

Rule 5.7: Responsibilities regarding Law-Related Services

1. Current Kentucky Rule with Official Comments:

The current Kentucky Rules of Professional Conduct do not have a Rule 5.7

2. Proposed Kentucky Rule with Official Comments:

The Committee does not recommend adopting MR 5.7 Responsibilities regarding Law-Related Services.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The Committee does not recommend adoption of MR 5.7 Responsibilities regarding Law-Related Services. This Rule covers what is more commonly referred to as Multidisciplinary Practice (MDP). The KBA appointed a special committee to study the desirability of adopting a Rule covering MDP in 2000. That committee unanimously recommended against permitting MDP in Kentucky. This Committee is unaware of any developments concerning the issues surrounding MDP that would change that recommendation and sees no reason to revisit this controversial issue.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

Not applicable. MR 5.7 is set forth below for the information of those reviewing this report:

Rule 5.7: Responsibilities regarding Law-Related Services

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

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

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

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

Comment

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

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

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

apply.

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

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

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

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

[8] Regardless of the sophistication of potential recipients of law related services, a lawyer should take special care to keep separate the provision of law related and legal services in order to minimize the risk that the recipient will assume that the law related services are legal services. The risk of such confusion is especially acute when the lawyer renders both

types of services with respect to the same matter. Under some circumstances the legal and law related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

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

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

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

Committee proposal recommending against 5.7 adopted without change. Order 2009-05, eff 7-15-09.