

You finally made it. No longer the lawyer, now the client. As head of regulatory affairs, you ask lawyers for advice (even though you know how to find the answers and often do). Life is less complicated, you sigh, not having to worry about those pesky ethical rules and reading the endless drivel in those ethics and privilege columns. But you have a nagging feeling. "Am I really free from those confusing ethical rules?" The short answer is that no one quite knows, as there are virtually no cases that address the issue — although one can clearly envision sanctions being imposed on a person who maintains her law degree and engages in conduct that would clearly be violative of ethical norms. And the sanctions could adversely impact the client as well.

## Wearing Two Hats – the Ethical Conundrum of the Lawyer Acting In a Business Capacity

BY JOHN K. VILLA

In the modern American corporate law department, lawyers often provide legal advice that includes a heavy dash of business judgment. In other areas of the company, employees who jokingly refer to themselves as "recovering lawyers" hold strictly business positions but regularly deal with issues once confined to lawyers including regulatory, compliance, negotiating transactions, lobbying-legislative advice, tax or disclosure decisions and related matters. While the aftereffects of the Enron-era litigation effectively ended the notion of multi-disciplinary practice (MDP) for private law firms, American companies and corporate law firms have moved rapidly in the opposite direction. Little thought, however, has been given to the manner in which these hybrid businessperson-lawyers

conduct themselves in respect to the ethical norms routinely applied to the legal profession. Certainly the ethical rules give little guidance. It is precisely in such jurisprudential vacuums that courts often insert themselves with harsh and unfortunate consequences for the unwary. Let us begin an exploration of this ticklish subject, a question to which there is unfortunately no comprehensive answer — yet.

The short answer to the question of whether the ethical rules literally apply to lawyers other than in the course of providing legal advice is that, in general, they literally do not (except for the rules on moral turpitude<sup>1</sup>). But that begs the real question: When is a lawyer providing legal advice? If the lawyer is both lawyer and businessperson, is she providing legal advice to

the corporation in the form of herself as the corporate decision-maker? If the lawyer/businessperson does not disclose the movement back and forth between hats, will she be estopped from this quick-change if it prejudices an opposing party? And even if the businessperson does disclose shifting back and forth between lawyer and businessperson hats, are there some rules intended to protect laypersons that the lawyer should not be able to so easily manipulate? None of these are yet known but one can imagine courts and ethics commissions frowning upon such conduct by corporate businesspeople trained as lawyers who stray over these unseen chalk lines.

So much for ruminations about future problems: now down to facts. First, this entire discussion assumes that the lawyer has become a member of some bar and thus is licensed — so we will assume a licensed lawyer.

For the most part, ethical rules, such as the ABA's Model Rules of Professional Conduct, address a lawyer's conduct with respect to the representation of a client (often using the clause "in the representation of a client..."<sup>2</sup>) and consequently require the existence of an attorney-client relationship for their application.

In the absence of such a relationship, therefore, a lawyer who acts in a purely business capacity will not be subject to the ethical rules and their potential limitations if applied in the business context — such as advertising and solicitation restrictions,<sup>3</sup> prohibitions on contacts with opposing parties without their counsel present,<sup>4</sup> heightened restrictions on subsequent employment,<sup>5</sup> prohibitions on deceptive conduct<sup>6</sup> and far greater limitations on disclosures of information.<sup>7</sup> While many business-



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people would be surprised to learn this, it is often recognized that a lawyer's higher ethical duties, if applied to everyday business, would raise the standards: as recognized by one commenter, "[a]pplication of the rules of ethics to the business relationship [can] greatly impact the conduct of the ancillary business."<sup>8</sup>

The ethical rules have not, however, totally ignored the fact that lawyers provide other services — ancillary to the provision of legal advice. This has led to the ancillary services rule which, unfortunately, seems to apply primarily to small scale law firm practice and does little to answer our broader questions. The ABA adopted a rule setting forth the ethical obligations of lawyers engaged in what it has characterized as "law-related services."<sup>9</sup> Model Rule 5.7 provides as follows:

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . 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. As indicated in the commentary,

the rule is intended to prevent a user of the law-related services from both believing that an attorney-client relationship exists between the user and the provider and, because of that relationship, from assuming that all of the protections inherent in such relationship apply — for example, protection of client confidences and prohibitions against conflicting representations.<sup>10</sup>

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**Even if the service is law-related, the lawyer's work is not subject to the ethical rules as long as precautionary measures have been made to assure persons using the services that the services are not legal services and that there is no attorney-client relationship.**

Thus, where the services are law-related as defined in the rule — such as "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"<sup>11</sup> — the ethical rules will apply, even if the services are provided through an entity distinct from the law firm,<sup>12</sup> unless the lawyer can establish that reasonable measures were undertaken to communicate the precise nature of the relationship between the user and the lawyer.<sup>13</sup> This rule thus addresses the movement that began in the 1980s for law firms to buy or start ancillary businesses that provide consulting to law firm clients rather than to farm out the work.


According to the clear import of Rule 5.7, therefore, where the work neither constitutes the practice of law

nor a law-related service, the ethical rules, other than the rules proscribing morally reprehensible conduct,<sup>14</sup> do not apply.<sup>15</sup> Even if the service is law-related, the lawyer's work is not subject to the ethical rules as long as precautionary measures have been made to assure persons using the services that those services are not legal services and that there is no attorney-client relationship. Seems relatively straightforward — ethics commissions applying the rule (or the jurisdiction's counterpart to the rule)<sup>16</sup> to particular types of services have had no difficulty in concluding that lawyers testifying as expert witnesses<sup>17</sup> or lawyers having an ownership interest in a separate business<sup>18</sup> are not subject to the rule.

But is the rule a model of clarity when pushed beyond the small law firm model? Although the commentary provides some guidance as to what types of services might be covered by the rule, and ABA has cautioned against construing the rule to reach beyond the intent of its drafters,<sup>19</sup> the definition of the term "law-related services" as encompassing services "performed in conjunction with and in substance . . . related to the provision of legal services," is so vague that it would be difficult to conclude that many business-related services routinely engaged in by lawyers — for example, strategic planning, financial analysis or contract negotiation — would fall outside the definition. For this reason, a better basis for insulating ancillary business-related services from coverage of the ethical rules would be to ensure that the provision of these services remains clearly distinct from the provision of legal services,<sup>20</sup> and that persons receiving such services understand that the services are not legal services to which the protections of the attorney-client relationship apply.<sup>21</sup>

How much benefit does this provide the corporate lawyer who moves breezily between her roles as a lawyer and a businessperson without notice to the others with whom she comes in contact and perhaps to their detriment? Not much. If corporate lawyers who hold business positions — or both business *and* legal positions — want to protect themselves from criticism or rulings that may damage their careers or their corporate employers, they should:

- Make sure to clearly identify what they are wearing as they engage in any conduct that could even arguably be misconstrued.
- When acting as the corporate lawyer, make sure that there is some person who is acting as the corporate businessperson/client. Courts are reluctant to shield all conduct from review under privilege or confidentiality grounds.
- Steer well clear of those rules that are intended to protect laypersons from being exploited by lawyers, including the rules that prevent a lawyer from having direct contact with an unrepresented opposing party in negotiations or litigation.

There are few certainties in law and ethics but one very strong likelihood is that the rules governing the businessperson lawyer will change — probably dramatically in some reported decision — and inside lawyers will regret not having considered the issue more carefully. 

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NOTES

1 See ABA, *Model Rules of Professional Conduct*, Rule 8.4 (prohibiting, *inter alia*, criminal acts that reflect adversely on a lawyer’s honesty, trustworthiness, or fitness as a lawyer, or conduct that involves dishonesty, fraud, deceit or misrepresentation);

*see also* ABA Formal Op. 336 (1974) (focusing on actions reflecting moral turpitude and fraud and broadly stating 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[.]”).

- 2 See, e.g., ABA, *Model Rules of Professional Conduct*, Rule 1.1 (stating that “a lawyer shall provide competent representation to a *client*[.]”) (emphasis added); ABA, *Model Rules of Professional Conduct*, Rule 1.3 (stating that “[a] lawyer shall act with reasonable diligence and promptness in *representing a client*[.]”) (emphasis added).
- 3 See ABA, *Model Rules of Professional Conduct*, Rules 7.1 through 7.3.
- 4 See ABA, *Model Rules of Professional Conduct*, Rule 4.2 (governing contacts with persons represented by counsel), and Rule 4.3 (governing contacts with unrepresented persons).
- 5 See ABA, *Model Rules of Professional Conduct*, Rule 1.9 (governing conflicts of interest with respect to former clients).
- 6 See, e.g., *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693 (8<sup>th</sup> Cir. 2003) (defendant’s attorneys acted impermissibly when they sent an investigator, posing as a customer who was equipped with a hidden tape recorder, to talk to employees of the defendant’s adversaries in an attempt to obtain statements for use as admissions against the plaintiff).
- 7 See ABA, *Model Rules of Professional Conduct*, Rule 1.6 (governing the confidentiality of information relating to the representation of a client).
- 8 Patricia A. Wilson, *Ethics for the Real Estate Lawyer*, 570 PLI/Real 153 180 (Spring, 2009); *see also* Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp., Op. 2002-07 (May 29, 2002) (commenting that many lawyers have noted that applying the ethical rules to an ancillary business can affect the viability of the business).
- 9 ABA, *Model Rules of Professional Conduct*, Rule 5.7.
- 10 *Id.*, Rule 5.7, cmt. 1.
- 11 *Id.*, cmt. 9.
- 12 *Id.*, cmt. 3.
- 13 *Id.*, cmt. 3, 7.
- 14 *Id.*, cmt. 2 (noting that even when the

services are not covered by the rule, the lawyer is still subject to the rules governing lawyer conduct such as that proscribed in Rule 8.4).

- 15 However, as the commentary cautions, even though all of the rules do not apply, the lawyer’s conduct will still be subject to “principles of law external to the Rules, for example, the law of principal and agent,” as well as to other legal principles. *See id.*, cmt. 11.
- 16 While not all jurisdictions have adopted Model Rule 5.7, *see* ABA, Center for Professional Conduct, *Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules*, available on the ABA website, [www.abanet.org/cpr/jclr/charts.html](http://www.abanet.org/cpr/jclr/charts.html), the rule has provided guidance for some ethics commissions that have addressed issues arising in connection with ancillary businesses engaged in by lawyers. *See* Ohio Bd. Com. Griev. Disp., Op. No. 2003-1 (April 11, 2003).
- 17 *See* ABA Formal Op. 97-407 (May 13, 1997).
- 18 *See* Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp., Op. 2002-07 (May 29, 2002).
- 19 *See* ABA Formal Op. 97-407, *supra* n. 8, at 4.
- 20 ABA, *Model Rules of Professional Conduct*, Rule 5.7, cmt. 8. *See, e.g.*, Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp., Op. 2002-07 (May 29, 2002) (finding that ethical rules did not apply to operation of ancillary insurance business partly owned by law firm and to which law firm referred clients for insurance services, where lawyers were excluded from providing insurance services, the billings of the law firm and the insurance business were separate, the operations of the law firm and the insurance business were physically separated, and customers of the insurance business were required to sign disclosures revealing the law firm’s ownership interest in the business, stating that the president of the business is not affiliated with the law firm, and declaring that the services provided by the business are not legal services).
- 21 *See* ABA, *Model Rules of Professional Conduct*, Rule 5.7 (a) and cmt. 3.