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John Nicoara, Chair
Supreme Court Rules Committee
416 Main Street, Suite 815
Peoria, IL 61602

December 24, 2007

RE: Proposals #04-18 and #04-19

Dear Mr. Nicoara,

The combined proposals now before the Illinois Supreme Court concern new Proposed Rules of Professional Conduct submitted by the ISBA/CBA Joint Committee on Ethics 2000. Generally, the proposed new Rules and Comments are helpful both to consumers and lawyers alike.

However, Proposed Rule 5.7 is a notable exception and it needs substantial revision or consumers will lose the very protection the Illinois Supreme Court should be trying to provide them. Rule 5.7 is designed to clarify that lawyers' activities are governed by the Rules of Professional Responsibility in two circumstances where it is not set out in black and white today that the Rules apply. First, lawyers are subject to the Rules where they provide non-legal services through the law firm. Second, the Rules also apply where the services are provided by another entity, but the lawyer does not make it clear to the consumer that the protections of the client-lawyer relationship are not available.

Unfortunately, Rule 5.7(b) attempts to accomplish this by defining "law-related services" and Comment [9] contains purported examples of them. Neither approach is necessary or helpful. If the lawyer provides legal services (engages in the practice of law) the lawyer is covered by the Rules. If the lawyer provides services that are not the practice of law, the lawyer's conduct ought to be covered by the Rules in the two factual settings noted, regardless of what name is given to the services provided. Two problems arise because of the approach taken by the current draft of Rule 5.7.

First, the definition of "law-related services" in Rule 5.7(b) creates an enormous erosion of what most lawyers and nonlawyers consider the practice of law. Under the proposed language, drafting contracts, leases, mortgages (and, perhaps, related documents), trusts, wills, incorporation documents and tax advice and returns will no longer be the practice of law but will become "law-related services". Moreover, consumers may lose the advice and counsel of an attorney because "real estate counseling" and "psychological counseling" are also "law-related services", not the practice of law and lawyers may hesitate to provide such services for fear their professional liability policies will not cover them.

Second, interplay between Rule 5.7 and Rule 1.8 requires the conclusion that delivery of a "law-related service" is necessarily the equivalent of entering into a "business transaction" with a client. Where there is a true business transaction between the lawyer and the client, the provisions of Rule 1.8 are appropriate. However, in some instances what have been defined as "law-related services" are

traditionally considered the practice of law. Consumers may think they are receiving, and lawyers may think they are providing, legal services in situations where the new Rules indicate there has been a business transaction with a client.

For example, long before title insurance was invented, attorneys delivered title searches, examinations and opinions to their clients and everyone called that the practice of law. Just because title companies now are allowed to insure title without being guilty of the unauthorized practice of law should not turn the lawyer's work into a "law-related service". Long before Realtors® existed, attorneys drafted contracts for the sale and purchase of real estate and called it the practice of law. Just because Realtors® are permitted to fill in the blanks in form contracts should not turn the lawyer's work from the practice of law into the delivery of a "law-related service". Similarly, property management companies can use their own lease forms and lenders can prepare their own mortgage documents, but that should not mean when a lawyer negotiates and/or drafts a lease or mortgage what has been traditionally the practice of law is now "selling" a "law-related service".

The erosion of the "practice of law" will deprive the public of the protection of legal counsel in what is for most people the largest financial transaction in their lives: the purchase or sale of the family home. And once the erosion of public protection starts, where will it end? There is no definition of the term "practice of law" in either the current Rules or the proposed Rules and that's by design. Activities either are or are not the practice of law depending upon a number of important factual considerations. Although the new proposed Rules do not define the practice of law, those Rules limit the scope of the concept by substituting for a reasoned analysis of all the surrounding facts and circumstances a facile definition of "law-related services" and jumping to the conclusion that if something is a "law-related service" it must necessarily not be the practice of law and that a lawyer providing same has entered into a business transaction with the client.

Unfortunately, the public loses much protection under this approach. By saying, essentially, "If an activity is not the unauthorized practice of law if performed by a nonlawyer it is automatically not the practice of law when performed by a lawyer", proposed Rule 5.7(b) deprives consumers of the possibility of holding the lawyer to a higher standard of care, possibly eliminates coverage under the lawyer's professional liability policy and encourages the public to forego the protection of the advice and counsel of attorneys. When a lawyer provides a service, it may be the practice of law, or not, depending on the totality of the circumstances. The fact that a nonlawyer can do it without being guilty of the unauthorized practice of law should not mean a lawyer is not practicing law if the lawyer provides the same service.

As pointed out in the December, 2007 Illinois Bar Journal article, "New Consumer Remedies for UPL", 95 Ill. Bar J. 632 (2007) at 633, "The Illinois Supreme Court has stated that the definition of the practice of law defies mechanistic formulation, but the court examines the character of the actions in question to determine if an act is the practice of law." (citation omitted) Further, "The supreme court has stated that arguments like 'widespread disregard' of the use of lawyers to perform said task or 'considerations of business expediency' are not persuasive." *Id.* Unfortunately, the proposed Rule 5.7 in its currently pending form commits both errors at once.

The proposed re-write of Rule 5.7 and associated Comments and proposed rewrite to Comment [1] of Rule 1.8, all attached, eliminate the unnecessary definition of "law-related services". What a lawyer

does is either the practice of law or it is not, and the answer will vary depending upon the individual facts and circumstances of each case. Where it is the practice of law, the lawyer's actions are governed by the Rules. Period. Where the lawyer is not practicing law, the lawyer is still governed by the Rules in the two instances envisioned by the original Rule 5.7(a)(1) and 5.7(a)(2), now simply labeled 5.7(a) and 5.7(b).

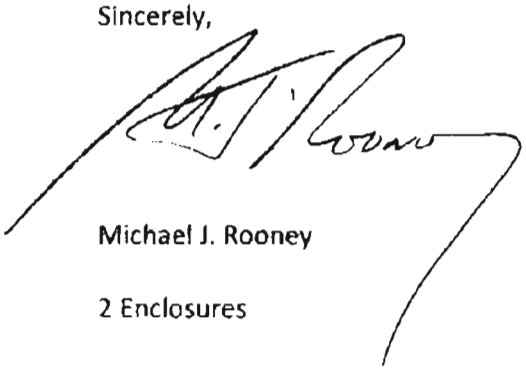
Rule 1.8 is not changed, but one sentence in Comment [1] is revised to acknowledge the elimination of the defined term "law-related services". Since a particular activity or service may or may not be the practice of law, the new Comment simply recognizes that there is no bright-line definition and leaves it to the individual facts and circumstances of each case to decide whether the lawyer has provided legal services or engaged in a business transaction with a client. Life is not that simple, and the approach taken by the Rules and Comments should likewise not be so simple as to embrace the notion that because a lay person can do something without engaging in the unauthorized practice of law, the same activity performed by a lawyer must automatically not be the practice of law.

By and large, the proposed new Rules of Professional Conduct include beneficial changes to the old Illinois Rules and yet also include sufficient changes to the ABA version to be workable in Illinois. I respectfully suggest, however, that there is no need to define "law-related services" when doing so is not required to implement the concepts of Rule 5.7 and when the ultimate result of that definition is to harm consumers by depriving them of the protection of lawyers practicing law.

Lawyers in Illinois have a long and proud tradition of representing consumers and protecting them. That tradition began before there were Realtors®, title insurance companies, property management companies and national mortgage lenders. The issue here is not about protecting the lawyer's turf, for it is clear that many of the services consumers need can be provided by those who are not licensed as lawyers. And yet, the definition of the "practice of law" must remain dynamic, not static. The definition must be fluid, not etched in stone, so consumers benefit from affordable services that can and should be provided by nonlawyers. But the definition of the "practice of law" should <u>never</u> be limited by saying if a nonlawyer can perform an act and not be engaged in the unauthorized practice of law, that same act is automatically <u>not</u> the practice of law if performed by a lawyer. The erosion of the protection of the public is, in that instance, coterminous with the erosion of the practice. Even worse, the harm to the public is far greater than the harm to the profession, since those lawyers can engage in providing the service anyway under both the original and revised proposals.

I respectfully urge the Committee to revise its recommendation to include the revised Rule 5.7 and associated Comments and the short modification to Comment [1] to Rule 1.8, both attached.

Sincerely,



Michael J. Rooney

2 Enclosures

Suggested Re-Write of Proposed Rules of Professional Conduct

Rule 5.7: Responsibilities Regarding Other Services

A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of services that are not the practice of law if those services are provided:

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

(b) 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 those services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Comment

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

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

[3] When services that are not the practice of law are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing such other services must adhere to the requirements of the Rules of Professional Conduct as provided in

paragraph (a). Even when services that are not the practice of law 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 lawyers as provided in paragraph (b) unless the lawyer takes reasonable measures to assure that the recipient of the other services that are not the practice of law knows that such other services are not legal services and that the protections of the client-lawyer relationship do not apply.

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

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

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

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of such other services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and services that are not the practice of law, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of such other services, a lawyer should take special care to keep separate the provision of legal services and services that are not the practice of law in order to minimize the risk that the recipient will assume that such other services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal services and services that are not the practice of law may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (b) of the Rule cannot

be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

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

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

Change only two sentences to Comment [1] to Rule 1.8:

Current sentences to be eliminated (p.81): "The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See, Rule 5.7."

INSERT NEW SENTENCES: "The Rule applies to lawyers engaged in the sale of goods or services that are not the practice of law, but if the goods or services are substantially related to the practice of law and the lawyer, or the lawyer's staff, on behalf of the lawyer or law firm, performs the underlying work in connection with providing such services, such work is likely the practice of law and not a business transaction with a client."

Then the next sentence, that now begins, "It also applies..." probably should be changed to, "The Rule also applies..."

~~RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES~~

~~(a)~~ **Rule 5.7: Responsibilities Regarding Other Services**

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 that are not the practice of law if those** services are provided:

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

~~(2)~~**(b)** 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~~ **those** services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

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

Comment

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

[2] Rule 5.7 applies to the provision of ~~law-related~~ services ~~by a lawyer~~ **that are not the practice of law** even when the lawyer does not provide any legal services to the person for whom ~~the law-related~~ **such other** services are performed and whether ~~the law-related~~ **such other** services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of ~~law-related~~ services **that are not the practice of law**.

Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of ~~law-related~~ services **that are not the practice of law** is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When ~~law-related~~ services **that are not the practice of law** are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing ~~the law-related~~ **such other** services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)~~(1)~~. Even when ~~the law-related~~ **services that are not the practice of law** 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~~ **firm**, the Rules of Professional Conduct apply to the ~~lawyer~~ **lawyers** as provided in paragraph ~~(a)(2)~~**(b)** unless the lawyer takes reasonable measures to assure that the recipient of the ~~law-related services knows that the~~ **other services that are not the practice of law knows that such other** services are not legal services and that the protections of the client-lawyer relationship do not apply.

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

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

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

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of ~~law-related~~ **such other** services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and ~~law-related~~ services **that are not the practice of law**, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of ~~law-related~~ **such other** services, a lawyer should take special care to keep separate the provision of ~~law-related and~~ legal services **and**

services that are not the practice of law in order to minimize the risk that the recipient will assume that ~~the law-related~~ **such other** services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal **services** and ~~law-related~~ services **that are not the practice of law** may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph ~~(a)(2)~~**(b)** of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

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

~~[10]~~ [9] When a lawyer is obliged to accord the recipients of such **other** services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f), and ~~to~~ scrupulously **to** adhere to the requirements of Rule 1.6 relating to **the** disclosure of confidential information. The promotion of ~~the law-related~~ **such other** services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

~~[11]~~ **10**] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of ~~law-related~~ services **that are not the practice of law**, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Proposed Revision of Comment [1] to Rule 1.8 (third sentence)

The Rule applies to lawyers engaged in the ~~sale~~**provision** of goods or services ~~related to~~**that are not** the practice of law, ~~for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7.~~**but if the goods or services are substantially related to the practice of law and the lawyer, or the lawyer's staff, on behalf of the lawyer or law firm, performs the underlying work in connection with providing such services, such work is likely the practice of law and not a business transaction with a client.** ~~It~~**The Rule** also applies etc. etc.