THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 642 (Revised)

September 2015

NOTE REGARDING REVISED OPINION:

Opinion No. 642 was issued by the Committee in May 2014. Upon reconsideration, the Committee withdraws that opinion and issues this revised Opinion No. 642 in its place.

QUESTIONS PRESENTED

1. May a for-profit Texas law firm include the terms "officer," "principal," or "director" in the job titles of the firm's non-lawyer employees?

2. May a for-profit Texas law firm pay or agree to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified amount of revenue or profit?

STATEMENT OF FACTS

A for-profit Texas law firm employs non-lawyer professionals to manage various aspects of the firm's business, such as marketing, advertising, and information technology services. The firm plans to give these employees job titles that may include the words "officer," "principal," or "director." In addition to paying salaries to these employees, the firm proposes to offer these employees specified bonuses that will be paid if the firm achieves a designated amount of revenue or profit.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct do not include specific provisions governing the titles of law firm employees. However, the Texas Disciplinary Rules prohibit a lawyer or law firm from allowing non-lawyer employees to control the law practice of a for-profit law firm. In the case of a law firm organized as a for-profit professional corporation or association, Rules 5.04(d)(2) and 5.04(d)(3) prohibit lawyers from practicing law with such an organization if a non-lawyer functions as a corporate director or officer or if a non-lawyer is given the right to direct or control the professional judgment of a lawyer in the organization. In the case of a law firm organized as a partnership, the conclusion is the same: a non-lawyer may not control a partnership's provision of legal services. Rule 5.04(b) prohibits a lawyer from forming "a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Thus, "a nonlawyer may not be empowered to or actually direct or control the

professional activities of a lawyer in the firm." Restatement (Third) of The Law Governing Lawyers section 10(1) (2000).

The assignment of a job title to a law firm employee publicly indicates, to the lawyers and non-lawyers in the firm and to the outside world, that the firm has conferred authority on the employee to act on behalf of the firm as to matters within the scope of the authority indicated by the job title. Assignments of job titles to law firm employees may also have other purposes – such as honoring a valued employee – but the central role of a job title is to indicate the authority conferred by the firm. The scope of authority associated with a particular job title will be determined by how similar titles are used and understood in the business world generally and in other law firms. Because of the prohibition on allowing non-lawyers to exercise control over the practice of law, a for-profit law firm that assigns a job title to a non-lawyer employee must ensure that the title does not improperly indicate authority for the employee to exercise control over the law practice of firm lawyers.

In the opinion of the Committee, certain titles for non-lawyer employees of a law firm that include the terms "officer," "principal," or "director" are permissible under the Texas Disciplinary Rules because the titles could not reasonably be understood to indicate authority to exercise control over the law practice of firm lawyers. Thus, titles such as "Chief Financial Officer," "Chief Information Officer," "Chief Administrative Officer," "Principal Technology Officer" and "Human Resources Director" indicate authority over specified aspects of a law firm's business other than the firm's law practice. On the other hand, the title "Chief Executive Officer" and the one-word titles "Officer," "Director," and "Principal" without any additional terms would generally be understood to indicate authority to exercise control over all law firm activities, including the provision of legal services, and hence these titles normally should not be used for non-lawyer employees of a for-profit Texas law firm.

The title "Chief Operating Officer" for a non-lawyer employee of a for-profit Texas law firm presents a particularly difficult question in view of the current usage of that title in the business world and in law firms. In the business world generally, the "Chief Operating Officer" of a company typically has authority, usually subordinate to that of the company's Chief Executive Officer, to control all aspects of the company's business. In law firms, however, the title "Chief Operating Officer" has sometimes been used for a key non-lawyer employee who is granted executive authority over various administrative functions of the law firm – such as human resources, accounting, and technical services – but not the law practice conducted by the firm's lawyers. Because the title "Chief Operating Officer" may have this more limited meaning in the law firm context, the Committee cannot conclude that the assignment of this title to a non-lawyer employee necessarily indicates that the employee's authority includes control over the firm's provision of professional services. However, if a for-profit Texas law firm assigns the title "Chief Operating Officer" to a non-lawyer employee in circumstances where it is unclear whether this employee has authority to exercise control over the firm's law practice, the law firm must take such additional steps as are necessary in the circumstances to make clear, to the firm's lawyers and non-lawyer personnel and to persons dealing with the firm, that the scope of this employee's authority does not in fact extend to the exercise of control over the practice of law by the firm's lawyers.

In sum, the critical question in the case of any job title assigned by a for-profit Texas law firm to a non-lawyer employee is whether the title indicates that the employee has authority to exercise control over the practice of law by lawyers in the firm. A title that has the effect of granting to a non-lawyer authority that includes exercise of control over the law practice of a for-profit Texas law firm's lawyers is prohibited by the Texas Disciplinary Rules. If a job title assigned to a non-lawyer employee is unclear as to whether it includes authority with respect to that firm's law practice, the law firm must take such additional steps as are necessary in the circumstances to make clear to all concerned that the scope of the employee's authority does not in fact extend to the exercise of control over the law practice of firm lawyers.

The law firm's plan to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified amount of revenue or profit requires consideration of Rule 5.04(a), which provides that "[a] lawyer or law firm shall not share or promise to share legal fees with a non-lawyer," except in circumstances not applicable here. As explained in Comment 1 to Rule 5.04, this Rule expresses traditional limitations on sharing fees with non-lawyers and these limitations are intended to prevent improper client solicitation and the unauthorized practice of law by non-lawyers. In the view of the Committee, a non-lawyer compensation plan that provides for a specified additional payment if the firm meets a predetermined revenue or profit goal is a type of fee-sharing arrangement that is prohibited by this Rule because the arrangement directly connects the amount of fees received by the law firm to the amount of compensation to be paid to non-lawyer employees.

Rule 5.04(a)(3) of the Texas Disciplinary Rules provides for an exception to the general prohibition of Rule 5.04(a) in the case of "a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." However, this exception applies only in the case of retirement plans and not in the case of employee compensation plans more generally. The Committee notes that other jurisdictions, following the lead of the ABA Model Rules of Professional Conduct, have adopted a broader version of this exception that allows non-lawyers to share law firm profits through a "*compensation or* retirement plan" (emphasis added). See ABA Model Rules of Professional Conduct, Rule 5.4(a)(3) (2011) ("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"). Jurisdictions that have adopted this broader exception have relied on it to approve bonus plans that appear to be similar to the bonus arrangement considered in this opinion. See e.g. Colorado Bar Association Ethics Committee Abstract of Informal Letter Opinion 00/01-02 (2000-2001) (lawyer or law firm may ethically pay a bonus to a non-lawyer based on the firm's exceeding predetermined income or net profit levels); and Utah Ethics Advisory Opinion No. 139 (1994) ("So long as there is nothing in the nature of the arrangement that would tend to impair the independence of the law firm or lawyer, and provided no other rule of professional conduct is violated, compensation of nonlawyer employees may be based upon a percentage of gross or net income so long as it is not tied to specific fees from a particular case."). However, Texas Rule 5.04(a)(3) does not allow for this interpretation.

Of course, a law firm's willingness and ability to pay bonuses will depend upon the firm's profitability. As a practical matter, a law firm may consider its revenue, expenses, and profit in determining whether to pay bonuses and, if so, how much. In the Committee's opinion,

Rule 5.04(a) does not preclude a law firm from taking such considerations into account when paying or promising to pay bonuses. Rule 5.04(a) does, however, prohibit a law firm from agreeing to pay a non-lawyer employee a specified bonus that is tied to specified revenues or profits, such as: "We will pay you a bonus of $10,000 if the firm's revenue (or profit) for the year is at or above $1 million."

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a for-profit Texas law firm may not assign to a non-lawyer employee a job title that, because of the title's generally accepted meaning, indicates that the employee's authority includes exercise of control over the firm's legal practice. If a title is assigned to a non-lawyer employee that is unclear as to whether the employee is authorized to exercise control over the for-profit Texas law firm's practice of law, the firm must take such additional steps as are necessary in the circumstances to make clear to all concerned that the scope of the employee's authority does not in fact extend to the exercise of control over the practice of law by lawyers in the firm.

The Texas Disciplinary Rules of Professional Conduct prohibit a for-profit Texas law firm from paying or agreeing to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified level of revenue or profit. A for-profit Texas law firm may, however, consider its revenue, expenses, and profit in determining whether to pay bonuses to non-lawyer employees and the amount of such bonuses.