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ETHICAL RESPONSIBILITIES OF LAWYERS WHO ENGAGE IN OTHER BUSINESSES *

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I. Introduction

In the increasingly complex and interrelated economy that lawyers face, it has become common for lawyers in private practice to engage in another business in addition to providing legal services in a firm or solo practice.

In this opinion, the Colorado Bar Association Ethics Committee (Committee) considers the ethical responsibilities of a lawyer engaged in private practice and in another business. The Committee specifically evaluates the ethical responsibilities owed by a lawyer who is engaged in a business that provides law-related services. In such a case, the lawyer generally is subject to the Rules of Professional Conduct (Colo. RPC or the Rules) in their entirety unless the lawyer takes reasonable measures to keep the law practice and the law-related business separate. This opinion does not address the ethical obligations of in-house lawyers engaged in another business.

II. Syllabus

The starting point for analyzing the ethical considerations applicable to a lawyer engaged in another business is to determine whether the other business is “law-related,” which is a term of art. If the business is not law-related, such as operating a dry cleaning store or a family restaurant, then a lawyer still has ethical responsibilities, but they are limited to those that apply to all lawyers at all times, including particularly the prohibition against conduct involving dishonesty, fraud, deceit or misrepresentation. Colo. RPC 5.7, cmts. [2], [11]. If, however, the lawyer’s other business provides a law-related service, such as title insurance, accounting or dispute mediation services, then the lawyer may have a number of additional ethical responsibilities. This opinion includes a diagram that demonstrates the analytical path for considering these additional ethical responsibilities.

A lawyer who practices law and is engaged in another business always has ethical responsibilities with respect to the legal services the lawyer provides. For example, the lawyer has a duty to maintain the confidentiality of client information and segregate that information from the lawyer's other business (Colo. RPC 1.6), and to avoid conflicts of interest if there is a significant risk that the lawyer's personal interests in the business will materially limit the lawyer's ability to represent a client (Colo. RPC 1.7(a)).

Rule 5.7 addresses the ethical responsibilities potentially applicable to a lawyer engaged in a law-related business. Generally stated, the Rules apply in their entirety to the lawyer's provision of law-related services *unless* the lawyer takes certain precautions. First, the lawyer must provide the law-related services in a way that readily distinguishes such law-related services from the lawyer's legal services. Colo. RPC 5.7(a)(1). Second, the lawyer must 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." Colo. RPC 5.7(a)(2). These precautions are required whether the lawyer provides the law-related services directly or through a separate entity that the lawyer controls.

Utilizing the framework of Rule 5.7, this opinion discusses specific issues relating to a lawyer's provision of law-related services, including what services constitute "law-related services" and what reasonable measures a lawyer should take to avoid confusion about whether a lawyer-client relationship exists when a lawyer is providing law-related services. This opinion also discusses the potential applicability of Rule 5.7 in the context of lawyers who provide mediation, arbitration, or expert witness services.

Finally, this opinion examines the substantial ethical responsibilities applicable to the lawyer when he or she provides law-related services in circumstances that are not distinct from the lawyer's provision of legal services, or where the lawyer has not taken reasonable measures to assure that the recipient of the law-related business services knows that no client-lawyer relationship exists. Generally, most of the Rules apply to a lawyer in such a circumstance, including those relating to conflicts of interest (Colo. RPC 1.7, 1.8, 1.9, and 1.10); disclosure of confidential information (Colo. RPC 1.6); reasonable fees (Colo. RPC 1.5); sharing legal fees or forming a partnership with nonlawyers (Colo. RPC 5.4(a)—(d)); and lawyer advertising, solicitation, and communication about legal services (Colo. RPC 7.1, 7.2, and 7.3). Although a lawyer's obligations necessarily will depend on the factual setting—whether the law-related services are being provided in a sufficiently distinct manner and whether the lawyer has taken reasonable measures to avoid confusion about whether a client-lawyer relationship exists—any lawyer engaged in a law-related business should take care to follow the strictures of Colo. RPC 5.7(a)(1)–(2).

III. Analysis

A. Analysis of Colo. RPC 5.7

Rule 5.7 provides:

- (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.

Rule 5.7 determines whether the Rules in their entirety will apply to a lawyer when someone receives “law-related services” from the lawyer or from an entity controlled by the lawyer. If the services provided by the lawyer (or an entity controlled by the lawyer) are *not* “law-related,” and are the only services provided, then the only Rules that govern the lawyer’s conduct are those that apply to lawyers regardless of whether they are providing legal services to a client. These include, for example, Colo. RPC 8.4(c), which prohibits conduct involving fraud, dishonesty, deceit, or misrepresentation. *E.g.*, *People v. Rishel*, 50 P.3d 938 (Colo. PDJ July 8, 2002) (lawyer’s dishonest handling of pool of funds used for Colorado Rockies season tickets, unrelated to the provision of legal services, violated Rules 8.4(b) (prohibiting “criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects”), 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), and 1.15(b) (requiring lawyers to deliver and account for funds and property)). A lawyer may be subject to discipline for engaging in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) for purely private conduct. *E.g.*, *In re Foster*, 253 P.3d 1244 (Colo. 2011) (lawyer’s reassertion of argument that judge was biased against lawyer in lawyer’s sixth appeal in his own divorce case). *See Attorney Grievance Comm’n v.*

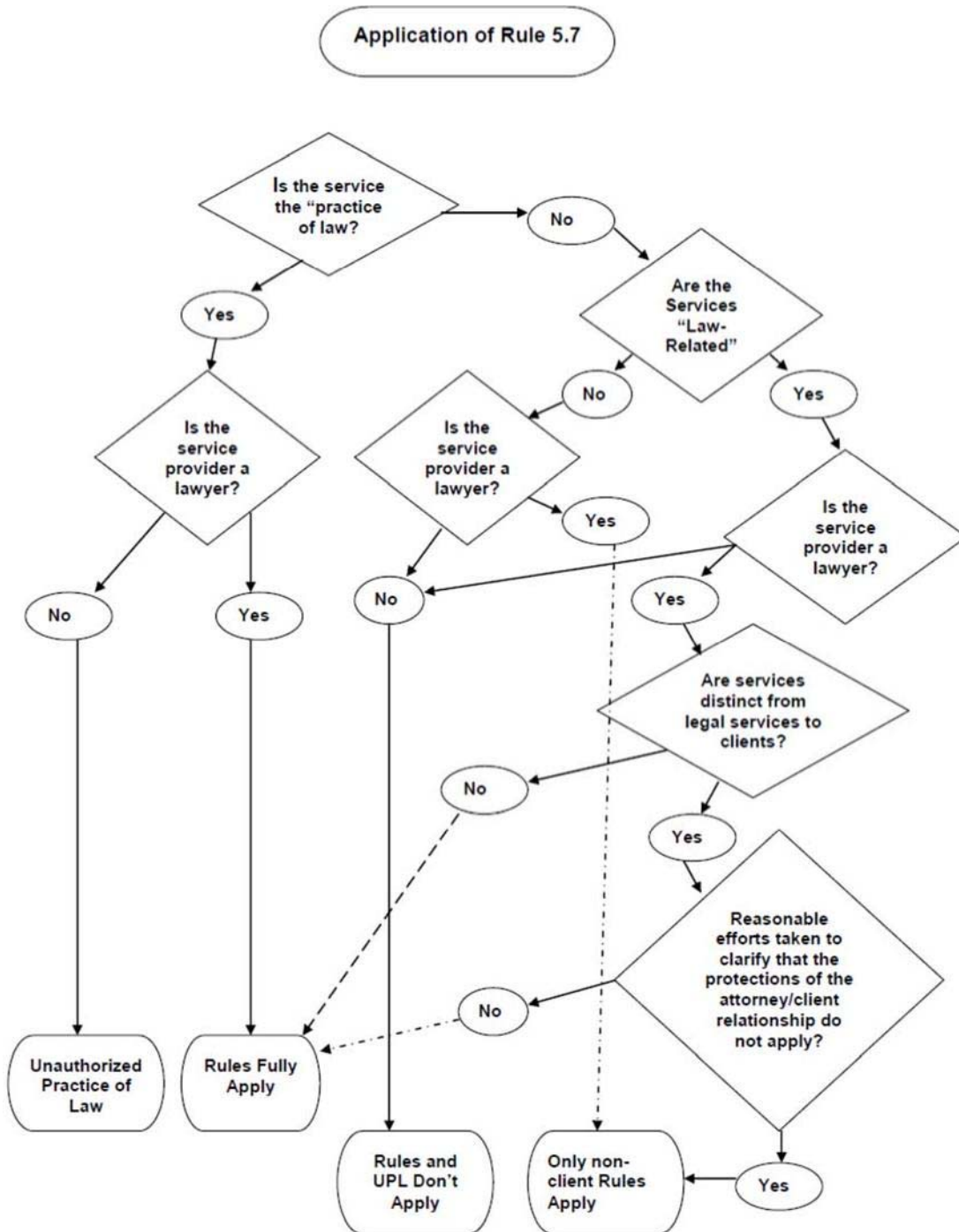
Link, 844 A.2d 1197, 1211-12 (Md. 2004) (“Only when such purely private conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent will that conduct be considered as prejudicing, or being prejudicial to, the administration of justice.”).

If the services provided by the lawyer or an entity he or she controls *are* “law-related,” the Rules will not apply in their entirety to the lawyer’s provision of the law-related services if the lawyer takes (a) steps to distinguish the law-related services from the lawyer’s legal services, and (b) “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.” Colo. RPC 5.7(a).¹

¹ Read literally, Rule 5.7(a)(1) refers to the provision of law-related services by a “lawyer,” while Rule 5.7(a)(2) refers to the provision of law-related services “in other circumstances by an entity controlled by the lawyer individually or with others.” This distinction leads to the inference that subsection (1) is not applicable if the law-related services are provided by an entity controlled by the lawyer, and, conversely, that subsection (2) is applicable only when the law-related services are provided by the lawyer individually or through a law firm. However, Comment [3] to Rule 5.7 indicates that both subsections apply regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls. The “legislative history” of Model Rule 5.7 supports the interpretation in Comment [3]. Ethics 2000 - February 2002 Report, “Reporter’s Explanation of Changes,” available at

http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_57_202.html. The Committee believes that Comment [3] reflects the intent of the rule and interprets it accordingly, such that, in order to avoid the application of the Rules in their entirety to the provision of the law-related services, a lawyer must satisfy each subsection of Rule 5.7(a), regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls.

The following diagram is a useful visual guide to the analytical framework of Rule 5.7:



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1. *Are the business services “law-related”?*

Rule 5.7(b) defines “law-related services” 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.” Comment [9] to Rule 5.7 gives as examples of law-related services “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.” *See, e.g., In re Rost*, 211 P.3d 145, 155 (Kan. 2009) (accounting services and business advice held to be law-related services under same definition). Mediation and arbitration services, discussed separately below, are other examples of law-related services. *E.g.*, N.D. RPC 5.7, cmt. [7] (including “ADR services” among examples of law-related services).

2. *What are “circumstances that are not distinct from the lawyer’s provision of legal services to clients”?*

The Rules will apply in their entirety to the provision of law-related services if the circumstances “are not distinct from the lawyer’s provision of legal services to clients,” as stated in Rule 5.7(a)(1). The comments to Rule 5.7 provide no guidance on when the circumstances surrounding a lawyer’s provision of law-related services are “not distinct from the lawyer’s provision of legal services to clients.”

The Committee concludes that a number of facts tend to show distinctness, including: (1) providing the law-related services from a separate office or facility; (2) using separate advertising, business cards, signage, telephone reception services, internet domain names, websites, and all other forms of communication to and with potential customers, vendors, creditors, service suppliers, and the public at large; (3) the nature of the other services provided, such as mediation; (4) offering the law-related services through a distinct entity with distinct support staff from the entity through which the lawyer practices law; and (5) avoiding the providing of both legal services and law-related services in the same matter. These factors are not exhaustive. A variety of other facts, in appropriate circumstances, may tend to show that a lawyer’s law-related services and legal services are distinct.

Comment [8] to Rule 5.7 states that “[u]nder some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other.” “The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter.” *Id.* In other words, there will be specific occasions when no amount of disclosure and consultation will avoid the application of the entirety of the Rules to the lawyer’s business services. A lawyer’s services when acting as a guardian ad litem may be an example of such circumstances. Indeed, Chief Justice Directive 04-06 states that a lawyer acting as a guardian ad litem for a child or a child’s representative is bound by the Rules, presumably without regard to steps the lawyer might take to distinguish the law-related services from the lawyer’s provision of legal services.

5. *What are “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”?*

In addition to keeping the lawyer’s legal services and law-related businesses distinct from each other, the lawyer must take “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.” Colo. RPC 5.7(a)(2). The comments to Rule 5.7 offer some guidance in this respect. Comment [6] states that a lawyer “should communicate to the person receiving the law-related services . . . 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.” Comment [7] states that the “burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding,” and that the depth of the explanation will vary depending on the sophistication of the consumer of the law-related services.

A Philadelphia ethics opinion states that to ensure that the recipient of the law-related services “understands that the ancillary business services are distinct from legal services, and therefore not subject to the protections of the rules,” the lawyer “must communicate, preferably in writing, to the person receiving the ancillary business services that the services will not be provided under the protections of the client-lawyer relationship.” Phil. Bar Ass’n Prof. Guidance Comm., Formal Op. 2003-16 (2004).

Oklahoma modified a comment to its identical version of Rule 5.7 to offer guidance about the “reasonable measures” a lawyer might take, depending on the facts and circumstances:

- (1) Providing written notice of the lawyer's interest in the entity before providing the law-related services, with written acknowledgment of the notice by the person;
- (2) Keeping the offices of the lawyer and the law-related business physically separate;
- (3) Providing disclaimers in any marketing or advertising; and
- (4) Maintaining separate letterhead, or providing clear notices of the relationship between the lawyer and the entity. Okla. RPC 5.7, cmt [6].

By contrast, in a case in which a lawyer opened a “consulting” business after disciplinary problems forced his early retirement, the Kansas Supreme Court observed: “If an attorney continues to perform the same law-related services, for the same clients, from the same location, with the same staff as was done when those services were not distinct from the attorney's provision of legal services, the burden to show the requisite client understanding that the lawyer-client relationship had ceased would appear to be onerous, at best.” *In re Rost*, 211 P.3d 145, 156 (Kan. 2009).

As the Oklahoma comment to Rule 5.7 notes, what reasonable measures need to be taken to assure client understanding may vary depending on the circumstances. Of course, if the legal services and law-related services are “so closely entwined that they cannot be distinguished from each other,” Colo. RPC 5.7, cmt. [8], there are no measures that a lawyer providing law-related services may take that will relieve the lawyer from being subject to the Rules in their entirety.

6. *When will an entity providing business services be deemed to be “controlled by the lawyer individually or with others”?*

If a lawyer is associated by ownership or otherwise with an entity that provides law-related services that are distinct from the lawyer’s law practice, the lawyer will not be subject to the Rules in their entirety when the entity provides the services unless the entity is “controlled by the lawyer individually or with others.” Colo. RPC 5.7(a)(2). Comment [4] explains that 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.” A Pennsylvania ethics opinion concluded that Rule 5.7 would not apply to a lawyer who, together with his law partners, owned 49% of an insurance agency, where their firm’s involvement in the operation of the agency would be “almost nil.” Pa. Bar. Ass’n Comm. Leg. Ethics and Prof. Resp., Formal Op. 2002-07, “Minority Ownership of Insurance Agency by Law Partners” (2002). *Cf. In re Griffith*, 748 P.2d 86, 115 (Ore. 1987) (notwithstanding other extensive misconduct, where company owned by lawyer and three other people entered into series of loans with clients of lawyer’s law firm, lawyer did not violate rule regulating business transactions with clients because he did not personally enter into business relationships with clients).

7. *Application of Rule 5.7 to arbitration, mediation and expert witness services*

Many lawyers in Colorado provide arbitration and mediation services. The Committee believes that a lawyer’s services as a mediator or arbitrator are law-related services within the meaning of Colo. RPC 5.7.

Rule 2.4 addresses lawyers serving as “third-party neutrals,” including as mediators and arbitrators. Similar to Colo. RPC 5.7, Comment [3] to Rule 2.4(b) recognizes that the “potential for confusion is significant when the parties are unrepresented in the process.” Therefore, Colo. RPC 2.4(b) requires a lawyer serving as a third-party neutral to “inform unrepresented parties that the lawyer is not representing them,” and, if the lawyer knows or reasonably should know the party does not understand the lawyer’s role, to “explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.” Where appropriate, the lawyer’s explanation should include the “inapplicability of the attorney-client evidentiary privilege.” Colo. RPC 2.4, cmt [3].

By definition, a lawyer serving as a third-party neutral who provides the information required by Colo. RPC 2.4(b) also will satisfy Colo. RPC 5.7. The required information can be provided in the written contract for mediation or arbitration services. Colo. RPC 2.4(b) expressly does not require lawyer-third-party neutrals to inform *represented* parties that such lawyer-third-party neutrals are not acting as the represented parties' lawyer. Likewise, the parties' legal representation by other lawyers in the proceeding will obviate the arbitrator/mediator lawyer's need to take further steps 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." Colo. RPC 5.7(a)(2).

Similarly, many lawyers in Colorado provide services as expert witnesses. There are generally two types of lawyer-experts: testifying expert witnesses and nontestifying consulting experts. As noted in American Bar Association (ABA) Formal Opinion 97-407, a testifying expert is obligated to provide independent, objective testimony. Emphasizing that a testifying expert rarely provides services directly to a client, the ABA opinion concludes that the services of a testifying expert are not law-related services under Model Rule 5.7. ABA Comm. on Ethics and Prof. Resp., Formal Op. 97-407, "Lawyer as Expert Witness or Expert Consultant" (1997). In contrast, the ABA opinion concludes that a consulting expert "occupies the role of co-counsel" and, as such, is subject to all of the Model Rules of Professional Conduct. *Id.*

The Committee believes that whether a lawyer acting as a testifying expert witness or a consulting expert, or both, forms a client-lawyer relationship with either the engaging lawyer or with the client of that lawyer, depends on the facts and circumstances. *See generally* D. Richmond, "Lawyers as Witnesses," 36 N.M. L. Rev. 47, 65-72 (Winter 2006). It is also an issue that requires the application of principles of law, not legal ethics, which the Committee does not address and which lawyers must decide for themselves.

If a lawyer who acts as a testifying or consulting expert, or both, concludes that he or she *in fact* has formed or will form a client-lawyer relationship with either the engaging lawyer or the client of that lawyer, then the Rules in their entirety apply to the expert lawyer, just as they would in any legal representation. In that event, Rule 5.7 is irrelevant.

But, if there is no client-lawyer relationship, then Rule 5.7 is applicable, because the lawyer's services are "law-related." The Committee disagrees with ABA Formal Opinion 97-407 that the services of a lawyer acting as a testifying expert witness are inherently not "law-related." A lawyer-expert may avoid the application of all of the Rules by compliance with Rule 5.7, for example, by clarifying the lawyer's role in a written engagement agreement signed at least by the engaging lawyer and, preferably, also by the engaging lawyer's client. In addition, lawyers with litigation experience are likely to understand the distinction between a lawyer-expert's legal services and his or her expert services, and, at least in the context of a testifying expert, that the protections of the client-lawyer relationship do not exist.

However, communications between lawyers and their consulting experts are generally protected from discovery by rules of civil procedure rather than by the attorney-client privilege. *See* C.R.C.P. 26(b)(4)(B); F.R.C.P. 26(b)(4)(D). A client may not understand the difference. In contrast, communications between lawyers and their testifying experts are generally subject to discovery under Colorado procedural rules. C.R.C.P. 26(b)(4). *But cf.* F.R.C.P. 26(b)(3) and (4) (testifying expert witness subject to discovery except for drafts of expert's report and communications with party's attorney).

Because consulting experts' communications are generally protected from discovery like those of a retained advocate lawyer, and the role of a consulting expert is often similar to that of an advocate lawyer, a client may not understand that the consulting expert's services are not legal services and that the protections of the client-lawyer relationship do not exist. Clients are less likely to fall prey to these misunderstandings in respect to lawyers serving as testifying expert witnesses because their role is so unlike that of the advocate lawyer. These distinctions may blur in the client's mind when a lawyer serves as both a consulting expert and a testifying expert witness in the same case, either in chronological sequence or contemporaneously. Lawyers, in contrast, are unlikely to be confused by the role of a consulting or testifying expert.

B. Significance of Applicability of the Rules to Law-Related Services

1. General background

As noted in a 1972 ABA formal opinion, the applicability of the Rules to a lawyer's provision of business services is a substantial obligation. ABA Comm. on Ethics and Prof. Resp., Formal Op. 328 (1972). It means that the lawyer will be required to treat customers of the law-related business as if they were law firm clients. Comment [10] to Rule 5.7 advises the lawyer to pay particular attention to "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)), as well as Rule 1.6 regarding confidentiality.

But this is not an exclusive listing. The fees and expenses charged by the lawyer or the lawyer's entity for the law-related service must be reasonable, as required by Rule 1.5(a); and other subsections of Rule 1.5 are applicable as well. The lawyer also must comply with various provisions of Rule 5.4, and the lawyer's communications regarding the law-related service, including advertising and solicitation of customers, must comply with Rules 7.1 through 7.3. The application of some of the most significant Rules to the provision of law-related services is discussed below.

2. Colo. RPC 1.5: Fees

When the Colo. RPC are applicable to the services provided by a lawyer's law-related business, Rule 1.5(a) requires the fees of the law-related business to be reasonable. Also, Rule 1.5(b) requires the lawyer to confirm the basis or rate of the fee in writing for all clients whom the lawyer has not "regularly represented." If the fee is contingent on the outcome of the law-related service,

Rule 1.5(c) requires the lawyer to comply with the Rules Governing Contingent Fees, C.R.C.P. Chap. 23.3.

The fees charged for some law-related services—for example, percentage-based commissions—may seem exorbitant when measured by one of the traditional methods of charging legal services, such as hourly or fixed fees. A California ethics opinion addressed an inquiry from a lawyer/real estate broker who proposed to charge his client a brokerage commission if the transaction closed and his normal hourly rate as a lawyer if it did not. The opinion concluded:

[The] fee payable in the circumstance that the transaction is successfully consummated is likely to appear shockingly large when compared to the attorney's normal hourly rate charges. On the other hand, the overall fee arrangement is quite advantageous to the client since the client obtains the services of both an attorney and a broker at no additional cost (indeed, at no cost in most cases where the buyer's and seller's broker split fees payable by the seller). Accordingly, the fee arrangement proposed should not be viewed as objectionable under [the California equivalent of Rule 1.5(a)].

State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct, Formal Op. 1982-69 (1982).

In addition, Rule 1.5(e) prohibits referral fees. It proscribes a lawyer from paying *and receiving* referral fees. CBA Formal Ethics Op. 106, “Referral Fees and Networking Organizations” (1999). When the Rules apply to a lawyer providing business services, the lawyer or the entity he or she controls may not pay or receive referral fees in connection with that business operation. For example, in an informal opinion, the Committee concluded that Colo. RPC 1.5(e) prohibited a lawyer from receiving a fee from a broker-dealer/registered investment advisor for referring clients to it for a “fee-based asset management program.” CBA Ethics Comm. Response to Letter Inquiry, Abstract 96/97-13, *available at* <http://www.cobar.org/index.cfm/ID/20280/subID/2101/CETH/96/97-13/>.

Colo. RPC 1.5(f) requires a lawyer to deposit any advance payment of fees in the lawyer’s trust account until earned. A Tennessee ethics opinion concluded that trust account requirements apply to law-related businesses operated by lawyers, including mediation and arbitration services. Tenn. Sup. Ct. Bd. of Prof. Resp., Formal Op. 94-F-135 (1994). Colo. RPC 1.5(g) prohibits nonrefundable fees or retainers and any agreement that “unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees.” Colo. RPC 1.5(g).

3. *Colo. RPC 1.6: Confidentiality of information*

Colo. RPC 1.6(a) requires a lawyer to maintain the confidentiality of “information relating to the representation.” When the Rules apply to the provision of law-related services, the lawyer will be required to protect information relating to the services provided by the law-related business to the

same extent as the lawyer must protect information relating to the representation of clients. This obligation would extend to (a) segregating information related to law-related services from information related to legal work for the lawyer's clients, (b) preventing access to information related to law-related services by individuals who do not work for the law-related business, and (c) preventing access to information related to the lawyer's legal work for clients by individuals who do not work for the lawyer in the provision of legal services.

With limited exceptions, Rule 1.8(b) prohibits a lawyer from using information protected under Rule 1.6(a) to the disadvantage of a client. Comment [10] to Rule 5.7 specifically mentions Rule 1.8(b) as a rule to heed when the Rules apply to the provision of law-related services.

4. *Colo. RPC 1.7(a)(2): Conflict of interest: current clients*

In relevant part, Rule 1.7(a)(2) states that a lawyer shall not represent a client if there is a "significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." When the Rules apply to the provision of law-related services, a lawyer providing such services will be deemed to "represent" the person receiving those services. Thus, among other considerations, the lawyer must ensure that his or her provision of law-related services is not limited by the lawyer's personal, including pecuniary, interests in providing those services, or by the lawyer's obligations to other clients or other customers of the law-related business.

When the Rules apply to the provision of law-related services, the law firm and the business will be treated as a single law firm for purposes of conflicts of interest. The conflicts of each lawyer will be imputed to all lawyers in the joint enterprise. *Cf.* ABA Comm. on Ethics and Prof. Resp., Formal Op. 90-357, "Use of Designation 'Of Counsel'" (1990) ("The effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications."). When undertaking a new law-related matter or a new legal matter, the lawyer will be required to conduct a check for conflicts of interest that includes all law firm clients as well as all customers of the law-related business, and their respective related and adverse persons.

When a lawyer provides both legal services and law-related services to a client-customer, and if relations sour between the lawyer and the client-customer relative to the law-related services—perhaps because the client-customer is dissatisfied with the services or is not current on its account—the lawyer side of the relationship may suffer. The lawyer's anticipation of such a problem may rise to the level of a "significant risk" that representation of the client will be limited. However, an anticipated or actual limitation on the lawyer's legal representation must be material before it creates a conflict of interest under Rule 1.7(a)(2).

If such a conflict arises, the lawyer must either decline or withdraw from the representation or seek to obtain the client's informed consent² to undertake or continue the representation despite the conflict, if the conflict is consentable under Rule 1.7(b).³

A lawyer may not be able to obtain client consent when he or she provides legal services and law-related services in the same transaction and the customer has agreed to pay a commission for the law-related services. In some jurisdictions, a lawyer representing a party in a real estate transaction may not serve as a real estate broker in the same transaction due to an inherent and irreconcilable conflict between the broker's personal interest in receiving a commission upon consummation of the sale and the lawyer's interest in protecting a client even if it means advising against the sale. *See In re Roth*, 577 A.2d 490 (N.J. 1990); New York State Op. 752 (Feb. 22, 2002); N.Y. Cnty. Lawyers Ass'n Comm. on Prof. Ethics Question No. 685, "Dual Practice: Conflict of Interest" (1991); R.I. Ethics Advisory Panel Op. 96-29 (Nov. 14, 1996). *But see* Wis. Op. E-86-3 (undated) (with client's informed consent, lawyer may receive both legal fee and real estate brokerage fee for services in same transaction).

The Committee believes that in limited circumstances, a lawyer may act as a lawyer and a broker in the same transaction. To do so, however, the lawyer would have to (a) act as lawyer and broker for the same party, (b) reasonably believe that he or she will be able to provide competent and diligent representation to the client, and (c) obtain the client's informed consent, confirmed in writing, consistent with the requirements of Colo. RPC 1.7(b). The lawyer also would have to comply with Rule 1.8(a), discussed below. *See, e.g.,* S.C. Bar Ethics Advisory Op. 95-04 (1995).

5. *Colo. RPC 1.8(a): Business transactions with a client*

As stated above, Colo. RPC 1.8(a) regulates "business transactions" between a lawyer and a client. Comment [5] to Rule 5.7 states: "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)." Rule 1.8(a) will be applicable whether or not

² "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Colo. RPC 1.0(e).

³ (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

the services provided by the lawyer to the client in the other business are law-related services and, thus, whether or not the lawyer is otherwise subject to the Rules.

6. *Colo. RPC 1.8(f): Accepting compensation from a third party*

Rule 1.8(f) prohibits a lawyer from accepting payment for representing a client from anyone other than a client unless “(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6. Comment [10] to Rule 5.7 calls attention to Rule 1.8(f) as a rule that must be considered and followed when the Rules apply to the provision of law-related services.

7. *Colo. RPC 5.4: Professional independence of a lawyer*

Rule 5.4(a) prohibits a lawyer or law firm⁴ from sharing legal fees with a nonlawyer, except, as relevant here, by means of a law firm compensation or retirement plan. When, under the preceding analysis, a lawyer is subject to the Rules in respect to the provision of law-related services, the revenue generated by the business is considered legal fees, and the lawyer may not directly share it with a nonlawyer except through a compensation or retirement plan.

Similarly, Rule 5.4(b) prohibits a lawyer from forming a “partnership” with a nonlawyer “if any of the activities of the partnership consist of the practice of law.” Although the Rules do not define the term “partnership” as used in Rule 5.4(b), other jurisdictions have interpreted the term expansively in this context to include entities in addition to partnerships. Ariz. Op. No. 93-01 (1993) (term “partnership” construed broadly); S.C. Bar Ethics Advisory Op. 93-05 (1993) (“Rule 5.4(b) applies not only to partnerships, but also to other organizations that lawyers are involved in managing.”). Accordingly, if a lawyer is subject to the entirety of the Rules when providing law-related services, the lawyer may not form a partnership with a nonlawyer that includes the provision of law-related services.

Further, Rule 5.4(d) prohibits a nonlawyer from owning an interest in a law firm operated as a “professional company,” as that term is defined in Colorado Rule of Civil Procedure 265(e). When a lawyer is subject to the Colo. RPC in providing law-related services, the law-related business is considered a professional company and, in these circumstances, a lawyer may not permit a nonlawyer to own any part of that business.

8. *Colo. RPC 7.1—7.3: Information about legal services, including advertising and solicitation*

⁴ Rule 1.0(c) defines “law firm” as “denot[ing] a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Although only individual lawyers are subject to professional discipline for Colo. RPC violations, and the Rules generally impose obligations only on individual lawyers, Rule 5.4(a) expressly includes law firms in its prohibition against sharing fees with nonlawyers.

When a lawyer is subject to the Rules with respect to law-related services, communications regarding those law-related services must comply with Rules 7.1, 7.2, and 7.3. *See* Colo. RPC 5.7, cmt. [10] (specifically mentioning the applicability of these Rules). In these circumstances, the Rules treat communications about the law-related business as though they were communications about a lawyer's legal services.

Rule 7.1(a) would prohibit a lawyer providing law-related services from making false and misleading communications, including communications that (a) are misleading because of omitted information, (b) compare the law-related services with the services of other businesses in ways that cannot be substantiated, and (c) are likely to create unjustified expectations about the services provided by the law-related business. Rule 7.1(c) contains proscriptions on the method and appearance of written communications mailed to prospective clients.

Rule 7.2(b) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services," except for reasonable advertising costs and other exceptions not relevant here. In addition to Rule 1.5(e), discussed above, Rule 7.2(b) prohibits a lawyer operating a law-related business from paying referral fees.

Rule 7.3 regulates lawyer solicitation of individual prospective clients. If a lawyer who provides law-related services has not succeeded, under Rule 5.7, in avoiding the application of the Rules to those services, the lawyer will be prohibited from soliciting prospective customers in person, or by telephone or "real-time" electronic contact such as a chat room, unless the prospective client is a lawyer, a family member or someone with whom the lawyer had a "prior professional relationship." *Accord Busby v. JRHBW Realty, Inc.*, Civil No. 2:04-CV-2799-VEH, 2006 WL 5325733 * 7 (N.D. Ala. July 20, 2006). Rule 7.3(c) and (d) will restrict the lawyer's written, recorded, or electronic solicitation activities within thirty days of a related personal injury or death and will require the lawyer to designate such communications as advertising material.

* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).