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June 16, 2014

**Via Federal Express**

Mr. Mark N. Osborn
c/o Michelle Jordan
Attorney Liaison
Office of the Chief Disciplinary Counsel
State Bar of Texas
Texas Law Center
1414 Colorado Street
Austin, Texas 78701

Re: Texas Ethics Opinion 642

Dear Mr. Osborn:

We are writing to you in your capacity as Chair of the Texas Supreme Court Professional Ethics Committee. We urge the Committee to reconsider, in part, Texas Ethics Opinion 642. As explained below, we believe the Opinion misapplied the relevant ethical rules and, as a result, reached an overly broad conclusion that is not supported by the rules and does not protect the public, but instead would cause enormous problems for the day-to-day operations of law firms throughout Texas.

***The Committee's Opinion.*** Opinion 642 considered this situation: "A Texas law firm employs nonlawyer professionals to manage the firm's business, including its marketing, advertising, IT services, and search-engine optimization. The firm plans to give these employees the titles 'chief executive officer' and 'chief technology officer' and to identify them as 'principals' in the law firm." The Committee concluded that "a Texas law firm may not use 'officer' or 'principal' in the job titles for nonlawyer employees of the firm."[1]

The Committee reasoned, in essence, that the words *officer* and *principal* are terms of art: they necessarily imply that those employees have ownership or management control over the law firm. And, since nonlawyers may *not* have management control over a law firm, only lawyers may have such titles. Accordingly, a nonlawyer with such a title presents a conundrum: either the employee is actually an "officer," in which case the firm is violating Rule 5.04(a) and (b) by

[1] The Committee also considered whether a law firm may pay nonlawyer employees specified bonuses if the firm achieves a designated amount of revenue or profit. We are not seeking reconsideration of that portion of the Opinion. Instead, our motion is limited to the Committee's conclusion that firms may not employ nonlawyers in any position with the word "officer" in the title.

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giving management control to a nonlawyer; or else the employee does *not* have management control and is thus not properly designated as "officer," in which case the firm is violating Rules 7.02(a) and 8.04(a)(3) by misleading the public about the status of the employee.

As framed by the Committee, thus, the analysis has two parts: (a) does the nonlawyer employee actually have management control over lawyers and, if not, (b) does the nonlawyer's title nonetheless mislead the public into believing that he or she has such control.

We begin with basic principles. In Texas, as in most U.S. jurisdictions, law firms must be owned by lawyers. *See, e.g., Restatement Third, The Law Governing Lawyers* § 10 ("*Restatement*"). This rule reflects the long-held view that lawyers' independent professional judgment must not be compromised by having nonlawyers own law firms. *Restatement* §10, Comment *b* ("Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers."). Implementing that view in Texas, Rule 5.04(a) prohibits Texas lawyers from giving nonlawyers an ownership interest or a controlling interest in their law firms. Further amplifying the point, Texas lawyers may not practice law in a firm if "a nonlawyer is a corporate director or officer thereof[,]" Rule 5.04(d)(2), or if "a nonlawyer has the right to direct or control the professional judgment of a lawyer."

We have no quarrel with those principles.

Our disagreement pertains to the second prong of the discussion, namely, whether *any* use of the "officer" title for a nonlawyer employee of a law firm would mislead the public. Even here, as discussed further below, we do not challenge all of the Committee's conclusions.

We do, however, disagree with the Committee's broad conclusion that *no* nonlawyer employee of a Texas law firm may have the word "officer" in his or her title. In our view, the Committee's conclusion reflects three inter-related problems. *First*, the Committee has ascribed too much significance to the word "officer" and, in the process, has lost sight of the purpose behind these rules. *Second*, in considering the potential for misleading the public, the Committee has ignored the important distinction between law firm employees who deal with clients and those who work in the back office. *Third*, the Committee's conclusion cannot be reconciled with the realities facing law firms in the twenty-first century. We turn to these issues below.

***Not Every Officer Is a Problem.*** Rule 5.04 was designed to prevent a particular problem; it was not meant to prescribe job titles. The rule was intended to prevent nonlawyers from owning law firms or exercising professional control over the lawyers. As the *Restatement* puts it, the rules ensure that "a nonlawyer may not be empowered to or actually direct or control *the professional activities of a lawyer in the firm.*" *Restatement* §10(1) (emphasis added). The problem with the Opinion is that, instead of analyzing the question in terms of ownership or control, it applies a "magic word" approach that ignores both ownership and control. An "officer" who does not either own a portion of the firm or control the professional activities of its lawyers does not trigger the concerns that Rule 5.04 addresses.

Courts in similar contexts have also reached the conclusion that the term "officer" must be interpreted functionally, not mechanically. In a securities case arising under Section 16 of the Securities Exchange Act of 1934, for instance, the court had to decide whether an individual defendant was, in fact, an "officer" of the company within the meaning of Rule 16a-1, 17 C.F.R. § 240.16a-1(f). *S.E.C. v. Prince*, 942 F. Supp. 2d 108, 133 (D.D.C. 2013). In that context, and concluding that the individual was not an officer, the court noted that those rules "require a court to reject reliance on an employee's title and instead to perform a fact-intensive analysis of the employee's duties and responsibilities to determine if they are a de facto officer." *Prince*, 942 F. Supp. 2d at 133, *citing Colby v. Klune*, 178 F.2d 872, 873 (2d Cir. 1949). *See also Wolf v. Weinstein*, 372 U.S. 633, 652 n.19 (1963) (in a Section 16(b) case, the Supreme Court observed that "it is clear that a determination of who is a corporate 'officer' within the meaning of the statute requires a flexible assessment of particular powers and responsibilities rather than a rigid rule of thumb"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston*, 566 F.2d 1119, 1122 (9th Cir. 1978) ("court must look behind the title. . . to ascertain [a] person's real duties"); *Gold v. Sloan*, 486 F.2d 340, 351 (4th Cir. 1973). Courts have used the same approach in connection with securities cases arising under Section 10(b) and Rule 10b-5 (see *S.E.C. v. Solucorp Industries, Ltd.*, 274 F. Supp. 2d 379, 382-87 (S.D.N.Y. 2003)), and Section 16(a) (see *S.E.C. v. Enterprises Solutions, Inc.*, 142 F. Supp. 2d 561, 574 (S.D.N.Y. 2001)).

Thus, as these courts have recognized, the term "officer" does not, by itself, answer the question of whether an individual has management control over the company. In the context of private law firms, the same approach is appropriate, although the analysis required is simplified. Under that functional approach, there is nothing wrong with hiring nonlawyers to manage certain aspects of the firm's affairs if those people do not (i) own a portion of the firm or (ii) control the lawyers' professional activities.

Many firms have done exactly that. Indeed, firms have hired nonlawyer professionals to manage their finances, human resources, technology, mailrooms, and so forth. Many of those people have the word "officer" in their job titles. Today, it is common for firms to employ nonlawyers as the Chief Financial Officer, Chief Technology Officer, Chief Operating Officer, Chief Human Resources (or Talent) Officer, Chief Information Officer, or Chief Marketing Officer. These people may manage important aspects of the firm's business, but—unless they are also lawyers—they do not own equity in the firm or control how the lawyers conduct their professional activities. They are, thus, not the sort of "officers" that are proscribed by the rules.

Moreover, the legal industry is not alone in using the "officer" title to describe employees who are obviously not corporate officers with the power to control and direct the corporation. We frequently read articles about companies that have appointed Chief Listening Officers, Chief Knowledge Officers, Chief Experience Officers, Chief Digital Officers, Chief Observation Officers, or Chief Customer Officers. Most of the people with such titles do not report to the CEO and, according to at least one management consultant, they generally do not have

management power.[2] Despite the terminology, these people are *not* corporate officers within the meaning of the rules.[3]

***The Public Is Not Misled.*** Has the public been misled by any of these titles? No. We are aware of no evidence that the public has ever been misled into believing that the mere use of the word "officer" necessarily connotes ownership or control of the firm's lawyers. To the contrary, the public knows full well that Chief Technology Officers, for example, supervise the other IT employees of the firm—not the lawyers. Likewise, the Chief Human Resources Officer of a law firm does not control any legal work done by the firm's lawyers. This fact is significant in itself, but it looms especially large where the Chief Human Resources Officer rarely, if ever, interacts with the firm's clients.

As several committees have noted, an important distinction exists between nonlawyer employees who interact with the firm's clients (*e.g.* paralegals, investigators, tax preparers), and those who do not because they are involved in the back-office management of the firm. *See, e.g.*, Opinion 296 (Supplement), New Jersey Advisory Committee on Professional Ethics, 99 N.J.L.J. 113 (Feb. 12, 1976); Opinion 471, New Jersey Advisory Committee on Professional Ethics, 107 N.J.L.J. 127 (Feb. 12, 1981). In the second of those two opinions, the New Jersey Committee considered whether a firm could permit its nonlawyer Office Manager to have a business card with that designation. The Committee there noted that it had previously concluded that:

> there were two classes of legal paraprofessionals: those who assist lawyers on behalf of clients, and those who are involved in the management of law firms who are not involved in the rendition of legal services. This Committee was of the opinion there that, because of the very nature of the tasks they perform, paralegals of the first class are more apt inadvertently to mislead clients or adverse parties as to their professional status, and that therefore greater restrictions are appropriate. We continue to recognize the validity of that distinction, and feel that it is particularly relevant to the inquiry at hand.

The Committee concluded that the firm could permit its Office Manager to use that title on business cards and in correspondence associated with the administration of the firm.
The American Bar Association went a step further in Informal Opinion 89-1527 (Feb. 11, 1989). There, the ABA considered whether a firm could list a nonlawyer "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 on letterhead and business cards was permissible so long as "the designation is not likely to mislead those who see it into thinking that the nonlawyers who are listed are lawyers or exercise control over lawyers in the firm." The ABA

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[2] *See C Is For Silly: The New C-Suite Titles*, Forbes Magazine, January 10, 2012, *available at* http://www.forbes.com/sites/jennagoudreau/2012/01/10/c-is-for-silly-the-new-c-suite-titles/ (last visited May 28, 2014).

[3] The Committee was not asked, and did not opine, about whether the term "director" poses similar problems. We note that the Committee's rationale might apply to directors as well, and that many firms employ people with titles such as Director of Marketing. The position we state here applies equally to people with such titles.

reached that result even though it recognized that the term "Executive Director," in some contexts, is the functional equivalent of CEO.

The same considerations apply here. The positions we are chiefly concerned with (for instance, Chief Financial Officer, Chief Administrative Officer, Chief Information Officer, or Chief Human Resources (or Talent) Officer) involve internal, administrative support functions; they are not "client-facing" positions. To the extent that clients ever encounter these employees, it is difficult to envision how the clients might conclude that those people are lawyers, or that they exercise control over the lawyers in the firm. Certainly, we have never encountered that situation. Rather, those professionals are employees of the firm: they work for and support the lawyers who own it; they do not control the lawyers.

This is not to suggest that *no* "officer" title could mislead the public. Some titles implicitly suggest control or ownership, and those titles should be reserved for lawyers. It is not the case that *every* "officer" title misleads the public, however. A degree of flexibility is required here. That leads us to our final point.

***Modern Law Firms Regularly Rely On Chief Financial Officers.*** Some Texas law firms today have more than 700 lawyers, and they have an equal or greater number of nonlawyer employees. Some have annual revenues in excess of $600 million. Even on a smaller scale, more than 10,000 Texas lawyers work in firms of more than 60 lawyers. Firms of that size and complexity require professional management. A Chief Financial Officer ensures that their finances are handled appropriately. A Chief Human Resources Officer ensures that the employees are treated appropriately. And a Chief Information Officer or a Chief Technology Officer has the professional expertise needed to provide technology that works reliably and is secure from hackers. Firms need those professionals for their own protection and, critically, for their clients' protection as well. Clients will be ill-served if lawyers also have to act as their firms' Chief Technology Officers.

This is not a problem that can be solved by changing the titles. We cannot simply call our CFO a "Head Accountant" and pretend the issue has gone away. A firm either employs a person who functions as the chief financial officer, or it does not. These days, virtually every large firm does. Changing the title does nothing to alter the underlying reality, and it does nothing to protect the public. To the contrary, degrading that individual's title has real ramifications. A well-regarded firm searching for a CFO will attract candidates with excellent credentials and qualifications. That same firm searching for a Head Accountant will not. A firm searching for a Chief Technology Officer will be competing with other companies—not just law firms—for the best candidates. Those candidates seek the right title—CTO or CIO—and will understandably turn up their noses at lesser-titled positions. Ultimately, the Committee's decision will degrade the quality of nonlegal professionals that are available to Texas law firms. This inures to no one's benefit.

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***Conclusion***. For all of these reasons, we believe that Opinion 642 went too far in its conclusion that *no* nonlawyer firm employee may have the word "officer" in his or her title. We think that conclusion does not take into account the facts that those employees:

- do not, in fact, control the lawyers' professional activities;
- do not own any portion of the firm;
- support the business administration of the firm, rather than regularly interacting with clients;
- mislead no one about their status within the firm; and
- are critical to the effective management of their firm.

We urge the Committee to adopt a more flexible formulation in evaluating such titles, similar to the approach used by the American Bar Association and the New Jersey Advisory Committee. Where the context indicates that there is no reasonable likelihood of confusion, those titles should cause no alarm. Thus, for back-office employees, the Committee should permit firms to use "officer" or "director" titles where the title clearly specifies a nonlegal or administrative role: Chief Information Officer, Chief Operating Officer, Chief Financial Officer, Chief Administrative Officer, Chief Human Resources (or Talent) Officer, and Director of Marketing, to name a few, do not suggest that those employees are lawyers or that they manage the lawyers.

We would be happy to discuss these issues with you or other members of the Committee at your convenience. Thank you for your consideration.

Very truly yours,

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