

## **BACKGROUND**

Two large law firms headquartered in Philadelphia (“Inquirers”) have submitted the following inquiry:

Pennsylvania law firms often hire non-lawyers to undertake leadership roles in their organizations. The skills of non-lawyer administrators are necessary to manage large legal partnerships. In order to attract the best candidates for those senior administrative positions, it is necessary to provide titles commensurate with the significant responsibilities that the law firms assign to those individuals. In light of Texas State Bar Ethics Opinion 642 (May, 2014) (the “Texas Opinion”), we are making a joint request for advice on certain issues related to the structure of those non-lawyer positions under the Pennsylvania Rules of Professional Conduct and particularly Rule 5.4 Professional Independence of a Lawyer.

These senior administrative positions include those which lead firm management teams and those which supervise functions like operations, finance, marketing, information services, nonlegal and legal recruiting functions (with the ultimate determinations to hire and attract legal professionals reserved to the partners). Titles include Chief Information Officer (CIO), Chief Marketing Officer (CMO), Chief Financial Officer (CFO), Chief Operations Officer (COO) and Director of Human Resources, Director of Facilities, Executive Director, etc.

Typically, the job description and/or employment contract for these senior administrators expressly provide that the duties of these positions shall not include responsibilities involving control over or direction of professional legal judgment or independence of the lawyers in the firm. The administrators do not have responsibility for the provision of services to clients. These non-lawyers have no partnership or ownership interest in the firm and these non-lawyers have no right to share in fees.

Law firms also typically appoint an attorney to serve in the role of managing partner, chair or Chief Legal Officer who independently reports to the firm’s governing body (consisting of lawyers) and who has responsibility for the firm’s practice areas and all matters related to the lawyers’ professional judgment and the rendering of legal services.

The following questions have arisen in connection with these senior administrative positions on which we request guidance:

1. Title – Given the express limitations on the scope of these positions, can firms use the titles listed above or otherwise include the word “Officer” or “Director” in the job title?
2. Management Role – May the individuals in these positions serve on the governing bodies of the firms in an ex-officio, but voting capacity? May they do so if they are not permitted to vote on any matter related to the provision of legal services, professional legal judgment or the evaluation of legal judgments?
3. Jurisdiction – Does the answer change if the firm has its principal place of business in Pennsylvania but has an office in Texas?

Inquirers seek a written advisory opinion from the Philadelphia Bar Association Professional Guidance Committee.

## **ANALYSIS**

Pennsylvania Rule of Professional Conduct (“Pennsylvania Rule”) 5.4 provides as follows:

### Rule 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer or law firm may purchase the practice of another lawyer or law firm from an estate or other eligible person or entity consistent with Rule 1.17; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

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

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation;

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer; or

(4) in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.

Subparagraphs (1), (2) and (4) shall not apply to a lawyer employed in the legal department of a corporation or other organization.

Pennsylvania Rule 5.4(d) thus prohibits lawyers from giving non-lawyers an ownership or controlling interest in their law firms and from practicing law in a firm if a non-lawyer is a corporate director or corporate officer thereof or if a non-lawyer has the right to direct or control the professional judgment of a lawyer.

It is clear that a lawyer's independent professional judgment must not be compromised by allowing non-lawyers to be partners in, principals of or have ownership interests in law firms. The Guidance Committee does not believe, however, that *any* use of the word "officer" or "director" in the title of a non-lawyer employee of a law firm is improper. Simply because a job title contains the word "officer" or "director" does not mean that that employee is a corporate director or corporate officer of the law firm as prohibited by Rule 5.4.

Pennsylvania Rule 5.4 would, however, prohibit a non-lawyer from serving as a corporate director or a corporate officer of a law firm *i.e.* someone with management authority over the attorneys. The crux of the issue is not the title of the non-lawyer, but what the non-lawyer does in his or her position at the law firm. The Chief Marketing Officer or the Director of Facilities for a law firm has no management authority over the lawyers' exercise of professional judgment in the firm, and does not have substantive, if any, contact with the firm's clients.

These non-lawyer management employees have been hired by most large law firms to manage their finances, human resources, technology, etc. Many of these non-lawyer professionals have the word “officer” or “director” in their job titles. It is common for firms to employ a non-lawyer as the CFO, CIO, COO, Director of Legal Hiring, Director of Human Resources or Director of Facilities. These employees may manage important aspects of the firm’s business, just as they may in other service businesses, but they do not own equity in the firm or control how the lawyers conduct their professional activities. They are not, in fact, “corporate directors or officers” of the law firms in the manner prohibited by Rule 5.4. These professionals serve in internal, support positions at the firm and they work for the lawyers who own it. They operate under the delegated authority of the lawyers.<sup>1</sup>

### Texas Rule

Texas Opinion 642 states that “[u]nder the Texas Disciplinary Rules of Professional Conduct (‘Texas Rule’), a Texas law firm may not use ‘officer’ or ‘principal’ in the job titles for non-lawyer employees of the firm.” Texas Rule of Professional Conduct 5.04 (Professional Independence of a Lawyer) is very similar to Pennsylvania Rule 5.4.

The Guidance Committee agrees with the Texas Opinion regarding the prohibition of the use of the word “principal” by law firms in the job titles of non-lawyer employees. The title “principal” would imply that the non-lawyer has a proprietary interest in the firm. However, as set forth above, the Guidance Committee disagrees with the Texas Opinion’s per se prohibition of the use of the word “officer” by law firms in the job titles of non-lawyer employees.<sup>2</sup>

Texas Rule 5.04 and Pennsylvania Rule 5.4 are intended to prevent non-lawyers from having an ownership interest in law firms or exercising professional control over the lawyers. The Texas Opinion does not analyze the word “officer” in terms of whether that means ownership or control, but rather states flatly that “officer” must not be used in

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<sup>1</sup> Pennsylvania Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) provides that lawyers are responsible for ensuring that the conduct of their non-lawyer employees complies with the lawyers’ obligations under the Rules of Professional Conduct. Therefore, whenever a non-lawyer employee, whether acting in a clerical, administrative or supervisory capacity, has job responsibilities that implicate the lawyer’s responsibilities under the Rules of Professional Conduct, lawyer supervision is required under Rule 5.3.

<sup>2</sup> The Texas Opinion also states that a firm may pay non-lawyer employees bonuses, as long as the bonuses are not “contingent upon the firm’s achieving a specified level of revenue or profit.” The Guidance Committee disagrees that bonuses may not be contingent upon a specified level of revenue or profit. Bonuses may not be contingent upon a specific client’s fee or be a share of particular clients’ fees, but if a law firm is profitable to a certain (perhaps predetermined) level, Rule 5.4 does not prohibit paying bonuses to non-lawyers based on that level of profitability.

a job title for a non-lawyer, without regard to the non-lawyer's management role. This is simply too limiting.<sup>3</sup>

There are generally two types of non-lawyer employees at law firms. Some of those employees interact with clients on various tasks relating to the clients' legal matters (such as secretaries, legal assistants and paralegals), and these employees do not have "officer" or "director" titles. The other type of non-lawyer employees at law firms are involved in the management or administration of the firm and sometimes have "officer" or "director" in their titles, but do not interact with clients in relation to the provision of legal advice.

### *Pennsylvania Rule of Professional Conduct 7.1*

Pennsylvania Rule 7.1 provides that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The Texas Opinion states that officer and director titles for non-lawyers would mislead the public (a violation of Texas Rule 7.02, which is very similar to Pennsylvania Rule 7.1). However, the use of the term "officer" in these types of titles is not misleading to the public, both because these types of employees rarely interact with law firms' clients, and because "officer" does not imply managerial control over lawyers' professional judgment.<sup>4</sup>

Many law firms today have hundreds of lawyers, with as many or more non-lawyer employees, and annual revenues in the hundreds of millions of dollars. Law firms require professional management, such as a CFO to ensure that their finances are handled properly, a Director of Human Resources to ensure that employment matters are managed appropriately, and a Chief Technology Officer to ensure that the firm's computer systems run efficiently and securely. Requiring these skilled positions to be held solely by lawyers would be almost impossible, as these are positions for which a law degree and the practice of law does not provide the necessary training, skill or expertise.

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<sup>3</sup> The Committee notes that law firms in Texas with non-lawyer employees holding job titles of "officer" and "director" have sought reconsideration of Texas Opinion 642 and the Texas State Bar has agreed to revisit the opinion.

<sup>4</sup> See, e.g., Opinion 471, New Jersey Advisory Committee on Professional Ethics, 107 N.J.L.J. 127 (Feb. 12, 1981), permitting the use of the term "Office Manager" on the business card of a non-lawyer employee of a law firm. In American Bar Association Informal Opinion 89-1527 (Feb. 11, 1989), the ABA considered whether a firm could list a non-lawyer "Executive Director" on its letterhead and on business cards without violating Rules 7.5 and 7.1. The ABA concluded that identifying the Executive Director as such was permissible if "the designation is not likely to mislead those who see it into thinking that the non-lawyers who are listed are lawyers or exercise control over lawyers in the firm."

Law firms must compete with non-legal enterprises in their search for suitably qualified non-legal professionals. Relegating these non-lawyer employees' titles to less impressive-sounding titles in the law firm setting will disadvantage law firms in the competition for the most qualified candidates. This will not serve law firms well and, ultimately, will not serve their clients well. These are important, demanding positions that require personnel with the best credentials so that law firms are best able to support their lawyers in servicing their clients.

## **CONCLUSION**

1. Title – Can Pennsylvania firms use titles for non-lawyer employees that include the word “Officer” or “Director” in the job title?

Yes, as long as those employees do not control the lawyers' professional activities and do not own any portion of the firm. They must be important to the effective management of the firm, may only support the business administration of the firm, and may not interact substantively with clients. They must mislead no one about their status within the firm,

2. Management Role – May the individuals in these positions serve on the governing bodies of the firms in an ex-officio, but voting capacity?

No.

May they do so if they are not permitted to vote on any matter related to the provision of legal services, professional legal judgment or the evaluation of legal judgments?

Yes, as long as any voting by these non-lawyers is limited to administrative matters such as leases, purchasing, travel expenses, finances or any of the many similar types of issues that the administrative officers and directors are retained by the law firms to handle.

3. Jurisdiction – Does the answer change if the firm has its principal place of business in Pennsylvania but has an office in Texas?

No. Pennsylvania Rule of Professional Conduct 8.5(b)(2) provides that the rules of the jurisdiction in which the predominant effect of the conduct is felt is the jurisdiction whose rules govern a lawyer's conduct (except for conduct occurring in connection with a matter pending before a tribunal, which is governed by the rules where the tribunal is located). Here, the large law firms are based in Pennsylvania and have the majority of their senior administrative personnel located in Pennsylvania, so the predominant effect of the conduct is in Pennsylvania.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of

Pennsylvania or any court. It carries only such weight as an appropriate reviewing authority may choose to give it.