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Doing Business: RPC 5.7 and "Law-Related Services"

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Among the developments in law practice over the past quarter century has been the advent of businesses owned or controlled by law firms that offer non-legal services to both law firm clients and others. The services vary widely and range from large firms having lobbying affiliates to solos operating a law practice and a real estate brokerage under the same roof. The economics also vary widely—in some cases aiming to increase overall revenue by offering a blend of services related to the firm's core legal practice and in others combining diverse services with the goal of providing a combined income that the separate areas would not generate standing alone.

RPC 5.7 addresses "law-related services," which are defined as "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."[1] Although the ABA Model Rule on which the Washington RPC is based has generated much scholarly commentary, it is comparatively "unplumbed" by either ethics opinions or court decisions. In fact, as of this writing, only two WSBA advisory opinions have cited the rule and no Washington appellate decision has touched on it.[2]

In this column, we'll focus on the risk management aspects of the rule for firms that are thinking of expanding into an associated business. We'll first briefly discuss the history and structure of the rule for context and then turn to some of the sharper edges of the rule in practice.

History

The ABA Model Rule had an unusual initial trajectory. It was not part of the original ABA Model Rules adopted in 1983.[3] Rather, as firms began to explore what were then called "ancillary" services later in that decade, the ABA created a special committee to examine whether the rules should be amended to address this development.[4] After dueling proposals and much debate, the ABA in 1991 narrowly adopted a predecessor version of the current rule.[5] That version, however, was not adopted by any state and was repealed the following year.[6] The ABA adopted a replacement version in 1994 that was then amended in 2002 as a part of the broader "Ethics 2000" review of the Model Rules.[7]

Washington, in turn, adopted RPC 5.7 in 2006 in a package of amendments that updated the Washington RPCs in light of the Ethics 2000 changes to the ABA Model Rules.[8] Washington's version is patterned directly on the corresponding ABA Model Rule. The report of the WSBA special committee that developed what were known as the "Ethics 2003" amendments noted that

"[t]he Committee's recommendation to adopt proposed Rule 5.7 was uncontroversial."[9] Since then, the text of the Washington rule has remained the same and the accompanying comments were only amended in 2015 to reference LLLTs.[10]

Structure

RPC 5.7 addresses three broad questions:

- *What are "law-related services"?*

RPC 5.7(b) sets the outer boundary of the rule by limiting the definition of "law-related services" to those "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services[.]" Activities that have no connection to a lawyer's legal practice, therefore, do not fall within the rule. *Bauer v. Pennsylvania State Board of Auctioneer Examiners*, 154 A.3d 899, 905 (Pa. Commw. Ct. 2017), for example, concluded that a lawyer's side business as a toy train auctioneer was not a "law-related service." By contrast, Comment 9 to RPC 5.7 includes a list of services that ordinarily fall within the rule: "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." It is important

to note, however, that this list is not exclusive and whether a particular service is considered "law-related" may ultimately turn on its relationship to the lawyer-owner. Vermont Ethics Opinion 2011-1 (2011), for example, concluded that an on-line data storage company owned by a lawyer was a "law-related service" because it was oriented toward organizing and saving personal information relevant to the lawyer's estate planning practice.

- *Does it extend to separate entities?*

Under Comment 1 to RPC 5.7, "law-related services" include both those provided by a lawyer or law firm directly and to any separate organization that the lawyer or firm owns or controls.

- *When do the RPCs apply?*

RPC 5.7(a) applies *all* of the RPCs to "law-related services" if they are provided:

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

On the former, New York State Bar Ethics Opinion 1135 (2017), for example, found that the RPCs would apply to a lawyer-CPA who planned to offer both services as an integrated package. On the latter, New York State Bar Ethics Opinion 938 (2012), by contrast, concluded that the RPCs would not apply to a separate claims handling service owned by a law firm that planned to use a written disclaimer advising customers that the services involved were not legal services.

Comment 5 to RPC 5.7 notes that regardless of the circumstances, RPC 1.8(a)—the "business transaction rule"—always applies if the customer of the law-related service is also a client of the lawyer or law firm involved. In *In re Spencer*, 330 P.3d 538 (Or. 2014), for example, a lawyer-realtor was disciplined under Oregon's version of RPC 1.8(a) for acting as broker in a real estate transaction for a legal client without an appropriate conflict waiver.[11]

Sharper Edges

Difficult consequences can follow when law firms and their law-related service providers fail to maintain adequate "separation" between the two or don't integrate their conflict systems.[12]

Inadequate "Separation." In most instances, a primary objective with a related service is to structure the business to avoid the full application of the

RPCs. It is critical, therefore, to maintain adequate “separation” between the law firm and the law-related service provider—typically through a combination of physical separation of facilities and personnel and the use of disclaimers.

The practical consequences of failing to maintain adequate “separation” are twofold.

First, the resulting application of all of the RPCs may render key portions of a business plan unenforceable. In *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014), the Supreme Court observed: “We have previously and repeatedly held that violations of the RPCs . . . in the formation of a contract may render that contract unenforceable as violative of public policy.” Consulting contracts in many industries, for example, contain provisions limiting liability to the cost of the services provided. That kind of clause, however, is generally prohibited by RPC 1.8(h)(1).

Second, if the law-related service provider is found to be functionally indistinguishable from its law firm owner, then the provider may be subject to a broader spectrum of civil damage exposure. In *Metro Sales, Inc. v. Core Consulting Group, LLC*, 275 F. Supp.3d 1023 (D. Minn. 2017), for example, a customer of a law-related service pursued a claim for breach of fiduciary duty against the provider—arguing that a disclaimer of legal services was inadequate.

The court concluded that dueling expert opinions on that point created a fact issue requiring jury resolution.

Conflicts. Integrating the conflict systems between the law-related service and the law firm is equally critical.

As noted earlier, the "business transaction rule"—RPC 1.8(a)—applies whenever a customer of the law-related service is a client of the law firm. Beyond lawyer discipline, doing business with law firm clients may—depending on the carrier involved—trigger exclusions from legal malpractice insurance coverage. If the law-related service and the legal work occur in the same matter without an accompanying waiver, then at least the "law side" may also be subject to a fee disgorgement claim for breach of fiduciary duty. The lawyer in *Spencer*, for example, was also ordered to disgorge his legal fee because the real estate brokerage transaction occurred in the course of representing the client involved.[13] A law firm and its law-related service provider, therefore, need to integrate their conflict systems so that they will know whether a prospective customer is also a law firm client and, if they decide to proceed, can obtain an appropriate waiver.

Similarly, integrating conflict systems should alert—and hopefully prevent—a law firm handling a matter for a client from being on the other side of

a law-related service customer without first obtaining appropriate waivers. In *United States ex. rel. Luke v. HealthSouth Corporation*, 2017 WL 5346385 (D. Nev. Nov. 10, 2017) (unpublished), for example, a law firm was disqualified from representing a plaintiff against a defendant that was a customer of the law firm's lobbying affiliate. The court in *Luke* treated the conflict as a multiple-client conflict under Nevada's version of RPC 1.7(a)(1). Even if it had not, the fact that a law firm is deriving income from a litigation opponent would ordinarily be the kind of information that a law firm would want to disclose to its client—and obtain a waiver—under RPC 1.7(a)(2), which governs "material limitation" conflicts.

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[1] RPC 5.7(b). LLLT RPC 5.7 addresses this topic within the context of LLLT practice.

[2] *See* WSBA Advisory Ops. 1723 (1997) and 2162 (2007).

[3] *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* (2013) (ABA Legislative History) at 671 (overall history of the rule); *see also* Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be "Non-Lawyers,"* 30 Geo. J. Legal Ethics 45, 50-56 (2017) (including a summary of the history of the rule).

[4] Dennis J. Block, Irwin H. Warren and George F. Meierhofer, *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 Geo. J. Legal Ethics 739 (1992) (focusing on the economic forces in the late 1980s that gave rise to the initial version of the rule).

[5] ABA Legislative History, *supra*, at 671-688.

[6] *Id*.

[7] *Id*. at 699-704.

[8] *See generally* Thomas R. Andrews, Robert H. Aronson, Mark J. Fucile and Arthur J. Lachman, *The Law of Lawyering in Washington* (2012) at 3-2 to 3-3 (describing the process).

[9] Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct (2004) at 62 (on file with author).

[10] Comment 12 addressing LLLTs was added in 2015.

[11] Although Oregon has not adopted ABA Model Rule 5.7, the Oregon Supreme Court described the lawyer's real estate brokerage business as "ancillary" to his law practice. *Id*. at 542.

[12] This is not intended as an exhaustive catalog of risks. Depending on the circumstances, others include assisting in the unauthorized practice of law (*see, e.g.*, *Sneed v. Board of Professional Responsibility of Supreme Court*, 301 S.W.3d 603 (Tenn. 2010)), loss of privilege (*see, e.g., SEC v. Alderson*, 390 F. Supp.3d 470 (S.D.N.Y. 2019)), or marketing-related issues (*see* RPC 7.1, *et seq*.)

[13] *See In re Smith-Canfield*, 2011 WL 1883833 (Bankr. D. Or. May 17, 2011) (unpublished).