THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Adoption of New Rules of Professional Conduct—Responsibilities Regarding Nonlegal Services; No. 260; Doc. No. 3

Order

Per Curiam:

And Now, this 14th day of August, 1996, it is ordered, pursuant to Article V, Section 10, of the Constitution of Pennsylvania, that:

1. The Pennsylvania Rules of Professional Conduct are amended by adding a new Rule 5.7 to read as set forth in Annex A hereto.

2. This Order shall be processed in accordance with Pa.R.J.A. 103(b). New Rule 5.7 shall take effect upon publication of this Order in the *Pennsylvania Bulletin* and shall govern all matters thereafter commenced and, insofar as just and practicable, matters then pending.

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 does 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 applies 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 comply 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 than 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.

[Pa.B. Doc. No. 96-1426. Filed for public inspection August 30, 1996, 9:00 a.m.]

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Amendment of Rules of Professional Conduct—Jurisdiction; No. 259; Doc. No. 3

Order

Per Curiam:

And Now, this 14th day of August, 1996, it is ordered, pursuant to Article V, Section 10, of the Constitution of Pennsylvania, that:

1. Pennsylvania Rule of Professional Conduct 8.5 is amended to read as set forth in Annex A hereto.

2. This Order shall be processed in accordance with Pa.R.J.A. 103(b). The amendment adopted hereby shall take effect upon publication in the *Pennsylvania Bulletin* and shall govern all matters thereafter commenced and, insofar as just and practicable, matters then pending.

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 jurisdiction, 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. 96-1427. Filed for public inspection August 30, 1996, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 1000]

Promulgation of New Rules Governing Case Submitted Upon Stipulated Facts and Abolishing Case Stated; No. 264; Doc. No. 5

Order

Per Curiam:

And Now, this 9th day of August, 1996, new Rules of Civil Procedure 1038.1 governing case submitted upon stipulated facts and 1038.2 governing the abolition of case stated are promulgated to read as follows.

This Order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective January 1, 1997.

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 1000. ACTIONS AT LAW

Subchapter A. CIVIL ACTION

JUDGMENT UPON DEFAULT OR ADMISSION

Rule 1038.1. Case Submitted on Stipulated Facts.

A case may be submitted on stipulated facts for decision by a judge without a jury. The practice and procedure as far as practicable shall be in accordance with the rules governing a trial without jury.

Official Note: See Rules 1038 governing trial without jury and 227.1 et seq. governing post-trial practice.

Rule 1038.2. Abolition of Case Stated.

The common law procedure of a case stated is abolished.

Official Note: The common law procedure of a case stated is no longer required in view of the practice of submitting a case on stipulated facts for decision by a judge without a jury. See Rule 1038.1.

Explanatory Comment

The Supreme Court of Pennsylvania has abolished the procedural device of the case stated and provided for the submission of a case on stipulated facts.

The distinction between the case stated and submission of a case upon stipulated facts has been described as follows:

> . . . In a case stated, the parties submit an agreed statement of facts and request entry of *judgment* by the court upon the facts stated. . . . The judgment entered is final, and no exceptions are necessary prior to the taking of an appeal. . . . A case stated is distinguished from a trial without jury upon a stipulation of facts in that, in a trial without jury, the parties submit an agreed statement of facts. The court then renders a decision, which is subject to exceptions and review by the court before any judgment is entered. . . . [1]

New Rule 1038.1 adds to the rules of civil procedure a specific provision governing the submission of a case for decision upon stipulated facts. The procedure under the new rule conforms to that quoted above. The parties may submit a stipulation of facts to the court for its decision. The procedure then follows an existing model, that of a nonjury trial with respect to the decision, post-trial practice and appeal.

New Rule 1038.2 abolishes the case stated, a device which has been described as "a misunderstood procedure" and "a trap for the unwary." The abolition eliminates confusion as "parties often call something a 'case stated' when they really mean a stipulation."[2]

There were two traps in the procedure for a case stated. First, there was the necessity to reserve the right to appeal in the agreement. Second, however, even where an agreement reserved the right to appeal, if the aggrieved party erroneously filed a motion for post-trial relief, the thirty-day period in which to appeal the judgment would be lost. With the abolition of case stated, these traps no longer exist.

By the Civil Procedural Rules Committee

EDWIN L. KLETT,
Chairperson

[Pa.B. Doc. No. 96-1428. Filed for public inspection August 30, 1996, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Transfer of Attorneys to Inactive Status

The following attorneys have been transferred to inactive status by Order of the Supreme Court of Pennsylvania dated July 16, 1996, pursuant to Rule 111(b), Pa.R.C.L.E., which requires that every active lawyer shall annually complete, during the compliance period for which he or she is assigned, the continuing legal education required by the Continuing Legal Education Board. The Order became effective August 15, 1996 for Compliance Group 3 due December 31, 1995.

Notice with respect to attorneys having Pennsylvania registration addresses, who have been transferred to inactive status by said Order, was published in the appropriate county legal journal.

ELAINE M. BIXLER,
Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania

LEWIS GERARD ADLER
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JAMES A. ALEXANDER
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BEN M. ARAI
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SCOTT J. BASEN
Freehold, NJ

RALPH THOMAS BORRELLO
Wilmington, DE

[1] *County of Allegheny et al. v. Allegheny County Prison Employees' Independent Union,* 53 Pa. Cmwlth. Ct. 350, 417 A.2d 864, 866 (1980).

[2] See the dissenting opinion in *McCarron v. Upper Gwynedd Township et al.,* 139 Pa. Cmwlth. Ct. 528, 591 A.2d 1151, 1159 (1990).

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