THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Adoption of Rule 5.7 of the Rules of Professional Conduct Regarding a Lawyer's Responsibilities for Nonlegal Services; Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it adopt a new Rule 5.7 of the Pennsylvania Rules of Professional Conduct to read as set forth in Annex A.

Proposed Rule 5.7 was prepared by the Committee on Legal Ethics and Professional Responsibility (Committee) of the Pennsylvania Bar Association. An explanation by the Committee of its proposal for the adoption of new Rule 5.7 is set forth below.

I. Background Information About ABA Model Rule 5.7:

The topic of a lawyer's involvement in the provision of nonlegal services has been a heated one over the last few years. In 1991 the ABA House of Delegates voted 197 to 186 to adopt "Rule 5.7 Provision of Ancillary Services." As summarized by Professor Hazard:

> Rule 5.7 as adopted by the ABA in 1991 largely—but not entirely—shut off the option of using independent business organizations to provide law-related ancillary services. Law firms could not establish or operate such entities as subsidiaries, but it was permissible for a law firm to invest, so long as its interest was not a "controlling" one. Otherwise the Rule assumed that ancillary services must be delivered only by traditional law firms, only to clients of the firm in connection with legal matters currently being handled, and only by employees of the firm.

Hazard & Hodes, 2 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 5.7:101 at 8.26.5 (1994 Supp.). One year later, however, the ABA repealed Rule 5.7 by a vote of 190 to 183. A year and a half later, in February 1994, the ABA adopted the current version of Model Rule 5.7. Professor Hazard has summarized the current rule by stating:

The new rule no longer draws its main distinction between what services may and may not be provided; instead, the key divide is whether a lawyer providing law-related services will or will not also have to comply with all of the other Rules of Professional Conduct. In effect, Rule 5.7 generally permits lawyers to act as nonlawyers when they are providing law-related rather than legal services.

Id.

The current text of Rule 5.7 as adopted by the ABA reads as follows:

RULE 5.7 Responsibilities Regarding Law-Related Services

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

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

(2) by a separate 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 of the separate entity 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.

II. Comments on ABA Model 5.7

As a general rule the Committee believes that it is desirable to have a new Pennsylvania Rule of Professional Conduct track the language of any recently adopted ABA Model Rule. The advantages can include national uniformity and the ultimate availability of a wider body of opinions and commentary to draw upon.

However, the Committee has found ABA Model Rule 5.7 of limited utility. In a survey of 20 past inquiries to the Committee's Hotline, the Committee found the rule would have applied or afforded guidance in less than half. The rule applies in just two situations: first, when the providing of nonlegal services is not distinct from the providing of legal services and, secondly, when the nonlegal services are provided by a separate entity controlled by the lawyer. Of the 20 surveyed inquiries, none involved the first category, and less than half involved the second. Furthermore, ABA Model Rule 5.7 does not address the special questions that the Committee believes arise when the lawyer, even though the lawyer may not control the separate entity, acts as an employee or agent thereof in providing the nonlegal services; over two-thirds of the surveyed inquiries involved that situation.

III. Goals With Respect to Rule 5.7

The Committee believes that the goals of Rule 5.7 are twofold: first, the rule should ensure that the Rules of Professional Conduct apply in those situations in which that is appropriate; and second, the rule should ensure that if a lawyer is somehow involved with a nonlegal services business, the customers of that business understand that they are not receiving the protection of a client-lawyer relationship.

The Committee believes that these two goals are consistent with the goals of ABA Model Rule 5.7. *See* ABA Model Rule 5.7, Comment ¶1 ("Principal among these [potential ethical problems] is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship."); Comment ¶7 ("The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation . . . 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 which the lawyer controls complies in all respects with the Rules of Professional Conduct.") Professor Hazard's comments, quoted earlier, reinforce the Committee's conclusion that the main goal of the current ABA Model Rule 5.7 is to identify those situations in which the Rules of Professional Conduct apply, rather than trying to prohibit a lawyer from engaging in certain ancillary businesses.

In sum, although the language of Rule 5.7 as proposed for adoption in Pennsylvania is very different from the language of ABA Model Rule 5.7, the Committee does not believe that the goals of proposed Pennsylvania Rule 5.7 are significantly different from the goals of ABA Model Rule 5.7.

IV. Implementing the Goal of Having the Rules of Professional Conduct Apply Where Appropriate

As stated above, the first goal is to make sure the Rules of Professional Conduct apply to nonlegal services where appropriate. After identifying this first goal, the Committee studied the circumstances under which a lawyer's conduct should always be subject to the Rules of Professional Conduct.

The Committee did not find that the factor used by ABA Model Rule 5.7—who provides the law-related services—to be most significant. Instead, the Committee concluded that the most significant variable is whether the recipient is receiving services that are distinct from legal services, or whether the recipient is receiving services that are not distinct from legal services.

In the latter situation, where the recipient is receiving services that are not distinct from legal services, the Committee believes the Rules of Professional Conduct must apply. (By stating the issue in this fashion, the Committee limited the rule to situations where a lawyer, although not necessarily the same lawyer, is providing legal and nonlegal services; the critical issue for deciding whether proposed Rule 5.7(a) applies is whether these services are distinct.) Similar to the approach used in ABA Model Rule 5.7(a)(1), the Committee believes that if the legal and nonlegal services are indistinct, the client/recipient probably will not know, for example, which comments are protected by attorney/client privilege and the lawyer's duty of confidentiality. Therefore, because the risk of confusion is unavoidable where legal and nonlegal services are indistinguishable, the Committee concluded that all of the Rules of Professional Conduct should apply in this situation to everything the lawyer does. Furthermore, the Committee concluded that this was the only situation in which it was appropriate to apply, without exception, the rules of Professional Conduct to the provision of nonlegal services.

V. Implementing the Goal of Ensuring that if a Lawyer is Somehow Involved with a Nonlegal Services Business, the Recipients of the Nonlegal Services Understand that They Are not Receiving the Protection of a Client-Lawyer Relationship.

The Committee also considered the situation of a lawyer who provides nonlegal services in a context that is distinct from the provision of legal services. (ABA Model Rule 5.7 simply does not address the situation of a lawyer who provides law-related services that are distinct.) The reason why the Committee thought it important to cover this situation is that even if the lawyer concludes that the provision of nonlegal services is distinct from the provision of legal services, there is still a risk that the nonlegal services recipient will be confused about the role and implications of the lawyer in the nonlegal services business. The Committee concluded that proposed Rule 5.7 should address this risk of confusion by imposing on the lawyer a duty to educate the recipient if there is a chance the recipient will misunderstand the implications of the lawyer's presence.

The Committee analogized this situation to the situation covered by Pennsylvania Rule of Professional Conduct 4.3(c). If a lawyer is dealing with someone who is not represented by counsel, and the lawyer knows or reasonably should know that the person misunderstands the lawyer's role, then the lawyer must make reasonable efforts to correct the misunderstanding. Similarly, if the lawyer knows or reasonably should know that there is a risk that the recipient of the nonlegal services will misunderstand the lawyer's role, then the lawyer should undertake reasonable efforts to educate the recipient.

Once the Committee identified as a concern the risk of confusion on the part of the recipient, the Committee determined that it did not matter whether the lawyer's involvement with the nonlegal services business was that of owner, controlling party, employee or agent. Furthermore, the Committee determined that it was not necessary to draw any lines about how large an ownership interest was needed to trigger the rule. The proposed rule is simply that if a lawyer is somehow connected with the provision of nonlegal services, and if the lawyer should know that the recipient might be confused about the implications of the lawyer's presence, then the lawyer has a duty to educate the recipient. Hence, proposed Rule 5.7 states that the Pennsylvania Rules of Professional Conduct apply unless the lawyer takes reasonable measures to assure the recipient understands the role of the lawyer, including the fact that the lawyer is not providing legal services and that the protections of the client-lawyer relationship do not apply.

The Committee considered this to be a fairly modest burden to impose on the lawyer, but a burden that could reap a substantial benefit in avoiding confusion, misunderstanding, ill will and loss of legal rights such as the attorney-client privilege. Thus, although the Committee initially thought that it might be important to include "owner," as well as "controlling party," and although it grappled with the issues of "how big an owner should be covered?", the Committee ultimately determined that this issue was not significant.

VI. Ensuring that Proposed Rule 5.7 Does Not Cancel Other RPC Provisions

There are some Rules of Professional Conduct to which a lawyer is subject 24 hours per day, regardless of whether the lawyer is providing legal services. Thus, a lawyer violates Rule 8.4(c) if the lawyer engages in dishonesty, fraud, deceit or misrepresentation, regardless of whether that occurs in the context of providing legal representation to a client. *Compare Office of Disciplinary Counsel v. Passyn*, 644 A.2d 699 (1994) (applying DR 1-102(A)(4)); *Office of Disciplinary Counsel v. Ewing*, 436 A.2d 139 (1981) (applying DR 1-1-2(A)(4)). Similarly, a lawyer engaged in any kind of business with a client must consider both Rules 1.7(b) and 1.8(a).

The Comment to Proposed Pennsylvania Rule 5.7 confirms that even if Rule 5.7 does not require a lawyer to be subject to all of the provisions of the Rules of Professional Conduct with respect to his or her involvement in the provision of nonlegal services, the lawyer is already

subject to some of the Rules of Professional Conduct with respect to everything he or she does, including the provision of nonlegal services.

VII. Concepts in ABA Model Rule 5.7 that are Omitted From Proposed Rule 5.7

In addition to using different language, the Committee dropped several of the concepts in ABA Model Rule 5.7 from the proposed Pennsylvania Rule 5.7.

The current version of ABA Model Rule 5.7 uses the term "law-related services," which it defines in Model Rule 5.7(b). The Committee decided that it does not make sense to use the term "law-related services." The reason is that the proposed rule requires lawyer disclosure to avoid confusion *even if the client is provided nonlegal services that in fact are wholly distinct from legal services*. In this situation, the Committee thought it might be confusing to call these distinct nonlegal services "law-related services." The issue is whether there is a risk of recipient confusion by virtue of the lawyer's involvement, not whether the services in fact are or are not related to the legal services. If the nonlegal services are completely unrelated so that there is no risk of confusion (e.g., the lawyer runs a gas station) then the rule simply is not triggered. The term "nonlegal services" is defined in the first paragraph of the Comment as "those not prohibited as unauthorized practice of law when provided by a nonlawyer." While the Committee recognizes that there is not always a bright line between legal and nonlegal services, the Committee believes that this line may be the clearest line available and that some line is necessary if there is to be a rule on this topic. Furthermore, to the extent that the line is fuzzy in a particular case, that may suggest that the legal and nonlegal services are indistinct, so that Rule 5.7(a) applies.

A second difference between ABA Model Rule 5.7 and proposed Pennsylvania Rule 5.7 is that the proposed rule is triggered in situations beyond the situation where a lawyer has a controlling interest in an entity providing law-related services. The Committee concluded that ABA Model Rule 5.7 probably uses the concept of "controlling interest by a lawyer" for two reasons. First, the predecessor to the current ABA Model Rule 5.7 talked about controlling interests; thus, there may have been some political pressure to draft alternative language which nevertheless used the same frame of reference. Second, the comment to ABA Model Rule 5.7 demonstrates the drafters' view that where a lawyer controls a separate entity, there is a risk of recipient confusion. The Committee believes that it is more useful for the rule to directly address the underlying goal of avoiding recipient confusion about the role of the lawyer and that this confusion might occur whenever a lawyer has some connection with the provision of nonlegal services. Accordingly, proposed Rule 5.7 puts the onus on the lawyer to educate the recipient about the lack of a client-lawyer relationship.

Interested persons are invited to submit written comments regarding the proposed new Rule 5.7 to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before June 3, 1996.

By the Disciplinary Board of the Supreme Court of Pennsylvania

ELAINE BIXLER,
Secretary

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

LAW FIRMS AND ASSOCIATIONS

Rule 5.7. Responsibilities Regarding Nonlegal Services.

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship do not exist with respect to the provision of nonlegal services to the recipient.

Comment

For many years, lawyers have provided to their clients nonlegal services that are ancillary to the practice of law. Nonlegal services are those that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Examples of nonlegal services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical or environmental consulting. A broad range of economic and other interests of clients may be served by lawyers participating in the delivery of these services. In recent years, however, there has been significant debate about the role the Rules of Professional Conduct should play in regulating the degree and manner in which a lawyer participates in the delivery of nonlegal services. The ABA, for example, adopted, repealed and then adopted a different version of Rule 5.7. in the course of this debate, several ABA sections offered competing versions of Rule 5.7.

One approach to the issue of nonlegal services is to try to substantively limit the type of nonlegal services a lawyer may provide to a recipient or the manner in which the services are provided. A competing approach does not try to substantively limit the lawyer's provision of nonlegal services, but instead attempts to clarify the conduct to which the Rules of Professional Conduct apply and to avoid misunderstanding on the part of the recipient of the nonlegal services. This Rule adopts the latter approach.

The Potential for Misunderstanding

Whenever a lawyer directly provides nonlegal services, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the nonlegal services are performed may fail to understand that the services may not carry with them the protection normally afforded by the client-lawyer relationship. The recipient of the nonlegal 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 nonlegal services when that may not be the case. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter.

Providing Nonlegal Services That Are Not Distinct From Legal Services

Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, confusion by the recipient as to when the protection of the client-lawyer relationship apply are likely to be unavoidable. Therefore, Rule 5.7(a) requires that the lawyer providing the nonlegal services adhere to all of the requirements of the Rules of Professional Conduct.

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, complies in all respects with the Rules of Professional Conduct. When a lawyer is obliged to accord the recipients of such nonlegal services the protection 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(b) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the nonlegal services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

Rule 5.7(a) applies to the provision of nonlegal services by a lawyer even when the lawyer does not personally provide any legal services to the person for whom the nonlegal services are performed if the person is also receiving legal services from another lawyer that are not distinct from the nonlegal services.

Avoiding Misunderstanding When A Lawyer Directly Provides Nonlegal Services That Are Distinct From Legal Services

Even when the lawyer believes that his or her provision of nonlegal services is distinct from any legal services provided to the recipient, there is still a risk that the recipient of the nonlegal services will misunderstand the implications of receiving nonlegal services from a lawyer; the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, Rule 5.7(b) requires that the lawyer providing the nonlegal services adhere to all the Rules of Professional Conduct, unless exempted by Rule 5.7(d).

Avoiding Misunderstanding When a Lawyer is Indirectly Involved in the Provision of Nonlegal Services

Nonlegal services also may be provided through an entity with which a lawyer is somehow affiliated, for example, as owner, employee, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might believe that the recipient is receiving the protection of a client-lawyer relationship. Where there is such a risk of misunderstanding, Rule 5.7(c) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules of Professional Conduct, unless exempted by Rule 5.7(d).

Avoiding the Application of Paragraphs (b) and (c)

Paragraphs (b) and (c) specify that the Rules of Professional Conduct apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if there is a risk that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship. Neither the Rules of Professional Conduct nor paragraphs (b) or (c) will apply, however, if pursuant to paragraph d, the lawyer takes reasonable efforts to avoid any misunderstanding by the recipient. In this respect, Rule 5.7 is analogous to Rule 4.3(c).

In taking the reasonable measures referred to in paragraph d, the lawyer must communicate to the person receiving the nonlegal services that the relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication, and preferably should be in writing.

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 nonlegal services, such as a publicly-held corporation, may require a lesser explanation that someone unaccustomed to making distinctions between legal services and nonlegal services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

The Relationship Between Rule 5.7 and Other Rules of Professional Conduct

Even before Rule 5.7 was adopted, a lawyer involved in the provision of nonlegal services was subject to those Rules of Professional Conduct that apply generally. For example, Rule 8.4(c) makes a lawyer responsible for fraud committed with respect to the provision of nonlegal services. Such a lawyer must also comply with Rule 1.8(a). Nothing in this rule is intended to suspend the effect of any otherwise applicable Rule of Professional Conduct such as Rule 1.7(b), Rule 1.8(a) and Rule 8.4(c).

In addition to the Rules of Professional Conduct, principles of law external to the Rules, for example, the law of principal and agent, may govern the legal duties owed by a lawyer to those receiving the nonlegal services.

Code of Professional Responsibility Comparison:

There is no counterpart to this Rule in the Code.

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PART V. PROFESSIONAL ETHICS AND CONDUCT
[204 PA. CODE CH. 81]
Amendment to Rule 8.5 of the Rules of Professional Conduct Regarding Disciplinary Jurisdiction; Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it amend Rule 8.5 of the Pennsylvania Rules of Professional Conduct as set forth in Annex A.

The amendment being proposed herewith is based on a recent amendment to Rule 8.5 adopted by the American Bar Association. The proposal to adopt that amendment in Pennsylvania has been developed and approved by the Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association. In addition, the Board of Governors of the Philadelphia Bar Association passed favorably on this proposed rule revision earlier this year.

The objective of the proposed change in Rule 8.5 is to bring some measure of certainty and clarity to the frequently encountered, and often difficult, decisions a lawyer must make when encountering a situation in which the lawyer is potentially subject to differing ethical requirements of more than one jurisdiction. It is generally the case that such decisions cannot await an authoritative ruling or advisory opinion from an independent source.

The most compelling circumstance of a lawyer caught between conflicting ethical obligations in all likelihood is that where a lawyer has become aware of a client's fraud committed in the course of the lawyer's representation, and the rule of one jurisdiction with authority over the lawyer would require disclosure of the fraud and that of another jurisdiction with authority would forbid it. Cf. Md. Final Op. No. 86-28 (Oct. 7, 1985). But this is by no means the only circumstance in which the problem arises.

As the Comment to present Rule 8.5 states, such issues may be expected to be governed by ordinary principles of conflict of laws; but those complex and subtle principles, well presented though they are in the Restatement (Second), Conflict of Laws, do not ordinarily provide to the practitioner (or the practitioner's client, who is likely to be affected by the lawyer's decision as to which rule the lawyer will follow) clear and readily decipherable guidance as to what a lawyer, facing a concrete decision where the potentially applicable ethical rules are at variance, should do. If, in the usual case where a lawyer was faced with a choice of law decision with respect to conflicting ethical requirements any of the potentially interested jurisdictions had adopted a clear and simple choice of law rule for purposes of application of its ethical rules to lawyers subject to those rules—or, even better, if all of the affected jurisdictions had adopted the same choice of law rules—the problem would undeniably be much ameliorated.

The problem of lack of clear guidance that the proposed change to Rule 8.5 seeks to address is exacerbated by the fact that existing authority as to choice of law in the area of ethics rules is unclear and inconsistent. Some authorities suggest that particular conduct should be subject to only one set of rules, while others suggest that more than one set of rules can apply simultaneously to the same conduct. Compare, e.g., Md. Final Op. No. 86-28 (Oct. 7, 1985) (Maryland attorney practicing in another jurisdiction need only comply with the other jursidiction's rules), with, e.g., In re *Porep*, 60 Nev. 393, 111 P.2d 533 (1941) (attorney disciplined under Nevada rules for the same California advertising that California had previously held not to violate California rules). Widely differing approaches to how to identify the applicable rules have been taken. See, e.g., Md. Final Op. No. 86-28, supra (rule of state in which practice occurs governs), Ala. Ethics Op. RO-81-542 (Dec. 4 & 28, 1981) (same); Mich. Informal Op. No. CI-709 (Dec. 28, 1981) (suggesting that any connection with Michigan, however small, would be sufficient to make Michigan rules applicable to lawyer admitted in both California and Michigan and practicing in California); Ariz. Op. No. 90-19 (Dec. 28, 1990) (applying the full panoply of choice-of-law factors from Restatement (Second), Conflict of Laws § 6(2)); Fla. Prop. Adv. Op. No. 88-10 (1988) ("most significant relationship test," with important factors being the client's state of residence, the state where the cause of action arose, and the state (or states) where suit may be filed"); In re *Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992) (conduct of attorney in federal district court suit is governed by general "national standards of legal ethics," even where contrary to state rules adopted by the district court to govern attorneys practicing before it).

Because of uncertainty resulting from the variety of choice of law approaches that the pertinent authorities of different jurisdictions have adopted, lawyers wishing to understand their ethical obligations often find themselves stymied by threshold questions of choice of law. In particular, two types of situations frequently arise: (a) the lawyer who is involved in litigation in another jurisdiction and does not know whether the rules of that jurisdiction, of the jurisdiction in which he or she principally practices, or of both, apply to conduct in connection with the litigation; and (b) the lawyer who is admitted in two jurisdictions and does not know whether the rules of one or the other jurisdiction, or both, apply to particular conduct.

The proposed amendment to Rule 8.5 seeks to provide clear answers to these problems in nearly all cases. In litigation, the ethical rules of the tribunal, and only those rules, would apply. The ABA version of new Rule 8.5 has been modified in this proposal by the addition of references to an "agency" in Rule 8.5(b)(1), thus broadening the scope of that provision to include litigation before an administrative agency. In non-litigation matters, the lawyer admitted in more than one jurisdiction would be subjected only to the rules of the jurisdiction where he or she principally practices, except when the particular conduct clearly has its predominant effect in another admitting jurisdiction.

The basic thesis of the proposal is that what it achieves in certainty and simplicity is worth much more than whatever regulatory interest it sacrifices in possibly preventing, in particular cases, a different set of rules, or two sets of rules, simultaneously, from being applied to a lawyer's conduct. The interests of the clients and of the profession alike are likely to be best served by clarity as to the governing rules. Under the proposed amended Rule, the rules of one jurisdiction, which undeniably will have a legitimate and substantial interest in the conduct, will in all cases govern every act of an attorney (and more than one jurisidiction may be empowered to enforce those rules). This being so, the benefits of clarity and simplicity of the proposal would appear to outweigh any benefit, in the form of substituting one set of rules for another or simultaneously applying two sets of rules in particular cases, to be had from more complex and uncertain alternatives.

It might be argued against the proposed amendment that, by providing for a single rule to apply to particular conduct, it would promote "forum-shopping." However, this seems unlikely, since a lawyer would rarely if ever be in a position to change the determinative factors (whether conduct relates to litigation, where he or she principally practices, and whether conduct clearly has its predominant effect in a particular jurisdiction) in order to affect the choice of ethics rules.

It might also be argued that under the proposed amendment an admitting jurisdiction might have to apply another jurisdiction's rules in a disciplinary proceeding. However, that is at least equally the case under the present regime.

Finally, it might be argued that, because of the exception for particular conduct that clearly has its predominant effect in another jurisdiction, the proposal falls short of achieving perfect clarity and certainty. This is indeed true, and there may be instances in which it is difficult to define the "particular conduct" and to decide whether it has its "predominant effect" in one jurisdiction or another. However, to provide for no exception would allow substantial conduct to occur in a second admitting jurisdiction without being subject to that jurisdiction's rules; and the exception has been crafted in a manner that is intended to minimize to the extent possible the difficulty of applying it in particular cases.

The proposed revised Comment would also make clear that the choice of law rules laid down in the black letter text are not intended to apply to transnational practice; in other words, the references in the Rules to other "jurisdictions" implicitly only assume such other jurisdictions as have promulgated some version of the Model Rules of Professional Conduct (or the predecessor Model Code of Professional Responsibility), thus providing complete reciprocity and certainty. Unlike domestic choice of law, on the other hand, international choice of law issues are not at this time resolvable by the adoption of uniform rules; although this may be possible in the future, at present they must continue to be resolved by internationally accepted conflict of law principles.

Interested persons are invited to submit written comments regarding the proposed amendment to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, First Floor, Two Lemoyne Drive, Lemoyne, PA 17043, on or before June 3, 1996.

By The Disciplinary Board of the Supreme Court of Pennsylvania

ELAINE BIXLER,
Secretary

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.5. **[Jurisdiction] Disciplinary Authority; Choice of Law.**

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction **[although engaged in practice elsewhere], regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.**

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court or agency before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court or agency sits, unless the rules of the court or agency provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jursidiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Comment

[In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.]

Disciplinary Authority

Paragraph (a) restates longstanding law.

Choice of Law

A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court or agency with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the

past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court or agency before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court or agency. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject only to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example; to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

Code of Professional Responsibility Comparison

There is no counterpart to this Rule in the Code.

[Pa.B. Doc. No. 96-716. Filed for public inspection May 3, 1996, 9:00 a.m.]

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 82]

Amendment of Continuing Legal Education Regulations

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

CHAPTER 82. CONTINUING LEGAL EDUCATION

Subchapter B. CONTINUING LEGAL EDUCATION BOARD REGULATIONS

Preamble. Statement of Purpose.

The public properly expects that lawyers, in the practice of the law, will maintain throughout their careers certain standards of professional competence and ethical behavior. These regulations prescribe the standards for the implementation of the Orders of the Supreme Court of Pennsylvania of January 7, 1992, July 1, 1992**, August 21, 1992**, November 29, 1993, **February 1, 1994, June 22, 1994, and March 7, 1995** promulgating the Pennsylvania Rules for Continuing Legal Education and mandating continuing legal education requirements for Pennsylvania lawyers. These regulations have been amended several times. As of here and now, the following regulations are in effect.

Section 1. Definitions.

Accredited Continuing Legal Education Provider—A not-for-profit **[company] corporation** or association accredited by the Board in accordance with the rules and these regulations.

* * * * *

Section 5. Credit for CLE Activities.

* * * * *

(b) *Teaching Activity.* The Board may assign credit to teaching activities involving courses accredited under the rules and these regulations upon written application describing the teaching activity. The Board will provide forms to be submitted for the approval of teaching credits. Credit for teaching activities will be given **[only for the time spent in making presentations of materials prepared by the applicant] on the basis of two hours credit for each hour of presentation where the applicant has prepared quality written materials for use in the presentation. Credit for repeat presentations or presentations without such materials will be given only for the actual time of presentation.**

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[Pa.B. Doc. No. 96-717. Filed for public inspection May 3, 1996, 9:00 a.m.]

Title 207—JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

Rules of Procedure; Doc. No. 1 JD 94

Order

And Now, this 17th day of April, 1996, pursuant to Article V, Section 18(b)(4) of the Pennsylvania Constitution, and in accordance with this Court's Order of February 6, 1996, proposing to amend C.J.D.R.P. No. 502, by adopting new subsections (D)—(F) and to adopt New Rule 112, the Court of Judicial Discipline hereby adopts the amendment to C.J.D.R.P. No. 502 Subsection (D)—(F) and Rule 112 in the following form, effective immediately.

Annex A

TITLE 207. JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

ARTICLE I. PRELIMINARY PROVISIONS

CHAPTER I. GENERAL PROVISIONS

IN GENERAL

Rule 112. Photocopies.

Upon the request of any resident of Pennsylvania, the Administrative Office of the Court of Judicial Discipline shall provide free of charge a copy of any Opinion or Order issued by the Court. The Administrative Office will provide photocopies of any other documents listed in the official docket at a cost of $.50 per page.

ARTICLE II. PROCEEDINGS BASED ON THE FILING OF FORMAL CHARGES

CHAPTER 5. TRIAL PROCEDURES

Rule 502. Trial. **Stipulations of Fact. Conclusions of Law. Withdrawal of Counts.**

* * * * *

(D) Stipulations of Fact.

(1) In lieu of a trial, the parties may submit to the Court an agreed statement of all facts necessary to a decision of the issues in the case. Said statement as submitted shall be binding upon the parties and shall be adopted by the Court as the facts of the case upon which the decision shall be rendered. When submitted, any such statement shall include a signed waiver of any right to trial granted under the Constitution and the Rules of this Court.

(2) The parties may submit stipulations as to issues of fact to which they agree, but which do not resolve all relevant issues of fact. In such case, the parties shall be bound by the stipulations as submitted and the Court shall proceed to trial on all other remaining factual issues.

(E) Conclusions of Law.

At the close of the evidence, the parties may submit suggested Conclusions of Law which the Court may consider in rendering the decision, however, said conclusions when submitted are not binding upon the Court.

(F) Withdrawal of Counts.

The Board may file a motion to withdraw counts in a Complaint, which shall be supported by a change in circumstances such as the loss of evidence or the unavailability of a necessary witness, or other justifiable reason.

By the Court

JOSEPH F. MCCLOSKEY,
President Judge

[Pa.B. Doc. No. 96-718. Filed for public inspection May 3, 1996, 9:00 a.m.]

Title 255—LOCAL COURT RULES

WESTMORELAND COUNTY

Adopted Civil Rule W6027; No. 3 of 1996

Order of Court

And Now, to wit this 11th day of April, 1996, *It Is Hereby Ordered, Adjudged, and Decreed* that Westmoreland County Civil Rule W6027 is adopted effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

By the Court

BERNARD F. SCHERER,
President Judge

Statutory or License Suspension Appeals

Rule W6027.

(a) All statutory or license suspension appeals shall be commenced by the filing of a petition.

(b) If a supersedeas or stay is not automatically granted by the filing of the petition, the petitioner shall present the assigned judge an unsigned order of court granting the supersedeas or stay and setting a date and time of the hearing.

(c) If a supersedeas or stay is automatically granted by the filing of the petition, the petitioner shall, within 30 days of the filing of the petition for appeal, file a signed order setting a date and time of the hearing. Failure to file the signed order may, upon motion of the opposing party, result in the dismissal of the petition.

[Pa.B. Doc. No. 96-719. Filed for public inspection May 3, 1996, 9:00 a.m.]

WESTMORELAND COUNTY

Adopted New District Justice Rule WD1016; No. 3 of 1996

Order of Court

And Now, to wit this 11th day of April, 1996, *It Is Hereby Ordered, Adjudged, and Decreed* that Westmoreland County District Justice Rule WD1008 is repealed. New District Justice Rule WD1016 is adopted. This order is effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

By the Court

BERNARD F. SCHERER,
President Judge

Statement of Objection

Rule WD1016.

The petitioner filing a Statement of Objection shall, within 10 days of the filing of the statement file a signed order setting a date and time of hearing. Failure to file the signed order may, upon motion of the opposing party, result in dismissal of the action.

[Pa.B. Doc. No. 96-720. Filed for public inspection May 3, 1996, 9:00 a.m.]

YORK COUNTY

Rescission and Promulgation of Certain Rules of the Court of Common Pleas; No. 96 M. I. 00194

Administrative Order

And Now, To Wit, This 18th day of April, 1996, it is ordered that the following Rules of this Court are Rescinded and Promulgated as follows:

1. Rule 1920.51(k) is hereby rescinded. Rule 1920.51(d) is hereby rescinded. Rule 1920.51(g) is hereby rescinded. Rule 1920.55(d) is rescinded.

2. The Rules that follow this Order are hereby promulgated as set forth in the text filed herewith.

It Is Further Ordered that this Administrative Order shall be effective thirty (30) days after the publication in the *Pennsylvania Bulletin* and shall govern all matters thereafter commenced, and insofar as just and practical, all matters then pending.

It Is Further Ordered that in accordance with Pa.R.C.P. 239, the District Court Administrator shall:

(a) File seven (7) certified copies hereto with the Administrative Office of the Pennsylvania Courts.

(b) Distribute two (2) certified copies hereof to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

(c) File one certified copy hereof with the Civil Procedures Rules Committee.

(d) Cause to be printed an adequate supply of the Rules hereby amended and promulgated for distribution to the Judges and the members of the Bar of this Court, and for sale at cost to any other interested parties, such printing to be done at the expense of the County of York, in accordance with the provisions of the act of July 9, 1976, P. L. 586, Sec. 2, 42 Pa.C.S. § 3722.

(e) Supervise the distribution hereof to all Judges and all members of the Bar of this Court.

By the Court

JOHN C. UHLER,
President Judge

I. Rule 1920.51(k) shall be amended to read as follows:

In each proceeding before a Master, including the Prehearing Conference, each party is entitled to one (1) continuance as a matter of right. Continuances must be requested at least thirty (30) days before the scheduled date of the proceeding. The Master may grant continuances for cause at any time.

II. Rule 1920.51(d) shall be amended to read as follows:

The filing of Income and Expense Statements and/or Inventory and Appraisements shall be governed by the following schedule:

1. Before a party files a motion for the appointment of a Master to hear the issues of alimony, alimony pendente lite, counsel fees, costs and expenses, or equitable distribution, the party must file those documents required by Pa.R.C.P. 1920.31 and 1920.33, as appropriate.

2. The adverse party must file the documents required by those sections within twenty (20) days after receipt of the motion appointing a master.

3. No party shall be required to file documents pursuant to this Rule sooner than the time frames allowed by Pa.R.C.P. 1920.31(a)(1) and 1921.33(a).

4. Parties failing to comply with subdivision 2 of this Rule shall be subject to sanctions upon motion by the moving party presented to the Court. Any party who fails to comply with the filing requirements of this Rule may be subject to sanction upon motion to the Court.

III. Rule 1920.51(g) shall be amended to add the following subsections:

4. During the conference, the Master shall determine what discovery shall be provided by the parties and shall include a description of this discovery in a prehearing statement which shall be provided to the parties shortly after the conference. In addition to other matters contained within it, the prehearing statement shall set a date by which all of the discovery shall be produced.

5. If either party fails to comply with the discovery deadlines established in the prehearing statement, the adverse party shall be entitled to a continuance of the hearing upon request.

6. Adverse party may also request that sanctions be imposed by the Master. The Master, in his or her discretion and without prior Court approval, may apply any of the sanctions set out in Pa.R.C.P. 4019(c)(1), (2), (3), or (5).

IV. Rule 1920.55(d) shall be amended to read as follows:

In the event no transcript has been filed by the Master at the time a party files exceptions, the party filing exceptions shall request in writing that a transcript be prepared and filed. This request must be made within ten (10) days after receipt of notice from the Master's office that the transcript has been filed. The opposing party shall file its brief fifteen (15) days after the service of the brief in support of exceptions.

[Pa.B. Doc. No. 96-721. Filed for public inspection May 3, 1996, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Collection Fee and Late Payment Penalty for 1996—1997 Registration Year

Notice is hereby given of the establishment by The Disciplinary Board of the Supreme Court of Pennsylvania for the 1996—1997 registration year of the collection fee for checks in payment of the annual registration fee for attorneys that are dishonored and the late payment penalty for registrations not received on time.

Pennsylvania Rule of Disciplinary Enforcement 219(d)(2) provides that, where a check in payment of the annual registration fee for attorneys has been returned to the Board unpaid, a collection fee established annually by the Board must be paid before the annual registration fee shall be deemed to have been paid. The Board has established the collection fee for the 1996—1997 registration year as $50.00 per returned item.

Pa.R.D.E. 219(h)(2) provides that a late payment penalty established annually by the Board must be paid by an attorney who fails to timely file an annual registration statement before the attorney shall be considered on active status for the new registration year. The Board has established the late payment penalty for the 1996—1997 registration year as $50.00.

The Disciplinary Board of the Supreme Court of Pennsylvania

ELAINE M. BIXLER,
Secretary

[Pa.B. Doc. No. 96-722. Filed for public inspection May 3, 1996, 9:00 a.m.]