

HEADLINE: Proposed Formal Opinion Interim No. 16-0003 (Ancillary Business)

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 16-0003 (Ancillary Business).

Deadline: August __, 2019

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with Tab 5.1, Article 2, Section 6(g) of the State Bar Board Book, the Committee shall publish proposed formal opinions for public comment.

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 16-0003 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 16-0003 considers: 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?

The opinion interprets rules 1.7, 1.8.1, 5.4, 7.2, 7.3, and 8.4 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code sections 6068(e)(1) and 6106.

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

including rules pertaining to solicitation, conflict of interest, and lawyer-client business transactions will, however, remain applicable to the lawyer's dealings with the non-legal entity in the course of the lawyer's practice. In addition, a lawyer is always subject to professional discipline for acts involving moral turpitude, dishonesty, or corruption, whether or not those acts occur in connection with the practice of law. Accordingly, the fact that a lawyer has made clear that her distinct non-legal business does not involve the practice of law or the formation of an attorney-client relationship is not a bar to such discipline.

At its April 11, 2019 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 16-0003 for a 90-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 16-0003

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

August __, 2019

Direct comments to

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4 **THE STATE BAR OF CALIFORNIA**
5 **STANDING COMMITTEE ON**
6 **PROFESSIONAL RESPONSIBILITY AND CONDUCT**
7 **DRAFT FORMAL OPINION INTERIM NO. 16-0003**
8 **ANCILLARY BUSINESS ISSUES**
9

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

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

38 **AUTHORITIES**

39 **INTERPRETED:** Rules 1.7, 1.8.1, 5.4, 7.2, 7.3 and 8.4 of the Rules of Professional Conduct
40 of the State Bar of California.

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

42 **INTRODUCTION**

43
44 In today's economic environment, many lawyers and law firms are interested in pursuing
45 business opportunities that do not involve the provision of legal services. Those activities may
46 draw on the lawyer or law firm's own non-legal background and skills or they may involve
47 investing in or partnering with non-lawyers. This opinion addresses the circumstances under
48 which those Rules of Professional Conduct that apply to lawyers in the practice of law may also
49 apply to lawyers' conduct providing non-legal services individually or through a lawyer-
50 controlled business.¹ It also addresses ethical issues that may arise for a lawyer in the practice of
51 law arising from her relationship with a separate non-law business.
52

53 **STATEMENT OF FACTS**

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55
56 A law firm is considering seeking to capitalize on capacities developed over time by marketing
57 those capacities through businesses that do not involve the representation of clients in legal
58 matters. The firm is considering a variety of options.
59

60 In Scenario 1, the firm would provide back office services for law firms who wish to contract out
61 for those services. The law firm would like to provide those services to other law firms pursuant
62 to contracts that, while fully compliant with the standards governing non-lawyer entities
63 providing such services, avoid the complexities and compliance costs associated with the Rules
64 of Professional Conduct relating to, among other things, conflicts of interest, lawyer trust
65 accounts, and similar issues. The services would be provided through a separate entity, which
66 would in turn seek investments from non-lawyer sources of funding.
67

68 In Scenario 2, the firm would provide services as a professional fiduciary, specializing in the
69 problems of beneficiaries and conservatees whose welfare is threatened by diminished or
70 declining capacity. The services would be provided through a separate entity. Services at the
71 professional fiduciary firm would be provided by lawyers from the firm and by some non-
72 lawyers trained as professional fiduciaries and the entity would be jointly owned by the law firm
73 and the non-lawyer fiduciaries working there. In California, professional fiduciaries are subject
74 to their own regulatory scheme. Business and Professions Code sections 6500-6592, Probate
75 Code sections 2340 and 2341, and California Code of Regulations sections 4400-4622. From the
76 perspective of the new business, an important and attractive feature of that separate scheme is
77 that the applicable confidentiality rules grant a professional fiduciary implied authority to
78 disclose an incompetent beneficiary's confidential information in the beneficiary's interest when
79 necessary to prevent the beneficiary from suffering or inflicting harm. In contrast, the rules of
80 lawyer-client confidentiality do not recognize such authority except in the rare case where the
81 client intends to commit a violent crime. Business and Professions Code section 6068 (e)(1) and
82 rule 1.6.
83

¹ This opinion supplements and updates important earlier opinions on this topic, including Cal. State Bar Formal Opn. No. 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

1. The Definition of Non-Legal Services

Our prior opinions have defined non-legal services as “services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law.” Cal. State Bar Formal Opn. No.1995-141.² It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing Charles W. Wolfram, *Modern Legal Ethics* 897-898 (1986)). A lawyer or law firm may engage in the provision of non-legal services either directly from the lawyer or the law firm’s own offices³ or through a separate entity in which the lawyer or law firm has an ownership interest. Such services may be delivered by lawyers or by non-lawyers.

The fact that a lawyer is providing services that are not part of the practice of law and that could lawfully be provided by a layperson does not mean that professional discipline and professional rules have no role to play.⁴ Even when a lawyer’s sole business is the provision of non-legal services, she is subject to professional discipline for “the commission of any act involving moral turpitude, dishonesty or corruption.” Business and Professions Code section 6106 and Cal. State Bar Formal Opn. No. 1995-141 at p. 2. In addition, certain provisions of rule 8.4 clearly apply to

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

³ The former rule forbidding the provision of legal and non-legal services from the same office has long since been disapproved. See Los Angeles County Bar Assn. Opn. No. 384 and 413.

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

conduct outside the practice of law. There are many reported cases of professional discipline being imposed under Business and Professions Code section 6106 for conduct occurring outside of the lawyer-client relationship.⁵

In addition, under certain circumstances lawyer or law firm involvement in a business providing non-legal services can trigger the application of other Rules of Professional Conduct applicable in the practice of law.⁶ Comments to the rules note that “a violation of a rule can occur... when a lawyer is not practicing law or acting in a professional capacity.” Rule 1.0, Comment [2] and Rule 8.4, Comment [1]. But with the exception of Rule 8.4, the Rules do not themselves specify when they apply to non-legal services, leaving that question to be resolved under other California authorities, including case law and ethics opinions.⁷

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

One way that services not constituting the practice of law can become subject to the Rules of Professional Conduct is when they are rendered in circumstances that are not sufficiently distinct from the provision of legal services. The authorities all involve situations where a sole practitioner offered to provide both legal and non-legal services in the same matter, from the same office, without any efforts to distinguish the two services. *Layton v. State Bar* (1990) 50 Cal.3d 888, 904 [268 Cal.Rptr. 802] [serving as lawyer for the estate and executor in the same matter], Cal. State Bar Formal Opn. No. 1982-69 [serving as lawyer and broker with respect to the same real estate transaction], and *Libarian v. State Bar* (1943) 21 Cal.2d 862 [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

⁵ Examples, several of which are discussed in more detail below, include *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298] (agent’s willful misappropriation of funds); *Sodikoff v. State Bar* (1975) 14 Cal. 3d. 422 [121 Cal.Rptr. 467, 535 P.2d 331] (fraud by lawyer-fiduciary); *Lewis v. State Bar* (1973) 9 Cal.3d 704, 712-13 [170 Cal.Rptr. 634, 621 P.2d 258] (same); *Alkow v. State Bar* (1952) 38 Cal.2d 257 (misrepresentation and misappropriation); *Jacobs v. State Bar* (1933) 219 Cal. 59, 63-64 (deception by lawyer escrow holder).

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

⁷ 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.

provides legal advice to her investment advisees as part of the separate business. Cal.State Bar Formal Opn. No. 1999-154.

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

Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the Rules of Professional Conduct can still apply if the non-legal services are sufficiently related to the practice of law that the lawyer’s involvement in them could “reasonably lead prospective clients to misperceive the nature of the services being offered.” Cal. State Bar Formal Opn. No. 1999-154. Thus, we have previously opined that an advertisement for an attorney’s separate investment advisory business that lists the attorney’s professional credentials as a lawyer is a “communication with respect to professional employment” within the meaning of former rule 1-400, because investment advising is an activity related to the practice of law and the use of the lawyer’s legal credentials to advertise that service could therefore lead the client to misperceive the nature of the service being provided. *Id.*

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

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

The California authorities do not provide a comprehensive listing of “law-related” non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. *See* Cal. State Bar Formal Opn. No. 1995-141 (fiduciary) and Cal. State Bar Formal Opn. No. 1999-154 (investment advisor). Beyond that, however, there is little relevant authority. Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct.⁸ 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,

⁸ Cal. Bar State Formal Opn. No. 2010-180 n.7 and *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 642, 655-56 [82 Cal. Rptr. 2d 799].

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. 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.

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

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

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

⁹ The leading California ethics authorities do not consider whether such clarifying measures are available or would be effective. *See, e.g.,* M. Tuft & E. Peck, *California Practice Guide: Professional Responsibility* (The Rutter Group [year]) §1:324 (a lawyer or law firm that directly or indirectly provides law related services, whether to clients or non-clients, “must comply” with the Rules of Professional Conduct and the State Bar Act in the provision of those non-legal services). The authors do not, however, consider the possibility of effective clarifying measures or the authorities or reasons of policy cited in text that support their recognition.

risks are not present, the reasons for applying the Professional Rules are also no longer present. Second, allowing such disclaimers to be effective may benefit both customers and service providers. The fact that the Rules of Professional Conduct do not apply does not mean that the relevant conduct will go unregulated. Apart from the residual power to discipline attorneys described above, the non-law business will very often be subject to regulation under an alternative regulatory or licensing scheme, such as those governing investment advisors or professional fiduciaries. There is no reason to think that the Rules of Professional Conduct, designed to regulate the practice of law, provide a superior regulatory framework for such activities. Instead, when the provision of a non-legal service is subject to its own regulatory or contractual scheme, the lawyer provider and the customer may have multiple shared reasons, including clarity, consistency and efficiency, for having the services regulated under that scheme alone. For example, in the professional fiduciary scenario described above, the parties could well conclude that a regime in which a fiduciary has implied authority to disclose confidential information for the beneficiary's protection is superior to one in which the fiduciary does not have such authority. Third, where California policy permits, it is desirable to align California's approach with that taken in other jurisdictions. The approach outlined here, which treats the application of the Rules of Professional Conduct to law-related services as presumptive only, advances national uniformity because it aligns with the approach taken in ABA Model Rule 5.7, which states that professional rules do not apply to law-related services if the lawyer has established that those services are distinct from legal services and that reasonable measures have been taken to ensure that the customer understands both that the services are not legal services and that the protections of the lawyer client relationship do not exist. ABA Model Rule 5.7, Comments [6] - [8]. In an era when many lawyers and law firms practice (and potentially offer non-legal services) in multiple jurisdictions, having a standard that advances national uniformity is a substantial advantage.

The effectiveness of measures taken to distinguish non-legal services from legal services and to clarify the nature of the services provided and the absence of a lawyer-client relationship will depend on the circumstances, including the clarity of the measures taken, the sophistication of the customer, whether the customer is a client or former client of the lawyer,¹⁰ whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. *Id.* We discuss these issues in more detail below. In some situations, particularly those involving the provision of legal and non-legal services in the same matter or to unsophisticated customers, the legal and non-legal services may be "so closely entwined" that even a very clear disclaimer may not be effective. See ABA Model Rule 5.7,

¹⁰ It has been suggested that the Rules of Professional Conduct should always apply to services provided by a separate non-law business to a lawyer or law firm's present or former client. No California authority supports this result, however, and we think it goes too far. While there may be some situations where the present or former client status of a customer, either individually or in combination with other factors, could render clarifying measures ineffective, there may well be others where such measures can still be effective, particularly when the non-legal services are being provided in a separate, unrelated matter and the client or former client is sophisticated and represented by separate counsel. The existence of a present or former client relationship may, of course, also trigger obligations stemming from that relationship, rather than from the nature of the non-legal services being provided. Those obligations are treated further in Section 4 of the Discussion below.

Comment [8]. But where non-legal services are clearly distinguished as such, and the lawyer has taken reasonable clarifying measures, there is no reason why the business cannot be conducted under the baseline legal rules governing non-lawyers who engage in it.

DISCUSSION

1. Applicability of the Rules of Professional Conduct

For purposes of discussion, we assume, without deciding, that the businesses contemplated in Scenarios 1 and 2, if conducted by non-lawyers, would not constitute the unauthorized practice of law.¹¹ 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 Cal. State Bar Formal Opn. No. 1995-141. In both Scenarios 1 and 2 there is a significant risk that the customer could misunderstand the nature of the services being provided and construe them as legal services.

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

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

2. Effectiveness of Clarifying Measures

¹¹ See the discussion *supra* at note 2.

296
297 Assuming the provision of non-legal services is distinct from the provision of legal services, the
298 question remains whether the law firm can avoid the application of the Rules of Professional
299 Conduct by taking appropriate measures to clarify the nature of the services being provided and
300 the absence of any lawyer-client relationship. With respect to Scenario 1, we think the answer is
301 clearly yes. With respect to Scenario 2, involving the provision of professional fiduciary
302 services, the question is closer, but we conclude that the ultimate answer is also affirmative.

303
304 The issue in connection with Scenario 2 arises from statements like those in Formal Opinion
305 1995-141, which states that, “when rendering professional services that involve a fiduciary
306 relationship, a member of the State Bar must conform to the professional standards of a lawyer.”
307 This language—and, more important, that in the Supreme Court cases on which it relies—could
308 be read as suggesting that a lawyer engaged in a separate non-legal business that involves any
309 assumption of fiduciary duties is always subject to the Rules of Professional Conduct, even if the
310 lawyer has made clear that she is not engaged in the practice of law or entering into a lawyer
311 client relationship, and even if the Rules of Professional Conduct are inconsistent with other
312 regulatory provisions applicable to that non-law business. Given the great range of non-legal
313 settings in which lawyers assume fiduciary duties, the sweep of such a rule would be broad
314 indeed. But we do not think that such a broad reading is warranted, for multiple reasons.

315
316 First, in many of the decided cases, the language concerning the fiduciary status of the lawyer
317 was dictum, because other recognized bases for professional discipline were present.¹² Second,
318 no case explicitly considers, let alone explicitly rejects, the use of clarifying measures for a
319 distinct non-law business providing fiduciary services. Third, the facts of the decided cases do
320 not implicitly reject that approach; in fact they are fully consistent with it.¹³ Because the decided
321 cases provide no explicit or implicit support for applying the Rules of Professional Conduct to
322 non-legal work that is distinct from the lawyer’s practice and clearly identified as non-legal, we
323 do not think that they alter the conclusion that California law does and should give effect to such
324 clarifying measures for all types of distinct non-legal businesses. Put simply, once appropriate
325 measures have been taken to avoid consumer confusion, there does not appear to be any good
326 reason why a lawyer who has a separate non-legal business as, for example, a professional

¹² In some cases, there was a lawyer-client relationship, *Priamos v. State Bar* (1987) 3 Cal. State Bar Ct. Rptr. 824; *Beery v. State Bar*, 43 Cal 3d. 802; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Jacobs v. State Bar* (1933) 219 Cal. 59 . In others, there was conduct involving moral turpitude. See cases cited in note 5 above.

¹³ The reported cases all involve individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services, see, e.g., *Libarian v. State Bar* (1943) 21 Cal.2d 862; *Jacobs v. State Bar*, *supra*; Cal. State Bar Formal Opn. No. 1982-69, or the lawyer’s affirmative use of his professional status to invite the injured person’s trust and confidence, *Priamos v. State Bar*, *supra*; *Beery v. State Bar*, *supra*; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467]; *Lewis v. State Bar*, *supra*; *Jacobs v. State Bar*, *supra*, or both. Because none of the decided cases involved distinct non-law businesses and appropriate clarifying measures, all would be decided the same way under the approach proposed here.

fiduciary, should be required to comply with rules that are unique to the legal profession, rather than those that govern the conduct of non-lawyers who conduct such businesses.

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

In Scenario 2, the law firm proposes to have one or more of its lawyers take an active role in directing, performing, or delivering the services in question, as opposed to simply being a passive investor in the entity. Lawyers may be fully as capable of providing non-legal services as their non-lawyer counterparts. The direct involvement of lawyers in providing such services may, however, increase the risk that the customer may believe the services entail the formation of 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 Rules of Professional Conduct apply, the degree to which the lawyer or law firm controls the business is important principally insofar as it may indicate to customers of the business that the services being provided are legal in nature. Accordingly, if the degree of lawyer control is not apparent to the customer, it is unlikely to support a finding that the professional rules apply. And even if that degree of control is apparent, it is unlikely, standing alone, to lead to a finding that the Rules of Professional Conduct apply if the non-legal business has properly disclaimed the provision of legal services and the formation of a lawyer client relationship.

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

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

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

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

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

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

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

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

Conflict of Interest. A lawyer who refers an existing client to a non-legal business in which the lawyer has an economic interest, with the expectation or intention that the client will purchase non-legal services from the entity, may be obliged to comply with rule 1.7, governing conflicts of interest. Rule 1.7(b) requires informed written consent of the affected client and compliance with rule 1.7(d), "if there is a significant risk the lawyer's representation of the client will be materially limited" by the lawyer's own interests. Rule 1.7(b). Whether the lawyer's referral to a business in which she has an interest will trigger rule 1.7(b) will depend on, among other things, the connection of the non-legal services to the representation of the client, the degree to which the choice of provider could affect the outcome or cost of the representation, and the degree to which the lawyer or law firm will benefit economically from the referral. *Compare* Cal. State Bar Formal Opn No. 1995-140 (construing the requirement of written disclosure of interests

under former Rule 3-310(B)(4)). Where the non-legal services are connected to the representation and the lawyer receives compensation for his referral, compliance with rule 1.7 is normally required, because of the risk that the lawyer's exercise of judgment in conducting the representation will be adversely affected by her economic interest. Cal. State Bar Formal Opn No. 1995-140. Conversely, if the referral is for services unrelated to the representation or if the lawyer's economic benefit from the transaction is immaterial, compliance may not be required. *Compare* Cal. State Bar Formal Opn No. 2002-159, section III (discussing written disclosure requirements under former Rule 3-310(B)(4)).

Lawyer-Client Business Transactions. Transactions by an existing client (and in certain circumstances, a former client) of a lawyer or law firm with an entity providing non-legal services may also be subject to rule 1.8.1, governing lawyer-client business transactions.¹⁴ That rule applies not only to transactions between client and lawyer directly, but also potentially to transactions between the client and an entity in which the lawyer has a controlling interest. Cal. State Bar Formal Opn No. 1995-141.

The test for determining the applicability of rule 1.8.1 to a transaction between a lawyer's client and a non-legal business in which the lawyer has an interest is "whether the transaction arises out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship." Cal. State Bar Formal Opn No. 1995-141 (applying former Rule 3-300); *compare Hunnicutt v. State Bar* (1988) 44 Cal. 3d 362, 370-71[243 Cal.Rptr. 699] (Rule 5-101 (predecessor to former rule 3-300) applies if the client placed his trust in his former attorney "because of the representation").¹⁵ When a lawyer advises a client to

¹⁴ 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.

¹⁵ There is a suggestion in Cal. State Bar Formal Opn No. 1995-141 that the applicability of Rule 1.8.1 to a transaction with a non-legal business is determined by whether the non-legal business is offering services that involve the assumption of a fiduciary duty. If so, then the Rule applies. If not, it does not.

patronize a non-legal business, and receives a referral fee for doing so, the transaction clearly arises out of the lawyer-client relationship and Rule 1.8.1 applies. Cal. State Bar Formal Opn No. 1995-140. The same conclusion should follow in any other case where the lawyer's referral to or involvement in the non-legal business is reasonably likely to cause the client to transfer the trust and confidence reposed in the lawyer to the negotiation of the client's relationship with the non-legal business. *Id.*¹⁶

CONCLUSION

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

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 Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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

¹⁶ Sometimes a transaction may involve the potential for exploitation of client trust both because of the lawyer's role in making the referral and the lawyer's role in the negotiation with the separate entity, as when a personal injury lawyer refers a client to a medical facility in which the lawyer practices as a doctor. Los Angeles County Bar Assn. Formal Opn. No. 477.

