



# Lawyers in Non-Lawyer Roles

*(When Can a Lawyer Not be a Lawyer?)*

**Government Lawyers Bar Association**

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**Hugh Spitzer**

**U.W. School of Law**

# The Not-So-Hypothetical Tale of Kelly Crockett, Esq.



# The Tale of Kelly Crockett, Esq.

- \* Ms. Crockett gets a J.D., passes the Bar and takes a position with OPR, where she does research & drafting.
- \* Hired as Policy & Planning Manager for DFI, supervising banking specialists, economists, and planners.
- \* Grumpy with the Director because he won't put payday loan legislation in an election year.

# The Tale of Kelly Crockett, Esq.

\* Quits and joins a consumer protection group, but blasts her former boss, telling the press what he told her about the Governor's motives for delaying her pet legislation.

\* Her former boss files a complaint with Disciplinary Counsel: *i.e.*, violations of:

- **RPC 1.6, 1.7, 1.9, 1.13, 8.4 (b), 8.4 (c), 8.4(e).**

\* Her reaction: “Unprofessional conduct? I don’t get it! I was in a management and policy job. I wasn’t even working as a lawyer!”

# The Tale of Kelly Crockett, Esq.

1. Was Ms. Crockett providing legal services?
2. What is the practice of Law?
3. Was she providing a “law-related service”?
4. Could non-lawyer *clients* think she was providing legal services?
5. How might she have protected herself?

# Legislative Counsel

*Counsel* to legislative offices and Committees are “Practicing Law” – Pay attention to Internal Leg. Rules on Confidentiality

For help, see: David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437 (1996); Kathleen Clark, *The Ethics of Representing Elected Representatives*, LAW & CONTEMP. PROBS., Spring 1998, at 31; Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature’s Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 439 (2003).

# Legislative Counsel

Identifying the client: The State? The Legislature? The House? The Committee? The Chair?

Who is the RPC 1.13(a) “duly authorized constituent,” “representational authority,” “authorized representative”?

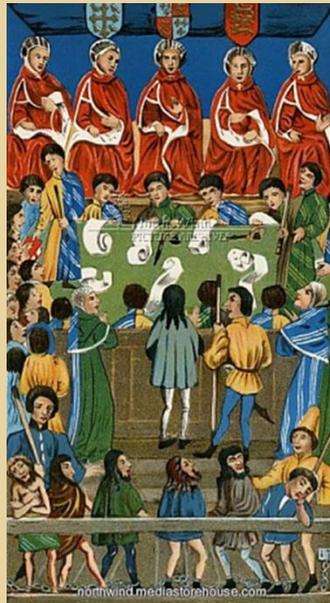
# Moving Back and Forth Between Government and the Private Sector



# Moving Back and Forth Between Lawyering and Managing



# A Short History of Model Rule 5.7 and “Responsibilities Regarding Law-Related Services”



# “Law-Related Services”?

## RPC 5.7(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 nonlawyer.”

# “Law-Related Services” ...

...are services that are:

- \*related to the provision of legal services, and

- \*are not prohibited as unauthorized practice of law when provided by a nonlawyer.

(Many of you do, or some day will, provide these services as administrators or department staff, as lobbyists, or in other private sector jobs.)

# **“Law-Related Services”**

## **RPC 5.7 Comment [9] Examples:**

- Title Insurance, Trust Services
- Financial Planning, Accounting, Tax Preparation
- Real Estate Counseling
- Legislative Lobbying
- Psychological Counseling, Social Work
- “Patent, Medical or Environmental Consulting

**If you *do* provide law-related services, then see  
RPC 5.7(a):**

“A lawyer shall be subject to the [RPCs] with respect to the provision of law-related services...if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; *or*

(2) in other circumstances...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 protections of the client-lawyer relationship do not exist.”

**So... What are “Legal Services”?**

**Answer: Hmmm ... Clear as mud.**

**Question: What are “Legal Services”?**

**Arkansas:**

“This court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law.”

# Question: What are “Legal Services”?

## Iowa:

“Representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments . . . . Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. “

**Was Kelly Crockett doing that?**

# Question: What are “Legal Services”?

## Iowa (cont.):

“The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client.”

**Was Kelly Crockett doing that?**

## **Question: What are “Legal Services”?**

### **Oregon:**

“Any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession.”

**Was Kelly Crockett doing that?**

## **Again, What are “Law-Related Services”?**

**“Services that a lay person might reasonably mistake for legal services.”**

--Hazard, Hodes & Jarvis, *The Law of Lawyering*

# Legal Services?



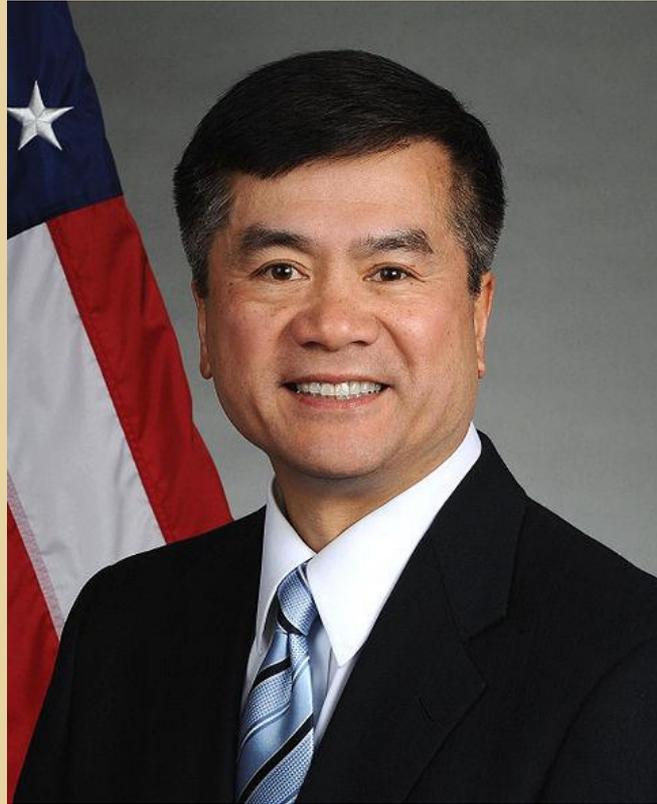
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# Legal Services?



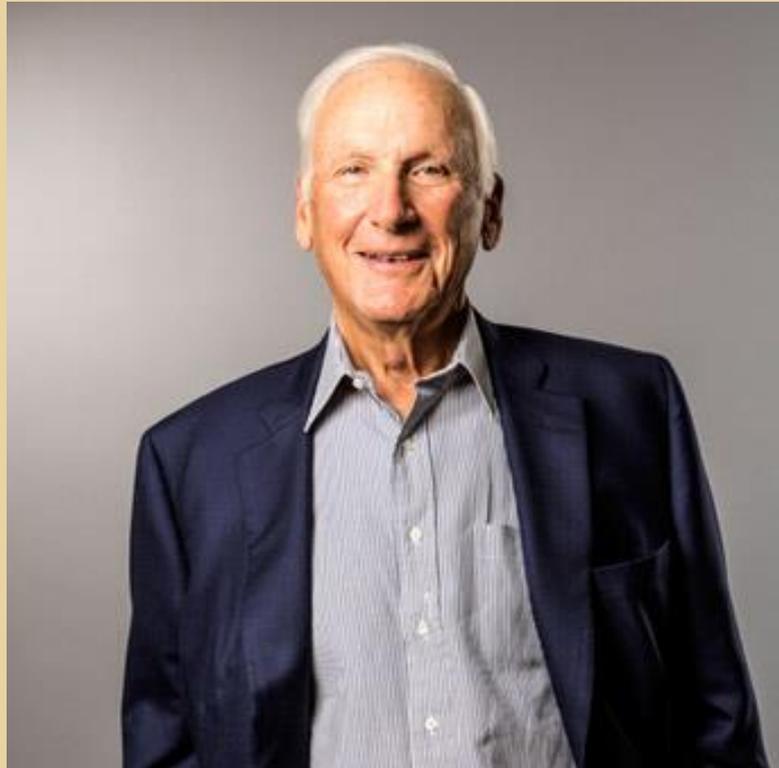
Ralf Roletschek  
[www.roletschek.at](http://www.roletschek.at)

# Legal Services?



**Gary Locke: Governor, Secretary of Commerce, Ambassador to China**

# Legal Services?



**Gerald Grinstein: Business Executive**

# Legal Services?

Ben Nichols, Asotin County...



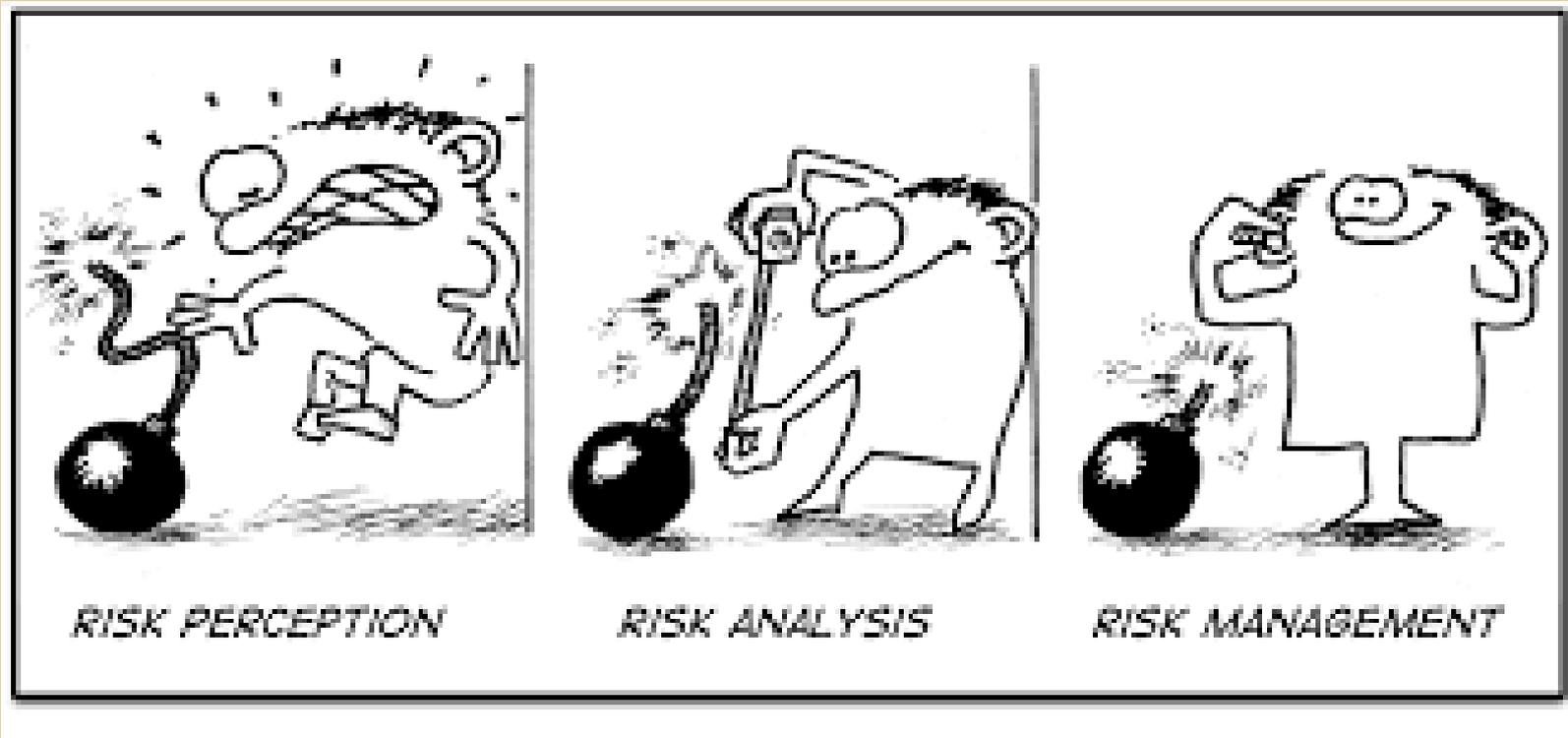
**Coroner !!!**

# Legal Services?



**Prosecutor Serving on a Canvassing Board?**

# Legal Services?



**Lawyer Serving as the State's Risk Manager?**

# Law-Related Services?

Any of the following tasks, at all levels of business or government, can easily be viewed as law-related services because they are “*performed in conjunction with and in substance are related to the provision of legal services*”:

# Law-Related Services?

- Interpreting and applying regulations and administrative rulings
- Serving as a legislative committee analyst
- Working as a regulatory analyst
- Human resources/personnel management
- Acquiring real property/procurements
- Managing environmental compliance
- Compliance audits & enforcement
- Investigating legal violations

# The Good News:

Under Rule 5.7(a), a lawyer may be released from obligations under the rules of professional conduct with respect to his or her work for an ancillary law-related enterprise if the lawyer's legal services and the "law-related" services are sufficiently distinct.

...this is *probably* true in the instance of an individual whose job involves both law and non-law work (*e.g.*, both legal and managerial work, or legal and policy work).

## The Good News:

A lawyer may be released from the RPCs when engaged in “law-related” activities if the lawyer takes “reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.”

--RPC 5.7(a)(2)

# Rule 5.7 and “Law-Related Services”

Model Rule 5.7 should be the focal point for lawyers working in many “non-lawyer” jobs.

★ MR 5.7(a)(1)’s plain language mandates that, except for activities that are clearly *not* related to the provision of legal services, a lawyer *shall* be subject to the RPCs with respect to law-related services *unless* those activities can be distinguished from legal services. ★

# What else should the “non-lawyer lawyer” do, from a practical standpoint?

- Expressly warn the “non-client client”.
- Pull in a “real” lawyer, as necessary.
- Warn others too.
- Update business cards/stationery.
- Go inactive with the Bar?

# Put it in Writing!

*(Here's what one lobbying firm sends out)*

“ As you may be aware, I hold a license to practice law in the state(s) of [insert state name(s)]. The responsibilities that I perform as [insert position] include certain tasks that might be characterized as “law-related services” under Rule 5.7 of the Rules of Professional Conduct governing attorneys in [insert state name(s)]. That Rule requires me to make disclosures clarifying that the services I will be performing may be law-related services, but that they are not legal services. . . .”

## Put it in Writing! (cont.)

“...Because they are not legal services, those services and our relationship will not be governed by the Rules of Professional Conduct that guide the client-lawyer relationship, such as rules on confidentiality and prohibitions of conflicts of interest. I will of course be subject to the provisions of [insert applicable federal or state general ethics laws], and I would like to assure you that I will be carrying out my responsibilities using the highest level of ethical and professional standards.”



**Based on:**

**Hugh D. Spitzer,**

**Model Rule 5.7 and Lawyers in Government Jobs—  
How Can They Ever Be “Non-Lawyers”?**

**30 Georgetown Journal of Legal Ethics 45 (2017).**

