced lawyers could gain access to these pre-built systems for a portion of their profits in lieu of expensive front-end costs.
 - 6. Expanded marketing-based referral partnerships.
 - 7. Expanded Limited Scope Representation wherein technology is used by an attorney firm to provide lower cost services and advice to clients.
 - 8. Subcontracted legal advice and services offered by the courts for pro se litigants.
 - 9. In-court kiosks and other self-help systems offered within the courthouse.

EXISTING RULES AND LAWS POTENTIALL CONSTRAINING LEGAL INNOVATION

Rule 1.1 Competence

A. Public Policy Issues

An attorney who utilizes new technology or offers tech-related legal products, has a duty to do so competently. This Rule instills an obvious obligation on attorneys to research and prepare to carry out the tasks for which they are hired. However, most attorneys are not likely to be intimately familiar with many aspects of cutting edge innovations.

Email, eFiling, and eDiscovery are three examples of technological advances that many attorneys must know how to competently utilize in 2019. Similar principals should apply to more cutting edge technology, but attorneys may face greater challenges if they are involved in untested waters on the forefront of innovation.

B. Impact on Attorney-Managed Tech

Existing rules appear to sufficiently protect the public and can be applied to attorney-managed tech. However, California should consider whether to follow the Florida State Bar and require attorneys to take MCLE courses in technology. Additionally, an Ethics Opinion or Comment that specifically addresses *new* innovation should be considered to offer attorneys a better understanding of what is required. For example, a Catch-22 may exist if attorneys are afraid to implement something new and different out of fear that such product may be considered a violation of this Rule if the new idea ultimately fails.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The rule may need to be revised to include a competency requirement for any non-attorney engaged in providing legal related services.

Additionally, if alternative business structures are permitted, the rule may need to be revised – or clarified– that an attorney is required to exercise care and due diligence prior to entering into a partnership with a non-attorney.

Rule 1.2 Scope of Representation and Allocation of Authority

A. Public Policy Issues

The current rule allows an attorney to limit the scope of representation so long as that representation is reasonable. An attorney must also comply with the requests and direction of the client.

B. Impact on Attorney-Managed Tech

The Rule does not generally prohibit attorney-managed innovation. However, reasonableness has not been tested with respect to the use of attorney tech and attorneys may have fear that certain limited scope offerings (such as do-it-yourself forms on an attorney website) may constitute unreasonable limitations.

For example, is it unreasonable for an attorney to offer client-facing self-help products with the express limitation that the attorney will not ever review the client's completed forms for accuracy or otherwise offer advice independent of the self-directed program? If the State Bar (or court) found this to be *unreasonable* the result could be a costly malpractice claim. Greater clarity by an Ethics Opinion or Comment on this issue could give attorneys greater comfort and lead to an increased use of these products.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The concerns are the same as above. Limited scope representation would be essential to any revision to the UPL rules and laws. To what extent this Rule would require revision would depend on exactly what UPL rule revisions are proposed.

Rule 1.5 Confidential Information of a Client

A. Public Policy Issues

An attorney's duty of confidentiality is related to but exceeds attorney-client privilege. (See *also* Evid. Code, §§ 952-955.) Confidentiality is imperative for a client to speak honestly to his or her attorney so that the attorney can render the best possible advice. Without confidentiality, clients would be unable to speak honestly with their attorney, and attorneys could easily exploit clients' often sensitive information.

B. Impact on Attorney-Managed Tech

There are challenges to protecting attorney-client communications over the internet as opposed to in-person communication. First, it is possible for electronic transmissions to be hacked. Second, the more third party platforms are used, the more vulnerability there is to outside invasion of the information. There is also risk that a third party entity could be subpoenaed. Even if a client is advised that the communication is not secure, what level of warning or notification to the client would be required?

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Non attorneys could be subject to the confidentiality requirements in the same way that attorney staff is subject to it. However, the privilege is limited to "those who are present to further the interest of the client in the consultation and those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted..." (Bus. & Prof. Code, § 952.) Clarity by Opinion or Comment may be helpful as to whether a non-attorney who partners with an attorney would be entitled to the privilege by virtue of the relationship. In other words, does the existence of the partnership meet the standard identified above, or is more required?

Rule 1.7 Conflict of Interest: Current Clients

A. Public Policy Issues

The duty of loyalty and prohibition of conflicts of interest is reasonably necessary to protect clients from bad legal advice guided by conflicting interests. This is generally a sound public policy.

B. Impact on Attorney-Managed Tech

The issue is whether an attorney offering legal tech services relating to litigation or disputes would be required to run a conflict check. For example, an attorney who offers self-guided divorce help on his website may risk offering the same help to both a husband and his soon-to-be ex-spouse. In a purely do-it-yourself format there may be no conflict. If, however, the attorney also offers limited-scope legal advice, conflicts of interest may arise. Clarification may be helpful as to what point that line is drawn.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

This Rule would likely need to be extended to any non-attorneys offering legal services for the same reason it applies to attorneys.

If alternative business structures are permitted, the rule may need to be clarified as to whether a firm that represents individuals in one capacity (such as a CPA providing tax advice to a married couple) is necessarily precluded from offering either of those same clients legal advice.

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client

A. Public Policy Issues

As to the general public, this Rule offers sound protections against an attorney taking advantage of his fiduciary relationship with a client.

B. Impact on Attorney-Managed Tech

No apparent concerns with this rule as applied to attorney-managed tech.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

If alternative business structures are permitted, this rule may be violated by an attorney who gives advice to the company of which he is also a part of.

Rule 1.8.8 Limiting Liability to Client

A. Public Policy Issues

A lawyer may not prospectively limit malpractice liability to a client. Generally, this rule protects the public by allowing them full recovery of injuries caused by attorney malpractice.

B. Impact on Attorney-Managed Tech

Attorneys are typically risk averse. New technology and innovation will necessarily lead to uncertainty as to what constitutes “reasonableness” under a variety of circumstances that have not been previously considered. This could easily expose attorneys to an influx of potential malpractice claims. Malpractice insurance rates may similarly be affected which could make offering innovative services cost-prohibitive. Limiting liability under certain, limited, circumstances may help to keep malpractice insurance costs down and reduce an attorney’s fear of testing new products that could increase the public’s access to legal services.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Attorney and non-attorney partnerships require equal risk and reward. Attorneys will not be incentivized to partner with non-attorneys if the non-attorney has the freedom to limit his/her liability to the client while the attorney must suffer full exposure of liability.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1. to 1.8.9

A. Public Policy Issues

This rule increases public protection by expanding the foregoing rules to include any clients of the firm, as opposed to limiting it to the one-on-one attorney-client relationship.

B. Impact on Attorney-Managed Tech

NOT YET DISCUSSED.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

NOT YET DISCUSSED.

Rule 1.9 Duties for Former Clients

SEE RULES 1.5 AND 1.7

Rule 1.10 Imputation of Conflicts of Interest: General Rule

SEE RULES 1.5 AND 1.7

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

A. Public Policy Issues

Trust accounting is necessary to protect client funds from attorney misuse.

B. Impact on Attorney-Managed Tech

Existing online services such as LawPay allow attorneys to receive client funds into their trust account but pay expenses out of their business account so that clients funds are not improperly invaded. Similar processes could and should be implemented if and when attorney-managed tech is used.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Existing rules would necessarily need to be extended to any non-attorneys in the case of alternative fee or business structures. Additionally, enforcement of the Rules against any non-attorneys would be imperative.

Rule 1.16 Declining or Terminating Representation

A. Public Policy Issues

Relevant here, an attorney must not represent a client when the attorney knows the client is pursuing the matter for an improper purpose.

B. Impact on Attorney-Managed Tech

An attorney's obligations may need to be clarified with respect to attorney tech to the extent that an attorney is engaging in a limited scope representation through the use of technology. For example, where an attorney manages a self-help client-facing product to assist clients in litigation, an attorney may receive information that would warrant a declination or termination of representation under the Rule. In such a case, however, the attorney may not be aware of the information if the terms of the site/attorney-client agreement do not require the attorney to personally review the materials provided by the client.

Similarly, an attorney might generally be liable for missing a statute of limitation or improperly filing an action after the expiration of a statute of limitation. Clarification may be necessary to determine whether an attorney – or his tech – has any obligation to warn a client of an impending or expired SOL and/or the obligation – or right – to refuse such a client.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The same rules may need to be extended to any non-attorney.

Rule 1.18 Duties to Prospective Client

SEE RULES 1.5 AND 1.7.

Rule 2.1 Advisor

A. Public Policy Issues

A lawyer shall exercise independent professional judgment and render candid advice. The purpose of the rules protects the client from the lawyer giving advice that is influenced by third parties.

B. Impact on Attorney-Managed Tech

This rule may be violated if an attorney develops technology wherein basic legal advice is offered based on a series of questions and answers without the attorney personally reviewing the responses of each client. Similarly, this rule may be violated if an attorney develops a program that utilizes artificial intelligence to render the legal advice.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Full service professional firms that include attorneys may cause conflicts for attorneys who may render advice that is in the best interest of the firm rather than the best interest of the client.

The same issues that apply to attorney-managed tech would also apply to any non-attorney tech.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

A. Public Policy Issues

This rule requires supervising lawyers and managers to take responsibility for all members of the firm complying with the Rules and State Bar Act. This further ensures the underlying Rules are enforced.

B. Impact on Attorney-Managed Tech

As a practical matter, attorney tech should not be impacted. Clarification by Opinion or Comment as to an attorney's "reasonable" requirements with respect to certain technology may increase an attorney's comfort level with implementation of certain technology or services.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The committee should consider whether this Rule should be extended to include non-attorney attorney-service managers and supervisors.

Rule 5.2 Responsibilities of Subordinate Lawyer

A. Public Policy Issues

The rule extends responsibility to comply with these Rules to all attorneys, even in the face of contrary direction by their superiors.

B. Whether Change is Recommended to Stimulate Attorney Tech

No apparent impact or change is necessary.

C. Whether Change is Required if Alternative Business Structures are Permitted

No apparent impact or change is necessary. Currently, non-attorneys within law firms are not subject to these same rules. Therefore, we can presume that even in an alternative business structure, non-attorney subordinates would not be expected to ignore their supervisor/manager in order to comply with the rules.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

A. Public Policy Issues

1. Attorneys are responsible for the non-lawyers that work for them. ABA Model Rule 5.3 uses the term “Assistance” versus California’s term, “Assistants.” Could this rule apply to an attorney’s use and oversight of technology as opposed to human assistance?

2. In addition to attorney oversight of tech, the requirement of attorney oversight of non-lawyer assistants may impede increased access to paraprofessionals. Paraprofessionals could also utilize technology developed by or with the assistance of attorneys.

B. Impact on Attorney-Managed Tech

The current Rule states that it applies to a “nonlawyer” and refers to a “person” which could easily be argued does not include technology. If this rule is to be applied to non-human lawyer assistance, it should be so clarified.

There is also little guidance on the extent of an attorney’s responsibility over such tech. If an attorney creates a do-it-yourself program for public use for free, what constitutes “reasonable” oversight of such product?

Many of the existing software services identified above, could be client-facing do-it-yourself type products instead of attorney-facing products.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Under the language of this rule, attorneys bear full responsibility for the non-attorneys they work for. This could create significant issues of inequity if attorneys are permitted to partner with non-attorneys. In such a situation, the attorney and non-attorney would be entitled to equal reward, while the attorney is strapped with all the risk.

Attorneys are typically risk-averse, partly because a misstep or failure on their part could result in the loss of their license to practice and thus the end of their legal career. In contrast, an entrepreneur merely risks the loss of a particular business and/or money but can otherwise continue his or her trade.

Should this Rule be adapted to minimize an attorney's risk of disbarment for the conduct of a non-attorney business partner? If so, how can we continue to protect the public?

Suggestions:

- High limit insurance policies for the non-attorneys
- Loss of the right of the non-attorney to partner with an attorney to offer legal services.

Rule 5.4 Financial and Similar Arrangements with Nonlawyers

TO BE COMPLETED BY OTHER SUBGROUP

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

TO BE COMPLETED BY OTHER SUBGROUP

ABA Rule 5.7 Law Firms and Associations

This rule does not presently exist in California, but there is a question as to whether it should. The language of the ABA Model Rule is as follows:

(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.

A. Public Policy Issues

As a matter of public policy, this rule would extend a lawyer's ethical obligations to any law related activity that meets the identified criteria. This would reasonably include attorney-related tech. This would increase public protections.

B. Impact on Attorney-Managed Tech

This rule would likely extend to attorney-managed tech and may fill a gap in public protections that existing rules do not address.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Clarification of this rule, if implemented, would likely be necessary if multidisciplinary practices are permitted. If a lawyer shares a business with a CPA, for example, might the CPA's efforts constitute law-related services such that the lawyer would then be subject to all of the Rules of Professional Conduct as they relate to the work performed by the CPA.

Rule 6.5 Limited Legal Services Program

A. Public Policy Issues

This Rule limits the application of the foregoing Rules to attorneys in certain circumstances in order to increase the Attorney's opportunity and willingness to provide legal services.

B. Impact on Attorney-Managed Tech

As written, this Rule is limited to programs sponsored by a "court, government agency, bar association, law school, or non-profit." This rule could potentially be extended to apply more broadly to other privately-offered programs/services. Alternatively, courts, agencies, bar associations, law school and non-profits could be incentivized to increase their programs.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

No identified concerns. Extending the application of this Rule could further the implementation of legal tech for limited services.

Rule 7.1 Communications Concerning a Lawyer's Services

A. Public Policy Issues

A lawyer is not permitted to make false or misleading statements about the lawyer or the lawyer's services. This is clearly necessary to protect the public against fraudulent attorneys and attorney marketing.

B. Impact on Attorney-Managed Tech

No identified impediment to innovation.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Rule would need to extend to non-attorneys offering attorney services and it should be clear to what extent an attorney is or is not participating in any limited scope offerings.

Rule 7.2 Advertising

NEWLY IMPLEMENTED RULES RE LAWYER REFERRAL SERVICES HAVE NOT YET BEEN DISCUSSED.

Rule 7.3 Solicitation of Clients

A. Public Policy Issues

The current rule prohibits lawyers from soliciting potential clients *in person*, by *live telephone* or *real-time electronic* contact when a significant motive for doing so is the lawyer's pecuniary gain, subject to limited exceptions. Written communications or electronic communications are permissible so long as the communication is labeled as an "Advertisement." The purpose of the Rule is to prohibit "ambulance chasing," wherein a potential client may be vulnerable to the undue influence or pressures of an attorney. The result, however, is that this may also prohibit an attorney from using technology to proactively contact potential clients that the attorney knows is in need.

Possible limitations could include live chat bots or pop-ups that appear in response to a potential client entering search terms that refer to a legal issue. For example, if a client types "final will and testament," current rules would likely restrict any type of immediate outreach by an attorney or attorney service. Also consider an application that refers a potential client to a personal injury and/or criminal attorney automatically when a vehicle has been in a car accident.

B. Impact on Attorney-Managed Tech

The current Rule may limit an attorney's ability to utilize social media and other modern forms of real-time communication to solicit clients for full-cost or *lo bono* services, including cost effective do-it-yourself services.

C. Concerns if Alternative Business Structures are Permitted

The same rules that apply to an attorney would need to apply to any non-attorney offering legal services. Otherwise, the non-attorney business would have the benefit of being able to target larger groups of people. Consider if Google or Facebook could analyze a person's searches or posts and then proactively respond by offering the legal services that the potential client appears to need.

PRACTICE OF LAW RELATED RULES AND STATUTES
RECOMMENDED DISPOSITIONS

		Recommended Disposition				
	Rule Number and Title	No Change	Amend Text	Amend Comment	Repeal	Other
1	CRPC 1.1 Competence					
2	CRPC 1.2 Scope of Representation and Allocation of Authority					
3	CRPC 1.3 Diligence					
4	CRPC 1.4 Communication with Clients					
5	CRPC 1.6 Confidential Information of a Client					
6	CRPC 1.7 Conflict of Interest: Current Clients					
7	CRPC 1.8.2 Use of Current Client's Information					
8	CRPC 1.9 Duties To Former Clients					
9	CRPC 1.15 Safekeeping Funds and Property of Clients and Other Persons					
10	CRPC 1.16 Declining or Terminating Representation					
11	CRPC 1.18 Duties To Prospective Client					
12	CRPC 2.1 Advisor					
13	CRPC 5.3 Responsibilities Regarding Nonlawyer Assistants					
14	CRPC 5.4 Financial and Similar Arrangements with Nonlawyers					



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

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: Memo Analyzing Rule 5.7 – 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 5.7.¹ Five jurisdictions have adopted a rule that is substantially similar to Model Rule 5.7.² Five jurisdictions have adopted a version of the rule with substantial variations from the organization or substance of the Model Rule.³ Twelve jurisdictions, including California, have not

¹ 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

² The five jurisdictions are: Georgia, Idaho, Massachusetts, North Carolina and Wisconsin.

³ The five jurisdictions are: Arizona, Florida, New York, Ohio and Pennsylvania.

adopted any version of Model Rule 5.7.⁴ [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.⁵ See further discussion at section 0 & note 7, below.

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

⁵ 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

(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. 31.⁶

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

⁶ 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.⁷

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.

⁷ 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 Ct. 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

Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Subcommittee on Rules and Ethics Opinions
From: Andrew Kucera
Date: February 14, 2019
Re: Case Law Concerning Attorney Competency (Rule 1.1) as It Relates to Technology and Innovation

Assignment

Research case law and to what extent it has defined or set standards for attorney competency (Rule 1.1) as it relates to tech and innovation. Cases will likely involve email and ESI [(electronically stored information)]. Are existing rulings applicable, or even practical, when discussing new tech? To what extent can attorneys offer “do-it-yourself” products for their clients, without personally speaking with each client? Disclaimers should also be reviewed and considered.

California Rule 1.1

The State Bar of California Rule of Professional Conduct 1.1 states:¹

Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

¹ Rule 1.1 was recently revised, effective November 1, 2018.

ABA Model Rule 1.1

For comparison purposes, American Bar Association (ABA) Model Rule of Professional Conduct 1.1 states:

Rule 1.1: Competence

Client-Lawyer Relationship

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The ABA Model Rules of Professional Conduct (ABA Model Rules) also contain a comment to Rule 1.1, relevant to the ATILS Task Force:²

Rule 1.1: Competence – Comment

Client-Lawyer Relationship

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Differences Between California Rule 1.1 and ABA Model Rule 1.1

There are several notable differences between CA Rule 1.1 and ABA Model Rule 1.1.

First, CA Rule 1.1 is phrased as a double negative (“A lawyer shall not...fail to perform legal services with competence”), whereas ABA Model Rule 1.1 is phrased in the affirmative (“A lawyer shall provide competent representation....”)

Second, CA Rule 1.1 restricts its prohibition of failure to perform legal services with competence to failure that is intentional, reckless, with gross negligence, or repeated. In other words, failure to perform legal services with competence that is an isolated incident of simple negligence is not a violation of the rule. ABA Model Rule 1.1 does not so restrict its application. Thus, an isolated incident of simple negligence may violate the rule.

Third, the definition of competence differs. Both rules include learning/knowledge and skill as components, but only CA Rule 1.1 includes “mental, emotional, and physical ability,” and only ABA Model Rule 1.1 includes “thoroughness and preparation.”

Fourth, CA Rule 1.1 contains two exceptions when representation may be undertaken despite the lawyer’s lack of learning and/or skill. These exceptions are absent in ABA Model Rule 1.1.

² ABA Model Rule 1.1, Comment 8, was added to the ABA Model Rules in 2012.

Fifth and last, Comment 8 to ABA Model Rule 1.1 specifically mentions “the benefits and risks associated with relevant technology” as a *recommended* component of “requisite knowledge and skill.” CA Rule 1.1 does not mention technology.

Other State Bar Associations’ Rules Regarding Competence in Technology

According to Robert Ambrogi at www.lawsitesblog.com, 35 states have adopted the duty of technology competence.³ Some states have adopted ABA Model Rule 1.1, Comment 8, verbatim, and some states have adopted the same with additions, changes, and/or deletions.

Rules of Professional Conduct Regarding Competence in Innovation

The assignment mentions “standards for attorney competency (Rule 1.1) as it relates to tech *and innovation*.” (Emphasis added.) Neither CA Rule 1.1 nor ABA Model Rule 1.1 mention innovation, and there does not appear to be an available resource regarding other state bar associations’ rules regarding competence in innovation.

Research case law and to what extent it has defined or set standards for attorney competency (Rule 1.1) as it relates to tech and innovation.

There are 178 California cases (reported and unreported) that cite to CA Rule 1.1⁴. Only six of those cases contain the word “technology” or some variation of it. None of those cases contain the word “innovation” or any variation of it.

The six California cases that cite to CA Rule 1.1 and contain the word technology have nothing to do with technology as a component of competency.

Cases will likely involve email and ESI [(electronically stored information)].

20 of the California cases that cite to CA Rule 1.1 discuss email, however most of those cases cite to email in the context of a general breach of the duty of competence, rather than the failure of understanding or use of email technology as causing the breach (i.e., Solo v. Am. Assoc. of Univ. Women, 2018 WL 4185429, at 1 (S.D. Cal. Aug. 31, 2018).)

Some cases do identify specific problems with the use of email, such as:

- Sending copies of confidential and privileged emails to opposing counsel (Blecher Collins Pepperman & Joye, P.C. v. Mireskandari, 2016 WL 6298751, at 2 (Cal. Ct. App. Oct. 27, 2016.))

³ <https://www.lawsitesblog.com/tech-competence/> as of February 2, 2019.

⁴ And/or its predecessor, Rule 3-110.

- Misuse of email signatures (In Matter of Henriouille, 2015 WL 5895512, at 2 (Cal. Bar Ct. Oct. 1, 2015.))
- Failure to respond to emails from a client (Matter of Boles, 2015 WL 3764938, at 1 (Cal. Bar Ct. June 12, 2015); In the Matter of Seltzer, 2013 WL 5826033, at 4 (Cal. Bar Ct. Apr. 16, 2013); In the Matter of Schweizer, 2012 WL 6209991, at 3 (Cal. Bar Ct. Dec. 11, 2012.))
- Making false statements in an email, which is also a violation of Business & Professions Code section 6106 (In the Matter of Haltom, 2013 WL 1084772, at 4 (Cal. Bar Ct. Mar. 11, 2013.))

I was hoping to find some cases that discussed issues relating to the competent understanding and use of email technology, such as data privacy, encryption, etc. I found no such cases.

Only one case discussed electronically stored information (ESI), however not in the context that the understanding or use of ESI led to a breach of CA Rule 1.1. (See Sabel v. City & Cty. of San Francisco, 2017 WL 3670783, at 3 (N.D. Cal. Aug. 25, 2017.))

California State Bar Ethics Opinions

After finding little in case law, I expanded my search to CA State Bar Ethics Opinions. Several opinions mention technology, and cover the following issues.

- What are an attorney's ethical duties in the handling of discovery of electronically stored information?
 - o [CA Eth. Op. 2015-193](#) (2015): ESI and Discovery Requests
- An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality. (CA Eth. Op. 2015-193 (2015))

- May an attorney maintain a Virtual Law Office practice (“VLO”) & still comply with her ethical obligations, if the communication with the client, and storage of and access to all information about the client’s matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., “Cloud Computing”)?
 - o [CA Eth. Op. 2012-184](#) (2012): Virtual Law Office

As it pertains to the use of technology, the Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client’s matter, are conducted solely via the internet using a third-party’s secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to distinct issues raised by the hypothetical VLO and its operation. Failure of Attorney to comply with all ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described herein. (CA Eth. Op. 2012-184 (2012))
- Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?
 - o [CA Eth. Op. 2010-179](#) (2010): Confidentiality and Technology

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client’s devices and communications. (CA Eth. Op. 2010-179 (2010))
- May an attorney-client relationship be formed with an attorney who answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship on a radio call-in show or other similar format?⁵
 - o [CA Eth. Op. 2003-164](#) (2003) Formation of Attorney-Client Relationship

The context of a radio call-in show or other similar format is unlikely to support a reasonable belief by the caller that the attorney fielding questions is agreeing implicitly to

⁵ Although this opinion does not discuss technology in substance, it is on point with other related issues that the Rules & Ethics Subcommittee has been discussing.

act as the caller's attorney or to assume any of the duties that flow from an attorney-client relationship. (CA Eth. Op. 2003-164 (2003))

Interestingly enough, several of the above ethics opinions cite to ABA Model Rule 1.1, Comment [8], in their discussion of the attorney's duty of competence.

Are existing rulings applicable, or even practical, when discussing new tech?

This question probably cannot be answered with any confidence based on this research. Case law is not instructive. Ethics opinions are instructive, but aren't designed to be forward-looking and generally do not discuss "new" technologies.⁶ The ethics opinions that are instructive are relatively fact-dependent. Guidelines for technologies that might be considered "new" are somewhat vague.

The following excerpts from CA State Bar Ethics Opinions are relevant (cited in full above, and generalized here):

- "An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."
- "Attorney competence related to [a particular practice area] generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to [technology used in that practice area.]"
- "On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability."
- "[An] attorney may be required to take additional steps to confirm that [he or] she is fulfilling [his or] her ethical obligations due to distinct issues raised by [that attorney's use of specific technology.]"
- "Whether an attorney violates his or her duties of confidentiality and competence when using technology ... will depend on the particular technology being used and the circumstances surrounding such use."

Probably the most useful Ethics Opinion relative to the use of new technology is 2010-179.

Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate:

- 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
- 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information;

⁶ Virtual law offices and cloud computing may not have been commonly used technologies in 2010-2012, but they certainly weren't new. Discovery of ESI raised technology issues well before 2014-2015.

- 3) the degree of sensitivity of the information;
- 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
- 5) the urgency of the situation; and
- 6) the client's instructions and circumstances, such as access by others to the client's devices and communications

However, what constitutes "appropriate steps" can be the subject of much debate.

To what extent can attorneys offer "do-it-yourself" products for their clients, without personally speaking with each client?

This is somewhat addressed by Ethics Opinion 2003-164, at least as an outside boundary. A full answer would require more analysis of how and when an attorney-client relationship would be formed, which would depend on the specific technology being considered. There is a good discussion of this generally in Ethics Opinion 2003-164, at Pages 3-4⁷, however the facts of that case have little to do with technology.

[T]he courts have looked to a number of factors in assessing whether the totality of circumstances warrants concluding that an attorney-client relationship has been formed absent express agreement of the attorney and client. Those factors include:

- (1) Whether the attorney volunteered his or her services to a prospective client.
- (2) Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case.
- (3) Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question.
- (4) Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice.
- (5) Whether the individual paid fees or other consideration to the attorney in connection with the matter in question.
- (6) Whether the individual consulted the attorney in confidence.
- (7) Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity.

Again, the inquiry is based on the totality of the circumstances. No single factor is necessarily dispositive.

⁷ Citing California Ethics Opinion 2003-161, at pages 3-4.

Again though, I would caution anyone against using Ethics Opinion 2003-164 prospectively, as a guideline for whether and to what extent attorneys can use technology to replace personal communication. In sum, it is far from an exact science to determine how new technology affects the creation of an attorney-client relationship.

Disclaimers should also be reviewed and considered.

Disclaimers are discussed in Ethics Opinion 2003-164, but again this opinion doesn't discuss the use of new technology. The opinion does cite to the attorney's screening and on-air disclaimers as facts that weigh against the formation of an attorney-client relationship, and presumably this application would carry over to the formation (or not) of an attorney-client relationship in a model that includes new technology.