

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 10:45 AM
To: Difuntorum, Randall; McCurdy, Lauren
Cc: Robert L. Kehr; Jerome Sapiro; Harry Sondheim; Kevin Mohr G
Subject: RRC - 5.7 [1-310X] - III.H. - 8/28-29/09 Meeting Materials
Attachments: RRC - 1-310X [5-7] - Selected State Variations (Fla, NY, Ohio) - REV (08-02-09).pdf; RRC - 1-310X [5-7] - Compare - Rule & Comment - DFT1 (08-01-09).doc; RRC - 1-310X [5-7] - Compare - Rule & Comment - DFT1 (08-01-09).pdf

Greetings Lauren & Randy:

On Bob's behalf, I've attached the following re Agenda Item III.H. for inclusion in the agenda materials for the August 2009 meeting:

1. Rule 5.7, Rule & Comment Comparison Chart, Draft 1 (8/1/09), in Word and scaled PDF.
2. Copies of Rules from three jurisdictions (Florida, NY and Ohio) that have substantially revised MR 5.7. In PDF.

Bob has recommend that the Commission recommend that a MR 5.7 counterpart not be adopted. His co-drafters have not yet responded to his recommendation.

I have inserted Bob's 8/3/09 cover e-mail to his co-drafters, below. Please let me know if you have any questions. Thanks,

Kevin

8/3/09 Bob Kehr E-mail to Drafters:

I have attached an initial draft of the three-column comparison chart for this Rule and copies of the substantially rewritten 5.7 versions adopted in Florida, Ohio, and New York. This draft recommends that California not adopt Rule 5.7. You will see my explanation.

I have not mentioned in the chart that any attempt to sort out the problems with 5.7 would make it much less likely that the Commission would finish its work within the next 12 months. I would prefer to have a Rule 5.7, and that is why I previously voted to continue the effort when the Rule was killed 3-1/2 years ago, but 5.7 is not necessary. This is a comment Harry made when we didn't face the same time pressures. See Kevin's 12/2/05 minutes at ¶1 (Harry's comment begins at the foot of p.11 of the cumulative notes that Kevin recently sent to us).

What seems to me to be vital is that we not permit an effort to draft a Rule 5.7 to interfere with the Rules that we must have, and must have right.

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<p style="text-align: center;"><u>ABA Model Rule</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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:</p>	<p>(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:</p>	<p>The Commission recommends against adoption of Model Rule 5.7. This Rule is based on the concept that a lawyer in certain situations can be subjected to professional discipline for conduct that arguably occurred outside of a lawyer-client relationship and that arguably involved services that do not amount to the practice of law. This concept is correct, but Rule 5.7 is materially inconsistent with the considerably broader and more client-protective standards found in current California case law.</p> <p>California disciplinary cases have addressed the general subject of Rule 5.7 many times, and going back as long ago as 1933 (see <i>Libarian v. State Bar</i>, 25 Cal.2d 314, 317-18 (1944), relying on <i>Jacobs v. State Bar of California</i>, 219 Cal. 59 (1933)). The many resulting instances of professional discipline demonstrate that Rule 5.7 is not needed in California to provide a basis for professional discipline. The problems with Rule 5.7 include the following:</p> <p>First, California lawyers can be subjected to professional discipline for conduct in a fiduciary capacity, even if there is no confusion about whether the lawyer was acting within the scope of a lawyer-client relationship, while paragraph (a)(1) is limited to situations in which a client might have been misled about whether the lawyer was performing all of the duties owed by lawyers to a client. See, e.g., <i>Kelly v. State Bar</i>, 53 Cal.3d 509, 514-17 (1991) [attorney disciplined for failing to deposit funds in trust account and otherwise failing to meet the trust account rules even though served only as client's agent, and not as the client's lawyer, and in the sale of client's airplane]; <i>Jacops v. State Bar</i>, 219 Cal. 59</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>(1933) [attorney acting as escrow holder disciplined for mishandling of money held by him in that capacity; Cal. State Bar Opn. 1995-141 [concluding that the Rules of Professional Conduct "... apply not only to the lawyer's conduct in rendering legal services, but also to the lawyer's conduct in rendering non-legal services in a fiduciary capacity."]</p> <p>Second, paragraph (a)(1) does not on its face appear directed to the correct question. The issue is not whether a lawyer provides services that are not distinct from the lawyer's provision of legal services but whether the person reasonably believes that the lawyer is providing legal services or is providing other services with the protections of a lawyer-client relationship. Paragraph (a)(1) appears directed to the lawyer who provides a mix of legal and non-legal services, but this is only one of the situations in which a lawyer is subject to discipline under California law. See, e.g., <i>Layton v. State Bar</i>, 50 Cal.3d 889, 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." [attorney disciplined for willful failure to act with diligence when serving in the dual capacity of executor and attorney for an estate even though some of the conduct was in the capacity of executor]. California now disciplines lawyers in circumstances that don't involve this mix of legal and non-legal services. See, e.g., <i>Crawford v. State Bar</i>, 54 Cal.2d 659, 668 (1960), in which the Court said: "People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel." 54 Cal.2d at 667-68 [attorney disciplined for forming a partnership and sharing profits</p>

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		<p>with a disbarred lawyer who was deemed to be practicing law, although not a lawyer, because he provided title, brokerage, and other services in a setting that suggested he was practicing law, and that appearance was not overcome by the fact that some of the acts of the disbarred lawyer "...might lawfully have been performed by title companies, insurance companies, brokers, and other laymen...." 54 Cal.2d at 667].</p> <p>Third, paragraph (a)(2) includes within the Rule any services provided by "an entity controlled by the lawyer individually or with others ..." unless the lawyer takes reasonable measures to assure that the person receiving the services knows that the services are not legal services and are provided without the protections of the lawyer-client relationship. This is both over-inclusive and under-inclusive. It is over-inclusive because it would subject a lawyer to discipline even if the person did not know that the entity is controlled by the lawyer (and without that knowledge the person could not be misled by the lawyer about whether legal services were being provided, or other services were being provided with the protections of a lawyer-client relationship). It is under-inclusive because, when the person is reasonably confused about whether the entity is providing legal services, or about whether it provides services with the protections of a lawyer-client relationship, the question of whether the lawyer controls the entity is irrelevant (it is the person's knowledge of the lawyer's involvement in the entity and the resulting confusion that is the proper basis for professional discipline).</p> <p>Fourth, there is nothing in Rule 5.7 that addresses the closely related situation in which a lawyer is subjected to professional discipline under Bus. & Prof. Code § 6106 for acts of moral turpitude outside of the practice of law. See, e.g., <i>Segretti v. State</i></p>

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		<p><i>Bar</i>, 15 Cal.3d 878 (1976). The moral turpitude cases are discussed at some length at 1 Witkin, Cal. Proc., Attorneys §568 (4th ed. 1997).</p> <p>After a good deal of effort, the Commission has concluded that the range of potential discipline does not lend itself to the kind of brief, declarative drafting required of a disciplinary Rule. Its attempt to encompass all pertinent points in a revised Rule so far has led to drafting that does not advance the current state of California law.</p> <p>Rule 5.7 has caused substantial difficulties in other jurisdictions. At least 12 jurisdictions have rejected Rule 5.7 entirely. These include Connecticut, Hawaii, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Jersey, Oregon, Texas, Virginia, and Wisconsin. In addition, at least five jurisdictions have issued substantially rewritten version of the Rule. These include Arizona, Florida, New York, Ohio, and Pennsylvania.</p>
<p>(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or</p>	<p>(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or</p>	

<p align="center"><u>ABA Model Rule</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 5.7 Responsibilities Regarding Law-Related Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(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.</p>	
<p>(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.</p>	<p>(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.</p>	

<p align="center"><u>ABA Model Rule</u> Rule 5.7 Responsibilities Regarding Law-Related Services Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.7 Responsibilities Regarding Law-Related Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	

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<p>[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.</p>	<p>[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.</p>	

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<p>[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.</p>	<p>[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.</p>	

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<p>[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.</p>	<p>[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.</p>	
<p>[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).</p>	<p>[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).</p>	

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<p>[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.</p>	<p>[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.</p>	
<p>[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.</p>	<p>[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.</p>	

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<p>[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.</p>	<p>[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.</p>	
<p>[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.</p>	<p>[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.</p>	

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<p>[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.</p>	<p>[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.</p>	
<p>[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).</p>	<p>[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).</p>	

RULE 4-5.7 RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) Services Not Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules Regulating The Florida Bar with respect to the provision of both legal and nonlegal services.

(b) Services Distinct From Legal Services. A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) Services by Nonlegal Entity. A lawyer who is an owner, controlling party, employee, agent, or otherwise is affiliated with an entity providing nonlegal services to a recipient is subject to the Rules Regulating The Florida Bar with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Effect of Disclosure of Nature of Service. Subdivision (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient, preferably in writing, that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

Comment

For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. A broad range of economic and other interests of clients may be served by lawyers

participating in the delivery of these services. In recent years, however, there has been significant debate about the role the rules of professional conduct should play in regulating the degree and manner in which a lawyer participates in the delivery of nonlegal services. The ABA, for example, adopted, repealed, and then adopted a different version of ABA Model Rule 5.7. In the course of this debate, several ABA sections offered competing versions of ABA Model Rule 5.7.

One approach to the issue of nonlegal services is to try to substantively limit the type of nonlegal services a lawyer may provide to a recipient or the manner in which the services are provided. A competing approach does not try to substantively limit the lawyer's provision of nonlegal services, but instead attempts to clarify the conduct to which the Rules Regulating The Florida Bar apply and to avoid misunderstanding on the part of the recipient of the nonlegal services. This rule adopts the latter approach.

The potential for misunderstanding

Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal 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 nonlegal services when that may not be the case. The risk of confusion is acute especially when the lawyer renders both types of services with respect to the same matter.

Providing nonlegal services that are not distinct from legal services

Under some circumstances, the legal and nonlegal services may be

so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship applies is likely to be unavoidable. Therefore, this rule requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules Regulating The Florida Bar.

In such a case, a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required elsewhere in these Rules Regulating The Florida Bar, that of nonlawyer employees comply in all respects with the Rules Regulating The Florida Bar. When a lawyer is obliged to accord the recipients of such nonlegal services the protection of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules Regulating The Florida Bar addressing conflict of interest and to scrupulously adhere to the requirements of the rule relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with the Rules Regulating The Florida Bar dealing with advertising and solicitation.

Subdivision (a) of this rule applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding misunderstanding when a lawyer directly provides nonlegal services that are distinct from legal services

Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

Where there is such a risk of misunderstanding, this rule requires that the lawyer providing the nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by other provisions of this rule.

Avoiding misunderstanding when a lawyer is indirectly involved in the provision of nonlegal services

Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party, or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, this rule requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules Regulating The Florida Bar, unless exempted by another provision of this rule.

Avoiding the application of subdivisions (b) and (c)

Subdivisions (b) and (c) specify that the Rules Regulating The Florida Bar apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules Regulating The Florida Bar nor subdivisions (b) or (c) will apply, however, if pursuant to subdivision (d), the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, this rule is analogous to the rule regarding respect for rights of third persons.

In taking the reasonable measures referred to in subdivision (d), the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in

writing.

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 nonlegal services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

The relationship between this rule and other Rules Regulating The Florida Bar

Even before this rule was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules Regulating The Florida Bar that apply generally. For example, another provision of the Rules Regulating The Florida Bar makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with the rule regulating business transactions with a client. Nothing in this rule (Responsibilities Regarding Nonlegal Services) is intended to suspend the effect of any otherwise applicable Rules Regulating The Florida Bar, such as the rules on personal conflicts of interest, on business transactions with clients, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In addition to the Rules Regulating The Florida Bar, principles of law external to the rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.

[Revised: 08-01-2006]

**RULE 5.7:
RESPONSIBILITIES REGARDING
NONLEGAL SERVICES**

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Ohio Rules of Professional Conduct with respect to the provision of law-related services, as defined in division (e) of this rule, if the law-related services are provided in either of the following circumstances:

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

(2) in other circumstances by an entity controlled or owned by the lawyer individually or with others, unless the lawyer takes *reasonable* measures to ensure 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) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business. A lawyer who controls or owns an interest in a business that provides law-related services shall disclose the interest to a customer of that business, and the fact that the customer may obtain legal services elsewhere, before performing legal services for the customer.

(c) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require the lawyer's client to agree to use that business as a condition of the engagement for legal services. A lawyer who controls or owns an interest in a business that provides a law-related service shall disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, before providing the law-related services to the client.

(d) Limitations or obligations imposed by this rule on a lawyer shall apply to both of the following:

(1) every lawyer in a *firm* who *knows* that another lawyer in his or her *firm* controls or owns an interest in a business that provides a law-related service;

(2) every lawyer in a *firm* that controls or owns an interest in a business that provides a law-related service.

(e) The term "law-related services" denotes services that might *reasonably* be performed in conjunction with 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, sometimes referred to as “ancillary business,” 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 Ohio 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 Ohio Rules of Professional Conduct as provided in division (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 Ohio Rules of Professional Conduct apply to the lawyer as provided in division (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 or owns an interest in the entity, 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 Ohio 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 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 division (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Ohio Rules of Professional Conduct, the lawyer should communicate to the

person receiving the law-related services, in a manner sufficient to ensure 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.

[8] A lawyer should take special care to keep separate the provision of law-related and legal services 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 division (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 Ohio 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 to 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)], and 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 to 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 Ohio 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.

[12] Division (d) makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer knows that another lawyer in the firm controls or owns an interest in a business that provides law-related services, and every lawyer in a firm that controls or owns an interest in a business that provides law-related services.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility contains no provision analogous to Rule 5.7. However, the rule is consistent with Advisory Opinion No. 94-7 of the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.7(a)(2) is expanded to include a lawyer who owns an interest in an entity, in addition to a lawyer who controls an entity.

Added to Rule 5.7 are divisions (b) and (c), which contain reciprocal prohibitions and disclosures when a lawyer controls or owns an interest in a business that provides law-related services. Specifically, division (b) prohibits a lawyer who controls or owns an interest in a business that provides a law-related service from requiring customers of the business to agree to legal representation by the lawyer as a condition of engagement of the law-related services. Additionally, prior to performing legal services for a customer of a business that provides law-related services, division (b) requires the lawyer to notify the customer that the customer may obtain legal services elsewhere.

Conversely, division (c) prohibits a lawyer who controls or owns an interest in a business that provides law-related services from requiring a client to use the services of the law-related business as a condition of the engagement for legal services. Additionally, a lawyer who controls or owns an interest in a business that provides law-related services must disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, prior to providing the law-related services to the client.

Rule 5.7 also includes a new division (d), which makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to (1) all lawyers in a lawyer's firm who know about the lawyer's interest in a law-related business, and (2) all lawyers who work in a firm that controls or owns an interest in a business that provides a law-related service.

Model Rule 5.7(b) has been redesignated as division (e) with no substantive changes.

Table of Contents

March 1, 2005 Kehr Memo to RRC:.....	1
<i>ATTACHMENT 1. Florida Rule 4-5.7</i>	6
<i>ATTACHMENT 2. Jerry Sapiro's e-mail dated 3/1/05</i>	7
<i>ATTACHMENT 3. Bob Kehr's Reply to Attachment 2 (3/1/05 Sapiro E-mail)</i>	9
May 10, 2005 Kehr Memo to RRC:.....	10
<i>PROPOSED RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED AND FIDUCIARY SERVICES</i>	13
June 5, 2005 Lamport E-mail to RRC List:	18
April 22, 2005 E-mail from Lauren McCurdy to RRC:.....	20
July 15, 2005 Tuft E-mail to RRC List:.....	20
July 16, 2005 Voogd e-mail to RRC List:	21
October 7, 2005 Kehr Memo to RRC:.....	21
<i>PROPOSED RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED AND FIDUCIARY SERVICES</i>	25
October 31, 2005 KEM E-mail to Drafting Team:	29
November 17, 2005 SeLegue E-mail to Drafting Team:.....	31
November 29, 2005 Difuntorum E-mail to Sondheim & KEM:	33
July 29, 2009 Kehr E-mail to KEM, cc Drafters (Sapiro), Chair & Difuntorum:.....	34
July 30, 2009 KEM E-mail to Drafters, cc Chair & Staff:.....	34
July 30, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:.....	35
August 3, 2009 Kehr E-mail to Sapiro, cc Sondheim, Difuntorum & KEM:.....	35
August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:.....	35
August 24, 2009 Tuft E-mail to RRC List:	36

July 29, 2009 Kehr E-mail to KEM, cc Drafters (Sapiro), Chair & Difuntorum:

When you can, I would appreciate your providing to me a Word version of the final draft of this Rule, the one that was killed by the Commission, and at least the meeting notes on that final discussion.

July 30, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the following:

1. Draft 3.1 (12/1/05), Annotated. In Word. See note 1, below.
2. Draft 3.1 (12/1/05), Clean. In Word. See note 1, below.
3. My cumulative notes for the Rule. In PDF.
4. E-mail compilation for the Rule. In Word.
5. A clean copy of MR 5.7, in Word.

Notes/Comments:

1. The draft rule I've attached is not exactly the last one you circulated, but comports w/ your preferences. First, I flipped the first two paragraphs (general rule and definition), and lettered the general rule. Second, I made the subheadings and substantive part of each paragraph a single paragraph. I had made these suggestion when you circulated an earlier draft and you agreed w/ them. However, you were unable to implement them because the computer file was not cooperative. I remedied that by, third, reformatted the file you had circulated by removing all formatting and then reformatting the file w/ underlines & italics, and adding the footnotes. The reason you had a problem w/ formatting is because the file had had been modified using DeltaView, which is a program that Sean's firm used for file comparisons (Sean had been a drafter back in 2005). Although DeltaView did a better job than Word of comparing files, it also inserts a lot of funky formatting code that can make the file unresponsive to simple formatting requests. Other formatting problems may have arisen because your firm switched from WP to Word in 2005 (well, at least your earlier memos were all in WP and you last memo was in Word).

a. This is more than you need to know, but I wanted to make sure the recipients of this e-mail understood why the Rule draft I've attached differs somewhat from the Rule draft (#3, dated 10/31/05) that I inserted in my notes for the 12/2/05 meeting (see page 11 of my attached notes). I put together the re-formatted draft just before the 12/2/05 meeting but probably did not send it to you in light of the fact the Commission voted not to pursue Rule 5.7 at that meeting. Fortunately, however, I followed the core Sondheim principle: Never throw out anything.

2. The notes are in PDF. If you would like them in Word, let me know and I'll convert my WP file.

**RRC – Rule 5.7 (1-310X)
E-mails, etc. – Revised (8/24/2009)**

3. The e-mail compilation contains the three somewhat lengthy memos you wrote in 2005 concerning the Rule (3/1/05, 5/10/05, 10/7/05). These should also be of some help in reminding you why you implemented the changes you did. You also inserted the earlier drafts (1 and 2) at the end of the May and October memos.

4. One final note. You also sent a memo on 10/31/05, but that memo only contained draft 3 of the Rule, the proposed final draft. This is the draft I used to create Draft 3.1, which I've attached to this e-mail. I did not include that memo in the e-mail compilation or attach it to this e-mail. If you would like a copy of draft 3, please let me know.

If you have any questions, please ask.

July 30, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

Thank you for this. By the way, I spent some time last night updating your chart on Rule 5.7 adoptions. There have been several changes since you did the chart 4-1/2 years ago. Time permitting, I will give some explanation of developments to the Commission.

August 3, 2009 Kehr E-mail to Sapiro, cc Sondheim, Difuntorum & KEM:

I have attached an initial draft of the three-column comparison chart for this Rule and copies of the substantially rewritten 5.7 versions adopted in Florida, Ohio, and New York. This draft recommends that California not adopt Rule 5.7. You will see my explanation.

I have not mentioned in the chart that any attempt to sort out the problems with 5.7 would make it much less likely that the Commission would finish its work within the next 12 months. I would prefer to have a Rule 5.7, and that is why I previously voted to continue the effort when the Rule was killed 3-1/2 years ago, but 5.7 is not necessary. This is a comment Harry made when we didn't face the same time pressures. See Kevin's 12/2/05 minutes at ¶1 (Harry's comment begins at the foot of p.11 of the cumulative notes that Kevin recently sent to us).

What seems to me to be vital is that we not permit an effort to draft a Rule 5.7 to interfere with the Rules that we must have, and must have right.

August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

On Bob's behalf, I've attached the following re Agenda Item III.H. for inclusion in the agenda materials for the August 2009 meeting:

1. Rule 5.7, Rule & Comment Comparison Chart, Draft 1 (8/1/09), in Word and scaled PDF.
2. Copies of Rules from three jurisdictions (Florida, NY and Ohio) that have substantially revised MR 5.7. In PDF.

Bob has recommend that the Commission recommend that a MR 5.7 counterpart not be adopted. His co-drafters have not yet responded to his recommendation.

**RRC – Rule 5.7 (1-310X)
E-mails, etc. – Revised (8/24/2009)**

I have inserted Bob's 8/3/09 cover e-mail to his co-drafters, below. Please let me know if you have any questions.

August 24, 2009 Tuft E-mail to RRC List:

1. I disagree with the proposed explanation recommending against adoption of rule 5.7. "Law-related services" are services that are reasonably performed in conjunction with and are related to the provision of legal services and, therefore, need not occur outside the client-lawyer relationship. Rule 5.7 was amended in 2002 to make it clear that the rule does not apply simply when the services are offered through a separate entity.
2. I recommend we consider including a version of Rule 5.7 now that a course has been chartered to hew more closely the Model Rules. Also, the rules we proposed should be forward thinking and not look back to cases decided 60 and 70 years ago. According to Gillers and Simon, many law firms today own, operate or are otherwise affiliated with ancillary businesses. According to Gillers, a 2003 survey by Hildebrandt International reported that law firms offered more than 70 separate lines of law-related businesses, the most common of which are 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. To these I would add ADR, litigation support services, financial and other transactional services. These types of law-related services are prevalent in California and are increasing. There is much discussion today on ways law firms are restructuring. The impact of technology and globalization on the way law is practiced has been the focus of several recent symposiums at Georgetown and the ABA. The ABA recently launched Ethics 20/20 to studying these issues and make recommendations on changes in the Model Rules, with particular emphasis on the "5 series."
3. There is considerable confusion among lawyers and the public how the rules interact with law related services, particularly where the services are offered by a "law firm." COPRAC 141, which Stan and I co-authored 15 years ago, points up many of the issues but is probably outdated. I realize less than half of the states have adopted rule 5.7, and that may be a reason for not including the rule in California, but the decision not to have the rule should be revisited and a proposal rule represented to the Commission for a vote.