

Memorandum

To: Team Cruz Work Group
From: Pat Sallen
Re: Proposals for incorporating or deleting comments (excluding advertising), and more
Date: July 5, 2019

I was tasked with reviewing the comments to rules we have revised to see if the comments should be incorporated into the black letter of the rules.

I based my review on the rules and comments included in our last comprehensive draft and on other rules and comments that appear to be affected by the decision to eliminate ER 5.4 and ER 5.7. (I have not included the advertising rules, as those are being addressed separately.)

I approached this task broadly, keeping in mind our expansive definition of “firm” and that we need to address conflicts of nonlawyers who could be firm owners and/or who may be providing nonlegal services to firm clients.

Here are my proposals, in track changes, with my proposals in **green**. In a few instances, marking a comment as “deleted” would override the workgroup’s collective tracked changes. In those instances, I’ve retained the workgroup’s version and added a note explaining what should be deleted.

In addition to reviewing the comments, I also suggest a few other changes, which I’ve also noted, including adding language in ER 5.1 and 5.3 for entity regulation, in the event the group wants to pursue that.

ER 1.0 Terminology

I. Summary

I suggest revising some definitions, eliminating one, and adding others, mostly to incorporate concepts from existing comments that should be part of a rule or to define undefined phrases in rules that I thought would be helpful as we incorporate the concept of nonlawyers having an ownership interest in firms and those nonlawyers providing nonlegal services to firm clients.

Revised:

“Firm”: We already collectively revised the definition of “firm.” I further revised it by incorporating the basic concept (from the comment) that whether two or more lawyers constitute a firm can depend on the facts. I also propose deleting the last sentence of the existing definition – “Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation” – as unnecessary. The three paragraphs in the existing comment about “firm” (comments 2, 3, and 4) are duplicative and/or unnecessary.

“Screened”: Because we’re proposing to eliminate ER 5.4, and because nonlawyers could become firm owners, the concept of “screened” needs to be revised to take into account nonlawyers. I therefore revised the definition of “screened,” incorporating nonlawyers as well as critical information about screening that is currently in comments 8, 9, and 10 and should be part of the rule.

Eliminated:

“Partner”: Because we’re proposing to eliminate ER 5.4, and therefore opening the door to many types of entities, having a stand-alone definition of “partner” seems unnecessary. The important issue is not be whether a lawyer is technically a partner, but whether the lawyer has an ownership interest – whatever that interest looks like – or has managerial responsibilities.

Added:

“Business transaction”: I pulled definitions out of the comments to ER 1.8 and then recommend eliminating those comments. (See section on ER 1.8 proposals.)

“Personal interests”: I pulled definitions out of the comments to ER 1.7 and ER 1.8 and then recommend eliminating those comments. (See section on ER 1.7 and 1.8 proposals.)

“Authorized to practice law in this jurisdiction”: This phrase is included in the new additions to ER 5.1 and ER 5.3 dealing with entity regulations. Because we don’t have a mechanism for registering or licensing entities that provide legal services, I pegged this to lawyers or nonlawyers who may provide legal services as allowed by Rule 31.

“Nonlawyer”: Someone not licensed as a lawyer in this jurisdiction or who is licensed as a lawyer in another jurisdiction but not able to practice here. This word is used in several rules.

“Nonlawyer assistant”: I constructed this definition out of comments to ER 5.3, with an eye toward eliminating those comments.

II. Proposed amendments

(c) "Firm" or "law firm" denotes ~~a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other any affiliation, association or entity that provides solely legal services; or legal services along with other services;~~ or lawyers employed in a legal services organization or the legal department of a corporation or other any organization entity that provides legal services for which it employs lawyers. Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation. Whether two or more lawyers constitute a firm can depend on the specific facts.

[. . .]

~~(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.~~

(k) “Screened” denotes the isolation of a lawyer or nonlawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or nonlawyer is obligated to protect under these Rules or other law.

(1) Reasonably adequate procedures include:

(i) Written notice to all affected firm personnel that a screen is in place and the screened lawyer or nonlawyer must avoid any communication with other firm personnel;

(ii) Adoption of mechanisms to deny access by the screened lawyer or nonlawyer to firm files or other information, including information in electronic form, relating to the matter;

(iii) Acknowledgment by the screened lawyer or nonlawyer of the obligation not to communicate with any other firm personnel with respect to the matter and to avoid any contact with any firm files or other information, including information in electronic form, relating to the matter

(iv) Periodic reminders of the screen to all affected firm personnel.

(v) Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

(2) Screening measures must be implemented as soon as practical after a lawyer, nonlawyer or firm knows or reasonably should know that there is a need for screening.

[...]

(o) “Business transaction,” when used in reference to conflicts of interests:

(1) includes but is not limited to

(i) The sale of goods or services related to the practice of law to existing clients of a firm’s legal practice;

(ii) A lawyer referring a client to nonlegal services performed by others within a firm or a separate entity in which the lawyer or the lawyer’s firm has a financial interest;

(iii) Transactions between a lawyer or a firm and a client in which a lawyer or firm accepts nonmonetary property or an interest in the client’s business as payment of all or part of a fee.

(2) does not include

(i) Ordinary fee arrangements between client and lawyer;

(ii) Standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others and over which the lawyer has no advantage with the client.

(p) “Personal interests,” when used in reference to conflicts of interests, include but are not limited to:

(1) The probity of a lawyer’s own conduct, or the conduct of a nonlawyer in the firm, in a transaction;

(2) Referring clients to a nonlawyer within a firm to provide nonlegal services

(3) Referring clients to an enterprise in which a firm lawyer or nonlawyer has an undisclosed or disclosed financial interest.

(q) “Authorized to practice law in this jurisdiction” denotes a firm that employs lawyers or nonlawyers who provide legal services as authorized by Rule 31.

(r) “Nonlawyer” denotes a person not licensed as a lawyer in this jurisdiction or who is licensed in another jurisdiction but is not authorized by these rules to practice in this jurisdiction.

(s) “Nonlawyer assistant” denotes a person, whether an employee or independent contractor, who is not licensed to practice law in this jurisdiction, including but not limited to secretaries, investigators, law student interns, and paraprofessionals. Law enforcement personnel are not considered the nonlawyer assistants of government lawyers.

Comment

Firm

~~[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.~~

~~[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

[Also delete next paragraph]

[4] Similar questions can also arise with respect to lawyers in legal aid, and legal services organizations, and other entities that include nonlawyers and provide other services in addition to legal services. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules. For instance, an organization that provides legal, accounting, and financial planning services to clients is a “firm” for purposes of these Rules for which a lawyer is responsible for assuring that reasonable measures are in place to safeguard client confidences and avoid conflicts of interest by all employees, officers, directors, owners, shareholders, and members of the firm, regardless of whether or not the nonlawyers participate in providing legal services. See Rules 5.1 and 5.7.

[...]

Screened

~~[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.~~

~~[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any~~

~~communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.~~

~~[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~

ER 1.5(e) (fee sharing)

I. Summary

We had revised ER 1.5(e) (fee sharing). I propose further amending the rule to incorporate three important concepts contained in the comment but that should be in the rule: the rule applies to firms dividing a single billing to a client; the rule applies to firms jointly working on a matter; and the division of responsibility must be reasonable. I also slightly revised the first part of the rule to put it in the active voice.

With these changes, comment paragraphs 8 and 9 about fee division can be deleted.

II. Proposed amendments

(e) Two or more firms jointly working on a matter may divide a fee resulting from a single billing to a client ~~A division of a fee between firms lawyers who are not in the same firm may be made only if:~~

~~(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation; the basis for division of the fees and the firms among whom the fees are to be divided are disclosed in writing to the client;~~

~~(2) the client consents to the division of fees agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of fees and responsibilities between lawyers; and~~

~~(3) the total fee is reasonable; and~~

~~(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.~~

Division of Fee

~~[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers, non-participating lawyers, and non-lawyers, if the division is in proportion to the services performed by each lawyer or all lawyer assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be completely and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).~~

~~[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.~~

ER 1.6 Confidentiality

I. Summary

The workgroup had proposed adding language to a comment that information about a client be treated as confidential even if a firm provides a client only with nonlegal services. I imported that language into ER 1.6(e), so the additional comment language isn't needed.

II. Proposed amendments

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

Comment

Acting Competently to Preserve Confidentiality

(Delete next paragraph)

[19] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the

lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision, including individuals who are providing nonlegal services through a firm. Lawyers shall establish reasonable safeguards within firms to assure that all information learned from or about a client of the firm shall remain confidential even if the client receives only non-legal services. See ERs 1.1, 5.1 and 5.3.

Note: For reference, this is the entire existing relevant comment in ER 1.6:

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]-[4].

ER 1.7 Conflict of Interest: Current Clients

I. Summary

The workgroup proposed amending comment 10, which deals with personal-interest conflicts, to include the important concepts of referring clients to a nonlawyer for nonlegal services; referring clients to an enterprise in which a lawyer has a financial interest; and prohibiting nonlawyers from affecting a lawyer's independent judgment.

I propose adding the conflicts issues to the new definition of personal-interest conflicts and to new provisions of ER 1.8, and nonlawyers affecting a lawyer's independent judgment to ER

5.3. In addition, I've added a related concept – imputation of conflicts if a lawyer has an ownership interest in an opposing party – to ER 1.10.

Comment 10 could then be deleted.

II. Proposed amendments

- See proposals for ER 1.8, ER 1.10 and ER 5.3 for rule additions derived from this comment.

(Delete paragraph)

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, a lawyer may not allow related business interests to affect representation, for example, by referring clients to a nonlawyer within a firm providing nonlegal services or to an enterprise in which the lawyer has an undisclosed or disclosed financial interest. A lawyer also cannot permit nonlawyers in a firm, including but not limited to officers, directors, shareholders, and partners to materially limit the lawyer's independent professional judgment on behalf of clients, adversely affect representation of a client, or materially influence which clients a lawyer does or does not represent. Appropriate written disclosures to clients about the lawyer's financial interest in other service providers/entities are necessary to assure that clients make informed decisions about retaining the other services and the lawyer's interests in such services. See ER 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also ER 1.10 (regarding personal interest conflicts under ER 1.7 ordinarily are not imputed to other lawyers in a law firm). See ER 5.7 regarding disclosures to clients about lawyer's interests in nonlegal services.

ER 1.8 Conflict of Interest: Current Clients: Specific Rules

I. Summary

Comments 1, 2, and 3 (the latter as proposed to be amended) can be deleted, for three reasons.

First, relevant parts of comments 1 and 3 can be part of a new definition of "business transaction" in ER 1.0.

Second, comment 2 for the most part restates ER 1.8(a).

Third, I propose adding a new ER 1.8(m) to address the point in comment 3 (plus the proposed amendments to comment 3) that when lawyers refer clients for nonlegal services provided by either the lawyer or nonlawyers in the firm or refer clients to a separate entity in which the lawyer has a financial interest, they must comply with ER 1.7 as well as ER 1.8(a).

II. Proposed amendments

(m) A lawyer or firm must comply with ER 1.7 if the client expects the lawyer or firm to represent the client in a business transaction or when the lawyer's or firm's financial interest otherwise poses a significant risk that the representation of the client will be materially limited by the lawyer's or firm's financial interest in the transaction.

Comment

~~[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule also applies to when clients are referred to or receive nonlegal services from others within a firm or from a separate entity in which lawyers have a financial interest, such as when clients receive accounting, financial planning or insurance services from nonlawyers in the firm, 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 ER 5.7. The client must be advised, in accordance with paragraph (a), of the lawyer's financial interest in such nonlegal services, whether or not the lawyer or a nonlawyer provides the services. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by ER 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.~~

~~[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can~~

~~be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See ER 1.0(e) (definition of informed consent).~~

[also delete next paragraph]

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of ER 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyers in the firm or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that ER 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

ER 1.10 Imputation of Conflicts of Interest: General Rule

I. Summary

ER 1.10(a) should be amended to refer to nonlawyers. If nonlawyers will be able to play significant roles in firms, and have ownership interests, the rules should explicitly address imputation of their conflicts.

I propose deleting comments 1, 2, 3 and 4.

Comment 1, which discusses a “firm,” is not needed in light of the expanded definition of “firm” in ER 1.0.

Comments 2 and 3 are summaries of the concepts of imputation, with one important exception that addresses conflicts if a lawyer owns all or part of an opposing party. That exception

should be expanded to include nonlawyers and be part of the rule. New (f) provides that a conflict imputes to the entire firm if a lawyer or nonlawyer owns all or part of an opposing party.

Comment 4 contains important concepts that should be part of the rule itself:

- New (g) would allow nonlawyers to be screened for personal disqualifications, unless the nonlawyer is an owner or manager.
- New (h) would allow lawyers to be screened if they are disqualified because of conduct that occurred before they became lawyers, unless the lawyer is an owner or manager.

II. Proposed amendments

(a) While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or nonlawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers and nonlawyers in the firm.

[...]

(f) If a lawyer or nonlawyer in a firm owns all or part of an opposing party, the personal disqualification of the lawyer or nonlawyer is imputed to all others in the firm.

(g) If a nonlawyer is personally disqualified, the nonlawyer may be screened and the nonlawyer's personal disqualification is not imputed to the rest of the firm unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm.

(h) If a lawyer is personally disqualified from representing a client due to events or conduct in which the person engaged before the person became licensed as a lawyer, the lawyer may be screened and the lawyer's personal disqualification is not imputed to the rest of the firm unless the lawyer is an owner, shareholder, partner, officer or director of the firm.

Comment

Definition of "Firm"

[1] — ~~For purposes of the Rules of Professional Conduct, the term "firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other affiliation, association or entity that provides solely legal services or legal services along with other services; or lawyers employed in a legal~~

~~services organization or the legal department of a corporation or other organization. Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation.~~

~~See ER 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See ER 1.0, Comments [2]—[4].~~

Principles of Imputed Disqualification

~~[2]—The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers and nonlawyers is essentially is one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer and nonlawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers and nonlawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by ERs 1.9(b) and 1.10(b). For example, if one lawyer in a firm represents a client and another lawyer in another office represents another client, the first lawyer could not sue the client of the second lawyer. Similarly, if one lawyer represents a client in legal matters and a nonlawyer accountant partner in the firm represents another client but only for accounting services, the lawyer could not, on behalf of her client sue the accountant's client. A lawyer could, however, sue someone who is merely a passive investor in the firm, unless the lawyer reasonably believed that the lawyer's objectivity for the client would be materially limited because the opposing party has a financial interest in the firm.~~

~~[3]—The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, for example, if an opposing party in a case were owned by a lawyer or nonlawyer in the law firm, and others in the firm are reasonably likely to be materially limited in pursuing the matter because of loyalty to that lawyer owner, the personal disqualification of the lawyer/nonlawyer would be imputed to all others in the firm. A disqualification arising under ER 1.8(l) from a family or cohabiting relationship is personal and ordinarily is not imputed to other lawyers with whom the lawyers are associated.~~

~~[4]—The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary, unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the~~

~~person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See ERs 1.0(k) and 5.3.~~

ER 1.17 Sale of Law Practice

I. Summary

The ER 1.17 comment contains several important points that should be in the rule itself, so I have added proposed language and new sections:

- Identity of purchaser must be part of seller's mandatory disclosure;
- Fees cannot increase because of the sale;
- New (d) would require that seller give notice to client before allowing purchaser to access detailed information;
- New (e) would require that the seller must make sure a purchaser is qualified;
- New (f) would advise that if courts must approve substitution, the matter can't be included in the sale until obtaining that approval; and
- New (g) would make the rule inapplicable to transfers of legal representation unrelated to a sale.

The workgroup also rendered many parts of the comment unnecessary when it decided to eliminate ER 1.17(a) and (b).

With these changes to the rule itself, the comments can be deleted.

II. Proposed amendments

ER 1.17. Sale of Law Practice or Firm[SK1]

~~(a) A lawyer or a law firm may sell or purchase a law practice, or a practice area of a law practice firm, including good will, if the following conditions are satisfied:~~

~~(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;~~

~~(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;~~

~~(e) The seller gives written notice to each of the seller's clients regarding:~~

- (1) the proposed sale, including the identity of the purchaser;
- (2) the client's right to retain other counsel or to take possession of the file; and
- (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

(b) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

~~(d) The fees charged clients shall not be increased by reason of the sale.~~

[10](c) The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

(d) Before providing a purchaser access to detailed information relating to the representation, including client files, the seller must provide the written notice to a client as described above.

(e) Lawyers participating in the sale of a law practice or a practice area must exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently; avoid disqualifying conflicts, and secure the client's informed consent for those conflicts that can be agreed to and the obligation to protect information relating to the representation.

(f) If approval of the substitution of the purchasing lawyer for a selling firm is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(g) This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

COMMENT [2003 RULE]

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See ERs 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by ER 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

~~[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.~~

~~Client Confidences, Consent and Notice~~

~~[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of ER 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See ER 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The ER provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.~~

~~[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)~~

~~[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.~~

~~Fee Arrangements Between Client and Purchaser~~

~~[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.~~

Other Applicable Ethical Standards

~~[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see ER 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see ER 1.7 regarding conflicts and ER 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see ERs 1.6 and 1.9).~~

~~[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see ER 1.16).~~

Applicability of the Rule

~~[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.~~

~~[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.~~

~~[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.~~

ER 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

I. Summary

Because a lawyer may hold an ownership interest in a firm in a variety of ways, the title and body of this rule should not be pegged to "partner." A broader reference to "ownership interests" is one option.

I added a new (a) based on New Jersey's rule providing for entity regulation.

The comment to this rule has important concepts that should be part of the rule. Specifically, I imported from the comment:

- The definition of “internal policies and procedures”;
- The point that whether a lawyer has direct supervision is a question of fact; and
- The description of reasonable remedial action.

With these changes, the entire comment can be deleted.

II. Proposed amendments

ER 5.1 Responsibilities of Lawyers Who Have Ownership Interests or Are Partners, Managers or Direct Supervisors, and Supervisory Lawyers

(a) Every lawyer or firm authorized to practice law in this jurisdiction shall make reasonable efforts to ensure that lawyers and nonlawyers participating in the firm’s work undertake measures giving reasonable assurance that all lawyers and nonlawyers conform to these rules.

(ba) A lawyer who has a financial ownership partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures measures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these Rules of Professional Conduct.

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be required depending on the firm's structure and the nature of its practice.

(cb) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. Whether a lawyer has direct supervisory authority is a question of fact.

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(de) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer ~~is a partner~~has a financial ownership in or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by a partner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

Comment

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See ER 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~

~~[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.~~

~~[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See ER 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

~~[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also ER 8.4(a).~~

~~[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.~~

~~[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.~~

~~[7] Apart from this Rule and ER 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.~~

~~[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See ER 5.2(a).~~

ER 5.3 Responsibilities Regarding Nonlawyer Assistants

I. Summary

The title to the rule should refer to both nonlawyers in the firm and nonlawyer assistants, who can be inside or outside the firm.

As with ER 5.1, I have added a new (a) based on New Jersey's rule providing for entity regulation.

And as with ER 5.1, the comment has important concepts that should be part of the rule. I imported from the comment:

- A definition of “reasonable measures”;
- What constitutes a direct supervisor’s “reasonable efforts”;
- A reference to directions appropriate under the circumstances; and
- A reference to allocating responsibility for monitoring an external nonlawyer with client when the client directs that the lawyer use that nonlawyer.

With those concepts imported into the rule, the comment can be deleted.

II. Proposed amendments

ER 5.3. Responsibilities Regarding Nonlawyers in Firms and Nonlawyer Assistants

(a) Every lawyer or firm authorized to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer or firm is compatible with the lawyer’s professional obligations.

~~With respect to all nonlawyers employed or retained by or associated with a lawyer or who are officers, directors, shareholders, partners or equity owners of a firm along with lawyers:~~

(ba) ~~A~~ ~~a~~ partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ~~person’s~~ conduct of nonlawyers, including those who have equity interests in the firm, is compatible with the professional obligations of the lawyer; Reasonable measures include adopting and enforcing policies and procedures designed:

- (1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer’s independent professional judgment on behalf of clients or materially influence which clients a lawyer does or does not represent.
- (2) to ensure that nonlawyers comport themselves in accordance with the lawyer’s ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all firm client information.

~~(c)~~ A lawyer having direct supervisory authority over ~~the a~~ nonlawyer within or outside a firm shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; ~~and~~

- (1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.
- (2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.
- (3) When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.
- (4) Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

~~(d)~~ A lawyer shall be responsible for conduct of ~~such a nonlawyer a person~~ that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer ~~is a partner or~~ has **comparable** managerial authority in the ~~law firm in which the person is employed, or has direct supervisory authority over the person,~~ and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment **Nonlawyers Within the Firm**

~~[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See ER 5.1, Comment [1] (responsibilities with respect to lawyers~~

~~within a firm). This obligation includes assuring that the conduct of nonlawyers who are partners, shareholders, officers, directors or equity owners in a firm is compatible with the lawyers' ethical obligations. Nonlawyers in a firm shall not direct, control or materially limit the lawyer's independent professional judgment on behalf of clients. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.~~

~~[2] Lawyers in firms that have nonlawyers as owners, shareholders, partners, officers, directors, or other equity owners must make reasonable efforts to ensure that the nonlawyers comport themselves in accordance with the lawyer's ethical obligations, including, for instance, avoiding conflicts of interest and maintaining the confidentiality of all firm client information. Nonlawyers in a firm shall not materially limit the lawyer's independent professional judgment on behalf of clients, adversely affect representation of a client, or materially influence which clients a lawyer does or does not represent.~~

~~[3] Lawyers generally employ some nonlawyer assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Law enforcement officers generally are not considered associated with government lawyers, for purposes of this ER. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.~~

~~Nonlawyers Outside the Firm~~

~~[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed,~~

~~particularly with regard to confidentiality. See also ERs 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.~~

~~[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See ER 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these ERs.~~