

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 2007-1
January 10, 2007

This opinion is merely advisory and is not binding on the inquiring attorney or the
Court or any other tribunal

Background Facts

The inquirer is a partner in a Pennsylvania limited liability partnership ("LLP"). All partners of the LLP are and will be licensed attorneys in one or more jurisdictions. LLP is considering the formation of a Pennsylvania limited liability company ("LLC"), which will qualify in Delaware as a foreign limited liability company and engage in the practice of law in Delaware. LLP will be the sole member of LLC. All attorneys practicing law in Delaware through LLC are or will be members of the Delaware Bar. The fees received by the LLC from its practice of law in Delaware will be distributed to LLP, as LLC's sole member, and, in turn, be distributed to the partners of LLP. The Committee has been asked to consider if the proposed arrangement complies with the Delaware Lawyers' Rules of Professional Conduct ("DLRPC").

Conclusion

The proposed arrangement does not violate the Delaware Lawyers' Rules of Professional Conduct if, as required by Rule 1.5(e), fees charged by the LLC to its clients are reasonable and the clients are advised in writing that fees may be shared with a different entity, and the client does not object. This opinion assumes the arrangement will comply with Delaware Supreme Court Rule 12(d), which requires a *bona fide* office located in Delaware, and staffed by attorneys admitted in Delaware, and not a subterfuge to avoid *pro hac vice* admission. Further, the requirements of DLRPC 7.5(b) must also be followed if the names of the entities are the same.

Discussion

The Committee has been asked the following questions:

I. DLRPC 1.5(e) restricts the division of fees between lawyers who are not in the same firm unless certain circumstances apply. The fees received by LLC from its practice of law in Delaware will be distributed to LLP, as LLC's sole member, and in turn to the partners of LLP. Would this be considered a violation of Rule 1.5(e)?

Response: DLRPC 1.5(e) states:

A division of fee between lawyers who are not in the same firm may be made only if:

(1) The client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) The total fee is reasonable.

Assuming compliance with these conditions, the division of fees is permissible.

II. DLRPC 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer except in certain circumstances. The fees received by LLC from its operations in Delaware will be distributed to LLP, as LLC's sole member, and in turn to the partners of LLP. Would this be a violation of DLRPC 5.4(a)?

Response: DLRPC 5.4(a) states:

A lawyer or law firm shall not share legal fees with a nonlawyer [with exceptions which are not applicable].

The distribution of funds would not constitute the sharing of fees with a nonlawyer. While the organization of LLC is unusual, the lawyers who are partners of LLP are the only ones sharing in the fees. No nonlawyer shares. See Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990) which rejected an argument that a law firm was a nonlawyer for purposes of the disciplinary rules.

III. DLRPC 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer if the practice of law is conducted by the partnership. While LLC is itself a nonlawyer, the beneficial owners of LLP, the sole member of LLC, are all licensed attorneys. No nonlawyer is or will be a beneficial owner of LLC or LLP. Would this tiered structure be a violation of DLRPC 5.4(b)?

Response: DLRPC 5.4(b) states:

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Literally read, DLRPC 5.4(b) is inapplicable because there is no partnership. The Rule would not be violated because no nonlawyer has an economic interest in either the LLC or the LLP.

IV. DLRPC 5.4(d)(1) prohibits a lawyer from practicing "with or in the form of a professional corporation or association authorized to practice law for a profit" if any interest in that professional corporation or association authorized to practice law is held by a nonlawyer. While LLC is itself a nonlawyer, the beneficial owners of LLP, the sole member of LLC, are all licensed attorneys. Would this tiered structure be a violation of DLRPC 5.4(d)(1)?

Response: Although a literal reading of the Rule would appear to prohibit this organization, since no nonlawyer is involved, it is the opinion of the Committee that this does

not violate the Rule since the sharing is between law firms, i.e., entities whose beneficial owners are all lawyers.

Although the inquirer did not address the issue of Delaware Supreme Court Rule 12(d), and did not present facts that directly bring the rule into question, the Committee believes reference to the rule is appropriate. Rule 12(d) provides:

“(d) *Office for the practice of law.* As used in these rules, an “office for the practice of law” means a bona fide office maintained in this State for the practice of law in which the attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney’s behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A bona fide office is more than a mail drop, a summer home which is unattended during a substantial portion of the year, or an answer, telephone forwarding, secretarial or similar service.”

LLC must comply with these provisions.

CONCURRENCE

I join the Opinion 2007-1 with respect to parts 1 and 2. For the reasons stated below, I concur in the result only for parts 3 and 4.

The Committee should essentially attempt to predict how the Supreme Court would interpret the Rules of Professional Conduct in a disciplinary proceeding. These rules were promulgated by the Supreme Court, and thus there are no separation of powers concerns that are present when construing statutes. Thus, there is no need to create some sort of “plain english” or “literal language” doctrine. The better approach in interpreting a rule of professional conduct is to discern the purpose of a rule through a combination of the text of the rule, the comments to the rule, its structure and prior case law construing that rule. See, e.g., DLRPC, Preamble, Scope, section 14.

Rule 5.4 is entitled “Professional independence of a lawyer” and the Comment reinforces the concept that the Rule expresses traditional limitations on sharing of fees, and the Rule is intended to protect the lawyer’s professional independence. The facts before the Committee are that there are two entities: (1) A Pennsylvania LLP, where all partners are licensed attorneys; and (2) A Pennsylvania LLC also engaged solely in the practice of law (in Delaware). Under the Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990) case, both the LLC and the LLP are “lawyers” for the purpose of analyzing DLRPC 5.4.

Thus, with respect to DLRPC 5.4(b), the question should not be the precise type of entity (e.g., partnership or LLC) the lawyer uses to associate with others, but whether the other entity or persons are lawyers, and could impair the lawyer’s professional independence. Under the facts here, there is no nonlawyer involved in the association, and there is no interference with the lawyer’s professional independence. The Committee’s approach, however, to interpreting DLRPC 5.4(b) and the basis for its conclusion in the opinion are unclear. Is the approach literal, or purpose oriented, or something else?

Part 4 does not clear up this confusion. With respect to DLRPC 5.4(d)(1), the Committee states that “a literal reading of the Rule would appear to prohibit this organization [*sic*],” but then goes on to review the three subsections and (properly) concludes that since no nonlawyer is involved, the proposed conduct does not violate DLRPC 5.4(d)(1). I disagree that a literal reading would prohibit the proposed conduct, since the prefatory clause of DLRPC 5.4(d)(1) cannot be read to the exclusion of the three subsequent subsections of that rule. A nonlawyer does not own any interest. Moreover, a review of the structure of DLRPC 5.4(d) suggests that again, the Supreme Court is concerned with any association that would allow a nonlawyer to direct or control the professional judgment of a lawyer. Here, the proposed LLC entity would be controlled by an LLP. All the partners of the LLP are lawyers. Thus, both with respect to the literal language of DLRPC 5.4(d), and the purpose of the Rule, there is no violation.

Thus, the Committee’s opinion with respect to Parts 3 and 4 is troubling in several respects. First, it suggests that there exists a “literal approach” to interpreting rules of professional conduct. Second, the Committee then apparently rejects this rule in construing

DLRPC 5.4(d). Thus, a reader is confused about the interpretational approach utilized by this Committee.

Finally, the opinion thus fails in its more holistic purpose to provide guidance. This opinion should be written not merely to respond to the inquiring attorney, but to provide more general guidance concerning the application of DLRPC 5.4. This opinion is a formal opinion that will be published on the bar association's website for these purposes. It will be available for review by any person with an interest in ethical issues. In the future, any such person (whether she be a Delaware attorney, an attorney from another jurisdiction, or another person with an interest in ethical issues) may be reviewing this opinion. A person who is analyzing or contemplating a similar but different factual set of circumstances that still implicates DLRPC 5.4 will receive little guidance from this opinion.

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