



The State Bar of California

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

To: Subcommittees on Alternative Business Structures/Multi-Disciplinary Practices and Rules and Ethics Opinions
From: Kevin Mohr and Andrew Arruda
Date: February 12, 2019
Re: C.4. Memo Analyzing Rule 5.7 – Consideration of a Rule of Professional Conduct Patterned on ABA Model Rule 5.7 or, in the Alternative, a State Bar Ethics Opinion

Introduction

During breakout session of the January 18, 2019, two of the Task Force’s subcommittees, the ABS/MDP and Rules/Opinion subcommittees, raised the issue of whether a rule of professional conduct similar to ABA Model Rule 5.7 should be considered as providing a potential means to increase access to justice. In the ABS/MDP subcommittee, the issue arose during a discussion of the meaning of “law-related services.” In the Rules/Opinion, the issue arose during a discussion exploring the means by which a lawyer could supplement the provisions of traditional legal services with technology. Specifically, a question was asked about a lawyer’s ability to supplement legal services provided through the lawyer’s firm with law-related services provided by a separate entity owned in whole or in part by the lawyer.

During the plenary session, the oral subcommittee reports revealed that the two subcommittees had broached the subject of ABA Model Rule 5.7. The subcommittees agreed to explore the issue further. In a sidebar discussion, Kevin Mohr of the Rules subcommittee informed Andrew Arruda of the ABS/MDP subcommittee that the first Rules Revision Commission had done a substantial amount of work on drafting a rule patterned on Model Rule 5.7 and that the materials should provide a basis for a memo to the entire Task Force. Using those materials and engaging in further independent research, the authors prepared this memo. In addition to considering a rule of professional conduct, the memo also discusses

This memo does not make a specific recommendation as to whether the Task Force should recommend the adoption of a rule patterned on Model Rule 5.7, nor does it making an explicit finding that such a rule, if adopted in California, would likely enhance access to justice. Rather, the memo is informational in nature. It provides a brief background of the adoption of ABA Model Rule 5.7, (Part 0), the previous studies of the feasibility of adopting a California rule 5.7 counterpart, (Part 0), and the case law addressing a lawyer’s provision of non-legal or law-related services that currently exists in California, (Part 0). Finally, in Part 0, the memo explores the benefits and disadvantages of addressing the issue of a lawyer’s provision of law-related services by rule of professional conduct or ethics opinion.

ABA Model Rule 5.7

Purpose

Model Rule 5.7 addresses the duties of lawyers who provide “law-related” services as opposed to “legal” services. The rule is intended to avoid client confusion regarding the protections a client can expect when a lawyer, whether through the lawyer’s law firm or a separate entity, provides ancillary services. The concern is that the client might assume that these services afford the same ethical protections as the client would expect from services delivered in a lawyer-client relationship. Model Rule 5.7 places the burden on the lawyer to inform the client and clarify that such services do not provide those protections. If the burden is not met, then the Rules of Professional Conduct will apply to the lawyer’s

provision of the services, i.e., the lawyer is required to perform the same duties a lawyer owes a client being provided legal services and advice, including the duties of competence, confidentiality, exercise of independent judgment and loyalty.

Model Rule 5.7 Overview

The text of Model Rule 5.7 provides:

Rule 5.7: Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

In addition to the rule text, the rule includes 11 comments. See Attachment 1.

The introductory paragraph of paragraph (a) sets forth the rule’s operative language, i.e., that a lawyer who is providing law-related services is still subject to discipline under the rules of professional conduct if the law-related services are provided in the manner described in either subparagraph (a)(1) or (a)(2).

Subparagraph (a)(1) involves a situation where the lawyer is providing law-related services that are “not distinct” from the lawyer’s provision of legal services to a client. Such services, when provided by the lawyer or the lawyer’s firm to a client who has or had also retained the lawyer for legal services, might include a tax preparation business, e.g., [N.D. Ethics Op. 01-03 \(5/4/2001\)](#) or financial planning services, e.g., [Ind. Ethics Op. 02-01](#), at least when they are provided in a way that the services are “not distinct” from the lawyer’s legal services.

Subparagraph (a)(2) involves a situation where the law-related services are provided either directly by the lawyer or lawyer’s law firm, or by a separate entity controlled by the lawyer or firm, but the lawyer has not taken “reasonable measures” to assure that the person who is to receive the law-related services knows the services are not legal services and that the protections afforded by a lawyer-client relationship do not attach. The practical effect of subparagraph (a)(2) is to permit a lawyer who provides such ancillary services to opt-out of being regulated under the Rules. So long as the lawyer takes “reasonable measures,” e.g., provides the person using the ancillary services with a sufficient explanation that the services do not afford the protections available from the lawyer-client relationship, e.g., duty of confidentiality, then the lawyer will not be subject to the Rules when providing those services. As to what those “reasonable measures” should include, Comment [6] provides some guidance:

“[T]he lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should

be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.”

In one case, it was held that the lawyer advising his former legal clients that he was retired and now offering accounting and “business advice” services did not constitute “reasonable measures” to opt out of the Rules. See *In re Matter of Rost*, 211 P.3d 145 (Kan. 2009), discussed more fully in section 0, below.

Concerning paragraph (b), Comment [8] provides guidance on the kinds of activities that might constitute “law-related” services:

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

History

A version of Model Rule 5.7 was adopted by the ABA House of Delegates in August 1991, but was rescinded by the same body in August 1992. After further study, a different, less-controversial version of the rule was adopted in February 1993. That rule was amended in February 2002 as part of the comprehensive revisions of the Model Rules recommended by the ABA Ethics 2000 Commission. Those revisions to paragraph (a)(2) and Comments [2] and [3] were intended to clarify that:

“(1) there can be situations in which a law firm’s provision of law-related services will be distinct from the firm’s provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2).”

The change eliminated an unintended gap in the coverage of the Model Rule. [Reporter’s Explanation of Changes, Rule 5.7](#). Put another way, the rule clarified that under certain circumstances, a lawyer will be able to opt out of the Rules even when the ancillary services are being provided directly by the lawyer or the lawyer’s firm, as opposed to by a completely separate entity.

State Adoptions of Model Rule 5.7

According to the ABA, the rule has been adopted in most jurisdictions, with 29 jurisdictions having adopted a rule identical to Model Rule 5.7.¹ Five jurisdictions have adopted a rule that is substantially similar to Model Rule 5.7.² Five jurisdictions have adopted a version of the rule with substantial variations from the organization or substance of the Model Rule.³ Twelve jurisdictions, including California, have not

¹ The 29 jurisdictions are: Alaska, Arkansas, Colorado, Delaware, District of Columbia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

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

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

adopted any version of Model Rule 5.7.⁴ [ABA, Variations of the Model Rules of Professional Conduct, Rule 5.7 \(9/29/17\)](#).

Discipline Actions

Although a substantial majority of jurisdictions have adopted a version of Model Rule 5.7, there are few reports of discipline imposed for violation of the rule. In some instances, the court accepted the respondent lawyer's stipulation that he or she had violated the jurisdiction's version of Model Rule 5.7 without reciting the facts that supported the concession. See, e.g., *In re Matter of Emery*, 799 S.E.2d 295 (S.C. 2017) (lawyer receives public reprimand after conceding that her loan modification services subjected her to rule 5.7); *In re Matter of Peper*, 763 S.E.2d 205 (S.C. 2014) (lawyer publicly reprimanded following concession that services lawyer provided as trustee of a trust were "law-related," subjecting him to discipline under rule 5.7). In one case, the lawyer was not charged with a violation of rule 5.7 but instead asserted that the rule provided him with a "safe harbor" from multiple violations of the Kansas Rules of Professional Conduct arising from the lawyer's representation of a financially distressed company. See *Matter of Hodge*, 407 P.3d 613 (Kan. 2017) (lawyer disbarred for multiple violations of the Kansas Rules, including a concurrent conflict of interest, business transaction with a client and conduct adversely affecting lawyer's fitness to practice law, the court having rejected the lawyer's "safe harbor" defense.) In some cases, the lawyer's violation of rule 5.7 was one among many violations of the jurisdiction's Rules. See, e.g., *In re Matter of Williams*, 755 S.E.2d 107 (S.C. 2014) (lawyer disbarred for multiple violations, including violation of rule 5.7). Finally, in one case, a lawyer who had retired from the practice of law was held to be still subject to the Rules of Professional Conduct for his provision of law-related services (accounting and "business advice"), his announcement to his pre-retirement law clients that he had retired found not to be sufficient to satisfy rule 5.7(a)(2)'s requirement that he take "reasonable measures" to insure those clients understood that he could not longer practice law and his provision of law-related services would not provide them with the protections of the lawyer-client relationship. See *In re Matter of Rost*, 211 P.3d 145 (Kan. 2009) (lawyer disbarred for engaging in the unauthorized practice of law).

California Law Concerning Law-related Services

California is one of the twelve jurisdictions that has not adopted any version of Model Rule 5.7 or any rule that expressly addresses a lawyer's provision of law-related or non-legal services. See section 0, above. The only mention in the California Rules of Professional Conduct of a lawyer being subject to discipline for conduct outside the practice of law is Comment [2] to Rule 1.0, which states: "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity." Although no rule that might be violated when a lawyer is not practicing law or acting in a professional capacity is identified, several provisions of Rule 8.4 ("Misconduct") could be violated in such situations. For example, Rule 8.4(b) and (c) are not limited to a lawyer's conduct as a lawyer.⁵ See further discussion at section 0 & note 7, below.

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

⁵ Cal. Rule 8.4(b) and (c) provide it is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

It is helpful to briefly review the work of the State Bar's Rules Revision Commissions empaneled after 2001, both of which considered the adoption of a version of Model Rule 5.7 and recommended that the rule *not* be adopted.

First and Second Rules Revision Commissions

First Commission

The First Commission was in session from 2001 until 2010. Although the Supreme Court ultimately rejected the First Commission's work product in favor of a set of rules that more closely hewed to California's traditional approach of enacting disciplinary rules, the First Commission was charged with seeking to draft rules that would eliminate unnecessary differences between the California Rules and the rules in other jurisdictions, nearly all of which had adopted rules based on the ABA Model Rules. The subcommittee that was appointed to study the possible adoption of Model Rule 5.7 submitted four separate memos and proposed several different versions of a proposed California Rule 5.7. However, the Commission ultimately recommended that the rule not be adopted in California:

"The Commission is not recommending adoption of Model Rule 5.7 because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection. Generally, the Commission agrees with the concept of Model Rule 5.7 but has determined that there are certain specific terms and standards provided for in the rule that are materially inconsistent with existing California authorities. The Commission reviewed the existing California authorities and concluded that adoption of any California counterpart to Model Rule 5.7 might undermine existing law and guidance." First Commission, *Rules and Concepts That Were Considered, But Are Not Recommended For Adoption* (July 2010) ("Rules and Concepts Not Adopted"), at p. 30.

A minority of the Commission dissented from the First Commission's recommendation:

"A minority of the Commission disagrees with the decision not to adopt a California version of Model Rule 5.7. The minority notes that many law firms, both inside and outside of California today own, operate or are otherwise affiliated with ancillary businesses, including: lobbying; financial counseling and planning; client asset management through registered investment companies; human resources and benefits; consulting and training; international trade; education; environmental and health care consulting; ADR; and litigation support services. In addition, law firms are restructuring due to the impact of technology and globalization and this will cause inevitable confusion among lawyers and the public about how the rules apply to law related services, particularly where the services are offered by a "law firm." The minority contends that, if the proposed new California rules are to remain viable for the foreseeable future, a version of Model Rule 5.7 is critical." *Id.* at pp. 30-31.

In addition, a public comment letter submitted by 30 California legal ethics professors requested that the First Commission reconsider its recommendation:

"The group asserted that Model Rule 5.7 simply makes it clear that when lawyers engage in multi-disciplinary work and are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct. The group disagreed with the Commission's view that California case

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

law provides “broader and more nuanced guidance,” such as to make the rule unnecessary. The group stated that adopting Model Rule 5.7 would in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance and that nuanced court adjudication might not be needed if the rule were adopted in California.” *Id.* at p. 31.

As recounted in *Rules and Concepts Not Adopted*, the First Commission remained unpersuaded:

“The Commission noted its extensive effort to capture, in rule format, the principles embodied in the many reported California appellate decisions. It made this effort, not because doing so is needed for discipline as lawyers have been disciplined many times without the existence of a rule comparable to Model Rule 5.7, but in order to help guide lawyers. The Commission finally concluded that this effort was not successful, that any iteration of the rule likely would be inaccurate and misleading, and that it would be better for lawyers to refer to case law in this area. Like a number of other states, the Commission decided not to recommend adoption of the rule.” *Id.* at p. 31.⁶

Although the First Commission decided not to recommend the adoption of a rule counterpart to ABA Model Rule 5.7, a copy of its last rule draft is attached as Attachment 2.

Second Commission

The drafting team of the Second Commission recommended a version of Model Rule 5.7 in California not be adopted because “[a]ppropriate guidance is currently provided by other California authorities, including case law and ethics opinions, and there appears no reason to supplement that authority.” Memorandum from Rule 5.7 Drafting Team to Commission dated May 16, 2016, at pp. 4-5. The drafting team also considered Comment [2] to rule 1.0, which provides in part that “a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity,” in reaching a decision to recommend that no rule need be adopted. The full Commission accepted the drafting team’s recommendation and the Board of Trustees adopted that recommendation in its submission to the Supreme Court. The authorities referenced in the aforementioned memorandum is discussed in section 0, below.

California Case Law and Other Authority

There is a substantial amount of California case law and other authority that addresses the application of the Rules of Professional Conduct when a lawyer is providing services that would not be considered

⁶ The First Commission’s concern that “any iteration of the rule likely would be inaccurate and misleading” and not be able to capture the “nuanced guidance” of the case law appears to be based on the cases’ treatment of services that impose a fiduciary duty. In some instances, the fiduciary duties would include all of the duties attendant upon the existence of a lawyer-client relationship. See, e.g., *Beery v. State Bar*, 43 Cal.3d 802, 811-814 (1987); *Sodikoff v. State Bar*, 14 Cal.3d 422, 428-429 (1975). In other situations, the duties imposed would be more limited in nature. See, e.g., *William H. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 1047-1048 (1983) (lawyer serving as corporate director would owe duty of confidentiality and be subject to the rules regarding conflicts of interest and trust accounts). In the former situation, a lawyer does not appear to have the ability to disclaim the application of rules of professional conduct. In the latter situation, the lawyer would appear to have a somewhat circumscribed ability to disclaim. See sections 0 and 0, below.

the unauthorized practice of law if provided by a nonlawyer. As noted, the First Rules Revision Commission recommended that a version of Model Rule 5.7 not be adopted “because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection,” and that certain terms and standards in the Model Rule “are materially inconsistent with existing California authorities.” *Rules and Standards Not Adopted*, p. 30, and the Second Rules Revision Commission reasoned that “[a]ppropriate guidance is currently provided by other California authorities.”

“Law-related” or “non-legal” services defined.

Under California law, the concept of a “non-legal service” has been defined as “services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law.” [Cal. State Bar Formal Op. 1995-141](#). This differs from the term “law-related services,” which as defined by Model Rule 5.7, means “services that might reasonably be performed *in conjunction with and in substance are related to the provision of legal services*, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” (Emphasis added)

Functional approach. The State Bar Committee subsequently clarified that the appropriate inquiry should be “functional,” i.e., “is the lawyer performing a service that is performed as part of the practice of law and would constitute the [unauthorized] practice of law if performed by a non-lawyer? [Cal. State Bar Formal Op. 1999-154](#), at n. 4 & accompanying text.

Categories of Non-legal Services a Lawyer Might Provide

Applying the aforementioned “functional” approach, there appear to be four categories of non-legal services recognized in the California authorities.

Non-legal services provided in circumstances “Not Distinct” from the provision of legal services.

There is a line of cases that recognize that when a lawyer provides non-legal services that are “not distinct” from the provision of legal services, the lawyer is subject to the Rules of Professional Conduct. See, e.g., *Layton v. State Bar*, 50 Cal.3d 888, 904 (1990) (“Where an attorney occupies a dual capacity, performing for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”)

Other cases in this line include *Kelly v. State Bar*, 53 Cal.3d 509, 514-17 (1991) (lawyer disciplined for failing to deposit funds in trust account although the lawyer served only as client's agent, and not as the client's lawyer, and in the sale of client's airplane); *Libarian v. State Bar*, 21 Cal.2d 862, 865-66 (1943) (the professional services performed by a lawyer “... are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession...” and whether or not the conduct would be acceptable in any other profession that might permit the performance of some of those services); *Alkow v. State Bar*, 38 Cal.2d 257, 263 (1952) (lawyer's provided collection services through a licensed collection agency that he controlled; all his activities were treated as being the practice of law); *Libarian v. State Bar*, 25 Cal.2d 314, 317-18 (1944) (lawyer provided services of a tax preparer, notary, and lawyer; lawyer's advertising in all three capacities treated without distinction as violations of the then-existing advertising prohibition); *Jacobs v. State Bar*,

219 Cal. 59 (1933) (lawyer acting as escrow holder disciplined for mishandling of money held in that capacity).

These cases all appear to track the scope of Model Rule 5.7(a)(1) as involving a lawyer's provision of non-legal services that are not distinct from the practice of law.

Non-legal services related to the practice of law.

Even when a lawyer is offering services that are “distinct from” the lawyer's practice of law, the lawyer might still be subject to the Rules of Professional Conduct if a recipient or potential recipient of the non-legal services reasonably might be confused as to the nature of services that the recipient is obtaining from the lawyer. See, e.g., [Cal. State Bar Op. 1999-154](#) (Where lawyer is seeking employment as an investment adviser, and uses the title “Esq.” on her stationery and promotional materials, refers to her experience in estate and tax planning law and that she is a “Certified Tax Specialist,” such advertising could lead potential customers to “misperceive the nature of the services being offered,” and thus subject the lawyer to the requirements of the lawyer advertising rules.) That same ethics opinion, however, suggested that such a result could be avoided if the promotional materials included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

Situations that fall into this category appear to be analogous to the situations described in Model Rule 5.7(a)(2).

Non-legal services requiring the exercise of fiduciary duties.

Aside from the provision of non-legal services “not distinct” from the provision of legal services and non-legal services that are related to the practice of law, California law also applies the Rules of Professional Conduct to a lawyer who provides non-legal professional services that are fiduciary in nature – even in the absence of a lawyer-client relationship. The State Bar summarized the law in a formal opinion:

As the Committee noted in California State Bar Formal Opinion Number 1995-141, even in the absence of a lawyer-client relationship, a California State Bar member must conform to the professional standards of a lawyer when rendering nonlegal professional services that involve a fiduciary relationship. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-814 [239 Cal.Rptr. 121] [“[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity as an attorney.” [Citation.]”]; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 428-429 [121 Cal.Rptr. 467] [attorney who assumes fiduciary relationship and breaches fiduciary duties in a manner that would justify discipline if the relationship had been that of attorney and client may be subject to discipline even if no formal attorney-client relationship existed].)

When [a lawyer's] relationship with a client in the course of rendering a purely non-legal service creates an expectation that she owes a duty of fidelity or she is exposed to a client's confidential information in the course of rendering the non-legal professional service, [the lawyer] may be subject to the same duties to avoid the representation of adverse interests under rule 3-310 [now rule 1.7] with respect to that client as she would if there had been a lawyer-client relationship. (See Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232]; *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785.)

The situations in this category do not appear to be fit neatly into either the Model Rule 5.7(a)(1) or (a)(2) category, and appear to be the kind of services that the First Commission concluded required “nuanced guidance.” See section 0, above.

Non-legal services completely unrelated to the practice of law.

There is a final category of non-legal services that a lawyer might provide that bear no relation to the practice of law, for example, a lawyer-owned restaurant, antiques store, body shop, dry cleaner or other business that provides goods or services that are completely unrelated to the practice of law. Even in situations where the customers of such establishments knew that a lawyer was an owner or even if the lawyer actively participated in its operation, it would not be reasonable for the customer to expect or misperceive the kinds of goods or services being provided as being related to the practice of law. As already noted, lawyers could still be subject to discipline under the Rules of Professional Conduct even when not acting as a lawyer or in a professional capacity.⁷

Opting Out of the California Rules of Professional Conduct When Providing Non-legal Services

An essential feature of Model Rule 5.7 is the ability of a lawyer who provides non-legal services to in effect opt out of being subject to the Rules by taking “reasonable measures” to assure that the recipient of the non-legal services knows that those services are not legal services with the protections of the lawyer-client relationship. Model Rule 5.7(a)(2). Despite the extensive California authority addressing a lawyer’s provision of non-legal services, there is scant authority that explicitly addresses the extent to which a lawyer in California might be able to take “reasonable measures” to “assure” that the recipients of the lawyer’s non-legal services are not confused about the nature of the services being provided, thus removing the application of the Rules to the lawyer’s conduct, i.e., opt out of the Rules. As noted, Cal. State Bar Formal Op. 1999-154 suggested that application of the Rules could be avoided if the promotional materials the lawyer used to advertise her non-legal services included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

There are at least two reasons why the concept of opting out has not been sanctioned by California authorities. First, the procedural posture of the court cases that have considered a lawyer’s provision of non-legal services has not been amenable to such a discussion. Nearly all of the cases have involved situations where the lawyer was charged with a disciplinary rule violation or a breach of fiduciary duty. The lawyers had not taken any measures to educate the clients that the services being provided might not come with the protections of the lawyer-client relationship. A court addressing such a neglect of duty would not discuss how a lawyer might have avoided being subject to those duties. Second, California traditionally has had a special focus on client protection. Model Rule 5.7(a)(2) applies not only to law-related services that are provided by a separate entity (as was true with the original version of Model Rule 5.7) but also to services that are provided directly by the lawyer or the lawyer’s law firm.

⁷ See discussion at the beginning of section 0. In addition to violations of the cited provisions of Cal. Rule 8.4, lawyers are also subject to discipline for violations of the State Bar Act, including [Bus. & Prof. Code § 6106](#), which provides “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

This latter situation would likely be viewed as more likely than not to cause a client or potential client to misperceive the nature of the services being provided. A court considering imposing discipline or a civil penalty on a lawyer would be unlikely to include dicta in its opinion that would explain how the lawyer might have avoided disciplinary sanctions. In addition, concern with this latter situation of client confusion might have also contributed to the rejection of a rule derived from Model Rules by both Rules Revision Commissions.

Nevertheless, the focus of Model Rule 5.7(a)(2) is on avoiding the confusion of the recipient of the non-legal services that the services come with the protections of the lawyer-client relationship, including the duty of confidentiality and lawyer-client privilege. There is California authority that recognizes a lawyer's ability to disclaim the lawyer-client relationship. For example, in [Cal. State Bar Formal Op. 2003-161](#), the Committee concluded that a lawyer could avoid the formation of a lawyer-client relationship by "express actions or words." *Id.* at p. 4 n. 1. In particular, the Committee cited to a California Supreme Court opinion, *People v. Gionis*, 9 Cal.4th 1196 (1995), in which the court held that a lawyer had effectively disclaimed the existence of a lawyer-client relationship before the lawyer had engaged in a discussion with the purported client, thus precluding the application of the attorney-client privilege.) See also *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651-52 (N.D. Cal. 1993) (applying California law).

In [Cal. State Bar Formal Op. 2004-168](#), the Committee concluded that a lawyer, who provides visitors to the lawyer's web site a means of communicating with the lawyer to obtain legal services or advice, can effectively disclaim either the formation of a lawyer-client relationship or the duty of confidentiality, but emphasized that the disclaimer would not be effective unless the lawyer explained the legal consequences that would result from no lawyer-client relationship being formed or a duty of confidentiality being owed (e.g., the lawyer would be under no obligation to keep the discussion with the web site visitor confidential). *Id.* at 4. The effectiveness of the disclaimer will generally in part depend upon the sophistication of the client. In essence, the opinion appears to require that only "reasonable measures" to remove any misunderstanding by a potential client of what protections are available when communicating on the web site will be effective.

It appears that notwithstanding the lack of explicit authority in the context of providing non-legal services that would permit a lawyer to opt out of the Rules similar to Model Rule 5.7(a)(2), lawyers have some ability to disclaim the formation of a lawyer-client relationship or duty of confidentiality, thus removing the primary concern with lawyers providing such services: that the client might be confused as to the protections to which the client is entitled. Further, the recipient of those services would likely also be protected because the lawyer would be subject to the regulatory scheme that governs the particular services – and thus to discipline for violation of those regulations. See, e.g., Bus. & Prof. Code §§ 6009 [attorney-lobbyists], 6009.3 [attorney-tax preparers], 6067 [lawyer's oath], 6068 [lawyers duties], 6090.5 and 6100-6107 [various disciplinary provisions], 6131 [former prosecutors], 6175-6177 [lawyers selling financial products], and 18895, et seq. [attorney-athlete agents], 16, U.S.C. §§ 1592 et seq. [Fair Debt Collections Practices Act].

Summary

Although California has not adopted a version of Model Rule 5.7, there is extensive California authority addressing the concerns of the rule. There even appears to be authority that might at least to some extent permit a lawyer the same opportunity to opt out of the application of the Rules of Professional Conduct that is provided under Model Rule 5.7(a)(2). The California authority, however, is not necessarily common knowledge to lawyers or the public, nor is it definitive.

The next section of this memorandum discusses whether a rule of professional conduct or an ethics opinion might be more effective in apprising lawyers of the law.

The Benefits and Disadvantages of Employing a Rule of Professional Conduct or an Ethics Opinion to Expand the Availability of Law-related Services Provided by Lawyers?

The charge of the ATILS Task Force includes (i) reviewing “the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public,” (ii) evaluating “existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need,” and (iii) “[w]ith a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.”

Adding a new rule of professional conduct that could provide lawyers or lawyers with an ability to provide ancillary services without being subject to the Rules might not appear to be in keeping with the Task Force’s charter and its emphasis on client protection, or its charge to explore means that might increase access to justice through innovation. This section of the memorandum is not intended to decide that issue but rather to simply determine whether, if a clarification of the availability of a lawyer providing non-legal services without being subject to the Rules of Professional Conduct is amenable to the charter, which approach would be best suited to providing that clarification given the current state of California law: a rule of professional conduct or an ethics opinion promulgated by the State Bar.

Rule of Professional Conduct

There are several advantages to a Rule of Professional Conduct patterned after Model Rule 5.7. First, the rule would be mandatory in nature as part of a set of disciplinary rules. A lawyer who seeks to engage in providing law-related services would have to comply with the rule to receive any of its benefits and be subject to discipline for non-compliance. Public protection should be enhanced. Second, because all lawyers are aware of the Rules of Professional Conduct, knowledge of what the lawyer’s obligations are with respect to the provision of law-related services would be more readily available and compliance with the law enhanced, as well as any benefits to the public more likely ensured. Third, related to the second advantage, to the extent the extensive law concerning law-related services can be reduced to a straightforward disciplinary rule, compliance will be enhanced and public protection fostered. Fourth, adopting a version of Model Rule 5.7, even if it were to diverge substantially from the substance of the model rule, would nevertheless remove an unnecessary difference between the law governing lawyers in California and the law governing lawyers in the substantial majority of other jurisdictions. Fifth, a rule approved by the California Supreme Court would clarify the current law and, to the extent that law might be inconsistent with the objectives of the rule or the goal of increasing access to justice, overrule the inconsistent law.

To be sure, there are disadvantages with a rule approach. First, as noted by the First Rules Revision Commission, a rule might not be able to capture the “nuanced guidance” of the case law. Second, because such a rule would necessarily be simplistic, “any iteration of the rule likely would be inaccurate and misleading.” Third, the California Rules are narrowly tailored to be disciplinary rules; they are mandatory and permissive or aspirational, nor intended to provide general guidance on a topic of concern to lawyers. The complexities of California law reduced to a rule might not fit within that paradigm. Fourth, California has been without a rule of professional conduct in this area for over a century without there having been a multitude of lawyers who have taken advantage of clients through the delivery of non-legal services; to the extent lawyers have violated the law, there are already rules available to discipline them. There is no compelling need for such a rule.

As noted, it is not certain to what extent, if any, a rule that is patterned on Model Rule 5.7 would promote innovation that would operate to increase access to justice. The adoption of such a rule in California could increase knowledge of and incentives to lawyers to provide law-related services, and thus increase opportunities for lawyers to expand the services they provide either directly or indirectly their clients or the general public, but whether such a rule will contribute to access to justice is not at present established.

Ethics Opinion Promulgated by the State Bar

There are several advantages to addressing by ethics opinion the matters regulated in other jurisdictions through a rule derived from Model Rule 5.7. First, an ethics opinion is generally a better vehicle than a disciplinary rule for providing the “nuanced guidance” that the First Commission concluded is necessary to understand and apply the current law in California. Second, by providing that “nuanced guidance,” the ethics opinion should enhance compliance with the law and thereby promote public protection. Third, an ethics opinion would be a better medium for identifying the different kinds of law-related services that lawyers could provide, describing the benefits and disadvantages of each, and even focusing on the kinds of services that might provide better access to justice.

The major disadvantage of an ethics opinion is the fact that such opinions are only advisory in nature. They are not mandatory and might not be viewed as carrying the weight of authority of a court opinion or rule of professional conduct. Further, although they are readily available on the State Bar’s web site, there is no assurance that a lawyer would review such an opinion before embarking on providing law-related services. Ethics opinions, although a valuable resource in applying the law and rules as they relate to a lawyer’s duties, are not controlling law, nor would the violation of a conclusion in an ethics opinion necessarily result in a lawyer’s discipline.

Summary

ABA Model Rule 5.7 has been adopted in a substantial majority of United States jurisdictions with little variation. California is one of twelve jurisdictions that have not adopted a similar rule. During the lengthy process to revise the California Rules of Professional Conduct, two separate Rules Revision Commissions studied the feasibility of California adopting a rule 5.7 counterpart to Model Rule 5.7. Both Commissions concluded that the provision of law-related services by a lawyer was adequately addressed in California case law and other authorities and, in the event, a rule of professional conduct would likely not capture the nuanced guidance provided by the case law. Nevertheless, should the Task Force determine that promoting law-related services might enhance access to justice and decide to further investigate its regulation to protect the public, there are two potential means to do so: by rule of professional conduct or by an ethics opinion.

Attachment 1
[ABA Model Rule 5.7, revised and adopted (Feb. 2002)]

ABA Model Rule 5.7 Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of

confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Attachment 2
[First Rules Revision Commission Draft (10/31/2005)]

Rule 5.7 Responsibilities Regarding Law-Related Services

A lawyer may provide to clients and to others law-related services, as defined in paragraph (a), subject to the requirements of this Rule:

(a) The Meaning of "Law-Related Services"

As used in this Rule, the term "law-related services" means services that a lawyer reasonably would be expected to perform in conjunction with or as part of the practice of law, even if the services might lawfully have been performed by non-lawyers.

(b) When Both Legal and Law-Related Services Are Provided by the Lawyer.

A lawyer is subject to these Rules with respect to all legal services and law-related services the lawyer provides at the same time to a recipient.

(c) When Only Law-Related Services Are Provided by the Lawyer.

If a lawyer provides law-related services, but is not providing legal services to the recipient, the lawyer is subject to these Rules with respect to all law-related services the recipient reasonably believes are being provided subject to the protections of a client-lawyer relationship with the lawyer.

(d) When Law-Related Services Are Provided by a Nonlegal Organization.

A lawyer is subject to these Rules, with respect to law-related services provided to a recipient by an organization with which the lawyer is affiliated in any way, if the recipient reasonably believes the services are being provided subject to the protections of a client-lawyer relationship with the lawyer.

(e) Avoiding the Duties of a Lawyer.

Paragraphs (c) and (d) do not apply if the lawyer makes efforts that are reasonable in the circumstances to avoid the recipient's belief that the protections of a client-lawyer relationship apply. Those efforts must include advising the recipient in writing both that the services are not legal services, and that the recipient will not have the protection of a client-lawyer relationship with respect to the law-related services being provided.

Comment

[1] When a lawyer performs law-related services, or is affiliated with an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed will not understand that the services might not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services might expect, for example, that the services are provided subject to the

obligation of lawyers to protect confidential information, to avoid conflicting representations, and to act with undivided loyalty.

[2] Paragraph (a) defines “law-related” services based on the reasonable belief of the recipient of the services. That belief can be based on what the lawyer says or fails to say about the nature of the services being provided. This belief also can be based on the nature of the services, that is, if they call upon the lawyer to give legal advice or counsel, to examine the law, or to pass upon the legal effect of any act, document, or law. Examples of law-related services include serving as the agent for a client in the sale of an airplane (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 514-17), acting as the Executor of a Will (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904), providing real estate title and brokerage services (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 668), providing debt collection services (*Alkow v. State Bar* (1952) 38 Cal.2d 257, 263), and providing tax preparation services (*Libarian v. State Bar* (1944) 25 Cal.2d 314, 317-18).

[3] The Rules of Professional Conduct apply to all legal and law-related services the lawyer provides at the same time to a recipient. Without regard to the sophistication of the recipient, any attempted distinction between legal and law-related services being provided at the same time would be too vague to be reliable. For example, if a lawyer provides advice on business transactions while providing real estate brokerage services to the same recipient, paragraph (b) conclusively presumes the lawyer could not make clear to the recipient of the services which services are given as a lawyer and which are not. Under paragraph (b), these Rules will apply when a lawyer provides law-related services in the general course of also providing legal services, even if the two are not provided simultaneously or as part of a single project. Under paragraph (c), these Rules will not apply when the provision of legal and law-related services are clearly distinct, as when the lawyer never has provided legal services to the recipient or did so in a matter that clearly has been concluded.

[4] This Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services by a lawyer. In addition, lawyers can be subject to discipline for conduct that might not amount to the practice of law. See, for example, B&P C '6009 [attorney-lobbyists], 6009.3 [attorney-tax preparers], 6067 [lawyer’s oath], 6068 [lawyer’s duties], 6090.5 and 6100-6107 [various disciplinary provisions], 6131 [former prosecutors], 6175-6177 [lawyers selling financial products], and 18895, *et seq.* [attorney-athlete agents], 16, U.S.C. '1592, *et seq.* [Fair Debt Collections Practices Act], Welfare & Institutions C '14124.76 [obligation to notify Department of Health Services regarding receipt of personal injury judgment, award, or settlement], [and Rule 8.4].

[5] Law-related services may be provided through an organization that is distinct from that through which the lawyer provides legal services. If a lawyer is affiliated with that organization in any way, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the organization knows that the services provided by the organization are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. There will be many situations in which the lawyer’s involvement with the organization will be unknown to the recipients of its services, and for that or other reasons there will be no reasonable basis on which the recipient could think the services are provided subject to the protections of the lawyer-client relationship; in these situations this Rule does not obligate the lawyer to communicate with the recipient about the lawyer’s role.

[6] The communication required by paragraph (e) should be made before entering into an agreement to provide or providing law-related services.

[7] Under paragraph (e), the lawyer has the burden of showing that the lawyer has communicated to the recipient, in a manner that reasonably should have been understood by the recipient, that the law-related services are provided without the protections of a client-lawyer relationship. For instance, a sophisticated user of law-related services, such as a publicly held corporation, might require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an unsophisticated individual seeking real estate brokerage services or investment advice from someone he or she knows to be a lawyer.

[8] When a lawyer is obliged to accord the recipients of services all the protections of these Rules, the lawyer must take special care to heed the Rules addressing conflicts of interest [(Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f))] and the requirements of [Rule 1.6] relating to disclosure of confidential information. The promotion of the law-related services also must comply in all respects with [Rules 7.1 through 7.3], dealing with advertising and solicitation. Lawyers also should take special care to identify all obligations imposed by case law.

[9] When the protections of these Rules do not apply to the provision of law-related services, the services are governed by principles of law external to these Rules, such as the law of principal and agent or the rules of another profession in which the lawyer is licensed. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. When the protections of the Rules do apply, the lawyer is obligated to provide services subject to the higher of the standard of the Rules and the external standard.

[10] Some doctrines of law not related specifically to lawyers can impose fiduciary duties on lawyers. This can occur when a lawyer acts in a role that is fiduciary in nature. See, e.g., *William H. Raley Co. v. Superior Court* (1983) 149 Cal. App.3d 1042 [lawyer served as corporate director], *Huston v. Imperial Credit Commercial Mortgage Investment Corp.* (C.D. Cal. 2001) 179 F. Supp.2d 1157 [lawyer served as corporate officer], *In re Mortgage & Realty Trust v. Zim Co.* (C.D. Cal. 1996) 195 B.R. 740 [lawyer served as trustee]. A lawyer who is obligated under principles outside these Rules to act in a fiduciary capacity is required to satisfy all of the duties of honesty and integrity imposed by law on fiduciaries and the duties of honesty and obedience to fiduciary duty imposed on lawyers. See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 and *In the Matter of Wyshak* (1999) 4 Cal. State Bar Ct. Rptr. 70, 80. A lawyer's obligation to act subject to fiduciary duties also can require the lawyer to act in accordance with particular requirements of these Rules. This could include the confidentiality and conflicts of interests provisions of these Rules and the trust account rules with regard to funds the lawyer receives in a fiduciary capacity. See, e.g., *William H. Raley Co. v. Superior Court*, *supra* at 1047-48 and *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 and *Matter of Hertz*, (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469-70. See [Rule 4-100]. [See Rule 2.4 with regard to lawyers acting as third-party neutrals.]



The State Bar of California

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

To: Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions
From: Andrew Tuft
Date: February 25, 2019 (**UPDATED: 6/18/2019**)
Re: Ethics Opinion Addressing Matters Regulated in Other Jurisdictions Through a Rule Derived From ABA Model Rule 5.7

PLEASE NOTE: The Committee on Professional Responsibility and Conduct approved the above referenced opinion for a 90-day public comment circulation with a public comment deadline of August 30, 2019. The version of the opinion currently circulating for public comment is attached to this memo.

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 following:

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
FORMAL OPINION INTERIM NO. 16-0003**

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. 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.

AUTHORITIES

INTERPRETED: 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.^{1/}

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

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

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 those Rules of Professional Conduct that apply to lawyers in the practice of law may also apply to lawyers' conduct providing non-legal services individually or through a lawyer-controlled business.^{2/} 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 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 and Professions Code sections 6500-6592, Probate Code sections 2340 and 2341, and California Code of Regulations sections 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. Business and Professions Code section 6068 (e)(1) and rule 1.6.

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

^{2/} This opinion supplements and updates important earlier opinions on this topic, including Cal. State Bar Formal Opn. Nos. 1982-69, 1995-141, and 1999-154.

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

This Committee's 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.^{3/} 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* (1986) pp. 897-898). 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 offices^{4/} 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.^{5/} 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 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.^{6/}

^{3/} 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 [142 P.2d 960].

^{4/} 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. Nos. 384 and 413.

^{5/} 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.

^{6/} 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] (fraud by lawyer-fiduciary); *Lewis v. State Bar* (1973) 9 Cal.3d

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.^{7/} 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.^{8/}

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. See, for example: *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 [136 P.2d 321] (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. 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-

704, 712-13 [170 Cal.Rptr. 634] (same); *Alkow v. State Bar* (1952) 38 Cal.2d 257 [239 P.2d 871] (misrepresentation and misappropriation); *Jacobs v. State Bar* (1933) 219 Cal. 59, 63-64 [25 P.2d 401] (deception by lawyer escrow holder).

^{7/} 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.)

^{8/} 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 p. 4-5. The full Commission voted to accept that recommendation.

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.^{9/} 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 Model Rule 5.7 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." ABA Model Rule 5.7, 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.

^{9/} See, Rule 1.0, Comment [4]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 642, 655-656 [82 Cal.Rptr.2d 799]; and Cal. State Bar Formal Opn. No. 2010-180 n.7.

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]; rule 1.13(f) and rule 4.3(a). It is also settled that: (1) 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) 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.^{10/}

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 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

^{10/} 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 [2018]) §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.

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,^{11/} whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. 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, 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.^{12/} 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 ethics opinions. See Cal. State Bar Formal Opn. No. 1995-141. In both Scenarios 1 and 2, there is a significant risk that

^{11/} 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.

^{12/} See the discussion, *supra*, at note 2.

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

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 taking appropriate measures to clarify the nature of the services being provided and the absence of any lawyer-client relationship. 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.

The issue in connection with Scenario 2 arises from statements like those in Cal. State Bar Formal Opn. No. 1995-141, which states 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, more important, that in the Supreme Court 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 multiple reasons.

First, in many of the decided cases, the language concerning the fiduciary status of the lawyer was dictum, because other recognized bases for professional discipline were present.^{13/} Second, no case explicitly considers, let alone explicitly rejects, the use of clarifying measures for a distinct non-law business providing fiduciary services. Third, the facts of the decided cases do not implicitly reject that approach; in fact they are fully consistent with it.^{14/} Because the decided cases provide no explicit or implicit support for applying the Rules of Professional Conduct to non-legal work that is distinct from the lawyer's practice and clearly identified as non-legal, we do not think that they alter the conclusion that California law does and should give effect to such clarifying measures 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.

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: (1) no legal advice or services are being provided, (2) no attorney-client relationship has been formed, and (3) the protections associated with the attorney-client relationship, including the attorney-client 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 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 an attorney-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

^{13/} 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* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Jacobs v. State Bar* (1933) 219 Cal. 59 [25 P.2d 401]. In others, there was conduct involving moral turpitude. See cases cited in note 5 above.

^{14/} 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 [136 P.2d 321]; *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.

involvement should give rise to a risk of misunderstanding sufficient to require the application of the Rules of Professional Conduct.

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 non-legal 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 below 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. 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.^{15/} 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.

^{15/} 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.

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); see also *Hunnecutt 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").^{16/} When a lawyer advises 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. 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.*^{17/}

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.

^{16/} 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. *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).

^{17/} 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.

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.

From: ATILS
Sent: Tuesday, February 26, 2019 2:34 PM
To: McCurdy, Lauren
Subject: ATILS: Email Comment on Model Rule 5.7 and Law Related Services

ATILS Task Force Members:

See email comment below from Crispin Passmore on the topic of Model Rule 5.7 and law related services, received and shared by Bridget Gramme.

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Lauren McCurdy | Program Supervisor
Office of Professional Competence
[The State Bar of California](#) | 180 Howard St. | San Francisco, CA 94105
415.538.2107 | lauren.mccurdy@calbar.ca.gov

Working to protect the public in support of the mission of the State Bar of California.

Please consider the environment before printing this email.

From: Bridget Gramme [mailto:bgramme@sandiego.edu]
Sent: Tuesday, February 26, 2019 11:39 AM
To: McCurdy, Lauren
Subject: Re: ATIL task force - Model Rule 5.7

"If I were at the meeting as a member of the public and allowed to speak (I like that you do that) the point I'd be making is that the paper is very focused on lawyers. It considers consumer protection only by saying that lawyers must in effect say to clients 'look, this service isn't ethical because I am not acting as a lawyer' but that isn't to my mind a real consideration of the consumer or public interest but one of dressing up protectionism as public interest/consumer protection; or suggesting that lawyers are the only ethical way to get law like service. It is almost designed to persuade clients not to go to a non lawyer service. To me a proper consideration of the consumer interest in this issue takes into account two different key points.

First is that too many individuals and small business don't get access to legal services. There is no point having perfect protection for those that make it if the unintended (or intended!) consequence is to keep the market small and exclude the majority of those that would benefit from advice and assistance. If a new rule encouraged as well as allowed firms to offer wider services then we might see new ways of reaching this currently excluded group. That is crucial to economic growth from small business as well as tackling poverty. There is great research in UK on small business legal need in particular. (see <https://research.legalservicesboard.org.uk/news/latest-research-18/> - The LSB commissioned research on small business legal need in 2013, then repeated in 2015 and 2017. This brings all of that together. The data is actually publicly available too but the reports are pretty comprehensive.)

Second is that it looks at MDPs only from the law firm end. Regulators and professions need to deal with whole market rather than just look at their narrow professional practice. So many businesses are in reality offering law like services in most of the

world. Accountancy firms, small business advisors and trade unions are just obvious examples: they find a way around the rules in most jurisdictions where there is money at stake. The effect of that is that innovation happens to benefit of big clients with money but is never available to poorer individuals and smallest business. One issue in the rule making is to think about how a non-law firm would be allowed to have solicitors added to their services - rather than just how are law like services added to regulated law firms."

Crispin Passmore
Passmore Consulting Ltd.
07834 856 564
www.passmoreconsulting.co.uk

BRIDGET FOGARTY GRAMME, ESQ. '98, '03
Administrative Director
Adjunct Professor of Law
Center for Public Interest Law
University of San Diego School of Law
5998 Alcala Park
San Diego, CA 92110
(619) 260-4806
(619) 260-4753 (fax)
www.cpil.org

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