

Superhuman Ethics: The Ethics of Industry and Issue Lawyering

Providing Law Related Services¹

The Rules of Professional Conduct always apply to lawyers to some degree, though their applicability depends on the lawyer's role. For analytical purposes, the rules can be divided into two basic subsets: (1) the rules that apply to lawyers acting as lawyers and (2) the rules that apply to lawyers in all circumstances. The first set refers to the Rules as a whole and apply when a lawyer is acting inside a more traditional client-lawyer relationship. The second set refers to the basic rules barring misconduct that reflects adversely on fitness to practice law (e.g. dishonesty or fraud) and "apply" always to a lawyer who wishes to retain a license. The difficult and important task for lawyers acting in ambiguous roles is to determine whether they must act in accord with the full Rules or just the basic expectations of fitness.

The first step in making that determination is always to decide whether a traditional client-lawyer relationship exists under applicable law. The step that follows will depend on the state in which the lawyer is working. Thirty-seven states have adopted Model Rule 5.7 (excluding Virginia), which creates an analytic framework for lawyers engaged in non-legal, law-related services.² These services include any related to the law that a non-lawyer could provide. Under Model Rule 5.7, a lawyer will be subject to the full Rules of Professional Conduct whenever providing provides law-related services, unless those services are distinct from legal services and the lawyer has taken reasonable steps to assure that the service recipient understands that no client-relationship has been formed. The key for lawyers in such states is to look at the nature of the services they are providing and determine whether they are legal, law-related, or fully non-legal, and then follow Rule 5.7 accordingly.

Thirteen states (including Virginia) have not yet adopted Rule 5.7.³ In those states, after deciding whether a traditional client-lawyer relationship exists under state law, lawyers must check state case law and ethics opinions to see whether the full Rules have been applied in similar circumstances.

A. Two Levels of Professional Conduct

There are two sets of standards to which a lawyer's professional conduct might be held: (1) the full rules of professional conduct in the applicable jurisdiction; or (2) the basic expectations of

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² See, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html

³ *Id.*

fitness to practice law. The first category includes the full panoply of protections expected in a traditional client-lawyer relationship—confidentiality, scope of representation, etc.—while the second refers to rules that apply to a lawyer no matter the activity the lawyer is engaged in. The American Bar Association Committee on Ethics and Professional Responsibility referred to the latter category of standards when it established in Formal Opinion 336 that “a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity.” These rules include prohibitions on behavior such as dishonesty (Model Rule 8.4(c)), making false statements about a judge (Model Rule 8.2(a)), and criminal conduct reflecting poorly on a person’s fitness to practice law (Model Rule 8.4(b)).

The difference between these two standards is significant. The range of decisions open to a lawyer expands dramatically upon leaving the realm of the full code of professional responsibility. Simultaneous to that expansion, and resulting from it, the protections afforded to a would-be client greatly contract. Thus, it is vital for both a lawyer and a potential clients to know which set of standards must guide the lawyer’s conduct.

Depending on the nature of the employment, a lawyer may have other responsibilities as well—for example, the obligations incumbent to fiduciary duty that a lawyer would have if employed as a corporate director. The Preamble, cmt. 18, specifically cites a government lawyer as an example when under various legal provisions, including constitutional, statutory and common law, a government lawyer’s responsibilities “may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment.” The rules do not abrogate any such authority. Preamble, cmt. 18. But with respect to the rules of professional conduct for bar membership, a lawyer’s potential duties may be split into the two standards noted above.

For most lawyers, most of the time, determining which set of standards applies is a straightforward task. A lawyer providing legal services as part of a traditional client-lawyer relationship must abide by the rules of professional conduct. At the other end of the spectrum, a lawyer acting distinctly outside of the legal profession—for example, working part-time as a museum tour guide—must only abide by the basic expectations of fitness to practice law, such as Rule 8.4 should the lawyer continue to hold a license. The question is more difficult in the middle such as when lawyers perform services which are not clearly legal, and when lawyers do not necessarily intend to create a client-lawyer relationship. Especially tricky is the instance of a lawyer taking on a job nominally as a non-lawyer, but which in some way takes advantage of the lawyer’s legal experience and knowledge, such as providing litigation support or compliance support.

B. How to Decide Which Level of Professional Conduct Applies

There are two methods of deciding to which level of professional conduct a lawyer must adhere. The first way is to simply decide whether a client-lawyer relationship exists under the law in the applicable jurisdiction. Section 14 of *The Restatement Third of The Law Governing Lawyers* provides the leading methodology for deciding this question, defining a “client” as a person who manifests an intent for the lawyer to provide legal services *if* the lawyer knows that the person reasonably relies on the lawyer to provide legal services but the lawyer fails to disclaim an intent to do so. If the relationship exists according to applicable law, then the code of professional

conduct applies regardless of the lawyer's official job title. This method has the benefit of simplicity.

The second method is more nuanced, but more complete. This method involves using Model Rule of Professional Conduct 5.7 as a supplementary analytical framework to decide what a lawyer's obligations are in instances when the lawyer is doing a job that is outside the traditional scope of legal service.⁴ Rule 5.7 was originally created to regulate the provision of ancillary services related to and in support of firms' legal practices.⁵ The rule states:

(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.

By applying the Rules of Professional Conduct to law-related services, Model Rule 5.7 expands the reach of the rules beyond the realm of the legal services traditionally provided in a lawyer-client relationship. Rule 5.7(a) opens the possibility that a lawyer will be subject to the obligations of a lawyer-client relationship in situations where the lawyer is not providing regular legal services. Indeed, Rule 5.7(b) clarifies that "law-related services" are services that can be provided properly by a non-lawyer without constituting unauthorized practice of law. Rule 5.7(a)(1) and (2) then limit the scope of this expansion to situations where the law-related services are not distinct from legal services, or where the services are distinct, the lawyer has failed "to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services." Thus, to obtain a complete picture of the circumstances in which a lawyer will be subject to the full rules of professional conduct, it is necessary to go beyond the first question of whether a traditional lawyer-client relationship exists and decide whether the obligations apply via Rule 5.7's regulation of law-related services.

⁴ Hugh Spitzer provides a thorough explanation and defense of this method as a means for lawyers working in non-lawyer government jobs to determine what Rules of Professional Conduct apply to their work. Spitzer, Hugh D. "Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be Non-Lawyers?" 30 GEO. J. LEGAL ETHICS 45 (2017).

⁵ GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 51.02 at 51-4 (4th ed. 2015).

To properly analyze the scope of professional responsibilities with Rule 5.7 in mind, then, a lawyer must look to the type of services to be provided and decide whether they are legal, law-related, or fully non-legal. If the services are legal, the lawyer must assess whether a traditional §14 client-lawyer relationship exists. If the relationship does exist, the rules will apply in full. If the services are only law-related, then the lawyer first must decide whether those services are distinct from any legal services also provided. If the law-related services are not distinct, then the rules will apply in full. If the law-related services *are* distinct, then the lawyer may avoid the full application of the rules only by taking reasonable steps to assure that the client understands that the law-related services are not legal services and the traditional protections of the client-lawyer relationship will not apply. Finally, if the services are fully non-legal, then the lawyer will be subject to only those basic rules which govern a lawyer's conduct at all times.

C. Breaking Down the Issues in Rule 5.7

Although incorporating Rule 5.7 into the analysis of when the rules of professional conduct apply helps to clarify the picture, the language of the rule presents a few immediate problems that must be addressed. First, Rule 5.7(a)(2) refers to services provided “by an entity controlled by the lawyer” while (a)(1) refers to services provided “by the lawyer.” This inconsistency causes some confusion about to whom the rule applies. Second, there are the analytical problems of determining what services count as “law-related,” and when such services can be considered “distinct from the lawyer's provision of legal services.”

1. Is the effect of subsection (a)(2) limited to services provided “by an entity”?

With respect to the first issue, note that Rule 5.7(a)(1) and (a)(2) read literally to apply to different groups. The language in the rule suggests that Rule 5.7(a)(1) only applies to lawyers acting in their individual capacities, while Rule 5.7(a)(2) only applies to entities controlled by a lawyer individually or with other lawyers. Both circumstances present the potential for ambiguity in terms of whether the services are legal services or merely law-related but otherwise non-legal services that could be provided by a non-lawyer.

The history and comments to the rule support a broad reading in which all of Rule 5.7(a) applies to lawyers in all circumstances, regardless of whether they control the entity through which they perform their services. Comment [3] of the rule states that “[e]ven 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).” This particular comment was accompanied by a note in the Reporter's Explanation of Changes stating that the sentence in Comment [3] was meant to clarify that (a)(2) applies in all cases not encompassed by (a)(1) “without regard to whether the law-related services are provided directly by the lawyer or the lawyer's firm or by a separate entity controlled by the lawyer or law firm.” Thus, the language in (a)(2) is not meant to limit the reach of the rule to only those instances where a lawyer controls an entity providing law-related services. Instead, the purpose of (a)(2) is to expand the reach of (a)(2) to include those cases where a lawyer only controls such an entity, as well as the general case of a lawyer providing law-related services directly. This language was necessary because a lawyer in control of such an entity might incorrectly assume that if the lawyer only controlled the entity, rather than literally providing the services, the lawyer is not subject to Rule 5.7.

This broader reading accords with the historical development of the rule. As described in *The Law of Lawyering*, the ABA originally devised Rule 5.7 as a means of regulating which ancillary, non-legal services lawyers would be allowed to provide, and through what vehicle (traditional law firms or separate business entities). However, by 1994, the focus of the rule had shifted away from whether lawyers were allowed to provide particular services through independent businesses; rather, “the key divide was whether a lawyer providing law-related services will or will not also have to comply with all of the other Rules of Professional Conduct.”⁶

As a general matter, states’ treatment of Model Rule 5.7 supports the broader reading as well. Three states have adopted versions of Model Rule 5.7 that specifically incorporate the broader reading of the rule. New York’s version of Rule 5.7, for instance, states in its analogous provision (Rule 5.7(3)) that “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.” Pennsylvania and Florida have similar provisions.⁷ Further, at least one state that adopted Model Rule 5.7 verbatim has adopted the broader meaning of the rule nonetheless. In a formal opinion “Ethical Responsibilities of Lawyers Who Engage in Other Businesses” the Colorado Bar Association (CBA) Ethics Committee specifically addressed this issue and adopted the broader reading wherein subsection (a)(2) refers to all circumstances not encompassed by subsection (a)(1) (i.e., opining that subsection (a)(2) applies to all circumstances where law-related services are provided in a manner distinct from legal services, regardless of whether an entity or an individual lawyer provides the services).⁸

2. What is the difference between law-related services and legal services?

Subsection (b) of Model Rule 5.7 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 non-lawyer.” The initial problem with this definition is that the Rule provides no guidance as to what “legal services” are, so the foundation of the definition of “law-related services” gains little by the comparison. Elsewhere in the Model Rules, the ABA has recognized that the definition of legal services is defined by local law and varies between jurisdiction. Although there are many

⁶ Hazard, et al. at 51-6.

⁷ CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES (Aug. 12, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_7.authcheckdam.pdf [<https://perma.cc/6CQY-JJ4N>].

⁸ See Spitzer at 61-63 for a parallel argument in support of applying Model Rule 5.7 to lawyers working as non-lawyers in government jobs.

overlapping themes from state to state, “developing a broadly-accepted definition of practice of law has proven difficult.”⁹

Common elements of a state’s definition of the practice of law include:

- Furnishing advice or service involving the application of legal principles to facts or purposes or desires.
- Prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- Representing the interests of another before a tribunal on than in the presentation of facts, figures, or factual conclusions as distinguished from legal conclusions or examination of witnesses or preparation of pleadings.
- “Holding out” as qualified or authorized to practice law.¹⁰

See, e.g., Rules of the Supreme Court of Virginia, Part 6, Section I

Along with the question of whether the lawyer’s conduct must comport with the professional rules, a lawyer must be aware of whether the lawyer is or not practicing law, and if so, where the lawyer is practicing in order to avoid the unauthorized practice of law (“UPL”). Lawyer licensure is regulated on a state-by-state basis. It is axiomatic that a state has power to regulate only that which occurs within its borders. Thus, the most important factor in a UPL analysis is where the lawyer is geographically located when practicing law. States typically have some version of what is Rule 5.5 of the ABA Model Rules stating that a “lawyer shall not practice law **in a jurisdiction** in violation of the regulation of the legal profession **in that jurisdiction.**” This

⁹ *Id.* at 52.

¹⁰ See, e.g., Rules of the Supreme Court of Virginia, Part 6, Section I:

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever

- (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- (3) One undertakes, with or without compensation, to represent the interest of another before any tribunal-judicial, administrative, or executive-otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.
- (4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

is true in Virginia (Rule 5.5(c) of the Virginia Rules of Professional Conduct) and elsewhere.

Just as there is some difficulty pinning down what is or is not the practice of law, there often is no certain answer as to what constitutes being “*in*” the state for purposes of practicing law. On one end of a spectrum are actions almost guaranteed to be considered being in the state, including establishing an “office or other systematic and continuous presence” in the jurisdiction “for the practice of law” or holding out to the public or otherwise that that lawyer is admitted to practice law in the jurisdiction. See, e.g., Virginia (Rule 5.5(d)(2) of the Virginia Rules of Professional Conduct), Maryland (Maryland Rules, Rule 16-812, MRPC 5.5(b)), and Delaware (Rule 5.5(b) of the Delaware Lawyers’ Rules of Professional Conduct). This also would include opening an office for a general law practice and signing court pleadings or papers submitted to a state agency. See e.g., *Attorney Grievance Comm’n of Maryland v. Barneys*, 370 Md. 566, 571-72, 805 A.2d 1040, 1043 (2002) (opening an office for general practice without noting any jurisdictional limitations and entering appearance as counsel in at least five cases); *Attorney Grievance Comm’n of Maryland v. Brown*, 353 Md. 271, 289, 725 A.2d 1069, 1077-78 (1999) (finding a Maryland attorney assisted a non-licensed attorney in the unauthorized practice of law by associating the foreign attorney in a certain case and filing pleadings with the foreign attorney’s name on them, and by introducing the foreign attorney in an administrative hearing as co-counsel); *Kennedy v. Bar Ass’n of Montgomery Cnty., Inc.*, 316 Md. 646, 663, 561 A.2d 200, 208-09 (1989) (attorney not licensed by state had his principal office in the state, from which he “began advising clients and preparing legal documents for them from that office”); *In re Williamson*, 838 So. 2d 226, 235 (Miss. 2002) (announcing prospective rule that signing a pleading or allowing one’s name to be listed on a pleading in a case is entry of an appearance, and noting other examples of actions sufficient to be entering an appearance, all of which involve physical presence at some proceeding in the state); *In re Jackman*, 165 N.J. 580, 583, 761 A.2d 1103, 1104 (2000) (attorney physically present in state in which he was not licensed preparing and signing legal documents, counseling clients, negotiating with other attorneys on behalf of his clients, and billing for his time as an associate during a period of almost seven years).

The other end of the spectrum involves circumstances in which an attorney is almost guaranteed to be considered not to be in the state, including advising clients at one’s office in a state in which the attorney is licensed. See, e.g., *Fought & Co. v. Steel Eng’g & Erection, Inc.*, 87 Haw. 37, 47-48, 951 P.2d 487, 497-98 (1998) (Oregon law firm advising Oregon client and its Hawaii attorneys on construction dispute in Hawaii, which performed all its services in Oregon and its attorneys did not “draft or sign” pleadings, appear in court, “or communicate with counsel for other parties,” was not practicing law “within the jurisdiction”); *Estate of St. Martin v. Hixson*, 145 So. 3d 1124, 1137 (Miss. 2014) (“We find no authority that supports a finding that advising a client on Mississippi law at an office located in another state constitutes an appearance in Mississippi or that an attorney would be required to seek admission pro hac vice in Mississippi before taking such action.”); Virginia Unauthorized Practice of Law Op. No. 93, “Real Estate Practice by a Foreign Attorney” (foreign attorney may prepare documents for recording on a sale or refinance of Virginia real estate, “conduct a settlement and render advice on applicable Virginia law, all from his office outside of Virginia”); Virginia Unauthorized Practice of Law Opinion No. 99, “Preparation of Documents by a Foreign Attorney in a Foreign Jurisdiction” (foreign attorney may prepare documents for and conduct the closing of the sale of a Virginia business to Virginia residents at the attorney’s office in the jurisdiction in which he is licensed).

Even physical presence in a state is not always determinative. A state may choose to allow a foreign attorney to act within its borders and there is no clear means to anticipate the circumstances in which that will be the result. The Court of Appeals of New York allowed a non-licensed attorney to recover fees for his services provided primarily in Lebanon and Massachusetts, even though he placed frequent telephone calls to his client in New York “to report on and discuss the progress of the case” and, during a trip to deliver luggage accidentally left in Lebanon, “he also discussed his bill with defendant” and later “mailed a bill for his services to defendant in New York.” *El Gemayel v. Seaman*, 72 N.Y.2d 701, 704, 533 N.E.2d 245, 247 (1988). The court discussed another case in which a California lawyer was precluded from collecting his fees after he assisted a New York client in divorce proceedings, including “spending 14 days in New York attending meetings, reviewing drafts of a separation agreement, discussing the client’s financial and custody problems, recommending a change in New York counsel and, based on his knowledge of New York and California law, rendering his opinion as to the proper jurisdiction for the divorce action and related marital and custody issues.” *Id.* at 706, 533 N.E.2d at 248 (1988) (discussing *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329 (N.Y. 1965)).

The court acknowledged that in *Spivak*, “While holding that these activities plainly constituted the ‘practice’ of law, we also recognized that the statute . . . should not be construed to prohibit ‘customary and innocuous practices’” and that modern reality demands “we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York.” *Id.* (citation omitted). In contrast to *Spivak*’s more substantial contacts, *El Gemayel* involved “incidental and innocuous” New York contacts and therefore, “We conclude that, in the circumstances of this case, phone calls to New York by plaintiff, an attorney licensed in a foreign jurisdiction, to advise his client of the progress of legal proceedings in that foreign jurisdiction, did not, without more, constitute the “practice” of law in this State in violation of Judiciary Law § 478.” *Id.* at 707, 533 N.E.2d at 249.

The Supreme Court of New Jersey contrasted Jackman’s behavior with prior cases in which foreign attorneys were held not to have committed the unauthorized practice of law, and explained that the prior cases “involved transitory legal activities in New Jersey by out-of-state attorneys employed by out-of-state firms that were countenanced by the Court because of the unique facts of those cases.” *In re Jackman*, 761 A.2d at 1108. Those cases did not involve a foreign attorney “practicing long term as a member of an in-state law firm” but instead “permitted the use of out-of-state attorneys only to participate in a single transaction.” *Id.*

Many states have adopted versions of Rule 5.5 to stake out some areas for “temporary” – not continuous and systematic – practice by someone licensed in a different United States jurisdiction. Again, although jurisdictions vary on whether or which activities are permitted, Model Rule 5.5 generally allows for the temporary provision of legal services that:

- Associate a lawyer licensed in that jurisdiction who actively participates;
- Involve pro hac vice admission consistent with the tribunal’s rules;
- Relate to a pending or potential arbitration, mediation, or other alternative dispute resolution; or

- Arise out of or reasonably related to lawyer’s practice where admitted.

With that background as to “legal services,” Model Rule 5.7 also does provide some further guidance as to law-related services. Comment 9 explains that law-related services relate to a “broad range of economic and other interests” and could 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.” States likewise may have developed guidance to define the boundaries between what non-lawyers can do without engaging in UPL. See, e.g., Rules of the Supreme Court of Virginia, Part 6, Section I (addressing practice before tribunals, lay adjusters, collection agencies, estate planning and settlement, tax practice, real estate practice, title insurance, trade associations, and administrative agency practice).

The key aspects of law-related services are that (1) they are services that a non-lawyer could give without engaging in unauthorized practice of law, and which (2) are so closely associated with the law that when a lawyer provides the same services, a client could reasonably believe that the lawyer is providing actual legal services. As noted in Comment 8 to Model Rule 5.7, “Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other.” Therefore, a crucial defining factor for law-related services may be whether the services *can* be kept distinct from legal services when a lawyer is providing them. A service that can legally be provided by a non-lawyer without constituting unauthorized practice of law, but which always would constitute legal practice if provided by a lawyer under a state’s definition of the practice of law would not constitute a law-related service.

3. When are law-related services “distinct” from legal services?

Whatever the definition of legal and law-related services may be in each state, Model Rule 5.7’s application hinges on the lawyer’s effort to keep those services distinct. When a lawyer provides law-related services in a manner that is “not distinct from the lawyer’s provision of legal services to clients,” Rule 5.7(a)(1) applies and the lawyer is subject to the Rules of Professional Conduct. Therefore, to obtain the latitude of (a)(2), a lawyer must make a diligent effort to distinguish the provision of law-related services from any legal services provided and then communicate that intent to the recipient of the law-related services.

Model Rule 5.7 does not elaborate on what counts as “distinct,” but the CBA Ethics Committee has provided this non-exhaustive list of factors which provides a good example as to what states will consider in determining whether legal and law-related services are sufficiently distinct: “(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.”

Depending on the circumstances and the state, these factors may be insufficient to make a determination, or alternatively the presence of a single factor may cause a per se failure to keep legal and law-related services distinct. For example, the New York State Bar Association (NYBSA) Committee on Professional Ethics opined that when a lawyer conducts a law practice

and a real estate brokerage business out of the same office, there would be a presumption that a client receiving brokerage services would believe those services to be subject to a client-lawyer relationship.¹¹ Yet, the lawyer could overcome that presumption by advising the client in writing that the services are not legal services. There, despite being provided out of the same office, the legal and law-related services were sufficiently distinct for the lawyer to escape the full Rules of Professional Conduct with sufficient notice.

4. When has a lawyer taken “reasonable measures” to enlighten a client?

Subsection (a)(2) of Rule 5.7 requires that even when a lawyer has succeeded in keeping law-related practices distinct from legal services, the lawyer will still be subject to the rules unless absent “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.” Comment 6 elaborates that the lawyer should make this communication “before entering into an agreement for the provision of or providing law-related services.” Further, the communication to the client should be made “in a manner sufficient to assure that the person understands the significance of the fact ... preferably in writing.”

Like the questions of the nature of the service and whether it has been kept distinct from legal service, the determination of whether a lawyer has taken reasonable measures to enlighten a client to the nature of the service will ultimately turn on the circumstances and the law of the jurisdiction. In the example from the NYSBA above, the Committee required written notice from a lawyer providing real estate brokerage services out of a law office, but in other circumstances the Committee might find that verbal notice is sufficient. State ethics opinions and comments to state versions of Rule 5.7 provide further guidance as to what will constitute reasonable measures.

D. Inconsistency Among States

Finally, it is important to note that not all states are on the same page with respect to Model Rule 5.7. Thirty-seven states have adopted Model Rule 5.7 in full or in modified versions that are substantially the same as the Model Rule, while thirteen have not yet adopted the rule.¹² As noted above, three states adopted modified versions clearly meaning to apply the Rule 5.7 framework to all instances of lawyers doing work outside the traditional scope of legal services. For lawyers doing law-related work in the states that have not adopted Rule 5.7, the question of whether they are subject to the rules of professional conduct will hinge on state case law and ethics opinions. The center of gravity for all states is still the question of whether a client-lawyer relationship exists, but for the states that have not adopted Model Rule 5.7, lawyers will have to dig a little deeper, and perhaps guess a little more to decide whether a court would consider the rules of professional conduct applicable.

¹¹ Opinion 933 (2012).

¹² CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES (Aug. 12, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_7.authcheckdam.pdf [<https://perma.cc/6CQY-JJ4N>].

What hole is left open between a state that adopted Model Rule 5.7 or a modified version of it versus a state that didn't adopt Model Rule 5.7 at all? On one hand, without Rule 5.7(a), a lawyer could conceivably argue that the lawyer is simply not subject to the rules of professional conduct when providing law-related services rather than legal services. In this way, the failure to adopt any version of Rule 5.7 could mean more latitude for lawyers and less protection for clients. On the other hand, failing to have some version of Rule 5.7 leaves lawyers to navigate a minefield of state law while simultaneously reducing certainty around a multi-disciplinary lawyer's provision of non-legal services.

It is not difficult to imagine scenarios in which the circumstances imply a lawyer's possession and use of legal knowledge or skill, but the lawyer is not providing traditional legal services. In the end, the effect (and, one might say, the benefit) of the Rule 5.7 method is to provide a more predictable framework for lawyers. Drawing a line between legal and non-legal services without acknowledging intermediate law-related services encourages the result that sometimes judges will err on the side of over-protection by declaring that legal services were provided and sometimes judges will err on the side of under-protection by saying no legal services were provided. When in reality there was a possible middle ground where services were provided that a reasonable person might have thought were legal, but in fact were only law-related. The recognition of the grey zone in Rule 5.7 gives lawyers room to practice non-legal activities without the full constraints of the code of professional conduct while still holding them accountable for the reasonable expectations of clients.

The practical presumption is that one who holds a license to practice law is likely using it. Accordingly, the practical bottom line is that lawyers carry the burden of establishing clarity of expectations and consequences associated with entering or disclaiming an attorney-client relationship.

III. What's the Real Difference Between Being Inside the Lawyer-Client Relationships and Being Outside the Lawyer-Client Relationship.

For a person who holds a license to practice law yet seeks a non-lawyer role, the real difference lies in who sets your goals and how you must resolve competing duties. If you are in a client-lawyer relationship and providing legal services, the client calls the shots and the Rules point the way to resolving competing duties. Rule 1.2(a) addresses this fundamental allocation of authority between a client and a lawyer:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The client-lawyer relationship is so fundamental and paramount that a lawyer's professional duties attach even before a client becomes a client – see, e.g., Rule 1.18 addressing duties to a prospective client -- and extend even when a client stops being a client – see, e.g., Rules 1.6-1.9

addressing confidentiality and conflict duties that extend past the end of a client-lawyer relationship.

Contrast this with one who holds a license to practice but is acting in a non-lawyer role. One acting outside a client-lawyer relationship and in a non-lawyer role may set his or her own goals (subject to the boundaries of the law) or define his or her goals and duties through a contract with another outside the boundaries of the Rules. Moral, economic, social and political factors may be considered apart from a tether to “the client’s situation” as references in Rule 2.1. One way to look at the potential distinction is going from one who counsels and takes direction from the decision-maker to potentially being a decision-maker or group of decision-makers (again, subject to the boundaries of the role undertaken). Nevertheless, one who holds a license to practice but is acting in a non-lawyer role will only retain that license by avoiding what amounts to “professional misconduct” as set out in Rule 8.4, even if it occurs in carrying out a non-lawyer role.

A. The Lawyer-Client Relationship

Managing your entry into and exit from a lawyer-client relationship is critical to understanding what professional duties attach and when. But you can only manage that if you get and maintain clarity regarding who that client is, and in many cases, isn’t. There are many challenging “client identity” scenarios that have implications for both you and your client or clients. Clients often need counseling about the ramifications of the “client identity” on issues of confidentiality, privilege, conflicts, and file ownership. Under Rule 1.4(b), it is the lawyer’s responsibility to provide that counseling: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The best way to do so is by documenting who is and who is not the client coupled with periodic reminders should communications inject ambiguity.

Once inside the client-lawyer relationship, the lawyer must keep focused on the client as the goal-setter and the beneficiary of the lawyer’s fundamental duties of competence (Rule 1.1), communication (Rule 1.2), diligence (Rule 1.3), confidentiality (Rule 1.6), and conflict avoidance (Rules 1.7-1.9) as well as the duties of a fiduciary. Moreover, the lawyer must be mindful of the general boundaries, such as:

- No counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent (Rule 1.2(d));
- No claims that lack a basis in law or fact (Rule 3.1);
- Candor to a tribunal regarding fact and law notwithstanding confidentiality (Rule 3.3); and
- A general standard of truthfulness to others (Rule 4.1).

Just as care must be taken in entering a client-lawyer relationship, a lawyer must exit a client-lawyer relationship consistent with the rules (see, e.g., Rule 1.16 on declining or terminating a representation).

Outside of providing legal services, the challenge for the lawyer outside a lawyer role and instead in more of a non-legal leadership role is to avoid picking up unintentional clients. Remember that the test for forming a client-lawyer relationship start with a person who manifests an intent for the lawyer to provide legal services. Section 14 of *The Restatement Third of The Law Governing Lawyers*. Although this is not the end of the analysis, it is easy to understand how questions about the law quickly get directed to the person in the room who holds a license to practice. Lawyers are popular candidates for Board and other leadership positions for this insight. Trying to make sure that people understand that you may share your views without providing legal advice is a tough road to navigate. Likewise, “privilege” and “confidentiality” are concepts so strongly tied to attorneys that people may be surprised to find out those concepts generally do not apply outside a client-lawyer relationship for legal services.

B. Outside the Lawyer-Client Relationship, But Staying “Fit” to Be a Lawyer

Under Rule 8.4, lawyers engage in “professional misconduct” if they engage in conduct involving dishonesty, fraud, deceit or misrepresentation or commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. But when does your “personal life” outside your practice of law cross the line drawn by the professional rules?

The ABA tied professional misconduct to illegal conduct involving “moral turpitude” in the ABA Model Code of Professional Responsibility, DR 1-102 (defining “misconduct”). Because states struggled to define “moral turpitude,” the ABA approved new rules that rejected illegal conduct involving “moral turpitude.” The ABA explained that it moved away from the “moral turpitude” standard because it is a “concept [that] can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” 1983 ABA Model Code of Prof’l Responsibility Rule 8.4 cmt; *see also* Hal R. Lieberman, *Private Conduct and Professional Discipline*, N.Y.L.J. (2002) (describing the “moral turpitude” standard as a “hopelessly subjective concept”).

The ABA Model Rule approach detaches professional misconduct from “moral turpitude” and, instead, lists examples in Rule 8.4 of activities that constitute professional misconduct:

- a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal [*Virginia Rule 8.4 adds: “or deliberately wrongful”*] act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation [*Virginia Rule 8.4 adds: “which reflects adversely on the lawyer’s fitness to practice law”*];
- (d) engage in conduct that is prejudicial to the administration of justice [*Virginia Rule 8.4 omits this*];

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules. *[Virginia Rule 8.4 omits this]*

The ABA kept its 1983 comment and added “[o]ffenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” Rule 8.4, cmt 2.

Many jurisdictions have followed the ABA and removed the “moral turpitude” standard from their rules. *See, e.g.*, Va. Rule of Prof'l Conduct 8.4(b) (stating it is professional misconduct for a lawyer to “commit a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law”); Hal R. Lieberman, *Private Conduct and Professional Discipline*, N.Y.L.J. (2002) (explaining that New York amended its rules “so it no longer enjoins illegal conduct involving moral turpitude. It now prohibits only illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. This reformulation tightened an impossible to define rule to require at least some relationship between the conduct and the attorney’s ability to practice law ethically.”); *see also* Restatement (Third) of the Law Governing Lawyers § 5 cmt g (2000) (“Those formulations have replaced in most jurisdictions a formerly employed standard stated in terms of criminal acts constituting ‘moral turpitude,’ a phrase that, while meaningful to individuals, is vague and may lead to discriminatory or otherwise inappropriate applications.”). *But see* Ga. Rule of Prof'l Conduct 8.4(a)(3) (keeping the “moral turpitude” standard for misdemeanors); *In re Jones*, No. S12Y1781, slip op. at 4 (Ga. S.Ct. June 3, 2013) (defining “moral turpitude to mean “everything done contrary to justice, honesty, . . . or good morals” and “an act . . . contrary to the accepted and customary rule of right and duty between man and man” (citations omitted)).

The following are illustrative cases by category in which “professional misconduct” outside a client-lawyer relationship was alleged:

- **Substance Abuse.** This is by far the largest category where attorneys are pursued for misconduct. In fact, one in three practicing lawyers are problem drinkers. <http://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html> Further, another statistic indicates that 25% of the lawyers

who face disciplinary actions abuse alcohol or drugs and they are suffering from mental disorders. <http://interventionstrategies.com/17-statistics-on-drug-abuse-among-lawyers/>

Attorney censured for conviction of cocaine possession, a misdemeanor. *Matter of Hildebrand*, 221 A.D.2d 85, 643 N.Y.S.2d 105 (1996).

Attorney placed on three years of disciplinary probation after two DUI convictions for alcohol. Although the drunk driving did not involve moral turpitude, it established “other misconduct warranting discipline.” *In re Kelley*, 52 Cal. 3d 487, 801 P.2d 1126 (1990).

Attorney suspended for six months for disruptive behavior and intoxication at a CLE seminar. Debra Cassens Weiss, *Lawyer is suspended after he is accused of intoxication at CLE seminar*, ABA Journal (Apr. 7, 2014), available at http://www.abajournal.com/news/article/lawyer_is_suspended_for_alleged_intoxication_at_cle_seminar/

- **Sexual Misconduct & Domestic Violence.**

Attorney censured for pre-bar-admission sexual misconduct with a minor. *In re Wong*, 275 A.D.2d 1, 710 N.Y.S.2d 57 (2000).

Attorney suspended for three years for assault of former girlfriend and destruction of property. *In re Zulandt*, 93 A.D.3d 77, 939 N.Y.S.2d 338 (2012).

Attorney suspended for three years for domestic violence against his wife. *In re Jacoby*, 86 A.D.3d 330, 926 N.Y.S.2d 480 (2011).

Attorney disbarred for possession of child pornography, a felony. *In re Grant*, 58 Cal. 4th 469, 317 P.3d 612 (2014).

Attorney disbarred for having sexual relations with his stepdaughter. *Clayton v. State*, 244 Ala. 10, 13 So. 2d 420 (1942).

Attorney suspended for two years for making obscene phone calls. *The Fla. Bar v. Helinger*, 620 So. 2d 993 (Fla. 1993).

- **Personal Financial Problems.**

An attorney may file personal bankruptcy. NC CPR 168.

Attorney failed to pay child support and was suspended until he caught up on payments. *In re Rosoff*, 225 A.D.2d 197, 650 N.Y.S.2d 149 (1996).

- **Criminal Behavior.**

Attorney disbarred for submitting an application to a city clerk falsely affirming he had never been married when, in fact, he had been married and had not divorced his first wife. *In re Masterson*, 283 A.D.2d 20, 726 N.Y.S.2d 114 (2001).

Attorney suspended for five years after being convicted of attempted assault, a misdemeanor. *In re Stockton*, 188 A.D.2d 10, 593 N.Y.S.2d 79 (1993).

Attorney suspended for two years after pleading guilty to promoting prostitution, a misdemeanor. *In re Cincotti*, 115 A.D.2d 24, 499 N.Y.S.2d 736 (1986).

Attorney disbarred for smuggling tobacco and tobacco-related contraband to a client in jail on at least ten occasions, all misdemeanors. *In re Jones*, No. S12Y1781 (Ga. S.Ct. June 3, 2013).

- **Civil Wrongs**

Attorney censured for plagiarizing two published works in a master's thesis. *In re Lamberis*, 93 Ill. 2d 222, 443 N.E.2d 549 (1982).

Attorney censured after being found to have engaged in civil fraud. *In re Sylvor*, 225 A.D.2d 87, 648 N.Y.S.2d 440 (1996).

IV. The Lobbying Example

Just as what is regulated as the practice of law varies by state, the activities that qualify as lobbying varies by state. Very generally, lobbying is an attempt to influence government action through either written or oral communication. The activity may be regulated in a state if it is done on behalf of another for compensation. For a table of state-by-state information about lobbying, see “How States Define Lobbying and Lobbyist,” National Conference of State Legislatures (9/4/2018) at <http://www.ncsl.org/research/ethics/50-state-chart-lobby-definitions.aspx>. A lobbyist may be, but does not have to be, a lawyer. A person defined as a lobbyist is typically required by state law to (i) register, see “Lobbyist Registration Requirements,” National Conference of State Legislatures (10/19/2017) at <http://www.ncsl.org/research/ethics/50-state-chart-lobbyist-registration-requirements.aspx>, and (ii) submit periodic disclosure report to identify how much money is spent on lobbying, what legislative issues are being lobbied, and for which officials’ benefit the expenditures are made. See “Lobbyist Activity Report Requirements,” National Conference of State Legislatures at <http://www.ncsl.org/research/ethics/50-state-chart-lobbyist-report-requirements.aspx> (including state-by-state summary of state reporting requirements).

Lobbying is also regulated at the federal level, including registration and disclosure requirements. See Lobbying Disclosure Act, as amended, 2 U.S.C. § 1601 et. seq.

When someone who holds a license to practice law provides lobbying-like services – as may happen in connection with representation of an industry or issue group – the questions addressed above regarding the scope of the applicability of professional rules come directly into focus. Although Virginia has not adopted Rule 5.7, Virginia Legal Ethics Opinion 1819, “Conflict of Interest – Lawyer Working as Lobbyist Rather Than in an Attorney Client Relationship,” recognizes that “[w]hile the rules do apply to this attorney’s lobbying activities, the precise application will not necessarily be identical that for the provision of legal services to a client.” The inquiry still begins with whether or not an attorney-client relationship for the provision of legal services was established. And the onus remains on the person with a law license to establish clarity:

When a lawyer establishes a relationship to provide other than legal services and the customer knows he is a lawyer, the lawyer must be cognizant of this opportunity for confusion. Unless the services clearly have no connection to legal training and expertise (e.g., a lawyer-owned restaurant), the lawyer should accept an affirmative duty to clarify the boundaries of the business relationship. The Committee suggest that such a duty is present in many nonlegal endeavors: for example, mediation, financial planning, and as in the present hypothetical, lobbying services.” This affirmative duty belongs on the part of the lawyer, rather than the customer, in that the lawyer is in the more informed position regarding the nature of his services and the details of the ethical rules.”

VA LEO 1819.

For a comprehensive discussion of issues associated with lawyer as lobbyist, see generally, Deborah J. Jeffrey, “A Practical Guide to Conflicts of Interest for Lawyer-Lobbyists,” Chapter 35 within William V. Luneburg, Thomas M. Susman, and Rebecca H Gordon, “The Lobbying Manual: A Complete Guide to Federal Lobbying Law and Practice” (ABA Section of Administrative Law and Regulatory Practice, 4th ed. 2009). For a discussion of conflict issues for lobbyists under the DC Rules, See D.C. Opinion 344, “Conflicts of Interest for Lawyers Engaged in Lobbying Activities that Are Not Deemed to Involve the Practice of Law.”