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Legal and Professional Ethics: The Regulation of Ancillaries and Law-Related Services Reaches Oklahoma

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NOTE

Legal and Professional Ethics: The Regulation of Ancillaries and Law-Related Services Reaches Oklahoma*

I. Introduction

During the past twenty years, the practice of law has ostensibly evolved from a profession to a business,[1] as law firms have sought to expand profits by providing law-related services to clients.[2] These services are not performed by the law firm itself, but rather are performed by ancillaries, entities the law firm owns and manages with nonlawyers.[3] This multidisciplinary integration between lawyers and various other business specialists ignited an ethical controversy within the legal profession. In response to this controversy, the American Bar Association (ABA) adopted Model Rule of Professional Conduct 5.7, regulating the law-related services that lawyers can provide their clients. The Rule reads as follows:

> Rule 5.7: Responsibilities Regarding Law-Related Services
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> (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:
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> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

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1. *See, e.g.*, Sandra Day O'Connor, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002*, 55 OKLA. L. REV. 197, 200 (2002) ("There are lawyers who never hear the law's music — indeed, those who think there is none; those who think the law is just a business . . . .").

2. This subject presents certain definitional problems. *See* JAMES W. JONES, BEYOND LEGAL PRACTICE: ORGANIZING AND MANAGING ANCILLARY BUSINESSES 7 (2002) [hereinafter BEYOND LEGAL PRACTICE]. One treatise on the subject of professional responsibility uses three terms to describe these activities: ancillary business services, non-law subsidiaries, and law-related services. RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 638-39 (2002). The conceptual similarities include (1) services similar enough to the practice of law that customers and clients would expect them to be offered by lawyers, and (2) services that could be performed by nonlawyers without violating laws regarding the unauthorized practice of law. This note considers "ancillaries" to be entities which satisfy these requirements and are managed, directed, or operated in part by nonlawyers.

3. *See* Thomas F. Gibbons, *Branching Out*, A.B.A. J., Nov. 1989, at 70, 73 (reporting more than sixty-two law firms starting ancillaries in the two years prior to 1989).

> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protection of the client-lawyer relationship do not exist.
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> (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 non-lawyer.[4]

In September 2002, the Oklahoma Supreme Court, at the behest of the Oklahoma Bar Association's (OBA) Board of Governors, responded to the controversy surrounding ancillaries by adopting verbatim ABA Model Rule 5.7. Eight justices voted to adopt ABA Model Rule 5.7; however, the vote was not unanimous because Justice Opala failed to participate in the court's decision.[5] Regarding Justice Opala's abstention, Tom McConnell — advocate for the Rule's adoption before the Oklahoma Supreme Court — has suggested that Justice Opala is "old enough and smart enough to know that [lawyers] can never ask all the questions [they] need to [ask]."[6]

This note embraces the notion behind Justice Opala's nonparticipation in the vote by analyzing some of the questions left unresolved in the wake of Oklahoma's adoption of Rule 5.7. Indeed, Oklahoma is only the eleventh state to adopt a version of the Model Rule since its passage in 1994.[7] A main concern for Oklahoma practitioners, the ethics and rules committee of the OBA, and the Oklahoma Supreme Court is whether Rule 5.7 sufficiently addresses the many ethical issues created by ancillaries and law-related services. Considerable confusion exists regarding the actual purpose of the

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4. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2002).

5. Interview with Tom McConnell, Member, Rules of Professional Conduct Committee, sponsor of Oklahoma Rule 5.7, in Norman, Okla. (Jan. 30, 2003) [hereinafter McConnell Interview]. The vote on the adoption of Rule 5.7 was unanimous at the committee level, unanimous at the Board of Governor's level, and nearly unanimous before the Oklahoma Supreme Court, with Justice Opala being the lone nonparticipant. *Id.*

6. *Id.*

7. *See* DEL. LAWYER'S RULES OF PROF'L CONDUCT R. 5.7 (1985); FLA. RULES OF PROF'L CONDUCT R. 4-5.7 (1987); GA. CODE OF PROF'L RESPONSIBILITY R. 5.7 (2001); IND. RULES OF PROF'L CONDUCT R. 5.7 (1987); MASS. RULES OF PROF'L CONDUCT R. 5.7 (1998); N.Y. CODE OF PROF'L RESPONSIBILITY R. 5.7 (1999); N.D. RULES OF PROF'L CONDUCT R. 5.7 (1988); OKLA. RULES OF PROF'L CONDUCT R. 5.7 (1983); PENN. RULES OF PROF'L CONDUCT R. 5.7 (1988); TENN. CODE OF PROF'L RESPONSIBILITY R. 5.7 (2003); VT. CODE OF PROF'L RESPONSIBILITY R. 5.7 (1999).

Rule and whether it is superfluous, in the event that all other Model Rules are strictly adhered to in the context of ancillaries and law-related services.[8]

In an attempt to dispel confusion, Part II of this note traces the history of law-related services, the advent of ancillaries, and the ABA and OBA legislative history regarding these two interconnected issues. Part III provides a general review of the ethical treatment of ancillaries and law-related services under the various contemplated versions of Model Rule 5.7, and Part IV analyzes the current version of the Rule. Part V then focuses on the Rule's effect on the provision of law-related services to clients, arguing that a proper application of existing ABA Rules of Professional Conduct renders the Rule unnecessary. Finally, Part VI explores the effect of the Rule on those it intends to protect: non-client customers.

II. Attracting the Attention of the ABA

A. The Evolution from Merely 'Law-Related' to 'Ancillary'

Since colonial times, lawyers have provided nonlegal services ancillary to the practice of law. Following the American Revolution, lawyers primarily served English creditors by collecting debt and recovering property under confiscatory laws.[9] These law-related services, services that could be performed by a lawyer or a nonlawyer, expanded in the nineteenth century to include accounting, financial planning, and marriage counseling. Given the practitioner's education, areas of expertise, and relationship with the client, all of these law-related services were readily sought by clients.[10] Throughout the twentieth century, lawyers continued to provide services ancillary to their legal practices, including acting as agents for title insurance companies in connection with transactions in which the lawyers also represented one of the parties, providing trust services as adjuncts to their probate practices, and serving as trustees in bankruptcy.[11]

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8. *See* Okla. Bar Ass'n Legal Ethics Comm., Ethics Op. 316 (2001), *available at* http://www.okbar.org/ethics/316.htm (applying pre-existing rules in the ancillary context); ROTUNDA, *supra* note 2, at 638 ("[O]ne can think of Rule 5.7 as an elaboration of the general principles found in Rule 1.8(a).").

9. *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 179-80 (1953).

10. BEYOND LEGAL PRACTICE, *supra* note 2, at 3.

11. WORKING GROUP ON ANCILLARY BUS. ACTIVITIES OF THE ABA'S SPECIAL COORDINATING COMM. ON PROFESSIONALISM, FINAL REPORT ON THE ANCILLARY BUSINESS ACTIVITIES OF LAWYERS AND LAW FIRMS 10-11 (1990). In Massachusetts, ancillaries providing trust services have grown to the point where they are sometimes registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940. BEYOND LEGAL PRACTICE, *supra* note 2, at 4.

These services attracted the attention of the American Bar Association in the 1980s because of the increasing practice of large, high-profile firms providing law-related services to both clients and nonclients through subsidiaries partly owned and controlled by nonlawyers.[12] This practice began in response to a decrease in the firms' revenues caused by the encroachment by other professionals into areas of practice in which lawyers historically had provided services.[13] As clients came to expect these services from nonlegal professionals,[14] law firms sought to capitalize on these expectations by establishing ancillaries as a means to regain lost sources of income. These subsidiaries assisted the firm in regaining market share by providing nonlegal services to legal customers.[15] Furthermore, by extending ownership privileges to nonlawyers, law firms succeeded in attracting highly competent and famous individuals from the political and business sectors to attract and retain clients.[16] Ancillaries of this kind have proliferated throughout the country,[17]

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12. In 1984, the American Bar Association formed the Commission on Professionalism at the request of Chief Justice Warren Burger, who expressed concerns about lawyers venturing into business activities. Burger encouraged the Commission to examine the effect these services have on the legal profession in general and the effect such practices would have on public perception. ABA Comm'n on Professionalism, *Report to the House of Delegates*, 112 F.R.D. 243, 280-81 (1986) [hereinafter *Report on Professionalism*].

13. For example, potential legal clients have come to choose accountants over lawyers for many services traditionally performed by lawyers. PROF'L RESP. PRAC. BULL. (Prof'l Responsibility Practice Group, Butzel Long), Fall 2001, at 1, *available at* http://www.butzel.com/pub/bulpdf/prc01fa.pdf (reporting that businesses turn to accountants more frequently for tax return preparation, financial statement audits, valuation, expatriate taxation, and investment advisory services).

14. *Id.*

15. Both the Model Rules of Professional Conduct and the Oklahoma Rules of Professional Conduct prohibit the practice of law by nonlawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002); OKLA. RULES OF PROF'L CONDUCT R. 5.5 (2002). The ancillary avoids this ethical prohibition by providing no services that are considered the "unauthorized practice of law"; therefore, lawyers and nonlawyers do not divide "*legal* fees." MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2002); OKLA. RULES OF PROF'L CONDUCT R. 5.4(a) (2002) (emphasis added). Moreover, operation of the ancillary business does not constitute forming a partnership with a nonlawyer because none of the business's activities constitute the "practice of law." MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2002); OKLA. RULES OF PROF'L CONDUCT R. 5.4(b) (2002).

16. *See generally* ROTUNDA, *supra* note 2, at 638. *See, e.g.*, Jonathan D. Glater, *New Venture Hopes to Offer Some Peace of Mind to C.E.O.'s*, N. Y. TIMES, Nov. 4, 2002, at C1 (reporting that former vice-presidential candidate Jack Kemp is to serve as chairman of Patton Boggs's and Fulbright & Jaworski's Corporate Diagnostics, assisting customers in meeting government regulatory requirements).

17. One legal consultant estimates that there are close to one-hundred firms in the United States operating close to 150 ancillaries. E-mail from Bob Denney, Robert Denney Associates, Inc., to Kencade Babb (Jan. 30, 2003, 09:54 CST) (on file with author). Another consultant and

are beginning to gain a presence in the Southwest,[18] and have established a foothold in Oklahoma.[19]

B. The Bars Respond

In 1991, the American Bar Association generated two competing proposals for dealing with the ethical issues created by ancillaries and law-related services.[20] The more conservative of the two approaches called for a complete ban on ancillaries. The ABA enacted this approach as the original Model Rule 5.7 in 1991.[21] However, it rescinded the rule the following year[22] in part

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legal author has verified the existence of eighty-five firms operating 135 ancillaries. E-mail from James W. Jones, Legal Consultant and Author of BEYOND LEGAL PRACTICE: ORGANIZING AND MANAGING ANCILLARY BUSINESSES (2002), to Kencade Babb (Feb. 4, 2003, 15:56 CST) (on file with author).

18. Last year, Armstrong Teasdale in St. Louis launched Lawgical Choice to provide technical services to law firms. Heather Cole, *Armstrong, Bryan Cave Build Case for Technology*, ST. LOUIS BUS. J., Sept. 6, 2002, at 30A-31A, *available at* http://www.bizjournals.com/stlouis/stories/2002/09/09/focus6.html. Kansas City firm Lathrop & Gage launched a human resources consulting firm in March 2002, the first ancillary business started by a Kansas City law firm. *Business Summary*, BUS. J. OF KANSAS CITY, Mar. 4, 2002, http://www.hildebrandt.com/home/hildheadlines?&id[1]=810&article_id[1]=911 (last visited Dec. 3, 2002).

19. The law firm of McAfee & Taft, P.C. in Oklahoma City maintains three ancillary businesses: a financial services company, which complements its estate planning and employee benefits practice; a human resources business complementing its employment, health care and immigration practice; and an aircraft title insurance agency, which complements the firm's aviation practice. Memorandum from John M. Hermes, Managing Director, McAfee & Taft, to Dean Lawrence Hellman, Chair, Oklahoma Bar Association Rules Committee (July 6, 2001) [hereinafter Hermes Memorandum] (on file with author).

20. *See* BEYOND LEGAL PRACTICE, *supra* note 2, at 5. The ABA's Special Coordinating Committee on Professionalism responded to the Report on Professionalism by appointing a Working Group on Ancillary Business Activities in 1989, directing the Working Group to consider whether the ABA needed to amend the Model Rules of Professional Conduct to address possible ethical problems arising from law-related subsidiaries. *Id.* The Working Group's proposal recommended that the ABA Standing Committee on Ethics and Professional Responsibility (CEPR) draft an ethics rule to regulate rather than prohibit law-related subsidiaries. *Id.* The CEPR drafted such a rule and recommended its adoption to the ABA House of Delegates in 1991. *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 7 Laws. Man. on Prof. Conduct (ABA/BNA) 256 (Aug. 28, 1991). However, the ABA adopted the Litigation Section's more restrictive proposal instead. *Id.*

21. MODEL RULES OF PROF'L CONDUCT R. 5.7 (1991) (repealed 1992), *reprinted in* AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-1998, at 248 (1999) [hereinafter LEGISLATIVE HISTORY].

22. *Id.*, *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 265.

because no state chose to adopt its restrictive mandate.[23] The ABA reconsidered the issue of ancillaries and law-related services over the next two years, and its House of Delegates finally adopted a new Model Rule in 1994. The second version of Model Rule 5.7, nearly identical to the current version of the Rule, regulated, rather than prohibited, ancillaries.[24]

In contrast to the ABA pushing for the passage of Model Rule 5.7, practitioners provided the impetus for the Rule's passage in Oklahoma. Four of the largest law firms in Oklahoma,[25] comprising more than three hundred Oklahoma lawyers, sent letters to Dean Lawrence Hellman,[26] Chair of the OBA's committee on the Rules of Professional Conduct, urging him to address the issue of ancillaries and law-related services in Oklahoma.[27] The Managing Director of McAfee & Taft, P.C., an Oklahoma City law firm that operates three ancillaries,[28] recommended that the OBA committee ignore the ancillary/nonancillary distinction, and stressed that the Oklahoma Supreme Court had already endorsed, by implication, the provision of all law-related services in Oklahoma.[29] He further emphasized that ethically, lawyers could engage in the provision of law-related services under the then-existing Oklahoma Rules of Professional Conduct and that the adoption of Model Rule 5.7 would merely provide guidance to the members of the Oklahoma Bar.[30]

Following one year of deliberation, the OBA Committee recommended to the Board of Governors that Oklahoma adopt Model Rule 5.7. The Board of Governors unanimously supported this recommendation and sent a proposal to the Oklahoma Supreme Court asking it to adopt the Rule.[31] Tom McConnell, a member of the Rules of Professional Conduct Committee, argued before the court that the Rule was necessary not as an implicit endorsement of law-related subsidiaries, but as a protection to clients who already received their services.[32]

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23. *ABA Rescinds Model Rule Barring Ancillary Business*, 8 Laws. Man. on Prof. Conduct (ABA/BNA) 261 (Aug. 26, 1992).

24. MODEL RULES OF PROF'L CONDUCT R. 5.7 (1994), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 266.

25. These law firms were McAfee & Taft, P.C., Gable & Gotwals, P.C., Crowe & Dunlevy, P.C., and Phillips, McFall, McCaffery, McVay, and Murrah, P.C. McConnell Interview, *supra* note 5.

26. Hellman is the Dean of Oklahoma City University's School of Law.

27. Hermes Memorandum, *supra* note 19.

28. *See id.*

29. *Id.* (referring to State of Oklahoma *ex rel.* Okla. Bar Ass'n v. Israel, 2001 OK 42, 25 P.2d 909).

30. *Id.*

31. McConnell Interview, *supra* note 5.

32. *Id.*

Despite years of ideological wrangling at the ABA level, the Oklahoma Supreme Court approved the ABA's modified version of Model Rule 5.7.

III. Competing Concerns and Competing Methods

The nearly uncontested adoption of Rule 5.7 in Oklahoma is surprising, given the competing concerns surrounding ancillaries that led the ABA to develop different methods for their ethical treatment. An analysis of these different approaches provides an understanding of the benefits and drawbacks of each method.

A. Drawing an Invisible Line in the Sand: The 1991 Model Rule

The controversial original Model Rule 5.7 passed by a mere 2% margin at the ABA annual meeting in August 1991.[33] Many members of the ABA were troubled[34] that the Rule prohibited lawyers and firms from operating or acquiring a controlling interest in a separate ancillary.[35] The Rule also severely restricted the ability of lawyers to provide law-related services in a traditional manner. The Rule prohibited lawyers from providing law-related services to nonclients, or even legal clients who were receiving legal services pursuant to a matter unrelated to the nonlegal service being offered.[36] Finally,

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33. The ABA adopted the Rule after a standing vote with 197 in favor and 186 opposed. LEGISLATIVE HISTORY, *supra* note 21, at 254; *see ABA Rejects Ancillary Business*, *supra* note 20, at 256.

34. *See, e.g.*, *ABA Rejects Ancillary Business*, *supra* note 20, at 257 (noting that a "prohibition [is] unwarranted by the facts and unsympathetic to all the medium and small firms around the country that have provided title insurance and trust services for years").

35. MODEL RULES OF PROF'L CONDUCT R. 5.7 (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 247. The rule states:

> (a) A lawyer shall not practice law in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).
>
> (b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:
>
> (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;
>
> (2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;
>
> (3) The law firm makes appropriate disclosure in writing to its clients; and
>
> (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.

Id.

36. *Id.* at 5.7(b)(1), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248.

the Rule permitted only the lawyer or an employee of the lawyer from providing the services, which prohibited law firms from operating ancillaries as a separate department within the firm.[37]

The Rule's proponents advanced two lines of reasoning in support of the ban on ancillaries. First, they concluded that a ban on law-related activities unconnected to the provision of legal services was necessary to prevent the avarice symptomatic of a decline in professionalism.[38] Lawyers and firms, proponents argued, pursued the almighty dollar to the peril of a self-regulated bar.[39] As lawyers began to engage in activities that were regulated by state legislatures, the bar feared that the legislatures would compel changes in the manner by which lawyers could provide *legal* services to their clients.[40] The public, it was theorized, would likely demand outside regulation because lawyers' unique standing as servants of the court had disintegrated to such an extent that concerns regarding separation of powers were outweighed by the need to regulate perceived corruption.[41] Moreover, the drafters of the original version of Rule 5.7 contended that lawyers, by devoting more time to law-related business ventures, would fail to satisfy their obligations to clients.[42]

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37. *Id.* at 5.7(b)(2), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248.

38. Advocates of professionalism have, since the time of the debate over Model Rule 5.7, developed separate codes of behavior, serving as aspirational models, distinct from the ethical standards reflected in the Rules. *See, e.g.*, Elizabeth A. Alston, *The Ten Commandments of Professionalism: A Misguided Effort*, 13 PROF. LAW. 24 (2002). *See generally* Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5 (1998); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999); William H. Simon, *Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445 (1998). For an overview of this trend and its impact on other areas of legal practice, see Judith C. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 147-55 (2002).

39. Litig. Section, ABA, Recommendation and Report to the House of Delegates 1 (1991) (Executive Summary).

40. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.7 (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248; Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992) (arguing that the provision of law-related services inevitably leads to a loss of self-regulation).

41. Block et al., *supra* note 40, at 739. The last survey conducted by the ABA found that the public holds lawyers in lower regard than members of almost any other profession. Only 19% of surveyed Americans expressed that they were "extremely" or "very" confident in lawyers and the profession. Those surveyed described lawyers as greedy, manipulative, and corrupt. Mary P. Gallagher, *ABA Survey Finds Lawyers Among Lowest-Regarded U.S. Professions*, 168 N.J. L.J. 411 (2002).

42. Litig. Section, *supra* note 39, at 1 (Executive Summary). The Litigation Section's Task Force on Ancillary Business Activities, the body that drafted the 1991 Model Rule, characterized the difference between the practice of the law and other professions in this way:

> Essential to the Litigation Section's approach was the belief and conviction that

Finally, proponents of the ban asserted that independence of professional judgment was *per se* impossible in the context of ancillaries because nonlegal professionals necessarily would influence lawyers' decisions regarding the efficacy of the law-related service.[43] This perceived conflict was deemed too great to permit.[44]

The ABA Ethics Committee, which proposed the competing version of the original rule, characterized its professionalism underpinnings as "evok[ing] remembrance of a pristine professional past that never was and fears of a subjugated future that never will be."[45] The Ethics Committee, on the other hand, argued that lawyers had always treated the practice of law as a business by receiving significant compensation without compromising the ethical values inherent in their roles as fiduciaries. Given the history and tradition of law-related services, the Committee labeled a fear of outside regulation as naïve.[46] Throughout the twentieth century, state supreme courts gave themselves exclusive control over the legal profession — despite a decrease in the proportion of attorneys practicing in the courtroom — thereby ensuring that the only outside regulation of lawyers by state legislatures would be through the unlikely state constitutional amendment process.[47] Moreover,

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> lawyers do and must constitute a special profession with unique roles and responsibilities; this approach also assumed that lawyers do not cease to be lawyers when they are "wearing their ancillary service 'hats'," but should always be held to the profession's high standards of ethical and professional conduct.

Block et al., *supra* note 40, at 744.

43. MODEL RULES OF PROF'L CONDUCT R. 5.7 (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248. This influence resulted not merely from the fact that nonlawyers operated or managed the ancillaries, but from the financial gains to be had by the lawyer in the event that the customer purchased the services suggested. In this sense, the concern was of a more ethical nature than one rooted in professionalism. *See infra* Part V.

44. Much scholarly criticism has focused on these professionalism concerns. *See* Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993) (arguing that professionalism should have no place in a debate regarding ethical considerations, but should serve as an aspirational goal). Schneyer argues that:

> [g]ood policymaking (1) identifies the societal risks specific to the practice in question; (2) gathers reliable data on the magnitude of those risks; (3) identifies the regulatory responses that might reduce or eliminate whatever risks can be substantiated; and (4) carefully compares the benefits and costs of the potential responses, rejecting any response whose costs cannot be justified by offsetting benefits.

Id. at 366.

45. Standing Comm. on Ethics & Prof'l Responsibility, ABA, Recommendation and Report to the House of Delegates 1 (1991) (Minority Report of Ralph G. Elliot).

46. *Id.* at 5; *see also* Schneyer, *supra* note 44, at 379-80.

47. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 27-31 (1986).

opponents of the ban on ancillaries argued that little proof existed to demonstrate a connection between the provision of law-related services and a decline in service to clients,[48] or to the public in general.[49] A lawyer's obligation to his clients was absolute and protected by existing Model Rules.[50] Lastly, the Ethics Committee asserted that the Model Rules have always endowed lawyers with considerable trust by granting them discretion concerning the issues of conflict of interest and undue influence. A rule banning ancillaries, however, undermines this discretion, contrary to the overall spirit and tone of the Rules of Professional Conduct.[51]

The second line of reasoning underlying the original Rule focused on matters more suitable for ethical consideration. Its proponents correctly contended that a complete ban on ancillaries and the provision of law-related services, unconnected with pre-existing legal matters, would eliminate client confusion regarding the lawyer's obligations to avoid conflicts of interest, provide confidentiality, and exercise independent professional judgment.[52] In terms of confidentiality, by limiting the scope of the provision of law-related services, the Rule ensured, in most instances, that clients would be protected by the pre-existing Model Rules from a possible breach of confidentiality by

48. *See* Schneyer, *supra* note 44, at 374 ("[A]ncillary work poses no greater risk of diminishing one's legal skills than practicing part-time for family reasons, having a side line unrelated to law, managing a law firm, or participating as house counsel in a client's business affairs.").

49. Opponents countered that in 1991, Arnold & Porter, the first large firm in the country to establish ancillaries, received an A rating by the ABA for pro bono service, putting in 129 hours of pro bono service per lawyer, third best among America's largest 100 firms. *Id.* at 375.

50. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (Competence); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002) (Diligence).

51. Opponents of the ban rightly maintained that "[t]here was (and is) no evidence, for example, that lawyers in firms with ancillary services . . . have a higher incidence of grievances alleging failure to uphold the standards of the profession under the Model Rules of Professional Conduct." Section of Real Prop., Probate & Trust Law, et al., ABA, Recommendation and Report to the House of Delegates 3 (1991); *see also* Schneyer, *supra* note 44, at 376. Schneyer suggests a myriad of outside influences on the lawyer and firm greater than that of an ancillary, yet deserving of no specific ethical attention outside the Rules governing conflicts: legal-aid lawyers and lawyers in group legal service programs addressing the competing vision of program directors regarding legal services; house counsel consulting corporate managers; "flagship" clients whose business constitutes a significant percentage of total revenue; and influence by creditors and malpractice insurers. *Id.*

52. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 cmts. 1 & 3 (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248-49; *ABA Considers Ethics Rule on Ancillary Businesses*, 7 Laws. Man. on Prof. Conduct (ABA/BNA) 29 (Feb. 27, 1991); *see also* OKLA. RULES OF PROF'L CONDUCT R. 1.6 (2002) (confidentiality); OKLA. RULES OF PROF'L CONDUCT R. 1.7 (2002) (conflicts of interest); OKLA. RULES OF PROF'L CONDUCT R. 5.4 (2002) (professional independence of a lawyer).

the lawyer. Moreover, the ban alleviated the attention to be paid to nonclient customers by prohibiting the provision of any form of law-related services to persons not receiving legal representation. Finally, by mandating that lawyers or their employees provide these services, the Rule ensured that, in most cases, these services were provided in compliance with the Rules of Professional Conduct.[53]

Despite its effectiveness, the Rule's prohibition of ancillaries had one glaring conceptual shortcoming: it drew a line in the sand between legal and nonlegal services without adequately distinguishing the two. Indeed, the drafters were guilty of speaking out of both sides of their collective mouths. The Rule defined law-related services, or "nonlegal services which are ancillary to the practice of law," as those services that "*clearly* do not constitute the practice of law" yet are "functionally connected to the provision of legal services."[54] According to the ethical rationale underlying the ban, however, this "functional" connection between legal and nonlegal services created such confusion in the minds of customers and clients that lawyers should be prohibited in providing the services to nonclients[55] and severely restricted in providing them to legal clients.[56]

The confusion surrounding the Rule's definition of law-related services not only confused clients, but lawyers as well. By concluding that law-related services, or "nonlegal services ancillary to the practice of law," were practices the law permitted nonlawyers to perform, the Rule cast a prohibitory umbrella over services that lawyers historically had provided to customers who received no other form of representation. In Oklahoma, for example, the Rule would have barred lawyers from providing lobbying services in most cases.[57] As lobbying does not require a legal degree in Oklahoma, the Rule would have prohibited a lawyer from lobbying on behalf of a customer unless the customer's lobbying needs flowed naturally from other legal services the lawyer provided to the customer.[58]

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53. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 252.

54. *Id.*, *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 249.

55. The proponents of the competing proposal also raised potential First Amendment concerns arising from the adopted ban, extrapolating principles applicable to law-related services from Supreme Court holdings addressing lawyer advertising. Standing Comm. on Ethics & Prof'l Responsibility, *supra* note 45, at 13; *see, e.g.*, *In re* R.M.J., 455 U.S. 192 (1982); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988).

56. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 249.

57. McConnell Interview, *supra* note 5.

58. *Id.* McConnell has provided lobbying services to people he considered clients since the

Contrary to the theoretical underpinnings of the Rule, nearly all jurisdictions defined law-related services as the practice of law when performed by a lawyer and as nonlegal services when performed by a nonlawyer professional.[59] Accordingly, the Model Rules obliged a lawyer to extend the ethical benefits of the lawyer-client relationship to the recipient, yet a nonlegal professional could provide the same services without extending such privileges. In effect, the Rule would have forced state ethics committees and lawyers to define the practice of law — a definition that states had not chosen to create. As one scholar has described the amorphous definition of the practice of law, "The best that courts and commentators have been able to come up with is the circular proposition that the practice of law is what lawyers do!"[60] Thus, the primary drawback of the original version of Rule 5.7 was not its prohibition against ancillaries, but rather its ambiguity regarding the delineation between legal and nonlegal assistance — an essential distinction given the Rule's prohibition of most law-related services.

B. Maintaining Focus: An Attempt to Resolve Customer Confusion

Initially, the ABA assigned the Standing Committee on Ethics and Professional Responsibility the task of examining ancillaries and proposing a Model Rule if necessary.[61] In 1991, the Standing Committee proposed a Model Rule that would have avoided the definitional ambiguities inherent in the eventually adopted Rule 5.7 while at the same time addressing the ethical issues ancillaries presented.[62] First, the proposed Rule would have required

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1970s. The Rule would have curbed this practice significantly. *Id.*

59. JONES, *supra* note 2, at 7 ("There are . . . many . . . activities that are regularly regarded as part of legal practice but that do *not* constitute the unauthorized practice of law if engaged in by laypersons.").

60. *Id.*

61. *See* LEGISLATIVE HISTORY, *supra* note 21, at 259.

62. The proposed Model Rules of Professional Conduct Rule 5.7 reads as follows:

Rule 5.7 Provision of Ancillary Services

(a) A lawyer who provides, or whose law firm provides, representation to clients, and who is also associated, or whose law firm is also associated, with an ancillary business entity:

(1) shall initially disclose in writing to all customers of the ancillary business entity the nature of the relationship between the lawyer or law firm and the ancillary business entity; and

(2) shall treat a customer of the ancillary business entity in all respects as a client under the Rules of Professional Conduct, unless:

(i) the ancillary service is unrelated to any matter in which representation is provided by the lawyer or the law firm to the customer as a client of the lawyer or law firm; and

(ii) the lawyer or law firm, directly or through the ancillary business entity, has

lawyers and firms associated with an ancillary to disclose the nature of the relationship between the firm, or lawyer, and the subsidiary to all customers.[63] Second, with respect to legal clients, the proposed Rule stipulated that the Rules of Professional Conduct would govern the activities of the ancillary if the services provided related "in any matter" to the client's legal representation.[64] However, as to client matters unconnected with legal representation, and nonclients in general, the proposed Rule contemplated a situation in which the Rules of Professional Conduct would not apply. If, for example, a lawyer or firm communicated either directly or through an ancillary that the relationship between the ancillary and the customer was not that of lawyer-client prior to the commencement of the assistance, then the ethical duties under the Rules would not apply.[65]

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first clearly communicated to that customer, by means including written disclosure, that the relationship between the ancillary business entity and the customer is that of non-legal business and customer, not that of lawyer and client.

(b) In the circumstances in which a customer of an ancillary business entity is required to be treated as a client pursuant to paragraph (a)(2):

(1) a lawyer who is a partner in the law firm associated with the ancillary business entity shall make reasonable efforts to ensure that the entity has in effect measures giving reasonable assurance that the conduct with respect to that customer of all those employed or retained by or associated with the entity conforms to the Rules of Professional Conduct;

(2) a practicing lawyer associated with the ancillary business entity who has direct supervisory authority over persons employed or retained by or associated with the entity shall make reasonable efforts to assure that their conduct with respect to that customer is compatible with the professional obligations of the lawyer;

(3) a practicing lawyer associated with the ancillary business entity shall be responsible for conduct with respect to that customer of a person employed or retained by or associated with the entity that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and if:

(i) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved; or

(ii) the lawyer is a partner in a law firm associated with that entity 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 remedial action; and

(4) if the lawyer reasonably should know that the ancillary business entity is not complying with any obligation imposed by the Rules of Professional Conduct with respect to the provision of ancillary services to such customers, the lawyer shall dissociate from the entity unless the entity immediately rectifies the situation.

MODEL RULES OF PROF'L CONDUCT R. 5.7 (proposed 1991), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254-55.

63. *Id.* at 5.7(a)(1), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254.

64. *See id.* at 5.7(a)(2)(i), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254.

65. *Id.* at 5.7(a)(2)(ii), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254-55.

The drafters of the competing proposal reasoned that a ban on ancillaries was unnecessary if the lawyer, in referring clients to an ancillary, conformed to the "appropriate standards of professional conduct."[66] However, the Rule contemplated two disclosure requirements. The first disclosure requirement of the proposed rule, addressing the nature of the relationship between nonclient customers and lawyers, obligated lawyers and firms to disclose their financial interest in the provision of the law-related services.[67] This mandate would have been superfluous to legal clients because the Rules already required the lawyer to disclose his financial interest.[68] The second disclosure requirement of the proposed rule, addressing the absence of a lawyer-client relationship between nonclient customers and lawyers, required the lawyer or firm to treat the customer as a client if the lawyer or firm failed to disclose their financial interest in serving the nonclient customer.[69]

Of the two proposals, the second was superior. The proposed rule narrowly identified risks not otherwise addressed by the Model Rules, while fashioning a response predicated on ethical principles inherent in the Model Rules; specifically, the sufficiency of communication between lawyer and client,[70] and the sufficiency of communication between lawyer and client as a means to allow the client to make informed decisions.[71] Furthermore, while the proposed Rule correctly focused both on customer confusion regarding the scope of the relationship between themselves and ancillary service-providers, and on the conflicts arising from the lawyer's interest in seeing that the customer receive the law-related services, the adopted Rule erroneously placed its emphasis on unavoidable potential conflicts — conflicts considered too great to permit obeisance under the Rules.

IV. Compromise: The Current Rule

In 1994, the ABA adopted current Rule 5.7 by a wide margin.[72] The Rule was the result of a compromise between the two competing 1991 proposals. First, it addresses law-related services provided by the lawyer or firm. In such cases, the Rules of Professional Conduct extend to the customer if the provision of legal services is not "distinct" from the provision of law-related

66. *Id.* at 5.7 cmt., *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 256.

67. *See id.* at 5.7(a)(1), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254.

68. *See id.* at 5.7 cmt., *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 257 (speaking of the disclosures required by MODEL RULES OF PROF'L CONDUCT R. 1.8(a)).

69. *Id.* at 5.7(2), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254.

70. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2002) (conflicts of interest).

71. *See, e.g., id.* at 1.4 (communication).

72. The Rule "[p]assed on a standing vote 237-183." LEGISLATIVE HISTORY, *supra* note 21, at 266.

services.[73] The reasonable belief of the client as to the existence of a lawyer-client relationship determines whether the lawyer or firm satisfies this requirement.[74] Second, the Rule addresses ancillaries by stating that the Rules of Professional Conduct extend to services provided by ancillaries only if the lawyer or firm fails to take "reasonable measures" to ensure that the customer knows that (1) the assistance does not constitute legal services, and (2) no lawyer-client relationship exists.[75] Again, the inquiry focuses on the client — whether such reasonable measures have been taken depends on the reasonable belief of the customer regarding the existence or nonexistence of a lawyer-client relationship.[76]

The drafters of the current Rule agreed with the 1991 Standing Committee on Ethics and Professional Responsibility insofar as the risk to be addressed by an additional ethical mandate was the customer's confusion regarding the relationship between the service-provider and the customer. The drafters of the current Rule did not consider professionalism concerns regarding avarice. Nor did the drafters accept the contention that conflicts arising from the influence of nonlawyers — chiefly concerned with the revenue-generating benefits of the service — rendered ancillaries *per se* impermissible.[77] Finally, because the Rule attempts to resolve customer confusion, it contains no

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73. MODEL RULES OF PROF'L CONDUCT R. 5.7(a)(1) (2002). The requirements for distinctness between the legal services and law-related services provided to clients are generally fact specific. *See* Okla. Bar Ass'n Legal Ethics Comm., Advisory Op. 316 (2001), *at* http://www.okbar.org/ethics/316.htm (advising that the offices of the lawyer and the law-related business be kept physically separate and that the businesses maintain separate letterhead, or provide clear notice of the relationship between the lawyer and business); JONES, *supra* note 2, at 26 ("At a minimum [Rule 5.7 requires the lawyer or firm to] structure and operate the ancillary business in a manner that makes it clear that the services provided by the business are separate and distinct from the services offered by the law firm . . . ."); *see also* Wis. State Bar Comm. on Prof'l Ethics, Memorandum Op. 4/77A (1984), *at* http://www.wisbar.org/ethop/memo/mem87.pdf (holding that a law office and another business may occupy the same building, provided that (1) the entities do not share the same physical space, (2) they maintain separate telephones, and (3) an office directory exists with separate listings to indicate a distinction between the two). *But see* Mass. Bar Comm. on Professional Ethics, Op.76-10 (1976), *at* http://massbar.org/ publications/ethics_opinions/article.php?c_id=427&vt=2 ("The use of a single telephone number for both a law office and another profession or business would be proper provided that the mode of answering the telephone, and the listing in the telephone directory, do not couple the two.").

74. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 4 (2002).

75. *Id.* at 5.7(a)(2).

76. *Id.* at 5.7 cmt. 3.

77. *But see* House of Delegates Comm. on Ancillary Bus., ABA, Recommendation and Report to the House of Delegates 7 (1994) (arguing that the Rule promotes professionalism by providing ethical guidance).

specific requirement that the lawyer disclose the nature of the relationship between himself, or the firm, and the ancillary.[78]

In contrast to other Rules of Professional Conduct, the ethical duties provided by Rule 5.7 are in some sense permissive. The Rule does not require a lawyer to separate the provision of law-related services from legal services or to take measures to ensure that the customer knows that no lawyer-client relationship exists in law-related services. When the lawyer chooses not to perform such tasks, however, the Rule requires him to treat the customer as a client.[79] Thus, Rule 5.7 effectively extends a lawyer's affirmative duty to nonclient customers in a manner unlike any other in the Rules.[80] On the other hand, when a lawyer or firm fails to ensure that the ancillary and legal practice are distinct, or make the necessary disclosures, the customer *becomes* a legal client. This interpretation of the current Rule corrects a conceptual flaw in the original version of Rule 5.7. Under the original Rule, lawyers owed a fiduciary duty to customers when providing law-related services.[81] The flaw is evident insofar as the provision of most law-related services is considered the practice of law when provided by a lawyer, and thus the customer already is deemed a client for purposes of imposing ethical obligations.[82] If this same rationale is applied, current Rule 5.7 serves not as an ethical rule, but as a loophole that permits a lawyer to avoid ethical duties by meeting the separation and disclosure requirements of the current Rule.[83]

Regardless of whether one perceives the current Rule as extending a new duty of care or merely recognizing a pre-existing duty, its method of addressing customer confusion provides a benefit the original Rule lacked. By framing the ethical analysis in terms of the reasonable belief of the customer, current Rule 5.7 avoids the pitfalls inherent in inquiries regarding the unauthorized practice of law. Although the current Rule defines law-related services as those that "might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not

78. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 5.7(a)(1) (proposed 1991), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 254.

79. MODEL RULES OF PROF'L CONDUCT R. 5.7(a) (2002).

80. For example, Model Rules of Professional Conduct Rule 8.4(c) extends a duty to nonclients only to prohibit the lawyer from behaving dishonestly when dealing with the community at large. *Id.* at 8.4(c).

81. *See supra* Part III.A.

82. JONES, *supra* note 2, at 7 ("There are . . . many . . . activities that are regularly regarded as part of legal practice but that do *not* constitute the unauthorized practice of law if engaged in by laypersons.").

83. *See id.* at 26 ("Rule 5.7 provides a 'safe harbor' for lawyers to provide law-related services without the necessity of conforming to the rules of practice normally applicable to legal services.").

prohibited as unauthorized practice of law when provided by a nonlawyer,"[84] the Rule does not pass judgment upon the nature or appropriateness of the law-related service at issue. Consequently, it does not compel lawyers to differentiate between legal services and law-related services. While ancillaries cannot perform acts prohibited as the unauthorized practice of law,[85] the ethical analysis under current Rule 5.7 correctly asks whether the customer perceives the services as the practice of law, not whether the services are objectively legal, nonlegal, or law-related.

V. Recourse to Existing Rules: An Argument for the Adequacy of Disclosure Mechanisms and Per Se Prohibited Transactions in Addressing Client Needs in the Ancillary Context

A. Improper Influence in the Ancillary Context as a Form of Conflict of Interest

Proponents of the ban on ancillary services contended at the time of the 1991 Rule[86] and proponents today assert[87] that the influence of nonlawyers, involved in the operation of ancillaries, on the decision-making process of lawyers and firms, is inadequately addressed under the Rules of Professional Conduct.[88] However, existing ethics rules — lending themselves to fact-specific inquiries rather than *per se* prohibitions of ancillaries — properly address this threat to the lawyer's independent professional judgment. Specifically, ABA ethics committees and various state bar associations have employed their respective versions of Model Rule 1.8(a) and 1.7(b) in response to these concerns.[89] Model Rule 1.7(b) addresses conflicts between

84. MODEL RULES OF PROF'L CONDUCT R. 5.7(b) (2002).

85. *See id.* at 5.4; *see also* discussion *supra* note 15.

86. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 2 (1991) (repealed 1992), *reprinted in* LEGISLATIVE HISTORY, *supra* note 21, at 248.

87. Arash Mostafavipour, *Mixing Law and Other Business Service: Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL ETHICS 435, 441 (1998).

88. A common justification given for the strict regulation or prohibition of ancillaries is predicated on the ineffectiveness of state disciplinary authorities to prosecute wrongdoers under the Rules of Professional Conduct. Although not addressed in this Note, proponents of this view assert that adding nonlawyer managers of ancillaries to the list of individuals capable of conducting transactions requiring disciplinary oversight places too great a burden on the bar. *See, e.g.*, Kevin Arquit, *FTC Unit Lauds Law-Firm Diversification*, LEGAL TIMES, Apr. 8, 1991, at 14; Mostafavipour, *supra* note 87, at 440-41.

89. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 418 (2000) (holding that a lawyer satisfies the disclosure requirements of Rule 1.8(a) if he explains the important features of the arrangement and its material consequences); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 753 (2002), *at* http://www.nysba.org/Template.cfm?Section=Ethics_ Opinions ("Where a client is represented by a lawyer and uses an ancillary business

the client's interest and the financial interest of the lawyer or firm by requiring the lawyer to consult with the client regarding the pros and cons of the proposed conduct.[90] Model Rule 1.8(a) governs transactions with clients by obligating the lawyer to disclose, in writing, his interest in the transaction.[91] The Comment to Rule 5.7 indicates that when a lawyer-client relationship exists prior to the provision of law-related services, by an ancillary or otherwise, the lawyer must comply with Rule 1.8(a).[92] The nonlawyer ancillary manager shares the conflicting interest of the lawyer or firm — an interest in the income to be derived from the provision of the law-related services. Thus, a separate ethical inquiry pertaining to the influence of the nonlawyer on the lawyer or firm regarding the transaction becomes unnecessary. The potential financial gain of the lawyer constitutes the conflicting ethical interest. Without this interest, the ancillary manager lacks any independent basis for influencing the decisions of the lawyer or firm regarding the client's need for law-related services. It is this financial interest of the lawyer in the ancillary that is of particular importance to the client when considering the propriety of the lawyer's recommendation. Consequently, Rule 1.8(a) requires that the lawyer disclose this interest.

B. The Effectiveness of Specific Inquiries: An Oklahoma Case Study

An analysis of recent Oklahoma caselaw demonstrates both the ineffectiveness of and the significant conflicts issues caused by a bright-line rule banning ancillaries while simultaneously permitting a wide variety of

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owned by the lawyer, the rules applicable to personal conflicts of interest and transactions between clients and lawyers continue to apply . . . ."); N.H. Bar Ass'n Ethics Comm., Formal Op. 1998-99/14 (2000) *at* http://www.nhbar.org/pdfs/FO98-99-14.pdf (holding that the rules applying to an ancillary insurance venture include New Hampshire Rule of Professional Conduct 1.7(b) and New Hampshire Rule of Professional Conduct 1.8(a)).

90. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002) (mandating consultation with the client in the event that the representation might be materially limited by the lawyer's own interest).

91. *Id.* at 1.8(a) (The Rule forbids a lawyer transacting business with a client unless (1) the transaction and terms are fair and reasonable; (2) the terms are disclosed to the client in writing; (3) the lawyer receives the opportunity to seek another lawyer regarding the transaction; (4) the client consents in writing; and (5) the lawyer's discloses his interest to the client). Under the Oklahoma Rules of Professional Conduct 1.8(a), the lawyer's duty to disclose his interest has been inferred from the language of 1.8(a)(1) (1988), which requires that the "transaction and *terms on which the lawyer acquires the interest* are fair and reasonable . . . and fully disclosed." Okla. Bar Ass'n Legal Ethics Comm., Advisory Op. 316 (1998), *at* http://www.okbar.org/ethics/316.htm. A similar approach can be found in most jurisdictions. *See, e.g.*, N.H. Bar Ass'n Ethics Comm., Formal Op. 1998-99/14 (2000), *at* http://www.nhbar.org/pdfs/FO98-99-14.pdf.

92. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 10 (2002).

other law-related services, as long as those services are provided to a client with in connection with a current legal matter. In 2001, the Oklahoma Supreme Court first addressed the issue of ancillaries in *State of Oklahoma ex rel. Oklahoma Bar Association v. Israel.*[93] In *Israel*, the respondent lawyer and a nonlawyer formed a corporation to help Oklahoma mothers collect court-ordered child support.[94] The lawyer contracted separately with the ancillary corporation's customers to obtain support orders and to establish paternity, if necessary.[95] The lawyer and the ancillary agreed to pay costs and defer fees in return for a percentage of the support checks. When the firm collected checks, it subtracted its fees and sent the remainder to the mother.[96] At the onset of the arrangement, the lawyer verbally informed the mother of his financial interest in the ancillary, yet failed to disclose the interest in writing or obtain her written consent.[97] The OBA filed a three-count complaint, alleging violations of Oklahoma Rules 1.7(b), 1.8(a), and 5.4(b).[98] The court held that no violation of the partnership provision (Rule 5.4(b)) occurred because the nonlawyer ancillary manager performed ministerial tasks that did not constitute the practice of law.[99] Additionally, the court held that no violation of the conflict provisions occurred because the ancillary did not earn income unless the customer did; therefore, the lawyer's personal financial interests flowing from the ancillary were consistent with the legal interests of his client.[100] Interestingly, the court disregarded the clear language of Rule 1.8(a) and held that the lawyer's verbal disclosure of his financial interest in the transaction between his client and the ancillary satisfied the requirements of the Oklahoma Rules.[101]

Israel demonstrates the folly in a *per se* ban on ancillaries as well as the importance of a fact-specific inquiry into potential conflicts and required disclosures in the context of ancillaries and law-related services. Indeed, the only influence the ancillary could have exercised would have been to encourage a more zealous representation. As *Israel* illustrates, the conflicts between the financial interests of ancillaries and the interests of their

93. 2001 OK 42, 25 P.3d 909.
94. *Id.* ¶ 2, 25 P.3d at 910.
95. *Id.*
96. *Id.* ¶ 3, 25 P.3d at 910
97. *Id.* ¶ 18, 25 P.3d at 914.
98. *Id.* ¶ 11, 25 P.3d at 913.
99. *Id.* ¶ 21, 25 P.3d at 914.
100. *Id.* ¶ 16, 25 P.3d at 914.
101. *Id.* ¶ 18, 25 P.3d at 914. The Court suggested that "[i]n any business association with a client, written disclosure of a lawyer's interest is certainly the safest course. Written disclosure in this matter would have eliminated any question concerning what the client was told." *Id.* ¶ 19, 25 P.3d at 914.

customers vary according to the services provided. By understanding that the referral of a client to an ancillary constitutes a business transaction, in which the lawyer or firm's representation may be materially limited by an adverse interest, it is evident that pre-existing disclosure requirements adequately address the need for the client to be fully informed about the legal advice he receives.

At the opposite end of the spectrum is a situation where a lawyer, engaged by a client to give advice in estate planning, refers the client to an ancillary in which the lawyer owns an interest. The lawyer refers the client so that the ancillary can provide law-related services connected with the sale of insurance or securities. Again, the pre-existing ethics rules provide adequate protection for the client and guidance for the lawyer. In 2001, the Legal Ethics Committee of the Oklahoma Bar Association[102] addressed this issue, as well as the more general issue of a lawyer or firm offering insurance or securities as an in-house law-related service. In Ethics Opinion 316,[103] the committee held that a lawyer could sell insurance and securities products to a client as long as he properly disclosed his interest as required by Rule 1.8(a).[104] The committee reasoned that full disclosure should include (1) the existence of a financial relationship with the ancillary; (2) the means by which the lawyer will be compensated as a result of the referral; and (3) why the lawyer is recommending the product, including a comparative analysis of alternative products applicable to the clients needs.[105] The committee embraced a fact-specific inquiry by specifying that in certain circumstances such a referral is barred because the client cannot give informed consent. For example, when

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102. Tom McConnell, a member of the Rules of Professional Conduct Committee of the OBA, indicates that the Supreme Court of Oklahoma defers to the advisory opinions of the Legal Ethics Committee of the OBA in almost every instance. McConnell Interview, *supra* note 5. *But see Israel*, 2001 OK 42, 25 P.2d 909.

103. Okla. Bar Ass'n Legal Ethics Comm., Advisory Op. 316 (2001), *at* http://www.okbar.org/ethics/316.htm.

104. *Id.* Other states similarly have held that a lawyer may sell the client — either directly or by means of a referral to an ancillary — insurance or securities in connection with a legal estate plan. *See, e.g.*, Cal. State Bar Ass'n, Formal Op. 1995-140 (1995), *at* http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sCategoryPath=/Home/Attorney%20Resources/Ethics%20Information/Ethics%20Opinions (finding that a lawyer may refer his client to an insurance agent and receive a commission for the referral so long as the lawyer fully discloses his interest); State Bar of Mich., Ethics Op. No. RI-135 (1992), *at* http://www.michbar.org (holding that a lawyer/insurance agent may sell insurance to clients with full disclosure of interest); S.C. Bar, Advisory Op. 90-16 (1990), *at* http://www.scbar.org/opinions/9016.htm (holding that a law firm may refer estate-planning clients to an insurance agency in which the firm has a 50% interest given sufficient disclosure of the interest).

105. Okla. Bar Ass'n Legal Ethics Comm., Advisory Op. 316 (2001), *at* http://www.okbar.org/ethics/316.htm.

the client is infirm or elderly, the trust placed in the lawyer and the incapacity of the client to comprehend the alternatives may foreclose the lawyer referring the client to the ancillary.[106] Tamila Rother and Elizabeth K. Brown, members of the committee and participants in the drafting of Advisory Opinion 316, point out that the opinion recognizes the growing sophistication of the legal client.[107] This sophistication permits the increasing use of disclosure mechanisms to overcome potential conflicts of interest. Accordingly, the opinion starkly contrasts the conservative approach to ancillaries, which was advocated by both the drafters of the original Model Rule 5.7 and the opponents of ancillaries — who feared the inevitable manipulation of legal clients for personal gain.

A prohibition deeming certain transactions with clients to be *per se* impermissible does not weaken the argument but merely demonstrates the effectiveness of other Rules in protecting clients in the ancillary context. Other states have concluded that estate-planning lawyers may neither refer clients to an ancillary nor sell clients financial products connected with a legal recommendation. For example, the New York State Bar Association held in 1991 that regardless of the disclosures provided, the client could not give informed consent to receive law-related services provided by an insurance ancillary because of the wide array of insurance products that are available at differing costs.[108] The Rhode Island Bar Association's Ethics Advisory Panel has similarly concluded that a lawyer's financial interest in a particular insurance ancillary bars his ability to refer clients to it, regardless of his belief in the propriety of the suggested estate-planning vehicle.[109]

The aforementioned ethical scenarios demonstrate two important points pertaining to the ethical treatment of ancillaries. First, they illustrate the gap

106. *Id.*

107. Interview with Tamila Rother, Member, Okla. Bar Ass'n Legal Ethics Comm., in Norman, Okla. (Feb. 6, 2003). Ms. Rother is a partner with Crowe & Dunlevy, P.C., in Oklahoma City. The firm has no ownership interest in an ancillary. However, William G. Paul, Of Counsel, participated in the drafting of Rule 5.7 of the Model Rules of Professional Conduct, stating at the time that the Rule "simply gives lawyers who are already providing nonlegal services needed ethical guidance." *Ancillary Business Rule Emerges from ABA Meeting*, 10 Laws. Man. on Prof. Conduct (ABA/BNA) 29 (Feb. 23, 1994) (quoting William G. Paul, Chair, Drafting Committee Model Rule 5.7); Interview with Elizabeth K. Brown, Member, Okla. Bar Ass'n Legal Ethics Comm., in Norman, Okla. (Feb. 3, 2003). Ms. Brown is a partner with Phillips, McFall, McCaffrey, McVay and Murrah, P.C., in Oklahoma City. The firm offers the law-related services at issue in Advisory Opinion 316 of the Legal Ethics Committee of the Oklahoma Bar Association. *Id.*

108. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 619 (1991) (prohibiting an estate-planning lawyer who is also an insurance broker from selling insurance to clients regardless of the disclosures regarding his interests).

109. R.I. Sup. Ct. Ethics Advisory Panel, Opinion No. 96-26, at 2-3 (1996).

between the mandates of the 1991 adopted Rule and the policies it sought to promote, which were a decrease in lawyer overreaching and a decrease in lawyer participation in business endeavors at odds with the needs of clients. Because *Israel* involved an entity operated by a nonlawyer, the Rule would have prohibited the ancillary despite a lack of any conflict of interest. Conversely, the Rule would have permitted the practice at issue in Oklahoma Advisory Opinion 316 if the lawyer or firm provided the investment vehicle, despite the split in opinion regarding the effectiveness of disclosure mechanisms in overcoming a conflict between the financial interests of the lawyer or firm and the legal needs of the client. Second, the ethical scenarios illustrate the effectiveness of the other Rules of Professional Conduct in addressing the unique conflicts that arise in the context of ancillaries and law-related services. The scope of the Rules is sufficiently broad to permit ethical inquiries into the effect nonlawyer managers and operators of an ancillary have on the lawyer. Their influence is limited by the financial interest of the lawyer or firm, and this interest is amenable to ethical examination under pre-5.7 Rules.

VI. Importing Transaction Disclosures into the Rule

A. The Disclosure Obligations Under the Model Rule

Under the transaction provisions of the Model Rules, the disclosure required in order for a lawyer to refer a client to an ancillary far exceeds the disclosure required by Model Rule 5.7 when a lawyer refers a nonclient to an ancillary. Rule 5.7 requires only that the lawyer or firm take reasonable measures to ensure that the customer knows that the services received from the ancillary "are not legal services and [thus] the protections of the client-lawyer relationship do not exist."[110] This requirement is consistent with the narrow risk Rule 5.7 contemplates alleviating — namely, customer confusion regarding the nature and scope of the relationship between him and the ancillary.[111] The lawyer must provide the disclosure required by Rule 5.7 before the commencement of the law-related services, preferably in writing.[112]

110. MODEL RULES OF PROF'L CONDUCT R. 5.7(a)(2) (2002).

111. *Id.* at 5.7 cmt. 1.

112. *Id.* at 5.7 cmt. 6; *see, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 755 (2002), *at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Opinion_755.htm ("[W]hile a client will ordinarily be presumed to believe that the non-legal services are the subject of an attorney-client relationship, that presumption will not apply if the lawyer advises the client in writing 'that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services."); *see also* JONES, *supra* note 2, at 60. James W. Jones offers this disclosure language in a sample retainer

Disclosures of specific facts — (1) that the services are not legal services and (2) that no lawyer-client relationship exists — are conceptually easier to satisfy than the disclosure required when the potential customer is a legal client — the Rules meet a greater risk with a greater mandate.

B. The Disclosure Obligations Under the Oklahoma Rule

Practitioners should know that although eleven states have adopted a version of Model Rule 5.7, only Oklahoma has added express language to the Comment, addressing the specific nature of the disclosure. The Comment to Rule 5.7, imputing language from Oklahoma Advisory Opinion 316, expressly suggests that the disclosure include written notice of the lawyer or firm's interest in the ancillary.[113] While nondisclosure is not objectionable from a policy perspective, it is contrary to the reasonable steps necessary to eliminate the risk of customer confusion contemplated by the drafters of the Model Rule. The customer need not know of the lawyer or law firm's interest in order to reasonably understand the lack of the lawyer-client relationship. Nevertheless, there it is, an anomaly in an otherwise well-crafted, narrowly tailored, and effective ethical Rule.

VII. Conclusion

An examination of the ends and the means of any law provides guidance for following its mandate. The history of Model Rule 5.7 exemplifies ethical overreaching. The original Rule was an attempt by the ABA to stop large firms from exploring new business models and, in the process, prohibit the single practitioner from providing those services he has always considered the practice of law. Oklahoma was wise to wait for an ethical rule that identified the potential risks ancillaries present, and to respond by addressing the risks with a narrow and effective disclosure requirement.

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agreement:

> (a) Client acknowledges that *S&J* is [a wholly owned subsidiary of] [partially owned by] the law firm of *Smith & Jones*, and that the attorneys of *Smith & Jones* have made a substantial contribution in time, effort, and financial resources toward *S&J's* success. Client also acknowledges that, notwithstanding its relationship to *Smith & Jones*, *S&J* does not practice law and the services that *S&J* offers are not legal services. Accordingly, Client understands and acknowledges that, in retaining *S&J*, Client will *not* have the benefits of an attorney-client relationship and that the protections of attorney-client privilege will *not* attach to its communications with *S&J*.

Id. (alteration in original).

113. OKLA. RULES OF PROF'L CONDUCT R. 5.7 cmt. (2002).

It remains unclear whether Rule 5.7 will serve in Oklahoma as a safe-harbor, whereby firms can escape their responsibilities as legal fiduciaries, or extend a new duty, to nonclient customers. Furthermore, confusion still exists surrounding the point at which legal services end and law-related services begin. Certainly, however, Rule 5.7 compels a lawyer financially tied to an ancillary to tell the customer where he stands. If he fails to do so, the Rule does it for him.

D. Kencade Babb