



# The State Bar of California

Rules Agenda Item B.3.  
06-03-19 Meeting

## Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Rules and Ethics Opinions Subcommittee  
From: Kevin Mohr  
Date: May 29, 2019  
Re: B.3. Report and recommendation on the adoption of proposed rule 5.4 as amended

### **Recommendation: Adoption of Proposed Rule 5.4 as Amended**

I've attached revised draft 3 of proposed rule 5.4, annotated, with pros and cons inserted into footnotes and highlighted in gray. I've also attached a copy of ABA Formal Ethics Op. 93-374 re sharing legal fees w/ a nonprofit organization.

I have also carried forward issues, also highlighted in gray, that the subcommittee has not yet addressed.

Finally, I have added the comments to the Ethics 20/20 Commission's proposed Rule 5.4 (2011) for consideration by the subcommittee. I don't think we should recommend the adoption of many (if any) of these comments but it is possible that some -- revised to conform to the California approach to rule comments -- might provide added clarity to the black letter.

I think that once the subcommittee agrees on the "final" form of the rule, we can transfer much of what is in footnotes to a memo for ease of presentation to the entire Task Force.

### Attachments:

- (1) Proposed rule 5.4, annotated with pros and cons
- (2) ABA Formal Ethics Opinion 93-374 (Sharing Fees with Non-Profit)



**NOTE:** The following draft is based on a revision to ABA Model Rule 5.4 that was proposed by the [ABA Ethics 20/20 Commission](#) in a [memo dated 12/2/2011](#). It is intended for discussion only. The footnotes include some observations and possible issues for discussion. Finally, this draft includes only changes to the black letter text. No changes have been made to the comment.

Finally, this proposed rule is not intended to circumvent a discussion of whether such a rule will operate to increase access to justice. It has not yet been established that jurisdictions that permit multidisciplinary practices have experienced a significant increase in access to justice. We still need a robust discussion on this issue.

Underlines represent additions to, and ~~strikethroughs~~ deletions from, current California Rule 5.4.

### Rule 5.4 Financial and Similar Arrangements with Nonlawyers

(a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:<sup>1</sup>

(1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration 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 purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;

(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, provided the plan does not otherwise violate these rules or the State Bar Act;

(4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; ~~or~~

(5) a lawyer or law firm\* may share with or pay ~~a court-awarded a~~ legal fee, including but not limited to a court-awarded legal fee, to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm\* in the matter;<sup>2</sup> or

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<sup>1</sup> The basic prohibition on fee sharing is preserved. The concept is that lawyers should not be sharing fees with nonlawyers. There is a concern that such fee sharing would result in nonlawyer marketing businesses that would direct clients to lawyers who pay the most for the referral, even if the lawyer is not qualified. However, there are six exceptions to the basic rule. A new exception, as proposed by the Ethics 20/20 Commission, is stated in subparagraph (a)(6), which refers to the paragraph (b) requirements.

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<sup>2</sup> At its 5/14/19 meeting, the Subcommittee voted to revise subparagraph (b)(5) to extend the exception for sharing legal fees with a nonprofit beyond just court-awarded fees.

Pros: (1) By not limiting the (b)(5) exception to court-awarded fees, access to justice might be increased by providing an increased source of revenue to nonprofit legal service providers such as the ACLU.

Cons: (1) There is no evidence that expanding the exception beyond “court-awarded” fees will increase access to justice.

(2) The limitation to court-awarded legal fees ensures that “[n]ot only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose.” ABA Formal Ethics Op. 93-374, at page 6.

(3) Further, limiting the exception to “court-awarded” legal fees “underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.” *Id.*

Note: Many jurisdictions have not adopted MR 5.4(a)(4) regarding sharing legal fees with nonprofits. In addition, some jurisdictions have modified MR 5.4(a)(4).

**D.C. Rule 5.4(a)(5):** “(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

In addition, **Comment [8] to D.C. Rule 5.4** provides in relevant part: “Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.”

**Mass. Rule 5.4(a)(4):** “a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.”

**R.I. Rule 5.4(a)(4):** “(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if: (i) the organization is one that is not for profit; (ii) the organization is tax-exempt under federal law; (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax-exempt; and (iv) the tribunal approves the fee-sharing arrangement.”

**S.D. Rule 5.4(a)(4):** “a lawyer may share court-awarded legal fees with a nonprofit 501 (c)(3) or 501 (c)(6) organization that employed, retained or recommended employment of the lawyer in the matter.”

D.C. is the only jurisdiction that has removed reference to “court-awarded” or “tribunal approved” fee but even D.C. further clarifies the intent by limiting the fees to those either awarded by a tribunal or received in settlement of a matter and specifies the type of nonprofit with which legal fees may be shared.

(6)<sup>3</sup> a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).<sup>4</sup>

(b)<sup>5</sup> ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~ A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest<sup>6</sup> unless each of the following requirements is satisfied:<sup>7</sup>

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<sup>3</sup> Subparagraph (a)(6) provides an explicit exception to the general prohibition against sharing fees with nonlawyers so long as the lawyer or law firm complies with each of the conditions set out in paragraph (b).

<sup>4</sup> Subparagraph (a)(6). We've added the full statement of what is permitted so that there is no confusion as to what is being permitted. The Ethics 20/20 version simply provided:

(x) a lawyer or law firm may do so pursuant to paragraph (b).

Although “do so” could be substituted, the subcommittee thought it important that the black letter text clarify that permission to “do so” mandates that “the lawyer or law firm complies with the requirements set forth in paragraph (b),” all of which requirements are mandatory.

The gist of paragraph (b) is that lawyers and nonlawyers are permitted co-own a law firm, which is defined in the rules as follows:

(c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization. CRPC 1.0.1(c).

Because sharing in the profits of such a firm requires that the legal fees, which would be the source of profit in such a firm, be shared, there has to be an express exception to the paragraph (a) prohibition as stated in subparagraph (a)(6).

**Issue:** Does the definition of “firm or law firm” have to be revised to encompass a company that is providing legal services primarily through technology?

<sup>5</sup> **Important note:** Paragraph (b) is substantially more limiting than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999. The Ethics 20/20 was adamant in arguing that this rule was not such an MDP, likely in an attempt to forestall a DOA judgment by the legal profession (the original MDP proposal, made contemporaneously with the Enron debacle, was rejected by the ABA House of Delegates as an invitation for the then Big Five accounting firms to enter the legal market. See note 9.

<sup>6</sup> **Issue:** This provision refers to “individual nonlawyers.” Some past proposals have limited the ability to hold a financial interest in the law firm (as defined above) to nonlawyer *professionals*. This is an issue that we should discuss.

<sup>7</sup> Similar to subparagraph (a)(6), the following phrase has been added to the Ethics 20/20 language:

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

Two points: First, this language is intended to emphasize that each of the requirements is mandatory. Second, the introductory paragraph has been rewritten to be prohibitory (“shall not ... unless”) as is standard in the California Rules rather than permissive (“may ... but only if”) as in the ABA Ethics 20/20 proposed rule 5.4.

(1) the firm’s sole purpose is providing legal services to clients;<sup>8</sup>

(2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;<sup>9</sup>

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<sup>8</sup> Subparagraph (b)(1) is identical to the same paragraph in Model Rule 5.4 proposed by Ethics 20/20.

**Pros:** (1) Limiting the type of firm to one whose sole purpose is providing legal services enhances public protection because the lawyer partners will be ultimately responsible for decisions relating to those services.

(2) This limitation on the services provided should avoid the negative implications of a full-fledged MDP, which was soundly rejected by the ABA in 2000. See note 9.

(3) This limitation on the services provided should also avoid the concerns stated in Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#), which likely would create pushback by the legal profession.

(4) Although limited, this proposal should nevertheless provide nonlawyer technologists with a financial incentive to join forces with lawyers to fashion technological solutions to the justice access problem in concert with the lawyers’ provision of legal services.

**Cons:** (1) There is little or no evidence that even this modest proposal will increase access to justice. The only jurisdiction that has adopted a similar rule is D.C., and that rule appears primarily intended to provide a means for nonlawyer lobbyists to share in a law firm’s profits (and enhance the law firm’s profits in that environment.)

<sup>9</sup> Subparagraph (b)(2) is identical to the same paragraph in Model Rule 5.4 proposed by Ethics 20/20.

**Pros:** (1) By limiting the role of nonlawyers to providing services “that assist” the provision of legal services, this provision addresses to some extent a concern expressed by members of ATILS regarding whether a tech solution can retain the protection of the privilege or work product in providing services. So long as the nonlawyers, whether through their own efforts or through apps they have designed, are assisting lawyers in providing services to the firm’s clients, the protections of privilege and work product should be preserved.

For example, with respect to privilege, see Evid. Code 952, which provides:

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those *who are present to further the interest of the client* in the consultation or *those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added)

**Cons:** (1) This rule would not address the stated concern as to a nonlawyer’s business that is engaged in providing legal services directly through technology, unless that business is majority owned or at least controlled by a lawyer or lawyers.

**Issue:** Should nonlawyer ownership be limited to nonlawyers who “assist” the lawyers of the firm in providing legal services?

If not so limited, e.g., the firm is a true MDP (i.e., providing legal, accounting, etc., services independent of one another), which could open the door wider than intended. See Sam Skolnik and

(3)<sup>10</sup> the nonlawyers have no power to direct or control the professional judgment of a lawyer;<sup>11 12</sup>

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Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#).

Compare the rule revision proposal of the ABA MDP Commission in their [Appendix A](#).

<sup>10</sup> Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 proposed by Ethics 20/20.

**Pros:** (1) A simple declarative statement that nonlawyers in the firm have no power to direct or control the professional judgment of a lawyer should provide sufficient assurance that the lawyers' professional judgment will not be impinged by the nonlawyers in the firm.

(2) The statement should also provide sufficient guidance on how the various ownership and voting interests should be structured in a firm set up under subparagraph (b). For further clarification, a comment could be added. Consider, for example, a variant Comment [8] to Model Rule 5.4, as proposed by Ethics 20/20, which provided:

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

**Cons:** (1) This black letter provision lacks specificity as to how the goal of preventing nonlawyer control of lawyers' professional judgment will be attained. See note 11.

<sup>11</sup> Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 proposed by Ethics 20/20.

Paragraph (b)(5) provided:

(5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

The Subcommittee did not reach consensus that the first clause of the Ethics 20/20 paragraph, standing alone, provided sufficient protection for the lawyers' independent professional judgment without adding the remaining language of Ethics 20/20 concerning relative ownership and voting interests in the entity. See note 12.

<sup>12</sup> **Issue:** There was no consensus among the subcommittee on subparagraph (b)(3). There are three alternative options being considered and will be discussed at the next meeting.

Under **ALTA**, the following clause would be added to subparagraph (b)(3) or would be inserted as a separate subparagraph:

**(3) [ALTA]** . . . and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm;



(4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;<sup>13</sup>

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**[Note for ALTA:** ALTA does not address the “aggregate” of financial and voting interests in the firm. Rather, it appears only to be an attempt to ensure that partner or shareholder in the firm with the greatest financial and voting interests must be a lawyer rather than a nonlawyer (“the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm,”).]

Under **ALTB**, the following clause would be added to subparagraph (b)(3) or would be inserted as a separate subparagraph:

**(3) [ALTB]** . . . and the aggregate financial and voting interests of the nonlawyers does not exceed [X%] of the firm total;

**[Note for ALT B:** ALT B addresses “aggregate” holdings and puts a limit on the aggregate of nonlawyer financial and voting interests (“the aggregate financial and voting interests of the nonlawyers does not exceed [X%] of the firm total,”).]

Under **ALTC**, no further changes would be made to subparagraph (b)(3).

<sup>13</sup> Subparagraph (4) is based on paragraph (b)(3) of Model Rule 5.4 proposed by Ethics 20/20, which provided:

(3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;

The additional language in subparagraph (b)(3) recognizes that in California, lawyer conduct is regulated not only by the Rules of Professional Conduct. Under subparagraph (b)(3), the nonlawyers must agree to undertake to conform their conduct to that of lawyers under the Rules of Professional Conduct, the State Bar Act, and the other laws that govern lawyer conduct (e.g., Evidence Code, Probate Code, Penal Code, etc.)

**Pros:** (1) This provision, when read in conjunction with subparagraph (b)(5), which imposes on the firms’ lawyer partners the duty to ensure the nonlawyers compliance with the Rules, etc., provides assurance that the services provided by the firm will be in compliance with the Rules.

(2) Requiring certification would not increase public protection. The key element in ensuring legal services are being provided in compliance with the Rules, etc., will be the continued monitoring of nonlawyer conduct by the lawyer partners in the firm.

**Cons:** (1) The provision does not provide sufficient public protection, even when read in concert with subparagraph (b)(5). The public would be better protected by requiring that each nonlawyer partner be certified by an appropriate authority. See “Issue3,” below.

**Issue1:** Is it necessary to require that they have “read” the rules & other laws or sufficient that they “understand” the conduct requirements imposed on lawyers by these laws?

**Issue2:** The provision requires nonlawyers agree to “undertake to conform their conduct.” Should the provision provide that the nonlawyers agree “to conform their conduct.” In other words, we’re not asking you to attempt to conform your conduct but telling you that you must agree to do so.

**Issue3:** In addition to the foregoing issues presented for the May 13-14, 2019 meeting, during the May 14 subcommittee meeting, there was a discussion whether this provision provides sufficient



(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1.<sup>14</sup>

(6)<sup>15</sup> compliance with the foregoing conditions is set forth in writing.<sup>16</sup>

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protection or whether each nonlawyer should be certified by some process implemented by the State Bar. The subcommittee concluded that this provision was sufficient. On reflection, perhaps a slightly revised provision that specifies that *each* nonlawyer must agree in a *signed* writing that the nonlawyer will conform his or her conduct would be an acceptable compromise. For example, subparagraph (b)(4) could be revised as follows:

(4) ~~the each~~ nonlawyer~~s~~ states in a writing signed by the nonlawyer that ~~they have the nonlawyer has~~ read and understands the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agrees in that writing to undertake to conform ~~their his or her~~ conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

See also note 15.

<sup>14</sup> Subparagraph (b)(5) is identical to paragraph (b)(4) of Model Rule 5.4 proposed by Ethics 20/20, which provided:

Pros: (1) Subparagraph (b)(4) clarifies that managerial and supervisory lawyers are still responsible for the nonlawyers, even though they might be co-owners in the firm. There could be circumstances where a particular nonlawyer might have a larger ownership share in the firm. Nevertheless, the lawyer would still ultimately be responsible for that nonlawyer as if the nonlawyer were a nonmanagerial partner/shareholder or a subordinate lawyer.

(2) This provision would fill a gap in the current rules. Under current rule 5.1, managerial and supervisory lawyers are responsible for subordinate or non-managerial lawyers. Under current rule 5.3, lawyers in a firm are responsible for nonlawyer assistants (or in ABA Model Rule 5.3, nonlawyer “assistance.”) This provision clarifies that the lawyers in the firm remain responsible for the nonlawyers even if they are co-owners in the law firm. See also note 15.

Cons: (1) None identified.

<sup>15</sup> In addition to the six subparagraphs proposed by the subcommittee, Ethics 20/20 also proposed a seventh, subparagraph (b)(6), which provided:

(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer’s integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results;

At its May 14 meeting, the subcommittee concluded that this provision was not necessary in light of subparagraph (b)(5) regarding the lawyers’ duty to be responsible for the nonlawyers as if the nonlawyers were lawyers under rule 5.1.

<sup>16</sup> Subparagraph (b)(6) is identical to paragraph (b)(7) of Model Rule 5.4 as proposed by Ethics 20/20. Subparagraph (b)(6) simply requires that the firm keep a written record, including the writings required under subparagraph (b)(4), to demonstrate that it has complied with all the requirements of paragraph (b).

Pros: (1) This provision should have a similar effect as a lawyer failing to keep adequate trust account records, i.e., failure to keep adequate records is a violation in itself and even if records are kept, but are inadequate, that would also be a violation, and in addition the lack of sufficient writings would constitute evidence of the violation.

(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 independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d)<sup>17</sup> A ~~lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~

~~(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;~~

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of

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Cons: None identified.

<sup>17</sup> Because the prohibitions in former paragraphs (b) and (d) have been subsumed in new paragraph (b), former paragraph (d) is deleted except for former subparagraph (d)(1) regarding the fiduciary of a lawyer's estate.

past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[5] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).

**Comments to Model Rule 5.4, as proposed by Ethics 20/20 Commission:**

[Underlines represent additions to, and ~~strike throughs~~ deletions from, Model Rule 5.4]

**NOTE:** The following comments are being provided for consideration by the subcommittee at its June 3, 2019 meeting. The California Supreme Court has stated the following regarding the use of comments in the Rules:

Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves. **Second Rules Commission Charter (2015).**

Because of the foregoing instruction from the Supreme Court, we should not any comments to current rule 5.4 unless they are necessary to clarify the scope or application of the rule. Moreover, before doing that, we should first attempt to tighten the black letter text to provide the necessary clarity.

[1] This Rule ~~traditional~~–limits sharing of legal fees with nonlawyers. Lawyers sharing legal fees with other lawyers not in the same firm is addressed by Rule 1.5(e). These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment

[2] Paragraph (b) rejects an absolute prohibition against lawyers and nonlawyers sharing legal fees, but continues to impose traditional ethical requirements with respect to such fee sharing. Thus, a lawyer may practice law in a firm where nonlawyers hold a financial interest, but only if the requirements set forth in paragraphs (b)(1) -

(7) are satisfied. The requirement of a writing helps ensure that the other conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers have a financial interest.

[3] Paragraph (b) does not permit an individual or entity to acquire all or any part of an interest in a law firm for investment or other purposes. Such an investor would not be an individual nonlawyer in the firm who performs services that assist the law firm in providing legal services under paragraph (b)(2). It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the profits of a law firm.

[4] The term “individual” in paragraph (b) does not preclude the participation in a law firm by an individual professional corporation.

[5] Paragraph (b) does not preclude a lawyer from providing “law-related services”, as defined in Rule 5.7, whether through a law firm or other organization. A lawyer shall remain subject to the Rules of Professional Conduct with respect to his or her provision of law-related services pursuant to Rule 5.7 whether or not the entity through which the lawyer provides such services is a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule.

[6] Paragraph (b)(3) requires that all nonlawyers having a financial interest in a law firm state in writing that they have read and understand the Rules of Professional Conduct and agree to conform their conduct to the Rules. This accords with the requirement that a partner or lawyer with comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that all lawyers in the firm conform to the Rules. See Rule 5.1. Further, the requirement in paragraph (b)(6) that each lawyer having a financial interest in the firm shall make reasonable efforts to ensure that each individual nonlawyer having a financial interest in the firm is of good character is an ongoing obligation that does not terminate with the admission of the nonlawyer to the partnership or other organization through which the lawyer delivers legal services to clients. The ethical atmosphere of a firm can influence the conduct of all its members, and the lawyer partners may not assume that all those associated with the firm will inevitably conform to the Rules. See Rule 5.1 Comment 3. Due care must therefore be exercised by the lawyers having a financial interest or exercising managerial authority with respect to the admission to the firm of a nonlawyer whose character and fitness may reflect on the integrity of the firm and thereby on the legal profession. Whether a lawyer may be liable civilly or criminally for the conduct of a nonlawyer partner or member of the firm is a question of law beyond the scope of these Rules.

[7] To avoid possible conflicts between a lawyer’s duties and those of a nonlawyer under the ethical rules or law applicable to their conduct, the law firm should not permit a nonlawyer to participate or continue to participate in a matter if the lawyer knows or reasonably should know that the legal or ethical duties of the nonlawyer are inconsistent with the duties of the lawyer or lawyers in the matter.

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

[9] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

[10] If a lawyer practices law in a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule, the lawyer, all such nonlawyers and the entity may be subject to registration or other requirements as may be determined by this jurisdiction.

[211] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).



# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-374

June 7, 1993

## Sharing of Court-Awarded Fees with Sponsoring Pro Bono Organizations

*It is not ethically improper for a lawyer who undertakes a pro bono litigation representation at the request of a non-profit organization that sponsors such pro bono litigation to share, or agree in advance to share, with the organization court-awarded fees resulting from the representation. Such sharing of the court-awarded fees does not constitute either a prohibited sharing of fees with a nonlawyer under Rule 5.4(a), or a prohibited payment for a referral under Rule 7.2(c).*

The Committee has been asked to opine on the ethical propriety of a lawyer who undertakes a pro bono litigation representation at the instance of an organization that is engaged in sponsoring such pro bono litigation sharing with the sponsoring organization court-awarded fees resulting from the representation.<sup>1</sup> There are two principal situations where the issue may arise: first, where the lawyer to whom the representation is referred by a sponsoring organization (commonly termed a "cooperating lawyer") and whose services are the basis of court-awarded attorney's fees contributes those fees to the sponsoring organization voluntarily or agrees in advance with the sponsoring organization to turn over all or part of any court-awarded attorney's fees; and second, where the lawyer is an employee of the sponsoring organization and is required, as a condition of employment, to turn over to the organization any court-awarded attorney's fees that may result from the handling of cases on the organization's behalf. For reasons to be explained, the Committee concludes that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization in either of these circumstances, whether the sharing consists of dividing the fees or turning them over in their entirety to the sponsoring organization.

There are two ethical prohibitions that might be viewed as prohibiting the sharing of fees in the circumstances here addressed: the first is, in those fre-

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1. We understand the phrase "pro bono," in this context, to have essentially the same meaning as it has in Rule 6.1 of the Model Rules of Professional Conduct, referring to litigation (in the present context) without fee from the client, directed to advancing the representation of the poor, civil rights or civil liberties, public rights, the representation of charitable organizations or the administration of justice.



quent cases where the referring organization has a membership or a governing body not solely composed of lawyers, the prohibition on sharing fees with a nonlawyer in Rule 5.4(a) of the Model Rules of Professional Conduct (1983, amended 1993) and its substantially identical predecessor DR 3-102(a) of the Model Code of Professional Responsibility (1969, amended 1980);<sup>2</sup> and the other is the prohibition on a lawyer's paying for a referral, under Rule 7.2(c)<sup>3</sup> or its predecessor DR 2-103(B).<sup>4</sup> In the Committee's view, neither of these prohibitions can properly be found applicable in either of the circumstances under consideration. This is so because although each of the two rules could be read literally as applying in these circumstances, in no instance would such an application be necessary or appropriate to accomplish the purposes that the

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2. Rule 5.4 reads in its entirety as follows:

- (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 purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
  - (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.
- (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 a 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
  - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

3. Rule 7.2(c) provides:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may (1) pay the reasonable costs of advertising or written communication permitted by this Rule; (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

4. Disciplinary Rule 2-103(B) provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

rules are intended to serve. Two features of the circumstances here addressed underscore the appropriateness of this result. The first is that the entity with which such fees are shared is a non-profit entity--a fact that has weight both in relation to the letter and purposes of the Model Rules and as a legal matter. The second feature is that the fee in question is court-awarded, which means both that it does not come from the client, and thus present a risk of burdening the client with excessive fees; and that it results from the successful pursuit of some type of litigation that is recognized as serving a public purpose, and that is intended to be encouraged by such fee awards.

Contribution or Surrender of Court-Awarded Fees to a Sponsoring Pro Bono Organization Is Not Improper Fee Sharing With Nonlawyers

The caption of Rule 5.4, "Professional Independence of a Lawyer," announces, and its very brief Comment confirms, that the purpose of each of the four provisions in its component paragraphs is "to protect the lawyer's professional independence of judgment."<sup>5</sup> The most obvious threat to the lawyer's independent judgment is intervention of a nonlawyer in the attorney-client relationship.<sup>6</sup>

The four paragraphs of the Rule<sup>7</sup>--in each instance substantially identical to a provision in the predecessor Model Code of Professional Responsibility--must accordingly each be viewed as addressed to one or another circumstance or course of conduct that, by reason of a nonlawyer's having an economic interest in what the lawyer is doing for another who is the lawyer's client, may significantly threaten interference in the lawyer-client relationship.<sup>8</sup> Thus, paragraph (b) prohibits a lawyer's forming a partnership with a nonlawyer if any of the partnership's activities consist of the practice of law; and paragraph

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5. See also C. Wolfram, MODERN LEGAL ETHICS § 9.2.4, at 510 (1986).

6. The concern of the rule with protecting the attorney-client relationship "amounts to protecting the attorney-client relationship from injurious lay interference." R. Simon, Fee Sharing Between Lawyers and Public Interest Groups, 98 YALE L.J. 1069, 1110 (1989). Thus, DR 2-103(D)(4)(d) emphasized that "[t]he member or beneficiary to whom the legal services are furnished, and not such [non-profit referring] organization, is recognized as the client of the lawyer in the matter." See also Model Rule 5.4(c). We note that Professor Simon concludes (contrary to the conclusion reached in this Opinion) that the prohibition of Rule 5.4(a) applies in the circumstances here discussed, and recommends that the rule be amended so as to make explicit exception for such circumstances. Simon, *supra*, at 1076, 1133.

7. See note 2, above.

8. Two of the four predecessor provisions were under Canon 5 of the Model Code, which declared that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." These provisions were DR 5-107(B), the model for paragraph (c) of Rule 5.4, and DR 5-107(C), the model for paragraph (d). The other two were under Canon 3, which declared that "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." These provisions were DR 3-102(A) and DR 3-103(A), the models for paragraphs (a) and (b) of Rule 5.4, respectively.

(d) provides that a lawyer "shall not practice [law] with or in the form of a professional corporation or association authorized to practice law for a profit" if, in specified respects, a nonlawyer has a financial interest or right of direction in the organization: these two provisions, taken together, address the risk of undue influence that may be exercised by a lay partner, principal or stockholder in a firm in which a lawyer practices law--but in the case of a corporation or association makes exception for a law firm that is not for profit.<sup>9</sup>

Paragraph (c), providing that 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," addresses circumstances where a lawyer may entertain a sense of economic obligation to a lay person or organization that has recommended or employed the lawyer on behalf of another.

Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a layperson, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership arrangement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

The prohibition against fee sharing also may be viewed as addressing six other possible points of ethical concern: stirring up litigation; improper methods of solicitation; unauthorized practice of law; excessive fees; referrals to incompetent lawyers; and unethical litigation practices.<sup>10</sup>

The Committee has previously opined that the prohibition against fee sharing has no application in circumstances where such underlying concerns would not be involved. See ABA Formal Op. 88-356 (1988) (finding ethically permissible a law firm's payment to a temporary lawyer placement organization of a percentage of the fee received by the lawyer for work performed for the client). Examination of the concerns that have been identified as underlying the prohibition on sharing fees with nonlawyers suggests that the prohibition should not apply in the circumstances to which this opinion is addressed.

### **Preventing Lay Interference in the Attorney-Client Relationship**

This most serious of the considerations underlying the prohibition on fee-sharing in Rule 5.4(a) must, as has been pointed out, rest on a concern that the

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9. The reason for the exemption from paragraph (d) of Rule 5.4 of corporations or associations engaged in the practice of law other than for profit is to allow for lawyers' participation in prepaid legal services plans. See G. Hazard and W. Hodes, *THE LAW OF LAWYERING*, § 5.4:500.03; C. Wolfram, note 5 *supra*, § 16.5.5.

10. These seven concerns were identified in Professor Simon's article. See Simon, *supra* note 6, at 1105; see also Wolfram, *supra* note 5, § 9.2.4, at 509- 10; James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When!*, 6 *GEO.J.LEGAL ETHICS* 1, 25 (1992).

fee-sharing arrangement enables the lay third party to intervene in the attorney-client relationship. Thus the fee-sharing arrangement must give rise not only to an economic incentive on the part of the lay third party to intervene, but also to an economic incentive on the part of the lawyer to allow such intervention. Absent such an economic incentive on both sides generated by the fee-sharing arrangement, the danger of actual intervention is minimal.

In the case of the cooperating lawyer, we do not believe that there are likely to be such mutually reinforcing incentives arising from the fee-sharing arrangement. Even conceding that a sponsoring lay organization may have an economic incentive to control the course of litigation where it has an expectancy of a fee award, this does not mean that a lawyer who contemplates turning over to the organization all or part of the fee award (whether voluntarily or by prior agreement) has an incentive by virtue of this financial arrangement to yield to pressures brought by the sponsoring organization. While it might be argued that a cooperating lawyer has an incentive to please the referring organization by the manner in which she conducts the referred case, in the interest of getting future referrals, this incentive does not arise from the fee-sharing arrangement, and is not made greater or less by it. In any event, this threat is one that is addressed directly by paragraph (c) of Rule 5.4, prohibiting a lawyer from allowing a person who recommends, employs, or pays a lawyer to represent another to direct or regulate the lawyer's judgment.

In the second kind of circumstance requiring consideration--a staff lawyer paid a fixed salary by a sponsoring pro bono organization--the lawyer is undeniably subject to financial control by the sponsoring organization that generally does not exist in the case of a cooperating lawyer, and hence arguably she has an incentive to allow the organization to intervene in litigation by virtue of her desire to keep her job. However, it is not the fee-sharing agreement itself that gives rise to the incentive to allow lay control, since the staff lawyer has no expectancy in the fee award and is not economically dependent on it. The question is whether the prohibition in paragraph (c) of Rule 5.4 is sufficient in these circumstances--where the employing organization is a non-profit one--to assure the staff lawyer's independence of judgment. The Committee believes that it is.

Even though the prospect of a fee award gives the organization an economic interest in a case, that economic interest is not likely to be a predominant factor but at most a subsidiary one in the non-profit organization's sponsorship of the litigation. For the non-profit organization, any incentive to intervene in sponsored litigation is much more likely to relate to the merits of the case, rather than the expectancy of a fee award; the element of a fee, in other words, does not provide a reason why the prohibition of paragraph (c) is not sufficient in the circumstances. That consideration is what distinguishes the case of a staff lawyer working for a non-profit organization from the case of a lawyer employed by a for-profit organization sponsoring litigation, at least for purposes of the prohibition on fee-sharing in Rule 5.4(a).

We believe it is highly relevant in this regard that, in the circumstances to which this opinion is addressed, the fees potentially shared with the sponsoring lay organization are only court-awarded fees. Not only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose. This underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.

Our conclusion about the intended applicability of Rule 5.4(a) to litigation sponsored by a non-profit organization is supported by the provisions of paragraph (d) of the Rule, which applies its prohibition on lay participation in the practice of law only to corporations and associations "organized to practice law for a profit." This provision recognizes that even though a non-profit organization may well have an economic interest in securing sources of funds, including court-awarded attorney fees, to support its otherwise economically disinterested activities, the danger of improper lay interference in such circumstances is minimal. Consequently, in the absence of evidence that a non-profit lay organization is improperly interfering in the relationships between its staff lawyers and their clients, in violation of Rule 5.4(c), we do not believe that the differences between the economic circumstances of cooperating lawyers on the one hand and staff lawyers on the other provide a basis for holding that conduct that is ethically permissible for one is ethically impermissible for the other.

While it is unnecessary to our conclusion under the ethics rules, we note that it is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate categories of third persons. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963). In the *United Mine Workers* case, the Supreme Court described the difference between a cooperating lawyer and a staff lawyer on a non-profit organization as one of "virtually imperceptible degree" that cannot justify different treatment in the absence of evidence of actual conflict. See 389 U.S. at 224.

Following the Supreme Court's decision in *United Mine Workers*, numerous courts have awarded attorney fees to non-profit organizations for legal services performed by staff attorneys.<sup>11</sup> These many decisions implicitly reject

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11. E.g., *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139, 1154 (2d Cir.1983); *McLean v. Arkansas Bd. of Educ.*, 723 F.2d 45, 47 (8th Cir.1983); *Oldham v. Ehrlich*, 617 F.2d 163, 165 n. 3, 168- 69 (8th Cir.1980); *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir.), cert. denied, 449 U.S. 839 (1980) (citing *Reynolds v. Coomey*, 567 F.2d 1166, 1166-67 (1st Cir.1978)); *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir.1977), cert. denied, 436 U.S. 913 (1978).

the notion that the prohibition on fee-sharing applies in this context.<sup>12</sup> Moreover, the existence of this extensive and well-established body of case law at the time the Model Rules were adopted supports the Committee's conclusion here that Rule 5.4(a) does not bar fee awards to non-profit organizations where staff attorneys conduct the litigation, and that such fee awards are thus ethically permissible in the absence of evidence that the organization has improperly interfered in the litigation, in violation of Rule 5.4(c).

We conclude, in sum, that where the sponsoring organization is a non-profit one, and the litigation it sponsors is litigation in which, if the client prevails, there may be a court-awarded fee, the organization's potential interest in that fee does not present a sufficiently significant threat of interference in the relationship between the cooperating or staff lawyer and her client to invoke the prohibition of Rule 5.4(a) to the sharing of such court-awarded fees.

We do not doubt that Rule 5.4(a) would be usefully and properly applied to a transaction in which every pertinent motive was predominantly profit-oriented: for example, a for-profit corporation sponsoring personal injury litigation in return for a share of the contingent fees. Where both the sponsoring organization and the lawyer are primarily motivated by the expectation of financial gain, the organization has a powerful motive deriving from that expectation to try to control the litigation, and the lawyer's incentive to yield to that control is correspondingly greater. We need not for present purposes address, and express no view upon, the obvious intermediate situations, such as a for-profit entity sponsoring litigation in which its only recompense would be a share of a statutory court-awarded fee, or a non-profit organization sponsoring personal injury litigation, and sharing in contingent fees paid by the client. We only conclude that in the circumstances here addressed the sharing of court-awarded fees with sponsoring non-profit organizations does not present a threat to the lawyer's independence of judgment sufficient to invoke the prohibition of Rule 5.4(a).

Finally, it also deserves note that there are other specific prohibitions, in addition to Rule 5.4(c), that directly and sufficiently address the problem of lay interference in the attorney-client relationship. Rule 1.2(a) requires a

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12. We recognize that one court has held that a former staff attorney of a non-profit organization was prohibited by Rule 5.4(a) from complying with a term of his contract of employment that obligated him to remit court-awarded fees to the non-profit organization that employed him. See *American Civil Liberties Union/Eastern Missouri Fund v. Miller*, 803 S.W.2d 592 (Mo.), cert. denied, 111 S.Ct. 2239 (1991). We also note, however, that opinion has been undercut by a subsequent decision of the relevant U.S. District Court, permanently enjoining the State of Missouri from enforcing its ethics rules so as to invalidate terms in contracts between the American Civil Liberties Union/Eastern Missouri Fund and its staff attorneys calling for the staff attorneys to remit all court-awarded fees, *Susman v. Missouri*, No. 91-4429-CV-C-5 (W.D.Mo. June 1, 1992).

lawyer to "abide by a client's decisions concerning the objectives of representation." And Rule 1.7 prohibits a lawyer from representing a client if the lawyer's responsibilities to a third person create a conflict of interest.

While the lawyer who contracts with a sponsoring pro bono organization to turn over all or part of any court-awarded fee to the sponsoring organization is aware of the terms of his or her contract and the attendant ethical obligations, the Committee is of the view that both parties to the lawyer-client relationship should be aware of the possibility of improper lay interference. Consequently, cooperating lawyers and staff lawyers who enter into such contracts should disclose the arrangement to their client.<sup>13</sup>

### **Other Concerns Served By the Prohibition of Fee Sharing**

The Supreme Court has observed that "regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest." *Button*, 371 U.S. at 440 (emphasis added). In contrast, "truly non-pecuniary arrangements involving the solicitation of legal business have been frequently upheld." *Id.* at 440 n. 19. Thus, the Court has indicated that both lawyers and nonlawyers may solicit cases on behalf of pro bono organizations, provided that the solicitor will receive no personal financial benefit from the solicitation.

In matters where the client is charged a fee the prohibition on fee sharing may tend to deter the use of improper methods of solicitation since nonlawyers receiving a share of a lawyer's fees would have a financial incentive to solicit potential clients. In the pro bono setting, the same financial incentive is not likely to be found. Moreover, Rule 7.1(a) prohibits false or misleading statements in solicitations. Thus, in the context here addressed, a limitation on fee sharing as a second, indirect deterrent to improper solicitations is not required.<sup>14</sup>

In a for-profit context, it has been suggested, the prohibition on fee sharing may tend to deter the unauthorized practice of law because in the absence of the prohibition nonlawyer intermediaries might be tempted to handle matters themselves rather than pay a lawyer a larger portion of the client's fee.<sup>15</sup> The Committee here addresses only a situation where the client is charged no fee. In that setting the nonlawyer has no such incentive to engage in unauthorized practice of law.<sup>16</sup>

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13. Model Rule 1.5(e) imposes a similar disclosure requirement on lawyers who agree to split fees with other lawyers.

14. Protection of constitutional interests such as the rights of free speech, association, and petition in pro bono litigation requires that ethical rules be narrowly tailored to address demonstrable harms. In *In re Primus*, 436 U.S. 412 (1978), the Court explained that where a lawyer's solicitation was not for the lawyer's own pecuniary gain the lawyer "may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition [of solicitation] is said to be directed." *Id.* at 434.

15. See Wolfram, *supra* note 5, § 9.2, at 510; Simon, *supra* note 6, at 1107.

16. Moreover, there are separate specific prohibitions on the unauthorized practice of law. See Model Rule 5.5(b); see also Rule 5.3(c).



In a for-profit context the prohibition on fee sharing may tend to discourage excessive fees by eliminating a possible additional interest in the lawyer's profits.<sup>17</sup> In the present context, however, this concern is simply inapplicable: the only fee that either the lawyer or the non-profit organization may receive is a fee paid by the opposing party, and the court awarding the fee will have independently determined its reasonableness.

In a for-profit context the prohibition on fee sharing may prevent referrals to incompetent attorneys since nonlawyers would have an incentive to refer a matter to the lawyer offering to share the largest percentage of the fee regardless of the lawyer's competence. We are concerned here, however, only with a situation where the client is charged no fee. In such a setting, a concern about referrals to incompetent lawyers has no application. If the only fees that may be recovered are fees awarded to a prevailing party, nonlawyers would have no incentive to refer matters to incompetent attorneys since incompetent attorneys would presumably be less likely to prevail and hence the nonlawyer would not receive any compensation.<sup>18</sup> The prohibition on fee sharing may also be viewed as serving to prevent unethical practices in litigation. Nonlawyers with a financial interest in the outcome of litigation could be tempted to engage in unethical practices to increase the chance of collecting fees. In the no-fee context, however, there is no likelihood of such a financial incentive.<sup>19</sup>

**Contribution or Surrender of Court-Awarded Fees to a Sponsoring Pro Bono Organization Is Not Payment For a Referral**

Turning over court-awarded fees to a sponsoring pro bono organization<sup>20</sup> does not appear to the Committee to fall under the prohibition of Model Rule 7.2(c) and DR 2-103(D) on "giv[ing] anything of value to a person for recommending the lawyer's services." When the cooperating lawyer turns over the entirety of the court-awarded fee there is no financial quid pro quo for which it could be said that a fee is paid: in these circumstances, the cooperating lawyer has no financial interest in receiving the referral.

Even where the court-awarded fees are shared rather than turned over in their entirety, however, the Committee believes these rules have no applicability when the only fee involved is a court-awarded one, paid not by the client but by the opposing party. Viewed from the time the lawyer accepts the representation, the fact that court-awarded fees are available to prevailing par-

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17. See Simon, *supra* note 6, at 1107-08.

18. In addition, the ethical rules directly address the issue of attorney competence. See, e.g., Model Rule 1.1.

19. Again, specific ethical limitations already address this concern. See, e.g., Model Rules 3.1, 3.3(a), and 3.4.

20. Many non-profit organizations may qualify as "legal service organizations" within the meaning of Rule 7.2(c) and as "bona fide organization [s] that recommend[ ], furnish[ ] or pay[ ] for legal services" within the meaning of DR 2-103(D)(4), so as to come within the specific exemption in those rules for payment of the "usual charges" for a referral, in cases where they in fact make a charge for referrals.

ties only, with the attendant risk that the case will generate no fee at all, is a significant factor limiting the potential for abuse.<sup>21</sup> One of the considerations underlying the prohibition is that if a lawyer paid a third party for a referral the total fee charged would likely be higher, increasing the probability that the lawyer's client would be charged an unreasonable fee. But since in the case of a court-awarded fee a court has reviewed the fee and determined that it is reasonable, the interest in prohibiting unreasonable fees is satisfied without application of the prophylactic rule against payment for referrals.<sup>22</sup> This careful scrutiny of any fee paid eliminates any remaining possibility of speculation for financial gain by either the cooperating lawyer or the non-profit referring organization. Other considerations underlying the rule include deterrence of improper methods of solicitation and avoiding referrals to incompetent attorneys. Both of these concerns also underlie Rule 5.4(c) and were discussed above in that context. See text accompanying notes 14 & 18, above. As demonstrated above, these concerns have little, if any, applicability in the pro bono, non-profit context.

The Committee also deems it significant in this context, as well as in that of the prohibition on sharing of fees with lay persons, that there are a good many court decisions awarding fees to non-profit organizations rather than to the lawyer or lawyers who provided the legal services that formed the basis for the award.<sup>23</sup> These numerous decisions implicitly reject the notion that there is any ethical inhibition on a lawyer's court awarded fees going directly to a sponsoring pro bono organization rather than to the individual lawyers who actually provided the sponsored representation. And, as the Supreme Court has observed, "Congress endorsed ... decisions allowing fees to public interest groups when it was considering, and passed, [42 U.S.C. § 1988]." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 n. 9 (1980).

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We conclude, in sum, that none of the policy considerations underlying the prohibition of Rule 5.4(a), Rule 7.2(c) or their predecessor provisions in the Model Code, would be served by precluding a lawyer who undertakes a pro bono representation either on referral from a sponsoring pro bono organization or as an employee of such an organization, and whose services are the basis of court-awarded attorney's fees, from contributing those fees to the sponsoring organization. We also conclude that it is ethically permissible for a cooperating lawyer or a staff lawyer to agree in advance to remit all such

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21. Clients with cases manifesting a high probability of success are likely to find lawyers willing to accept their cases without having to turn to non-profit organizations for assistance.

22. This concern also underlies Rule 5.4(a) and was discussed above in that context. See *supra* text accompanying note 17.

23. See note 11, *supra*.

fees to the organization as long as this arrangement is disclosed to the client. This is not to say, of course, that cooperating lawyers, or staff lawyers, are excused from compliance with any other specific ethical obligations that may be applicable in the circumstances.<sup>24</sup>

### DISSENT

I dissent from the Committee's opinion. Model Rule 5.4(a) is clear. It says in part: "A lawyer or law firm shall not share legal fees with a nonlawyer...."

If the ethical principles are to have meaning, that meaning must be found in the words that state the principle. In the matter before the Committee, the Model Rule stating the principle is clear. Lawyers shall not share fees with nonlawyers. The Rule provides for three exceptions. None of the exceptions include sharing fees with a nonlawyer organization simply because it is not-for-profit or pro bono.

My first concern is over the use of the words "shall not" in the Rule. Shall not means shall not to me. Or, if that is not clear enough, "don't do it." The majority think this needs to be explained. The Committee's 11 page opinion implies that when they use a word it means what they choose it to mean--neither more nor less.<sup>25</sup>

The Committee seeks to justify inferring an additional exception to Model Rule 5.4 because the purposes served by the Rule are not served when applied in not-for-profit situations. As support, the Committee relies on Rule 5.4(d), which expressly applies only to professional corporations for-profit, reasoning that "[t]he four paragraphs of the Rule ... must accordingly each be viewed as addressed to one or another circumstance or course of conduct that, by reason of having an economic interest in what the lawyer is doing for another who is the lawyer's client, may significantly threaten interferences in the lawyer-client relationship." Opinion at p. 3.

This rationale is flawed. Such a matter of "statutory" construction is reserved for matters not clear on their face. Rule 5.4(a) is clear on its face: it says what it means, it means what it says. The House of Delegates did not fail to consider whether there should be any exceptions to the Rule. It expressly provided three exceptions. Further, regarding the distinction in paragraph (d), that the Rule only applies to for-profit organizations illustrates that the House of Delegates was aware of the distinction but did not choose to apply it to Rule 5.4(a).

The Committee's interpretation of Model Rule 7.2(c) is similarly flawed. That Rule prohibits lawyers from paying referral fees. The only exceptions in the Rule apply to costs of permissible advertising and usual charges of a not-for-profit legal referral service. The fees contemplated by this opinion do not

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24. Mr. Coquillette did not participate in the Committee's decision on this opinion.

25. Compare: "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean--neither more nor less." Lewis Carroll, *Through the Looking Glass* 112 (Heritage Press 1941) (1871).

fall within either category, as "usual charges" can only be reasonably interpreted to mean a cost per referral, not an amount contingent on a court award.

The Committee relies on two arguments: (1) that turning over the award is not "giv[ing] anything of value to a person for recommending the lawyer's services"; and (2) that because the money is paid by the losing party, the purpose of the Rule would not be served.

The basis of the first argument is the suggestion that no true referral exists if the entire award is transferred because the lawyer had no financial interest in receiving the award. However, the definition of the word "referral" is not based on any person's financial interest in the referral itself; a referral is simply "the act of ... referring," which is simply "to direct attention, usu[ally] by clear and specific mention." Webster's New Collegiate Dictionary 971, 972 (Henry Bosely Woolf ed. 6.8 C. Merriam Co. 1977). Here, the Committee is adding meaning to the plain reading of the Rule. The plain language of the Rule prohibits a lawyer from giving either all or part of a fee award to a party who refers a client to a lawyer.

The second argument may be based on good policy, but has nothing to do with the plain language of the Rule. The Rule does not say that a lawyer shall not pay a referral fee if he is paid by his client; it says that a lawyer shall not pay a referral fee, period, with two exceptions. The omission of the not-for-profit referring organization scenario leads to only one conclusion: that the scenario falls within the general prohibition.

I am also concerned with the Committee's ultimate conclusion that lawyers working for or with not-for-profit organizations are inherently less likely to be pressured by lay parties for whom they work, and that not-for-profit organizations do not pose the same threats as others in fee-sharing arrangements.

The Rule does not, and it should not, draw a line between classes of lawyers based on their clients. Lawyers are held to strict ethical standards regardless of client attempts to convince the lawyers to violate the standards. Given that lawyers who work for not-for-profit organizations and lawyers who work for for-profit organizations must focus on the client's needs, the attempts by an employer or referrer to convince the lawyer otherwise should not matter.

Rather than issue an opinion in obvious derogation of the Model Rules, I would have chosen from the following options. (1) Recommend to the House of Delegates that Model Rule 5.4 be abolished; (2) recommend to the House of Delegates that Model Rule 5.4 be amended to carve out exceptions for not-for-profit organizations; (3) do none of the above, but suggest to inquiring minds that if they wish to take court awarded legal fees generated in pro bono cases and give them to the agencies, that they should do that by accepting the fee and voluntarily writing the agencies a check for a like amount.

If Model Rule 5.4 is not one for our times, the Committee ought to recommend it be changed. Undermining it as the majority does may be politically correct but it is not delivered from the ethical high ground expected of opin-

ions of the Ethics Committee of the American Bar Association.

The Rules of Procedure under which this Committee operates contain the following statement in paragraph 1. "The Model Rules of Professional Conduct and the Code of Judicial Conduct, as they may be amended or superseded, contain the standards to be applied." Applying the standards found in 5.4 of the Model Rules of Professional Conduct, the answer to the question posed is that it is improper to share court-awarded fees with sponsoring pro bono organizations. Only under the world view of Mr. H. Dumpty, where words mean only what he chooses them to mean,<sup>26</sup> can the Committee's conclusion be reached.

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26. See footnote 25.