



# The State Bar *of California*

## Task Force on Access Through Innovation of Legal Services

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To: Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions  
From: Andrew Tuft  
Date: February 25, 2019  
Re: Ethics Opinion Addressing Matters Regulated in Other Jurisdictions Through a Rule Derived From ABA Model Rule 5.7

In your meeting materials, Kevin Mohr and Andrew Arruda have provided the following item: “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.”

For informational purposes, staff is including a draft opinion currently under consideration by the State Bar of California’s Standing Committee on Professional Responsibility and Conduct (COPRAC). This draft opinion analyzes the application of ABA Model Rule 5.7 under the following questions posed:

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

It is important to note this opinion is only a draft opinion at this stage. Before an opinion becomes formally published, it must be circulated for public comment and approved for publication by the State Bar of California Board of Trustees. To that end, this draft opinion has not yet been circulated for public comment, or presented to the Board of Trustees for final approval. Accordingly, the substance of the opinion is subject to change.



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

**ISSUES:**

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

**DIGEST:**

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

**AUTHORITIES**

**INTERPRETED:**

Cal. Bus. & Prof. Code §6106; California Rules of Professional Conduct 1.7; 1.8.1; 5.4; 7.2; 7.3; 8.4

## INTRODUCTION

In today's economic environment, many lawyers and law firms are interested in pursuing business opportunities that do not involve the provision of legal services. Those activities may draw on the lawyer or law firm's own non-legal background and skills or they may involve investing in or partnering with non-lawyers. This opinion addresses the circumstances under which the Rules of Professional Conduct may apply to a lawyer's conduct in providing non-legal services individually or through a lawyer-controlled business.<sup>1</sup> It also addresses ethical issues that may arise for a lawyer in the practice of law arising from her relationship with a separate non-law business.

## STATEMENT OF FACTS

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

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

In Scenario 2, the firm would provide services as a professional fiduciary, specializing in the problems of beneficiaries and conservatees whose welfare is threatened by diminished or declining capacity. The services would be provided through a separate entity. Services at the professional fiduciary firm would be provided by lawyers from the firm and by some non-lawyers trained as professional fiduciaries and the entity would be jointly owned by the law firm and the non-lawyer fiduciaries working there. In California, professional fiduciaries are subject to their own regulatory scheme. Business & Prof. Code §§6500-92; Probate Code §§ 2340-41; Cal. Code of Regulations §§ 4400-4622. From the perspective of the new business, an important and attractive feature of that separate scheme is that the applicable confidentiality rules grant a professional fiduciary implied authority to disclose an incompetent beneficiary's confidential information in the beneficiary's interest when necessary to prevent the beneficiary from suffering or inflicting harm. In contrast, the rules of lawyer-client confidentiality do not recognize such authority except in the rare case where the client intends to commit a violent crime. Bus. & Prof. Code §6068 (e) (1); Rule 1.6.

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<sup>1</sup> This Opinion supplements and updates important earlier opinions on this topic, including Formal Opinions 1982-69, 1995-141, and 1999-154.

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

## BACKGROUND

*The Definition of Non-Legal Services.* Under California law, non-legal services are 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.” Formal Opinion 1995-141.<sup>2</sup> It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing C. Wolfram, *Modern Legal Ethics* 897-98 (1986)). A lawyer or law firm may engage in the provision of non-legal services either directly from the lawyer or the firm’s own offices,<sup>3</sup> or through a separate entity in which the lawyer or law firm has an ownership interest. Services may be delivered by lawyers or by non-lawyers.

The fact that a lawyer is providing services that are not part of the practice of law and that could lawfully be provided by a layperson does not mean that professional discipline and professional rules have no role to play.<sup>4</sup> Even when a lawyer’s sole business is the provision of non-legal services, she is subject to professional discipline for “the commission of any act involving moral turpitude, dishonesty or corruption.” Business & Professions Code § 6106; State Bar of

<sup>2</sup> Consistent with the Committee’s longstanding practice, this opinion is not intended to address or opine upon the issue of the unauthorized practice of law. Regarding activities undertaken by an individual who is not an active member of the California State Bar, members should consider California Business and Professions Code sections 6125 to 6127. Regarding what constitutes the practice of law in California, members should consider the following cases: *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858]; *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535 [209 P. 363]; *Estate of Condon* (1998) 65 Cal.App.4th 1138 [76 Cal.Rptr.2d 922]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].

<sup>3</sup> The former rule forbidding the provision of legal and non-legal services from the same office has long since been disapproved. See LACBA Opinion 384, LACBA Opinion 413.

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

California, Formal Opinion No. 1995-141 at 2. In addition, Rule 8.4 applies by its own terms even “when a lawyer is ... not practicing law or acting in a professional capacity.” Rule 8.4, Comment [1]. There are many reported cases of professional discipline being imposed under these provisions for conduct that is not the practice of law.<sup>5</sup>

In addition, under certain circumstances lawyer or law firm involvement in a business providing non-legal services can trigger the application of other Rules of Professional Conduct.<sup>6</sup> A Comment to the Rules notes that “a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.” RPC 1.0, Comment 2. But with the exception of Rule 8.4, the Rules do not themselves specify when they apply to non-legal services, leaving that question to be resolved under other California authorities, including case law and ethics opinions.<sup>7</sup>

*Non-Legal Services Provided in Circumstances Not Distinct from the Practice of Law.* One way that services not constituting the practice of law can become subject to the Rules of Professional Conduct is when they are rendered in circumstances that are not sufficiently distinct from the provision of legal services. The authorities all involve situations where a sole practitioner offered to provide both legal and non-legal services in the same matter, from the same office, without any efforts to distinguish the two services. *Layton v. State Bar*, 50 Cal. 3d 888, 904 (1990) (serving as lawyer for the estate and executor in the same matter), *State Bar Formal Opinion 1982-69* (serving as lawyer and broker with respect to the same real estate transaction); *Libarian v. State Bar*, 21 Cal. 2d 862 (1943) (lawyer and notary). This principle may apply even if the non-legal services are provided through a separate entity devoted primarily to the provision of such services. For example, a lawyer who establishes a separate entity through which she primarily intends to provide investment advice (a non-legal service) is nevertheless subject to the Rules of Professional Conduct if she also provides legal advice to her investment advisees as part of the separate business. *State Bar Formal Opinion 1999-154*.

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<sup>5</sup> Examples, several of which are discussed in more detail below, include *Kelly v. State Bar*, 53 Cal. 3d 509, 517 (1991) (agent’s willful misappropriation of funds); *Sodikoff v. State Bar*, 14 Cal. 3d 422 (1975) (fraud by lawyer-fiduciary); *Lewis v. State Bar*, 9 Cal. 3d 704, 712-13 (1973) (same); *Alkow v. State Bar*, 38 Cal. 2d 257 (1952) (misrepresentation and misappropriation); *Jacobs v. State Bar*, 219 Cal. 59, 63-64 (1933) (deception by lawyer escrow holder).

<sup>6</sup> Several independent statutory provisions govern lawyer’s provision of certain products and services ancillary to the practice of law. *E.g.*, Cal. Bus. & Prof. Code §§ 6009.3 (tax preparation); 6009 (lobbyists); 6077.5 (consumer debt collection); 6175 (financial products); 18895 (athlete agents). All are beyond the scope of this opinion.

<sup>7</sup> Many American jurisdictions have addressed the issue of the application of professional rules to non-legal businesses by adopting a version of American Bar Association Model Rule 5.7. A drafting team of the Commission for the Revision of the Rules of Professional Conduct recommended against adoption of Rule 5.7 in California “because appropriate guidance is currently provided by other California authorities.” Memorandum from Rule 5.7 Drafting Team to Members, Commission for the Revisions of the Rules of Professional Conduct, May 16, 2016 at 4-5. The full Commission voted to accept that recommendation.



*Non-Legal Services “Related to the Practice of Law.”* Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the Rules of Professional Conduct can still apply if the non-legal services are sufficiently related to the practice of law that the lawyer’s involvement in them could “reasonably lead prospective clients to misperceive the nature of the services being offered.” State Bar Formal Opinion 1999-154. Thus, we have previously opined that an advertisement for an attorney’s separate investment advisory business that lists the attorney’s professional credentials as a lawyer is a “communication with respect to professional employment” within the meaning of former rule 1-400, because investment advising is an activity related to the practice of law and the use of the lawyer’s legal credentials to advertise that service could therefore lead the client to misperceive the nature of the service being provided. *Id.*

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

*Types of Law Related Services Potentially Subject to the Rules of Professional Conduct.* The California authorities do not provide a comprehensive listing of “law-related” non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. *See* Formal Opinion 1995-141 (fiduciary); Formal Opinion 199-154 (investment advisor). Beyond that, however, there is little relevant authority. Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct. Formal Opinion 2010-180 n.7; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 642, 655-56 [82 Cal. Rptr. 2d 799]. American Bar Association Model Rule 5.7 defines “law-related services” subject to the Rules of Professional Conduct as those “that might reasonably be performed in connection with legal services and in substance are related to the provision of legal services.” This definition reflects the same concern as California law: the risk of client confusion concerning the nature of the services being provided.

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

Committee believes, however, that this broader list may provide useful guidance to lawyers seeking to determine whether a non-law business is potentially subject to the Rules of Professional Conduct.

*Affirmative Steps May Avoid the Application of the Rules of Professional Conduct.* The question remains whether the application of the Professional Rules to “law-related” non-legal services is automatic and inescapable, or instead can be avoided through appropriate clarifying measures. No California authority directly addresses this question. It is settled, however, that a lawyer providing non-legal services has a duty to clarify whether and to what extent a lawyer-client relationship exists, at least when a lawyer knows or reasonably should know that the customer believes that such a relationship exists. Formal Opinion 1995-141; *compare Butler v. State Bar*, 42 Cal. 3d 323, 329 (1986); *cf. Rule 1.13 (f); Rule 4.3 (a)*. It is also settled (1) that a lawyer can avoid the formation of an implied lawyer-client relationship through words or actions making it unreasonable for the putative client to infer that such a relationship exists and (2) that the sophistication of the client is relevant in assessing the reasonableness of the client’s belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651-52 (N.D. Cal. 1993) (applying California law); *see also People v. Gionis*, 9 Cal. 4th 1196 (1995); Formal Opinion 2003-161 n.1. These principles suggest that appropriate efforts to distinguish legal and non-legal services, coupled with appropriate warnings that no attorney-client relationship exists and that no legal services are being provided, can be effective to take law-related non-legal services outside the coverage of the Rules of Professional Conduct.<sup>8</sup>

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

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<sup>8</sup> The leading California ethics authorities do not consider whether such clarifying measures are available or would be effective. *See, e.g.,* M. Tuft & E. Peck, California Practice Guide, Professional Responsibility [1:324], stating that a lawyer or law firm that directly or indirectly provides law related services, whether to clients or non-clients, “must comply” with the Rules of Professional Conduct and the State Bar Act in the provision of those non-legal services. The authors do not, however, consider the possibility of effective clarifying measures or the authorities or reasons of policy cited in text that support their recognition.



example, in the professional fiduciary scenario described above, the parties could well conclude that a regime in which a fiduciary has implied authority to disclose confidential information for the beneficiary's protection is superior to one in which the fiduciary does not have such authority. Third, where California policy permits, it is desirable to align California's approach with that taken in other jurisdictions. The approach outlined here, which treats the application of the Rules of Professional Conduct to law-related services as presumptive only, advances national uniformity because it aligns with the approach taken in Model Rule 5.7, which states that professional rules do not apply to law-related services if the lawyer has established that those services are distinct from legal services and that reasonable measures have been taken to ensure that the customer understands both that the services are not legal services and that the protections of the lawyer client relationship do not exist. Model Rule 5.7, Comments [6] - [8]. In an era when many lawyers and law firms practice (and potentially offer non-legal services) in multiple jurisdictions, having a standard that simultaneously reflects California policy and advances national uniformity is a substantial advantage.

The effectiveness of measures taken to distinguish non-legal services from legal services and to clarify the nature of the services provided and the absence of a lawyer-client relationship will depend on the circumstances, including the clarity of the measures taken, the sophistication of the customer, whether the customer is a client or former client of the lawyer,<sup>9</sup> whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. *Id.* Ordinarily the lawyer should explain that the protections associated with forming an attorney-client relationship, including the attorney-client privilege and the duty of confidentiality, will not apply. In some situations, particularly those involving the provision of legal and non-legal services in the same matter or to unsophisticated customers, the legal and non-legal services may be "so closely entwined" that even a very clear disclaimer may not be effective. See Model Rule 5.7, Comment [8]. But where non-legal services are clearly distinguished as such, and the lawyer has taken reasonable clarifying measures, there is no reason why the business cannot be conducted under the baseline legal rules governing non-lawyers who engage in it.

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<sup>9</sup> It has been suggested that the Rules of Professional Conduct should always apply to services provided by a separate non-law business to a lawyer or law firm's present or former client. No California authority supports this result, however, and we think it goes too far. While there may be some situations where the present or former client status of a customer, either individually or in combination with other factors, could render clarifying measures ineffective, there may well be others where such measures can still be effective, particularly when the non-legal services are being provided in a separate matter and the client or former client is sophisticated and represented by separate counsel. The existence of a present or former client relationship may, of course, also trigger obligations stemming from that relationship, rather than from the nature of the non-legal services being provided. Those obligations are treated further in Section 4 of the Discussion below.

## DISCUSSION

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

For purposes of discussion, we assume, without deciding, that the businesses contemplated in Scenarios 1 and 2, if conducted by non-lawyers, would not constitute the unauthorized practice of law.<sup>10</sup> If conducted by a lawyer or law firm, however, both would be sufficiently law-related to be presumptively subject to the Rules of Professional Conduct. In Scenario 1, back office services for law firms are frequently provided in connection with, and are substantively related to, the practice of law. The same is true of fiduciary services, where the conclusion is also supported by the case law and our prior opinions. See Formal Opinion 1995-141. In both Scenarios 1 and 2, then, there is a significant risk that the customer could misunderstand the nature of the services being provided.

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

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

### *2. Effectiveness of Clarifying Measures*

Assuming the provision of non-legal services is distinct from the provision of legal services, the question remains whether the law firm can avoid the application of the Rules of Professional Conduct by making clear that it is not providing legal services and that no lawyer-client relationship exists. With respect to Scenario 1, we think the answer is clearly yes. With respect to Scenario 2, involving the provision of professional fiduciary services, the question is closer, but we conclude that the ultimate answer is also affirmative.

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<sup>10</sup> See the discussion *supra* at note 2.

The issue in connection with Scenario 2 arises from statements like those in Formal Opinion 1995-141, which states without apparent qualification that, “when rendering professional services that involve a fiduciary relationship, a member of the State Bar must conform to the professional standards of a lawyer.” This language—and that in the cases on which it relies—could be read as suggesting that a lawyer engaged in a separate non-legal business that involves any assumption of fiduciary duties is always subject to the Rules of Professional Conduct, even if the lawyer has made clear that she is not engaged in the practice of law or entering into a lawyer client relationship, and even if the Rules of Professional Conduct are inconsistent with other regulatory provisions applicable to that non-law business. Given the great range of non-legal settings in which lawyers assume fiduciary duties, the sweep of such a rule would be broad indeed. But we do not think that such a broad reading is warranted, for several reasons.

First, the explicit language in the cases does not sweep that broadly. In particular it does not explicitly consider, let alone explicitly reject, the approach proposed here. Second, the facts of the decided cases do not support such a broad rule. In many of those cases, the language was not necessary to the decision because an independent ground for imposing professional discipline existed, either in the form of a lawyer-client relationship<sup>11</sup> or conduct involving moral turpitude,<sup>12</sup> or both. Moreover, we have found no decided case involving a non-legal business distinct from the lawyer’s practice and a lawyer who made it clear that no lawyer-client relation was being formed or legal services provided. To the contrary, the reported cases all involve individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services,<sup>13</sup> or the lawyer’s affirmative use of his professional status to invite the injured person’s trust and confidence,<sup>14</sup> or both. In short, all the decided cases would come out the same way under the approach outlined here. Equally important, because none of those cases involved a separate law-related business or clarifying measures of the kind outlined above, or considered the precedents and policies that support giving them effect, none can fairly be read as holding that the Rules of Professional Conduct must be applied in such situations. For all these reasons, we do not think that those authorities alter the conclusion that California law does and should give effect to such disclaimers for all types of distinct non-legal businesses. Put simply, once appropriate measures have been taken to avoid consumer confusion, there does not appear to be any good reason why a lawyer who has a separate non-legal business as, for example, a professional fiduciary, should be required to comply with rules that are unique to the legal profession, rather than those that govern the conduct of non-lawyers who conduct such businesses.

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<sup>11</sup> *Priamos v. State Bar*, 3 St. Bar. Ct. Rptr. 824; *Beery v. State Bar*, 43 Cal 3d. 802 (1987); *Clancy v. State Bar*, 71 Cal. 2d 140 (1969); *Jacobs v. State Bar*, 219 Cal. 59 (1933).

<sup>12</sup> In addition to the cases cited in note 5 above, *see also*, *Clancy*.

<sup>13</sup> *See, e.g., Libarian v. State Bar*, 21 Cal. 2d 862 (1943); *Jacobs*; State Bar Formal Opinion 1982-69.

<sup>14</sup> *Priamos*; *Beery*; *Sodikoff v. State Bar*, 14 Cal. 3d. 422 (1975); *Lewis*; *Jacobs*.

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

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

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

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

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

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

A separate entity providing exclusively non-legal services is, by definition, not engaged in the practice of law. Accordingly, RPC 5.4 (b) does not bar a lawyer from forming a partnership or

other organization with non-lawyers to conduct such a business, or from accepting investment in such a business from non-lawyers. Moreover, fees that are derived exclusively from the provision of non-legal services are not legal fees. Thus, RPC 5.4 (a) does not bar the direct or indirect sharing of fees with non-lawyers who work or invest in a separate non-law business. *Accord*, State Bar Formal Opinion 1995-141.

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

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

*Solicitation.* The law of solicitation governs oral or written targeted communications by or on behalf of a lawyer that are directed to a specific person and that offer to provide, or can reasonably be understood as offering to provide, legal services. Rule of Professional Conduct 7.3 (e). A lawyer or law firm that solicits non-client third persons for a distinct non-legal business is not covered by this Rule, because the communication cannot be understood as offering legal services. *Accord*, State Bar Formal Opinion 1995-141 (construing former Rule 1-400). For the same reasons, the solicitation rules do not apply when a lawyer-controlled entity that provides solely non-legal services is soliciting on its own behalf.

When the separate entity is engaged in efforts to obtain clients for the law firm, however, the solicitation rules that govern the law firm's conduct will apply to those efforts, because such communications are "on behalf of" the law firm and can be understood as offering to provide legal services. *Id.* Moreover, any compensation, gift or promise by the lawyer given in consideration of a recommendation by the non-lawyer entity would be forbidden by RPC 7.2 (b). *See* State Bar Formal Opinion 1995-141.

*Conflict of Interest.* A lawyer who refers an existing client to a non-legal business in which the lawyer has an economic interest, with the expectation or intention that the client will purchase non-legal services from the entity, may have a potential conflict of interest. Rule 1.7 (b) requires informed written consent of the affected client and compliance with Rule 1.7 (d), "if there is a significant risk the lawyer's representation of the client will be materially limited" by the lawyer's personal interest. Rule 1.7 (b). Whether the lawyer's referral to a business in which she has an interest will give rise to a potential conflict under Rule 1.7 (b) will depend on, among other things, the connection of the non-legal services to the representation of the client, the degree to which the choice of provider could affect the outcome or cost of the representation, and the degree to which the lawyer or law firm will benefit economically from the referral. *Compare* Formal Opinion 1995-140 (construing the requirement of written disclosure of interests under former Rule 3-310 (B) (4)). Where the non-legal services are connected to the representation and the lawyer receives compensation for his referral, compliance with Rule 1.7 is normally required, because of the risk that the lawyer's exercise of judgment in conducting the



representation will be adversely affected by her economic interest. Formal Opinion 1995-140. Conversely, if the referral is for services unrelated to the representation or if the lawyer's economic benefit from the transaction is immaterial, compliance may not be required. Cf. Formal Opinion 2002-159, section III.

*Lawyer-Client Business Transactions.* Transactions by an existing client (and in certain circumstances, a former client) of a lawyer or law firm with an entity providing non-legal services may also be subject to Rule 1.8.1, governing lawyer-client business transactions.<sup>15</sup> That rule applies not only to transactions between client and lawyer directly, but also potentially to transactions between the client and an entity in which the lawyer has a controlling interest. Formal Opinion 1995-141.

The test for determining the applicability of Rule 1.8.1 to a transaction between a lawyer's client and a non-legal business in which the lawyer has an interest is "whether the transaction arises out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship." Formal Opinion 1995-141 (applying former Rule 3-300); *compare Hunnicutt v. State Bar* (1988) 44 Cal. 3d 362, 370-71 (Rule applies if the client placed his trust in his former attorney "because of the representation").<sup>16</sup> When a lawyer advises

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

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

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

<sup>16</sup> There is a suggestion in Formal Opinion 1995-141 that the applicability of Rule 1.8.1 to a transaction with a non-legal business is determined by whether the non-legal business is offering services that involve the assumption of a fiduciary duty. If so, then the Rule applies. If not, it does not. *Id.* at p.3. To the extent that Formal Opinion 1995-141 takes that view we believe it is incorrect. As the Opinion itself acknowledges, the critical question is whether the transaction with the non-legal business arises out of the attorney-client relationship or the trust and confidence engendered there. But that question is largely independent of the type of non-legal service offered—it turns instead on the degree of risk that the trust and confidence arising from the lawyer-client relationship will influence the customer's approach to the



a client to patronize a non-legal business, and receives a referral fee for doing so, the transaction clearly arises out of the lawyer-client relationship, and Rule 1.8.1 applies. Formal Opinion 1995-140. The same conclusion should follow in any other case where the lawyer's referral to or involvement in the non-legal business is reasonably likely to cause the client to transfer the trust and confidence reposed in the lawyer to the negotiation of the client's relationship with the non-legal business. *Id.*<sup>17</sup>

## CONCLUSION

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

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

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transaction with the non-legal business. Where that risk is present, Rule 1.8.1 should apply regardless of the type of law-related service being provided. Where it is not, then the Rule should not apply, even if the services being provided are fiduciary in nature. See Probate Code § 16004 (c) (presumption of undue influence does not apply to the initial agreement relating to the hiring or compensation of a trustee).

<sup>17</sup> Sometimes a transaction may involve the potential for exploitation of client trust both because of the lawyer's role in making the referral and the lawyer's role in the negotiation with the separate entity, as when a personal injury lawyer refers a client to a medical facility in which the lawyer practices as a doctor. LACBA 477.