



# The State Bar of California

ATILS Agenda Item B.5.  
[Rule 5.7]  
02-24-20 Meeting

## Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force  
From: Mark Tuft and Kevin Mohr<sup>1</sup>  
Date: February 18, 2020  
Re: B.5. Proposed Rule 5.7

### Short Statement of Recommendation

ATILS recommends that the Board of Trustees consider the adoption of a new Rule of Professional Conduct similar in concept to the American Bar Association Model Rule 5.7, including careful consideration of potential access to justice benefits to the PeopleLaw sector from innovative delivery of law related services provided by: (i) lawyers and law firms; and (ii) businesses owned or affiliated with lawyers and law firms. Information and data generated by a regulatory sandbox, pilot program, or other similar time-limited program can help inform this rule study.

### **Executive Summary**

This memo responds to the concern expressed at the February 4, 2020 meeting as to whether proposed rule 5.7 should apply where non-legal services are performed by a lawyer acting as a trustee or other fiduciary. The issue is addressed by surveying relevant Supreme Court decisions and suggesting clarifying comments for consideration by the Task Force.

### **Discussion**

#### California Law Concerning the Provision of Non-Legal Services By Lawyers

Kevin Mohr and Andrew Arruda's memo to the Task Force dated February 12, 2019 describes four categories of non-legal services recognized by case law. State Bar Interim Opinion 16-0003 distinguishes between non-legal services that are potentially subject to the rules and those where steps can be taken to ensure that the rules do not apply. The Office of Chief Trial Counsel's comments regarding Interim Opinion 16-0003 includes case authorities concerning attorney discipline for conduct in performing non-legal services. The recent State Bar Court's opinion in *Matter of Lingwood* is also considered.

#### Where A Lawyer's Provision of Non-Legal Services is governed by the Rules of Professional Conduct and the State Bar Act

Rule 5.7 is not intended to apply in circumstances that are not distinct from the lawyer or law firm's provision of legal services to clients. (paragraph (a)(1)). Thus, the rule would not apply where a lawyer or the lawyer's firm renders legal and non-legal services to the same client or in the same matter, even if the non-legal services might otherwise be performed by non-lawyers. *Layton v. State Bar* (1990) 50 Cal.3d 889: "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

<sup>1</sup> Staff added a short statement of the recommendation, sections on the ATILS charter, public comments and next steps.

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; *Crawford v. State Bar* (1960) 534 Cal. 2d. 659, 667-668 - attorney provided title and brokerage services; *Alkow v. State Bar* (1952) 38 Cal. 2d 257y, 263 - attorney provided collection services; *Libarian v. State Bar* (1944) 25 Cal. 2d 314, 317-18 - attorney provided services as tax preparer, notary and lawyer.

In *Kelly v. State Bar* (1991) 53 Cal.3d 509, the attorney had represented Smyth in various business matters for a number of years. Smyth loaned money to the owner of an airplane, the owner defaulted, and Smyth became the owner of the airplane. Smyth and Kelly agreed that Kelly would sell the plane and would receive 50 percent of the sale price as his compensation. Kelly sold the plane but did not deposit the net proceeds in his client trust account. The check Kelly gave Smyth was returned for insufficient funds. Although Kelly had represented Smyth as an attorney in various matters, the airplane sale was a straightforward business transaction, which did not involve the practice of law. This circumstance did not insulate Kelly from discipline. The Supreme Court held that "when an attorney serves a single client both as an attorney and as one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services," citing Layton.

#### Where Lawyers May Otherwise Be Subject to Discipline in the Provision of Non-Legal Services

The question of whether a lawyer's conduct in rendering non-legal services is governed by the rules is distinct from the question of whether the lawyer may be subject to discipline in performing non-legal services. Lawyers are subject to discipline for conduct outside the practice of law even where the conduct is not governed by the rules of professional conduct. Rule 1.0, Comment [2] - "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;" and see rule 8.4(b) and (c) and Comment [1]. The same is true with respect to certain provisions of the State Bar Act (e.g., Bus. & Prof. Code §6106 – acts involving moral turpitude, dishonesty or corruption). State Bar Formal Opinions 1995-141, 1999-154.

Cases that fall into this category include *Matter of Schooler* 2016 WL 7176690 (2017). The respondent in that matter violated her fiduciary duties as trustee of her parents' trust and estate under the Probate Code and by making misrepresentations and misappropriating trust and estate assets. In affirming the findings that respondent committed multiple acts of moral turpitude in violation of section 6106 and failed to comply with the law in violation of section 6068(a), the Court stated:

"The law is clear that even if Schooler was not practicing law, she was required to conform to the ethical standards required of attorneys[citing *Crawford*]. 'Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter. [Citations.]' An attorney who breaches fiduciary duties that would justify discipline if there was an attorney-client relationship may be properly disciplined for the misconduct."

In *Worth v. State Bar* (1976) 17 Cal.3d 337, 551, an attorney who was also a licensed real estate broker and a licensed contractor obtained money from his law partner's elderly mother in connection with a real estate development scheme. Having accepted the woman's investment, the lawyer was found to breach his fiduciary duties by failing to prepare an instrument setting forth the parties' rights, by commingling funds, by failing to account and by misrepresenting the ownership of the property. The Court held: "[a]n attorney who breaches fiduciary duties that would justify discipline if there was an attorney-client relationship may be properly disciplined for the misconduct."

In *Crooks v. State Bar* (1970) 3 Cal.3d 346, 475, a lawyer acting as escrow holder violated his fiduciary duties by willfully appropriated to his own use escrow proceeds held by him. The Court stated: “[w]hen an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. . . . When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”

*Jacobs v. State Bar* (1933) 219 Cal. 59, is a similar case where the attorney claimed he was not acting as an attorney in the transaction, but merely as an escrow-holder. The Court held: "It may be assumed that he was acting merely as an escrow-holder in the transaction. It is the additional fact of his status as an attorney licensed to practice and member of The State Bar that brings him within its disciplinary reach whenever 'the commission of any act involving moral turpitude, dishonesty or corruption' is involved. (citation) In this connection we are constrained also to note the inconsistency between the petitioner's position that he acted as an escrow-holder merely and his reliance upon cases involving claims and liens as an attorney for services rendered as such pursuant to which he urges the right to retain moneys to satisfy his client's debt to him for services rendered."

*Matter of Gordon* (2018) 2018 WL 580 involves an unsuccessful attempt to avoid the statutory prohibition against attorneys receiving advance fees for loan modification services prior to completion of the work. Respondent marketed his services nationwide using misleading, false advertising. To justify his advance fees, he characterized his work as “pre-litigation” activities and his loan modification work as “pro bono” services. Respondent claimed he was not engaging in the practice of law in providing loan modification assistance to homeowners as a part of the “custom products” he sold. However, the customers were told that they were getting the services of an attorney and that an attorney would handle the loan modifications “pro bono.” The work of the non-lawyers was found to constituted the practice of law. The Court held that although certain services (such as loan modifications) might be performed by lay people, “it does not follow that when they are rendered by an attorney, or in his office, they do not involve the practice of law” ( citing Crawford).

In *Clancy v. State Bar* (1969) 71 Cal. 2d 140, the attorney conceded that he represented the client when he obtained money to invest on her behalf. The facts showed that he concealed adverse and material facts when he obtained the money from his client.

In *Matter of Sodikoff* (1975) 14 Cal.3d 422, a fiduciary relation was found to exist between an attorney while acting as counsel for the administrator of an estate and a beneficiary who lived abroad, where by means of misrepresentations, the attorney attempted to buy, for substantially less than its value, realty which had been held in joint tenancy by the beneficiary and the testator. The attorney's communications implied that the attorney or his firm either continue to manage the property for the beneficiary's account or act as his agent in finding a purchaser. Each service was often rendered by an attorney for a client and the beneficiary was aware that respondent was an attorney, and conversely, respondent knew the beneficiary was an elderly man living thousands of miles away. The Court held that even if no formal attorney-client relationship existed, the attorney voluntarily assumed a position of trust and confidence and should be held to similar high standards of conduct: “When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”

*Beery v. State Bar* (1987) 43 Cal. 3d. 802, involved an attorney soliciting to invest settlement funds for a client the attorney represented in a serious personal injury case without complying with the conflict of interest and business transaction rules. The Court confirmed that an attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney-client relationship, citing *Worth* and *Sodikoff*.

The Supreme Court held in *Guzzetta v. State Bar* (1987) 43 Cal. 3d. 962, 979 that the nature of an agreement to sell a family restaurant in a dissolution proceeding in which Guzzetta represented the husband and the sale proceeds were to be held in Guzzetta's client trust account imposed a duty to the husband's spouse as well as the husband to account for the funds. Rule 1.15 currently applies to funds held for the benefit of a third person to whom the lawyer owe a contractual, statutory or other duty.

The Review Department's recent decision in *Matter of Lingwood* (2019) 2019 WL 4046745 is similar to the Supreme Court decision in *Schneider v. State Bar* (1987) 43 Cal. 3d. 784, 796-796. Each case holds that an attorney who prepares a trust in which she is appointed as trustee and who later lends herself assets of trust must comply with the processor to Rule 1.8.1 (entering into a business transaction with a client) even though the trust powers authorize the trustee to borrow from the trust and the lawyer's fiduciary duties are owed to the beneficiaries. Lingwood was also found culpable under §6068(a) for failure to comply with the applicable provisions of the Probate Code. The Review Department relies on *Layton* and *Guzzetta* as well as *Schneider* in holding that the Rules impose independent requirements on trustees when they are attorneys. For disciplinary purposes, Lingwood was required to treat the beneficiaries as "clients" for purposes of former rule 3-300 (Rule 1.8.1).

Proposed rule 5.7 is not intended to change the law in this context and a comment to the rule is recommended to make this clear.

#### Other Consequences For Lawyers Providing Non-Legal Services to Clients and Other Persons

Lawyers may encounter conflicts of interest and other ethical consequences as a result of providing non-legal services in a law firm or in an organization that is owned and operated with non-lawyers. Rule 5.7 is not intended to immunize lawyers from these consequences. A comment to this effect is recommended.

#### Proposed Comments to Rule 5.7<sup>2</sup>

[1] Rule 5.7 applies to the provision of non-legal services as defined in paragraph (c)(1) by a lawyer even when the lawyer does not provide legal services to the person for whom the non-legal services are performed and whether the non-legal services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules apply to the provision of non-legal services. Even when those circumstances do not exist, the conduct of a lawyer involved in the provision of non-legal services is subject to those rules and provisions of the State Bar Act that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. (see, e.g., Rule 8.4 and Business and Professions Code §6106).

[2] When non-legal services are provided by a lawyer [or the lawyer's firm] under circumstances that are not distinct from the provision of legal services to clients, the lawyer involved in the provision of

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<sup>2</sup> The suggested comments are not intended to be inclusive of all the comments to the rule. Additional comments may also be considered.

non-legal services is subject to the Rules and the State Bar Act. For example, a lawyer must conform to the Rules and the State Bar Act as to all non-legal services the lawyer renders in a dual capacity along with legal services for a single client or in a single matter, even if the non-legal services might otherwise be performed by non-lawyers. [citations]

[3] A lawyer who assumes a fiduciary relationship in the provision of non-legal services to a person who is not a client of the lawyer or the lawyer's firm and who violates a fiduciary duty in a manner that would justify disciplinary action if there was an attorney-client relationship may be subject to discipline for the misconduct. [citations]

[4] When a lawyer-client relationship exists with a person a lawyer refers to a separate organization owned [or controlled] by the lawyer individually or with others for the provision of non-legal services [or who the lawyer knows or reasonably should know is the recipient of such services], the lawyer must comply with rule 1.8.1.

[5] Under some circumstances the legal and non-legal services rendered in the same matter may be so closely entwined that they cannot be distinguished from each other, and the requirements of paragraph (a) cannot be met. In such a case, the lawyer is responsible for assuring that the lawyer's conduct, and to the extent required by rule 5.3, the conduct of non-lawyers in the firm or in separate organization complies with the rules.

[6] A lawyer who is obligated to accord recipients of non-legal services the full protection of the rules and the State Bar Act must adhere to the requirements of the rules addressing conflicts of interest (rules 1.7 – 1.1), the requirements of rule 1.6 relating to the protection of client confidential information, and lawyer advertising rules (rules 7.1 – 7.5).

#### ATILS Charter and Request for Public Comment:

In part, ATILS' charter instructs the Task Force to:

Evaluate 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.

This recommendation responds to the charter by proposing a new rule that would clarify a lawyer's duties in the provision of law related services. California does not have a version of ABA Model Rule 5.7 but as detailed above the issue is addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, lawyers may be uncertain about their duties and reluctant to explore innovative delivery systems for law-related services as well as combined law related and legal services. If a new rule is adopted, there would be greater clarity about those duties and the obstacle of the uncertainty would be alleviated. ATILS received a [Corporate Legal Market Report](#) finding, in part, that in the corporate sector legal work is being done in different ways, by different people, with new tools, and in many cases, corporate legal work is being provided by entities beyond the scope of traditional lawyer regulation. A California version of ABA Model Rule 5.7 might facilitate a similar level of innovative delivery systems in the PeopleLaw sector.

This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the rules of professional conduct. It was issued as recommendation 3.3 as set forth below.

Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

What will this recommendation do? – If a new rule is ultimately adopted, this recommendation could enhance access to justice in California by promoting the delivery of law related services by lawyers and law firms because the applicability of attorney professional responsibility standards to such services would be clarified by the new rule.

Recommendation 3.3 received a total of approximately 98 written comments, 89 in opposition, 5 in support, and 4 with no stated position. Some of the general themes derived from the written public comments, the public hearing testimony, various articles, podcasts, social media posts and the oral input conveyed at the bar association Town Hall Outreach meetings are listed below together with the Task Forces' response.

- The need for this new rule of professional conduct is unclear because the provision of law related services, including dual profession services, in the context of an attorney-client representation is already addressed in California case law and ethics opinions, and these authorities appear to offer better client protection than the terms of Model Rule 5.7.

*Task Force Response:* Case law and ethics opinions are not as accessible as the rules. As discussed above, a new rule offers the appeal of greater clarity in a lawyer's duties and could facilitate innovative delivery of law related services.

- Adding this new rule would encourage the provision of law related services and give law firms options to lower costs or provide added value.

*Task Force Response:* The Task Force agrees but also believes that further study and drafting of the actual proposed new rule could be informed by the data generated by a regulatory sandbox, pilot program, or other similar time-limited program in which the program participants can experiment with new approaches for delivering both law related and legal services.

### **Conclusion and Possible Next Steps**

Proposed rule 5.7 is not intended to change California Supreme Court law on the application of the rules of professional conduct to a lawyer's provision of non-legal services, with one possible exception. The Office of Chief Trial Counsel claims that lawyers cannot disclaim the existence of an attorney-client relationship or claim that the services are not legal services when that is not the case. While that is generally true and is supported in cases such as *Matter of Gordon*, lawyers should be permitted as a matter of public policy to engage in business with non-lawyers in the provision of innovative and cost efficient services to consumers outside the traditional attorney-client relationship where the services themselves are not governed by the rules of professional conduct. It currently is the case in situations where a lawyer serves as a mediator or third party neutral. Rule 2.4. There is no reason why lawyers

and non-lawyers should not be able to join forces in providing services to consumers outside the traditional attorney-client relationship with adequate notice and disclosures that the services are not legal services and the protections of the attorney-client relationship do not exist. Lawyers may continue to be held to a higher standard under the Rules and State Bar Act depending on the nature of the services being provided, and there may be ethical consequences to the lawyer in performing non-legal services. These issues can be appropriately addressed in comments to the rule.

Should the Board of Trustees consider adoption of a new rule 5.7, it is anticipated that the next step of further study and drafting of the actual revisions would be informed by data generated by a regulatory sandbox, pilot program, or other similar time-limited program.

### **Proposed Rule 5.7 Responsibilities Regarding Non-Legal Services**

*(Staff prepared version with Mark Tuft's proposed comments regarding fiduciary and other duties)*

- (a) A lawyer is subject to these rules and the State Bar Act with respect to the provision of non-legal services, as defined in paragraph (c)(1), if the non-legal services are provided by the lawyer [or the lawyer's law firm\*]:
  - (1) in circumstances that are not distinct from the lawyer's [or the firm's] provision of legal services to clients; or
  - (2) in other circumstances by an organization other than a law firm\* that is (i) owned [controlled] separately by the lawyer [or the lawyer's firm\*] or (ii) owned [controlled] with others unless written disclosure as defined in paragraph (c)(2) is provided to the recipient of the services that (i) the services are not legal services and (ii) that the protections of the lawyer-client relationship do not exist.
- (b) When a lawyer knows\* or reasonably should know\* that a recipient of non-legal services provided pursuant to paragraph (a)(2) does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role with respect to the provision of non-legal services and the lawyer's role as one who represents a client.
- (c) For purposes of this rule:
  - (1) "Non-legal services" means services that might reasonably be performed in conjunction with the practice of law, including services may be lawfully performed by a person who is not authorized to practice law.
  - (2) "Written disclosure" means advance written notice is communicated to the person receiving the services that explains that the services are not legal services and that the protections of a lawyer-client relationship do not exist with respect to the non-legal services.

### **Comments<sup>3</sup>**

[1] Rule 5.7 applies to the provision of non-legal services as defined in paragraph (c)(1) by a lawyer even when the lawyer does not provide legal services to the person for whom the non-legal services are performed and whether the non-legal services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules apply to the provision of non-legal services. Even when those circumstances do not exist, the conduct of a lawyer involved in the provision of non-legal services is subject to those rules and provisions of the State Bar Act that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. (see, e.g., Rule 8.4 and Business and Professions Code §6106).

[2] When non-legal services are provided by a lawyer [or the lawyer's firm] under circumstances that are not distinct from the provision of legal services to clients, the lawyer involved in the provision of non-legal services is subject to the Rules and the State Bar Act. For example, a lawyer must conform to the Rules and the State Bar Act as to all non-legal services the lawyer renders in a dual capacity along

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<sup>3</sup> The suggested comments are not intended to be inclusive of all the comments to the rule. Additional comments may also be considered.



with legal services for a single client or in a single matter, even if the non-legal services might otherwise be performed by non-lawyers. [citations]

[3] A lawyer who assumes a fiduciary relationship in the provision of non-legal services to a person who is not a client of the lawyer or the lawyer's firm and who violates a fiduciary duty in a manner that would justify disciplinary action if there was an attorney-client relationship may be subject to discipline for the misconduct. [citations]

[4] When a lawyer-client relationship exists with a person a lawyer refers to a separate organization owned [or controlled] by the lawyer individually or with others for the provision of non-legal services [or who the lawyer knows or reasonably should know is the recipient of such services], the lawyer must comply with rule 1.8.1.

[5] Under some circumstances the legal and non-legal services rendered in the same matter may be so closely entwined that they cannot be distinguished from each other, and the requirements of paragraph (a) cannot be met. In such a case, the lawyer is responsible for assuring that the lawyer's conduct, and to the extent required by rule 5.3, the conduct of non-lawyers in the firm or in separate organization complies with the rules.

[6] A lawyer who is obligated to accord recipients of non-legal services the full protection of the rules and the State Bar Act must adhere to the requirements of the rules addressing conflicts of interest (rules 1.7 – 1.1), the requirements of rule 1.6 relating to the protection of client confidential information, and lawyer advertising rules (rules 7.1 – 7.5).

## Email Compilation From Drafters

**From:** Kevin Mohr [<mailto:kejmohr@gmail.com>]

**Sent:** Friday, February 14, 2020 4:20 PM

**To:** Difuntorum, Randall; 'mlt1@cwclaw.com'

**Cc:** Tuft, Andrew; McCurdy, Lauren; Lee, Mimi; ATILS

**Subject:** ATILS - [5.7] - Re: ATILS: Non-Legal Services Rule Recommendation

Randy:

I've made what I believe are only stylistic changes for purposes of clarification. See attached redline.

My only concern is that the provision might be too narrow in light of the position that OCTC has taken.  
Thanks,

Kevin

Attached:

ATILS - [5.7] - Proposed Rule 5.7 w Trustee Para - DFT1 (02-13-20)-RD-KEM\_RED.docx (see next page for attached document)

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**From:** Difuntorum, Randall

**Sent:** Thursday, February 13, 2020 3:26 PM

**To:** 'mlt1@cwclaw.com'; [kejmohr@gmail.com](mailto:kejmohr@gmail.com)

**Cc:** Tuft, Andrew; McCurdy, Lauren; Lee, Mimi; ATILS

**Subject:** RE: ATILS: Non-Legal Services Rule Recommendation

In follow-up to my message below, please see the attached revised draft of a proposed new rule 5.7. – Randy D.

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**From:** Difuntorum, Randall

**Sent:** Monday, February 10, 2020 11:07 AM

**To:** 'mlt1@cwclaw.com'; [kejmohr@gmail.com](mailto:kejmohr@gmail.com)

**Cc:** Tuft, Andrew; McCurdy, Lauren; Lee, Mimi; ATILS

**Subject:** RE: ATILS: Non-Legal Services Rule Recommendation

Mark & Kevin:

For the open issue in proposed RPC 5.7, one possible approach might be to change the language of para. (D) to specifically refer to a lawyer acting in the capacity of a “trustee” rather than a lawyer providing any non-legal service that establishes a fiduciary relationship. A comment could be added citing relevant case law (such as the recent State Bar Court decision linked below and the Supreme Court cases cited therein). This would still likely be viewed as a narrowing change in the current disciplinary common law but perhaps it could be a compromise. -Randy D.

*In the Matter of Rita Mae Lingwood* (SB Ct. Rev. Dept., 08/27/19, case #16-O-17302)

[http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Lingwood\\_%20Rita\\_Mae\\_%2016-O-17302\\_%20Opinion\\_and\\_%20Order.pdf](http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Lingwood_%20Rita_Mae_%2016-O-17302_%20Opinion_and_%20Order.pdf)

**Proposed Rule 5.7 Responsibilities Regarding Non-Legal Services**

- (a) A lawyer is subject to these rules and the State Bar Act with respect to the provision of non-legal services, as defined in paragraph (c)(1), if the non-legal services are provided by the lawyer [or the lawyer's law firm\*]:
  - (1) in circumstances that are not distinct from the lawyer's [or the firm's] provision of legal services to clients; or
  - (2) in other circumstances by an organization other than a law firm\* that is (i) owned [controlled] separately by the lawyer [or the lawyer's firm\*] or (ii) owned [controlled] with others unless written disclosure as defined in paragraph (c)(2) is provided to the recipient of the services that (i) the services are not legal services and (ii) that the protections of the lawyer-client relationship do not exist.
- (b) When a lawyer knows\* or reasonably should know\* that a recipient of non-legal services provided pursuant to paragraph (a)(2) does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role with respect to the provision of non-legal services and the lawyer's role as one who represents a client.
- (c) For purposes of this rule:
  - (1) "Non-legal services" means services that might reasonably be performed in conjunction with the practice of law, including services may be lawfully performed by a person who is not authorized to practice law.
  - (2) "Written disclosure" means advance written notice is communicated to the person receiving the services that explains that the services are not legal services and that the protections of a lawyer-client relationship do not exist with respect to the non-legal services.
- (d) Notwithstanding paragraph (a), a lawyer is subject to these rules and the State Bar Act when the lawyer acts as a trustee regardless of whether any beneficiary of the trust is a client of the lawyer.

**Comment**

[1] Regarding the duties of a lawyer when the lawyer acts as the trustee of a trust where none of the trust's beneficiaries is a client of the lawyer, see: *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979; and *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307. See also: *Layton v. State Bar* (1990) 50 Cal.3d 889, 904; and *Schneider v. State Bar* (1987) 43 Cal.3d 784, 796 regarding the duties of lawyer who acts as a trustee and also provides legal services to a beneficiary.

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## Attachment from Prof. Mohr's February 14<sup>th</sup> Email

Excerpt from: [\*In the Matter of Rita Mae Lingwood\*](#) (State Bar Ct. Rev. Dept., 08/27/19, case no. 16-O-17302) at pp. 7 – 8.

### **1. Attorneys acting as trustees must follow rule 3-300**

While a trustee must follow the directives contained in the trust instrument (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 279), the Rules of Professional Conduct impose independent requirements on trustees when they are attorneys. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 796.) Even though a non-attorney can serve as a trustee, an attorney trustee who is also performing legal services in a dual capacity must conform all of the services performed to the Rules of Professional Conduct. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904.) An attorney entering into a business transaction arising from his or her duties as trustee is not exempted from rule 3-300. (*Schneider v. State Bar*, *supra*, 43 Cal.3d at p. 796 [applying former rule 5-101].)

### **2. Belinda and Gerald were Lingwood's "clients" for rule 3-300 purposes**

Beneficiaries of a trust are not "clients" of an attorney trustee, but the attorney trustee may nevertheless be disciplined as if they were her clients because of the attorney's fiduciary relationship with the beneficiaries. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 [non-client treated as client for purposes of discipline where attorney was constructive trustee to non-client constructive beneficiary with respect to funds held in client trust account]; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307 [attorney trustee had fiduciary duties to non-client beneficiaries of trust for disciplinary purposes under rule 3-300].)