



# The State Bar of California

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## **OPEN SESSION**

## **AGENDA ITEM**

**54-123 SEPTEMBER 2020**

## **REGULATION AND DISCIPLINE COMMITTEE III.D**

**DATE:** September 24, 2020

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

**FROM:** Andrew Tuft, Supervising Attorney, Office of Professional Competence

**SUBJECT:** Proposed Amended Rule of Professional Conduct 5.4 – Return from Public Comment and Request for Adoption

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### **EXECUTIVE SUMMARY**

On March 12, 2020, the Board of Trustees received the final report and recommendations of the Task Force on Access Through Innovation of Legal Services (ATILS). At that meeting, the Board approved ATILS' recommendations for amendments to rules 1.1 and 5.4 of the California Rules of Professional Conduct for a 60-day public comment period.<sup>1</sup> The initial public comment period concluded on May 18, 2020. The Board directed the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC or Committee) to receive and review the public comments submitted. On July 13, 2020, COPRAC requested an additional 45-day public comment period for Rule 5.4 as revised, which was approved by the Board of Trustees Committee on Regulation and Discipline (RAD). The 45-day public comment period concluded on August 28, 2020. COPRAC has reviewed the public comments received and recommends that the Board adopts rule 5.4 as modified.

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### **BACKGROUND**

At the meeting of the Board of Trustees on March 12, 2020, the Board received the final report and recommendations submitted by ATILS. The report included a recommendation that the Board issue for public comment an amended rule 1.1 (Competence) and an amended rule 5.4

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<sup>1</sup> Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

(Financial and Similar Arrangements with Nonlawyers). The Board approved these recommendations and the public comment period ended on May 18, 2020. Because the terms of appointment for ATILS' membership expired on March 31, 2020, the Board directed COPRAC to receive and review the public comments submitted concerning these two rules. At the Board's meeting in July, the Board adopted amended rule 1.1 for submission to the California Supreme Court for approval and RAD authorized an additional 45-day public comment period for rule 5.4 as revised.

## DISCUSSION

Following study and in accordance with their charter, ATILS recommended that rule 5.4 be amended in order to extend the existing exception for fee sharing arrangements with a nonprofit organization to include the sharing of fees that arise out of a settlement or other resolution of a matter. Currently, rule 5.4 paragraph (a)(5) permits sharing a court-awarded fee with a nonprofit organization that employed, retained, or recommended the lawyer's employment. The amended rule proposed by ATILS would permit a lawyer to share a legal fee with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter where the legal fee is not court-awarded, but arises from a settlement or other resolution of the matter, provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code. A specific precedent for this proposed exception is found in the [District of Columbia's version of rule 5.4](#).<sup>2</sup> ATILS determined that this rule amendment would "directly enhance the ability of a nonprofit legal services organization to expand its activities and funding options through sharing in legal fees that are achieved through a settlement." ATILS also recommended that the rule be revised to include the term "facilitate" to the language of the exception. This addition is intended to address "incubator programs and other similar relationships with lawyers who are working through a nonprofit legal services organization administering an incubator or similar program."<sup>3</sup>

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<sup>2</sup> D.C. Rule 5.4 includes Comment [11] which provides that:

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the lawyer's fees does not inherently compromise the lawyer's professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. 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.

<sup>3</sup> Information about incubator programs is provided on the State Bar's website under the Office of Access & Inclusion section: <https://www.calbar.ca.gov/Access-to-Justice/About-the-Office-of-Access-Inclusion/OurProjects/Incubator-Projects>.

Following the initial public comment period, COPRAC determined that the sharing of noncourt-awarded fees with a nonprofit organization merited its own subsection, (a)(6). In addition, in order to address concerns that this type of fee division must always be communicated to the client, and because fee divisions between lawyers and nonlawyers have thus far been generally prohibited outside of the current exceptions contained in rule 5.4(a), COPRAC further revised the rule by applying the same safeguards contained in rule 1.5.1 (Fee Divisions Among Lawyers). These safeguards include requiring that: (1) the lawyer to enter into a written agreement with the nonprofit organization to divide the fee; (2) the lawyer obtains the client's consent in writing after a full written disclosure to the client that a division of fees will be made, the identity of the lawyer and nonprofit organization who are parties to the division, and the terms of the division; and (3) the total fee charged by the lawyer is not increased solely by reason of the agreement to divide fees.

### **Consideration of Public Comments Received**

In response to the additional public comment period, 39 written comments were received concerning rule 5.4 as revised.<sup>4</sup> The rule as proposed was opposed by 27 commenters, three supported the rule, and nine supported the rule if modified. In addition, during COPRAC's September 11, 2020 meeting, Alex Cherin and Jennifer Kropke provided public comment in opposition to the rule.

The Committee considered all of the public comments received. The Committee noted that the comments included observations that the proposed rule both underregulates as well as overregulates the type of fee sharing contemplated by the rule. Commenters who believe the rule underregulates this form of fee sharing include Assemblywoman Lorena Gonzalez, the California Attorney General's Office – Charitable Trust Section, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, and the Orange County Bar Association. Commenters who believe the rule overregulates this form of fee sharing include the California Lawyers Association Ethics Committee and the San Diego County Bar Association Legal Ethics Committee. The Committee believes the proposed rule strikes a fair balance between these two concerns. Following consideration of all comments received, the Committee determined to leave the black letter text of the proposed rule unchanged and instead add clarifying revisions to the Comments, which are explained below.

Common points raised by the public comments included the following observations. First, several commenters disagree with the concept of nonprofit organizations sharing legal fees with lawyers and believe the proposed rule might result in unscrupulous referral activity. The Committee observes that case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit organizations with respect to court-awarded fees (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 and rule 5.4(a)(5)). As stated above, the proposed rule extends the ability of a lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where

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<sup>4</sup> A public comment synopsis table, including the Committee's response to each comment, is provided as Attachment B. The full text of the public comments is provided as Attachment C.

the legal fee is not court-awarded but arises from a settlement or other resolution of the matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including that the nonprofit qualify as a 501(c)(3) organization under the Internal Revenue Code and a requirement that the lawyer obtain the client's consent in writing to the fee division. In addition, the laws and rules governing lawyer referral activity, including restrictions on a lawyer paying compensation to a person or entity that is conducting a referral business, are not intended to be changed by the proposed amendments to rule 5.4 (See Bus. & Prof. Code § 6155 *et seq.*; Rules of Professional Conduct 5.4(a)(4) and 7.2(b); Jackson v. LegalMatch.com (2019) 42 Cal.App.5<sup>th</sup> 760). Finally, it should also be noted that under existing law, a lawyer who is complicit with a sham organization's activities to collect attorney fees from opposing parties by filing fraudulent claims is subject to discipline (See 3 Trevor Lawyers Suspended, June 2003 Calbar Journal). This significant disciplinary exposure for bad actors will remain unchanged notwithstanding the fee-sharing exception under the proposed amended rule.

Second, a few commenters believe that the term "qualifies" under 501(c)(3) of the Internal Revenue Code is vague and that the rule should be revised to require that the organization possess an IRS tax-exempt determination letter both at the time the agreement to divide the fee is entered into and at the time the payment is made. In addition, some commenters believe the rule should require that the nonprofit has a confirmable mission aligned with the purposes of the litigation. The Committee observes that the rule would only apply to bona fide 501(c)(3) entities that are recognized by the IRS. In addition, the proposed rule is patterned after District of Columbia Rule 5.4(a)(5) which also uses the term "qualifies." The Committee is unaware of any unintended consumer harm as a result of this term in the District of Columbia, and the Committee values maintaining a national standard where possible. With respect to the suggestion that the nonprofit has a "confirmable mission" aligned with the purposes of the litigation, the Committee does not believe such a limitation is warranted under the proposed rule. The current exception for sharing legal fees with a nonprofit organization under rule 5.4(a)(5) is not similarly limited and the Committee observed, in particular, that Comment [3] to the rule limits qualifying organizations to include "nonprofit legal aid, mutual benefit, and advocacy groups." The Committee believes the requirements that the organization qualifies under 501(c)(3) of the Internal Revenue Code and that the client must consent in writing to the fee division provide substantial client protection.

Finally, two ethics committees stated that the proposed rule overregulates the sharing of legal fees in this context by requiring an attorney to comply with the provisions of rule 1.5.1, whereas the exception under rule 5.4(a)(5) does not even require disclosure to the client that the fee will be shared. The Committee acknowledges that there are differences between rule 5.4(a)(5) and (a)(6). However, because the sharing of fees under (a)(6) occurs where the fee-sharing process is not public or subject to the protective supervision of a court, the Committee believes the additional client protective provisions found in rule 1.5.1 are appropriate. Rule 1.5.1 offers protection against the potential for an increase in the fee as a result of an agreement to divide the fees, and the requirement for the client to provide informed written consent to the fact a division is being made, as well as the terms of the division. Analogous in the context of the proposed amended rule, an underlying reason for rule 1.5.1 is to assure that

the client is aware of information that might impact the client's assessment of the relative interests and responsibilities of the persons or organizations who are dividing the fees. In turn, this information enables a client to guard against the potential that the client's representation might be adversely affected as a result of an agreement to divide a fee.

The Committee made a few clarifying edits to the rule Comments. First, they amended the second sentence of Comment [3] to read in parallel with the first sentence of the Comment in order to clarify the types of nonprofit organizations that may share fees under the rule. This sentence now reads: "Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter with nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law."

Second, to clarify the reason why ATILS added the term "facilitated" to rule 5.4(a)(5) and (a)(6) as intended to include law practice incubator programs, the Committee added the following two sentences to the end of Comment [3]: "Paragraphs (a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program." In addition, because these revisions to Comment [3] result in this Comment more fully providing guidance and interpretation on rule 5.4(a)(5) and (a)(6), the Committee has moved the last sentence of the Comment—which cross-references to Comment [5] of rule 1.0 regarding a lawyer's contribution of legal fees to a legal services organization—to the end of Comment [4]. Comment [4] as proposed cross-references to rules 1.7 and 2.1 concerning a lawyer's obligation to exercise independent professional judgment. The Committee believes these two sentences work better together in a single Comment.

Finally, in order to address concerns that the proposed rule might possibly be interpreted as changing the existing prohibitions on sharing fees with uncertified referral services, the Committee has added a new Comment [5] which states: "Nothing in paragraphs (a)(5) or (a)(6) is intended to alter the regulation of lawyer referral activity set forth in Business and Professions Code section 6155. In addition, a lawyer must comply with rules 5.4(a)(4) and 7.2(b)."

Following discussion of the public comments received, COPRAC voted unanimously in favor of recommending that rule 5.4 as revised be adopted by the Board of Trustees. A copy of the revised rule is provided in Attachment A.

## **FISCAL/PERSONNEL IMPACT**

None

## **AMENDMENTS TO RULES OF THE STATE BAR**

If adopted by the Board, this rule amendment would only become binding and operative if approved by the Supreme Court of California (Bus. & Prof. Code § 6076 and 6077).

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None.

### **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: d. Commencing in 2018 and concluding no later than March 31, 2020, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

### **RECOMMENDATIONS**

**Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Regulation and Discipline Committee recommends that the Board of Trustees adopts the amendments to Rule of Professional Conduct 5.4 as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that the Regulation and Discipline Committee recommends that the Board of Trustees directs staff to submit the amended rule to the Supreme Court of California with a request that the rules be approved.

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that upon recommendation of the Regulation and Discipline Committee, the Board of Trustees adopts the amendments to Rule of Professional Conduct 5.4 as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that staff is directed to submit the amended rule to the Supreme Court of California with a request that the rules be approved.

### **ATTACHMENT(S) LIST**

- A.** Proposed Rule 5.4 – (Clean and Redline)
- B.** Synopsis of Public Comments
- C.** Full Text of Public Comments

## **Rule 5.4 Financial and Similar Arrangements with Nonlawyers (Proposed Rule – Clean Version)**

- (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:
- (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;
  - (5) a lawyer or law firm\* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter; or
  - (6) a lawyer or law firm\* may share with or pay a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter provided:
    - (i) the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code;
    - (ii) the lawyer or law firm\* enters into a written\* agreement to divide the fee with the nonprofit organization;
    - (iii) the lawyer or law firm\* obtains the client's consent in writing,\* either at the time the lawyer or law firm\* enters into the agreement with the nonprofit organization to divide the fee or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of the fact that a division of fees will be made, the identity of the lawyer or

law firm\* and the nonprofit organization that are parties to the division, and the terms of the division; and

- (iv) the total fee charged by the lawyer or law firm\* is not increased solely by reason of the agreement to divide fees.
- (b) 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.
- (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) 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



!ct . 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 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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter to 501(c)(3) organizations, such as nonprofit legal aid and charitable groups that are not engaged in the unauthorized practice of law. Paragraphs (a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program.

[4] A lawyer or law firm\* who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client's best interest. See rules 1.7 and 2.1. 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.

[5] Nothing in paragraphs (a)(5) or (a)(6) is intended to alter the regulation of lawyer referral activity set forth in Business and Professions Code section 6155. In addition, a lawyer must comply with rules 5.4(a)(4) and 7.2(b).

[6] 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].)

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

**Rule 5.4 Financial and Similar Arrangements with Nonlawyers  
(Proposed Rule – Redline Version to Current Rule)**

- (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:
- (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 legal fee to a nonprofit organization that employed, retained~~or~~, recommended, or facilitated employment of the lawyer or law firm\* in the matter-; or
  - (6) a lawyer or law firm\* may share with or pay a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter provided:
    - (i) the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code;
    - (ii) the lawyer or law firm\* enters into a written\* agreement to divide the fee with the nonprofit organization;
    - (iii) the lawyer or law firm\* obtains the client's consent in writing,\* either at the time the lawyer or law firm\* enters into the agreement with the nonprofit organization to divide the fee or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of the fact that a division of fees will be made, the identity of the lawyer or

law firm\* and the nonprofit organization that are parties to the division, and the terms of the division; and

(iv) the total fee charged by the lawyer or law firm\* is not increased solely by reason of the agreement to divide fees.

- (b) 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.
- (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) 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

1ct . 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 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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter to 501(c)(3) organizations, such as nonprofit legal aid and charitable groups that are not engaged in the unauthorized practice of law. Paragraphs (a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program. 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] A lawyer or law firm\* who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client's best interest. See rules 1.7 and 2.1. 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.

[5] Nothing in paragraphs (a)(5) or (a)(6) is intended to alter the regulation of lawyer referral activity set forth in Business and Professions Code section 6155. In addition, a lawyer must comply with rules 5.4(a)(4) and 7.2(b).

[46] 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].)

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



# The State Bar of California

## OFFICE OF PROFESSIONAL COMPETENCE

Date: September 24, 2020

To: Members, Regulation and Discipline Committee  
Members, Board of Trustees

From: Andrew Tuft, Supervising Attorney

Subject: Agenda Item RAD III.D and Board 54-123 - Proposed Amended Rule of Professional Conduct 5.4 - Return from Public Comment and Request for Adoption

Members of the Regulation and Discipline Committee:

In this agenda item, Attachment A presents the text of the proposed amended rule. Staff has replaced Attachment A with a revised document. The new document modifies the second sentence in Comment [3] to Rule of Professional Conduct 5.4 in order to accurately conform the Comment's language to the blackletter text of Rule of Professional Conduct 5.4(a)(6), as explained below.

As background, following consideration of the public comments received the Committee on Professional Responsibility and Conduct (COPRAC) amended the second sentence of Comment [3] to parallel the first sentence of that Comment. COPRAC's amendment was intended to clarify that the same type of nonprofit organizations that are able to share court-awarded legal fees under the existing exception (paragraph (a)(5)) includes organizations that also would be able to share fees arising out of a settlement or other resolution of the matter under the proposed new exception (paragraph (a)(6)). The Comment as proposed by COPRAC and presented in the agenda item reads:

[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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. Paragraphs

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(a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program.

However, following the posting of this agenda item, staff received a comment from Toby Rothschild, former ATILS co-chair and long-time legal services attorney. He correctly noted that the second sentence is overbroad because mutual benefit groups are organized as 501(c)(6) entities, and advocacy groups are generally organized as 501(c)(4) entities. In order to conform this sentence to the blackletter of the rule, staff proposes the following revision:

[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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter to ~~nonprofit legal aid, mutual benefit, and advocacy groups~~ 501(c)(3) organizations, such as nonprofit legal aid and charitable groups that are not engaged in the unauthorized practice of law. Paragraphs (a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program.

Nonprofit legal aid organizations and charitable groups, among others, are those groups that are able to be categorized as a 501(c)(3) organization under the Internal Revenue Code. The requirement that the nonprofit organization qualify as a 501(c)(3) organization is one of the specified circumstances required by the rule 5.4 paragraph (a)(6). As a result, this non-substantive revision accurately conforms the Comment's language to the rule.

**TOTAL = 39**    **S = 3**  
**SM = 9**  
**O = 27**  
**NP = 0**

**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers**  
**Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Preferred Alternative / Position<sup>1</sup></b>	<b>Comment</b>	<b>COPRAC Response</b>
1	Zavieh, Megan (07-15-20)	N	S	The edits to the rule are practical and simple. There's no reason to object to it. I do still hope to see much more extensive revisions to this rule, but the current proposed modifications are not objectionable at all.	The Committee agrees with the comment supporting the proposed rule.
2	Furman, Joshua (07-20-20)	N	SM	<p>The proposed rule appears to be a logical extension of the policy behind the Tenderloin case and its progeny. The policy of the State Bar should be to continue to incentivize nonprofit involvement in legal representation for underserved persons and areas of the law. For these reasons, I support the proposed rule change.</p> <p>The rule should be modified to include (1) a requirement that the nonprofit have a confirmable mission aligned with the purposes of the litigation (e.g., Tenderloin obtaining fees in a housing case); and (2) that there be a disciplinary mechanism to deal with unscrupulous actors working under the guise of nonprofits.</p>	The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under (a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances. With respect to the suggestion that the nonprofit have a “confirmable mission aligned with the purposes of the litigation,” the Committee does not believe such a limitation is warranted under this proposed rule. We note, in particular, that Comment [3] to the rule limits qualifying non-profits to “non-profit legal aid, mutual benefit and advocacy groups.” In addition, proposed rule (a)(6) adds the requirements for 501(c)(3) qualification and client consent to the fee division. With these modifications, the Committee believes existing Rules of Professional Conduct, together with provisions in the Business

<sup>1</sup> S = Support    SM = Support If Modified    O = Oppose    NP = No Position

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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					and Professions Code, are sufficient to deal with unscrupulous actors (see, e.g., rules 1.2.1, 5.4, 7.2(b), 8.4; and Bus. & Prof. Code §§ 6106, 6128).
3	Anonymous (07-21-20)	N	SM	None	No response required.
4	Anonymous (07-21-20)	N	O	None	No response required.
5	Lai, Anthony (07-21-20)	N	O	I oppose the proposed modification the rule. Fee sharing should remain among licensed attorneys.	<p>Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).</p> <p>The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under rule 5.4(a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p>
6	Rowen, Eric (07-21-20)	N	SM	My concern is that no one has explored the consequences to a 501(c)(3) organization of taking in "unrelated business income" and, thereby,	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a qualified nonprofit organization. The Committee is unaware of such fee sharing



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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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				destroying the entity's tax exempt status. Generally speaking, a non-profit organization cannot make profits from the conduct of business that otherwise would be earned in the private market. Here, the proposal is to allow referral fees, which fees generally are earned by for-profit referral sources, i.e., lawyer referrals. Allowing nonprofit organizations to compete with for-profit organizations for earnings (here, referral fees) is among the quickest ways for a non-profit to lose its tax exempt status.	instances having a negative impact on a qualified organization's nonprofit status. The proposed rule is intended to extend the sharing of legal fees currently permitted under (a)(5) by allowing a lawyer to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances.
7	Jones, David (07-21-20)	N	O	Terrible idea, does not achieve the intended purpose. A money grab by non-lawyer entities which will erode the quality of legal services provided and create financial conflicts of interest.	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a qualified nonprofit organization. The proposed amended rule extends this exception by providing that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division. The Committee is not aware of any evidence that (a)(5) has eroded the quality of service or created conflicts. To the extent that (a)(6) creates any additional risk, the requirements for 501(c)(3) qualification

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers**  
**Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Preferred Alternative / Position<sup>1</sup></b>	<b>Comment</b>	<b>COPRAC Response</b>
					and client consent to the fee division are sufficient to address them, given the many other rules regulating such conduct.
8	Goldman, Martin (07-21-20)	N	O	This is a bad idea. To many "well intentioned" rules such as this proposal, turn into cottage industries in which litigation clogs the courts with lawsuits that truly provide no meaningful benefit to the named Plaintiff but turn into churned lawsuits for the sole benefit of "special interest" lawyers or law firms and otherwise do tremendous detriment to targeted small businesses.	<p>Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a nonprofit organization. The proposed amended rule extends the ability of a lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division. This rule change is intended to directly enhance the ability of nonprofit legal services organizations to expand its activities and funding options through sharing in legal fees that are achieved through a settlement, thereby improving access to justice for consumers who lack access to legal services.</p> <p>The Committee is not aware of any evidence that the current rule has led to the kinds of abuses identified or that the amended rule would do so.</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers**  
**Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Preferred Alternative / Position<sup>1</sup></b>	<b>Comment</b>	<b>COPRAC Response</b>
9	Gold, Arnold (07-21-20)	N	O	All of the reasons against fee-sharing in general apply with full force and vigor against this proposal. The need of 501(c)(3) organizations for support pales in contrast to the harm this proposal would generate.	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a qualified nonprofit organization. The proposed amended rule extends this exception by providing that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division. The Committee is not aware of any evidence that (a)(5) has eroded the quality of service or created conflicts. To the extent that (a)(6) creates additional risk, the requirements for 501(c)(3) qualification and client consent to the fee division are sufficient to address them, given the many other rules regulating such conduct.
10	Wolf, Barry (07-21-20)	N	S	Hopefully, the revised rule will result in low income people receiving more legal services.	The Committee agrees with the comment supporting the proposed rule.
11	Anonymous (07-21-20)	N	O	This is a terrible rule which will further erode away at the legal profession. It encourages nonlawyers to try to practice in the legal profession, it co-mingles the finances of lawyers with nonlawyers (which will needlessly result in litigation, prolonged disciplinary matters, etc.) and basically	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a qualified nonprofit organization. The proposed amended rule extends this exception by providing that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
Synopsis of Public Comments**

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				will cause a cottage industry of nonprofits who drum up business for unethical lawyers. This is a rule in search of a non-existent problem.	or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division. The Committee is not aware of any evidence that (a)(5) has eroded the quality of service or created conflicts. To the extent that (a)(6) creates additional risk, the requirements for 501(c)(3) qualification and client consent to the fee division are sufficient to address them, given the many other rules regulating such conduct.
12	Oren, Eric (07-21-20)	N	O	Although there may be some benefit, I see more possibility of misuse of this proposal. Is there anything to prevent formation of nonprofits to simply facilitate referrals to specific attorneys or firms? The potential for abuse seems likely without more defined restrictions.	Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).  The proposed rule extends the ability of a lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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					consent in writing to the fee division. Comment [3] to the Rule limits qualifying non-profits to “non-profit legal aid, mutual benefit and advocacy groups.” In addition, proposed rule (a)(6) adds requirements for IRS qualification and client consent to the fee division. With these modifications, the Committee believes existing Rules of Professional Conduct, together with provisions in the Business and Professions Code, are sufficient to deal with unscrupulous actors (see, e.g., rules 1.2.1, 5.4, 7.2(b), 8.4; and Bus. & Prof. Code §§ 6106, 6128). In addition, the proposed rule does not change the existing prohibitions on sharing fees with an uncertified lawyer referral service. (See, rules 5.4(a)(4) and 7.2(b); and Bus. & Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.
13	Stone, Robert (07-21-20)	N	O	This proposed rule change will lead to more litigation and further clogging of our civil court system. Marginal cases may be filed because the nonprofit hopes to force a settlement for which it will receive a cut.  Attorneys should not be using services that will provide them cases if they	Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).  Rule 5.4(a)(5) currently permits the

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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				share their fee. The possibility of corruption in such a situation is real. A non-profit organization looking for operating funds might try and put pressure on a client or an attorney to prematurely settle a case so it can get paid. This rule change brings in other parties who have not had ethical training or legal training to make decisions on how matters are handled, thus practicing law without a license.	sharing of court-awarded fees with a qualified nonprofit organization. The proposed amended rule extends this exception by providing that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division. The Committee is not aware of any evidence that (a)(5) has led to the types of abuses identified. To the extent that (a)(6) creates any additional risk, the requirements for 501(c)(3) qualification and client consent to the fee division are sufficient to address them, together with provisions in the Business and Professions Code, are sufficient to deal with unscrupulous actors (see, e.g., rules 1.2.1, 5.4, 7.2(b), 8.4; and Bus. & Prof. Code §§ 6106, 6128).
14	Norton, Cathleen (07-21-20)	N	O	I am opposed to the proposed rule change.	No response required.
15	Narayan, Santosh (07-21-20)	N	O	This will encourage "capping" by allowing people to organize non-profits to steer personal injury cases to specific attorneys under the guise of "Injured Persons Network", etc. Fee sharing in this matter will erode trust	Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5))

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				in the profession and should absolutely be barred.	<p>and Comment [3]).</p> <p>The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under rule 5.4(a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances, including a requirement the lawyer obtain the client’s consent in writing to the fee division.</p> <p>The proposed rule does not change the existing prohibitions on sharing fees with an uncertified lawyer referral service. (See, rules 5.4(a)(4) and 7.2(b); and Bus. &amp; Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.</p>
16	Hinman, John (07-21-20)	N	SM	I think the idea that a true non-profit, community service based organization, should be able to share fees is a good one as they can help their bottom line potentially. However, I believe as written this rule would allow for significant abuse as a savvy operator could create a lucrative "non-profit" enterprise that had little or no	<p>Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).</p> <p>The proposed rule extends the ability of a</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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				relationship to actual community service and still comply with the rule. In lieu of actual prior state bar approval, something along the lines of a "501(c)(3) organization whose primary purpose IS NOT to provide client referrals to attorneys" or something like that could work too.	<p>lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p> <p>Comment [3] to the Rule limits qualifying non-profits to "non-profit legal aid, mutual benefit and advocacy groups." In addition, the proposed rule (a)(6) adds the requirements for 501(c)(3) qualification and client consent to the fee division. With these modifications, the Committee believes existing Rules of Professional Conduct, together with provisions in the Business and Professions Code, are sufficient to deal with unscrupulous actors (see, e.g., rules 1.2.1, 5.4, 7.2(b), 8.4; and Bus. &amp; Prof. Code §§ 6106, 6128).</p>
17	Stidham, Matthew (07-21-20)	N	O	None	No response required.
18	Blume, James (07-23-20)	N	SM	There are many "Legal Business" that do [only] one thing, such as opening a Trust, or doing a will. We don't need Attorneys for simple Filings anymore.	The Committee views this comment as supporting the proposed rule.



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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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				This will also bring down prices to the poor and disabled.	
19	Akopyan, Michael (07-23-20)	N	O	None	No response required.
20	Akopyan, Ani (07-23-20)	N	O	None	No response required.
21	Spencer, Jeffrey (07-25-20)	N	O	Non-profit organizations should not be allowed to receive a referral fee or percentage of the attorneys' fees from attorneys to whom they refer cases. The rule encourages non-profits to engage in capping and to farm out referrals to firms who agree to pay them the highest referral fees.	<p>Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).</p> <p>The proposed rule extends the ability of a lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p> <p>The proposed rule does not change the existing prohibitions on sharing fees with an uncertified lawyer referral service.</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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					(See, rules 5.4(a)(4) and 7.2(b); and Bus. & Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.
22	Gourley, Steven (07-30-20)	N	O	Don't we have enough frivolous lawsuits?	The proposed rule is aimed at improving access to justice for consumers who have a legitimate need for legal services that are currently not being met. The Committee is not aware of any evidence suggesting that the proposed rule would lead to the abuses described, which are subject to independent regulation under other Rules of Professional Conduct.
23	Hosseini, Ali (08-04-20)	N	O	Strongly oppose any changes to regulations concerning our profession. Strongly oppose allowing non-lawyers to share lawyer fees or take any ownership interest in law firms or cases. Do not allow outside interests to ruin our profession. Integrity of our profession depends on it. Further, do not dilute our profession by lowering merit required for admission. Protect our profession please.	Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).  The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under rule 5.4(a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances, including a requirement

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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					<p>the lawyer obtain the client’s consent in writing to the fee division.</p> <p>The Committee is not aware of any evidence that the proposed change would give rise to the abuses claimed. In particular, Rule 5.4 continues to afford protections against the interference with a lawyer’s professional judgment and the attorney-client relationship. (See, current rule 5.4(c) and proposed Comment [4].)</p>
24	LaGuardia, Eric (08-04-20)	Y	O	None	No response required.
25	Bojeaux, Darian (08-05-20)	N	O	There is no good reason for there to be fee splitting with a nonlawyer of any kind. So what if it is a nonprofit organization. That just means that they take large salaries so there is no profit.	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with a nonprofit organization. The proposed amended rule extends the ability of a lawyer to share fees with a qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the qualified nonprofit organization, subject to specified circumstances, including a requirement the lawyer obtain the client’s consent in writing to the fee division. This rule change is intended to directly enhance the ability of nonprofit legal services organizations to expand its

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					activities and funding options through sharing in legal fees that are achieved through a settlement, thereby improving access to justice for consumers who lack access to legal services.
26	Kennedy, Grant (08-05-20)	N	O	This is a scam on the public, no attorney should be splitting fees it destroys independence. If you really want to help the public and you think you have solutions, create those without breaking and destroying long established rules.	<p>Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).</p> <p>The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under rule 5.4(a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances, including a requirement the lawyer obtain the client’s consent in writing to the fee division.</p> <p>Rule 5.4 continues to afford protections against the interference with a lawyer’s professional judgment and the attorney-client relationship. (See, current rule 5.4(c) and proposed Comment [4].)</p>

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27	Klausner, Alyssa	N	O	None	No response required.
28	Johnson, Thomas (8-19-20)	N	O	I oppose any rule, or the expansion of any rule that allows non-attorneys (private equity funds, large corporations) to share in legal fees. These funds and corporations do not have undivided duties of loyalty to clients. Instead, the funds and corporations look at clients only as a means to a legal fee, and client referrals.	<p>Case law and the Rules of Professional Conduct currently recognize a special fee-sharing arrangement involving lawyers and qualified nonprofit entities (see, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal. 4th 23; and rule 5.4(a)(5) and Comment [3]).</p> <p>The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under rule 5.4(a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p> <p>The rule does not authorize fee sharing with private equity funds or large corporations.</p> <p>Rule 5.4 continues to afford protections against the interference with a lawyer's professional judgment and the attorney-client relationship. (See, current rule 5.4(c) and proposed Comment [4].)</p>

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No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
29	Tse, Temple (8-20-20)	N	O	This change will be detrimental to both litigants and defendants (and even for lawyers). This change will lead to less awards to plaintiffs and overall higher costs for defendants.	The Committee is not aware of any evidence that the rule will lead to the consequences claimed. We note that the rule expressly requires that the fee division not lead to any increase in the total fee charged to the client.
30	California Lawyers Association (CLA) Majchzak, David (8-25-20)	Y	SM	<p>The proposed addition of a requirement to comply with Rule 1.5.1 requirements to subparagraph (a)(6) is inconsistent with subparagraph (a)(5) and would not serve to protect the public. The primary difference between (a)(5) and (a)(6) is that (a)(5) concerns the sharing of court awarded fees with a non-profit organization, whereas (a)(6) applies to sharing of fees that are not court-awarded with a non-profit that is organized under 26 USC 501(c)(3), which largely consist of religious, educational, charitable, scientific, and literary organizations.</p> <p>But the fact that the fee is court-awarded as opposed to otherwise obtained does not relate to any public protection. We note that, for example, (a)(5) does not require court-approval of the fee-sharing, or even a disclosure to the court that the fee will be shared. In theory, the court could award fees and the lawyer could decide afterward to share a portion or all with the</p>	The Committee acknowledges that there are differences between paragraphs (a)(5) and (a)(6). But because the sharing of fees under (a)(6) occurs where the fee-setting process is not public or subject to the protective supervision of a court, the Committee believes the additional client protective provisions found in rule 1.5.1 are appropriate. Rule 1.5.1 offers protection against the potential for an increase in the fee as a result of an agreement to divide the fees, and the requirement for the client to provide informed written consent to the fact that a division is being made, and the terms of the division. An underlying reason for rule 1.5.1, that is analogous in the context of proposed amended 5.4, is to assure that a client is aware of information that might impact the client's assessment of the relative interests and responsibilities of the respective persons or organizations who are dividing the attorney fees. In turn, this information enables a client to guard against the potential that the client's representation might be adversely

TOTAL = 39 S = 3  
SM = 9  
O = 27  
NP = 0

**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
				<p>nonprofit that employed, retained, recommended, or facilitated the lawyer's employment.</p> <p>The rationale for the Rule of Professional Conduct 1.5.1 requirements would not apply in this situation. The primary reason for them is to safeguard against fee sharing that establishes a disproportionate incentive for the legal services to be provided such that a lawyer that the client prefers be doing the lion's share is doing a smaller portion.</p>	<p>affected as a result of an agreement to divide a fee. (Compare the discussion in State Bar Formal Op. No. <a href="#">2004-165</a>, at footnote 4.)</p>
31	Stanford Center for Legal Informatics (CODEX) Vogl, Roland (8-26-20)	Y	S	<p>We strongly feel that – if promoting access to justice is a policy objective – then legal tech providers should be allowed to share in the social value they help produce by making the legal system accessible to those who cannot afford a lawyer. This should equally apply to both non-profit and for-profit providers of legal tech solutions.</p> <p>We support the amendments to Rule of 5.4 that allow for fee sharing with non-lawyers. We strongly urge you to expand the rule to apply to for-profit entities as well, and to accelerate the State Bar's regulatory sandbox project.</p>	<p>The Task Force on Access Through Innovation of Legal Services (ATILS) recommended that a revised version for rule 5.4 be circulated for public comment that focused solely on sharing non-court awarded fees with a qualified nonprofit organization. ATILS' recommendation concerning rule 5.4 was submitted to the Board of Trustees together with an explicit clarification that ATILS also recommended ongoing further study of revisions to rule 5.4. On May 14, 2020, the Board acted to authorize a working group to continue the work of ATILS and specifically included a reference to rule 5.4 as one aspect of the continued reform efforts. Accordingly, implementation of the proposed amendment to rule 5.4 does not prejudice</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
					further study and proposed revisions to the rule. When appropriate, COPRAC's staff will make available to the new working group the public comments received in the course of this process, including public comments urging consideration of broader fee sharing reforms.
32	Orange County Bar Association (OCBA) Garner, Scott (8-27-20)	Y	O	<p>We oppose the expansive nature of the proposed rule and its likely impact on existing bar associations and certified referral services. The rule will promote the formation of 501(c)(3) organizations whose unstated mission may be to advance the interests of those who will receive referrals in exchange for the promise of a contribution to the organization through the process of fee sharing.</p> <p>If the rule remains considered for adoption, then we believe fee sharing with an organization should be permissible only if the recipient organization is actually qualified as a 501(c)(3) charitable organization based upon the grant of exempt status, at all times, inclusive from the date of referral, the date of the written agreement and the date of payment.</p>	<p>Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with specified nonprofit organizations (see, Comment [3] to rule 5.4). The proposed amended rule extends the ability of a lawyer to share fees with these qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the same types of qualified nonprofit organizations, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p> <p>The proposed rule does not change or alter the existing prohibitions on sharing fees with an uncertified lawyer referral service and there is no language evincing that intent. (See, rules 5.4(a)(4) and 7.2(b); and Bus. &amp; Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a</p>



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SM = 9  
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NP = 0

**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
					<p>Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.</p> <p>The proposed exception would apply only to bona fide § 501(c)(3) entities that are recognized by the IRS. For example, church organizations are not required to apply for and obtain recognition of tax exempt status in order to qualify for exemption. (See, <a href="#">IRS Publication 1828</a>, Dept. of the Treasury, Tax Guide for Churches and Other Religious Organizations, p. 2) In addition, this revision is patterned after District of Columbia Rule of Professional Conduct 5.4 (a)(5) which also uses the term “qualifies.” The Committee is unaware of any unintended consumer harm as a result of this term, and the Committee values maintaining a national standard where possible.</p>
33	California Attorney General's Office-Charitable Trust Section (CADOJ) Ibanez, Tania M. (8-27-20)	Y	O	The requirement that a non-profit qualify under Section 501(c)(3) of the Internal Revenue Code is an insufficient protection from abuse. First, the rule should require non-profits to be in compliance with all Government Code Sections, rules of other State Regulatory agencies and current in their registration requirements.	The proposed rule extends the ability of a lawyer who is currently able to share court-awarded fees with a qualified nonprofit organization under (a)(5) to share fees with a qualified nonprofit organization where the legal fee arises from a settlement or other resolution of the claim or matter, subject to specified circumstances. Because the current

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers**  
**Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Preferred Alternative / Position<sup>1</sup></b>	<b>Comment</b>	<b>COPRAC Response</b>
				<p>Second, there should be protection against self-dealing by lawyers.</p> <p>Third, the proposed amendment requires no connection between the charitable purpose of the non-profit and the legal matter and may result in referrals motivated by profit.</p> <p>Finally, the State Bar should have a reporting requirement for lawyers who share legal fees with non-profits without court oversight.</p>	<p>exception provided in (a)(5) does not limit the sharing of fees with a qualified nonprofit organization to cases where the nonprofit has complied with the additional regulatory requirements identified by the commenter, the Committee does not believe such additional regulation is warranted under proposed rule (a)(6). The client's interest is adequately protected by the requirements of IRS qualification and client consent to the fee division, together with other provisions of the Rules of Professional Conduct and State Bar Act.</p> <p>In particular, self-dealing by lawyers is independently regulated under the Rules of Professional Conduct (see, e.g., rules 1.8.1 and 1.7) and the State Bar Act (see, e.g., 6106 and 6128) , as well as under fiduciary duty and anti-fraud laws.</p> <p>The proposed rule does not change or alter the existing prohibitions on sharing fees with an uncertified lawyer referral service and there is no language evincing that intent. (See, rules 5.4(a)(4) and 7.2(b); and Bus. &amp; Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
34	Perrochet, Lisa (8-28-20)	N	O	<p>Regardless of whether the amendment to rule 5.4 is adopted as proposed, the Board of Trustees should consider whether additional measures are needed to ameliorate such risks. One measure to consider is a State Bar rule concerning contemporaneous recording of attorney time on legal services in certain situations.</p> <p>The Board should consider crafting standards for contemporaneously recording time in matters where lawyers are not billing for fees on an hourly or flat fee basis, negotiated by the party ultimately paying. Those are the cases where trial courts evaluating fee claims should have the best evidence available to evaluate fee claims, and where protection of clients is most needed.</p>	<p>As an initial matter, we note that the potential for higher fees under (a)(6) is expressly addressed by the requirement that the fee sharing not lead to any increase in the fee. As a more general point, we note that a requirement for contemporaneous time billing record keeping practices exceeds the scope of the instant rule amendment proposal in terms of a new duty applied to all time-based billing arrangements with clients. The Committee notes enhanced time-billing duties have been considered by the State Bar but not adopted. See: <a href="#">State Bar Commission for the Revision of the Rules of Professional Conduct – Rules and Concepts that were Considered, but are not Recommended for Adoption</a>, at pp. 28 – 29 (reflecting the then Board of Governor’s action at its July 22 - 24, 2010 meeting). As a threshold matter, the reasons stated by the Rules Revision Commission should be addressed by a proponent for such a rule amendment.</p>
35	Johnston, Thomas (8-28-20)	N	O	<p>We strongly recommend that the proposed changes to Rule 5.4 be eliminated or modified to require that those non-profit entities be restricted to “legal aid organizations”. As currently structured, the proposed changes to Rule 5.4 would allow lawyers or law firms to share</p>	<p>Current rule 5.4, Comment [3], clarifies that paragraph (a)(5) permits a lawyer or law firm to share with or pay a court-awarded fee to “nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law.” (See, e.g., <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
				settlement fees with ANY 501(c)(3). There are no requirements that the nonprofit be chartered for the purposes of assisting indigent litigants. Rather, the proposed rule would make any nonprofit entity eligible for a fee-splitting arrangement, regardless of their mission or purpose.	Cal. 4th 23.) Comment [3] has been amended for parallel construction and states that, “Under the specified circumstances, paragraph (a)(6) permits a lawyer or law firm to share with or pay a legal fee arising from a settlement or other resolution of the matter with nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law.”
36	San Diego County Bar Association (SDCBA) Blankson, Olga (8-28-20)	Y	SM	<p>We do not believe there are adequate grounds to limit fee sharing in the context of settlements to § 501(c)(3) organizations, but to impose no similar limit in the context of court-awarded fees. We believe that the broader range of non-profit organizations should be able to benefit from sharing in fee awards in both contexts.</p> <p>We also do not believe it necessary or appropriate to import the fee sharing requirements from Rule 1.5.1 to the context of settlements. Rule 1.5.1 address fee sharing among lawyers, whereas the current rule addresses fee sharing between lawyers and clients. Rule 1.5.1 is intended to apply prior to a lawyer performing any services on behalf of a client, while the current rule applies at the end of a case, after a</p>	<p>The requirement that the nonprofit qualify under section 501(c)(3) of the Internal Revenue Code is intended to prevent abuse under this exception permitting the sharing of fees with a nonprofit organization that is not subject to the protective supervision of a court. In addition, the exception is patterned after District of Columbia’s rule 5.4 which uses the same language.</p> <p>Because the sharing of fees under (a)(6) occurs where the fee-setting process is not public or subject to the protective supervision of a court, the Committee believes the additional client protective provisions found in rule 1.5.1 are appropriate. Rule 1.5.1 offers protection against the potential for an increase in the fee as a result of an agreement to divide the fees, and the requirement for the client to provide informed written consent</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers**  
**Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Preferred Alternative / Position<sup>1</sup></b>	<b>Comment</b>	<b>COPRAC Response</b>
				lawyer has already provided most, if not all, services for the client.	to the fact that a division is being made, and the terms of the division. An underlying reason for rule 1.5.1, that is analogous in the context of proposed amended rule 5.4, is to assure that a client is aware of information that might impact the client's assessment of the relative interests and responsibilities of the respective persons or organizations who are dividing the attorney fees. In turn, this information enables a client to guard against the potential that the client's representation might be adversely affected as a result of an agreement to divide a fee.
37	San Diego County Bar Association – Lawyer Referral and Information Service Committee (SDCBA LRIS) Blankson, Olga (8-28-20)	Y	SM	The proposed changes are insufficient. The rules must protect private referrals from competing with existing Bar Association referral system unless they comply with the same protections and requirements for attorney's and potential clients. Compromising the integrity of the attorney-client relationship and creating potential conflicts of interests with creditors should not be a side effect of this legislation.	Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with specified nonprofit organizations (see, Comment [3] to rule 5.4). The proposed amended rule extends the ability of a lawyer to share fees with these qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the same types of qualified nonprofit organizations, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
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No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
					<p>The proposed rule does not change or alter the existing prohibitions on sharing fees with an uncertified lawyer referral service and there is no language evincing that intent. (See, rules 5.4(a)(4) and 7.2(b); and Bus. &amp; Prof. Code § 6155 et seq.). Nonetheless, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are not intended to alter these existing regulations.</p> <p>Rule 5.4 continues to afford protections against the interference with a lawyer's professional judgment and the attorney-client relationship. (See, current rule 5.4(c) and proposed Comment [4].)</p>
38	Los Angeles County Bar Assn. Professional Responsibility & Ethics Committee (LACBA PREC) (Bradley, Elizabeth) (8-28-20)	Y	SM	Where there is no court order, fee sharing should be permitted only if the recipient organization is qualified as a charitable organization under the Internal Revenue Code §501(c)(3), and currently exempt, as established by a determination letter issued by the IRS, both when the agreement is made, and when the lawyer makes the payment to the organization.	<p>The proposed exception would apply only to bona fide § 501(c)(3) entities that are recognized by the IRS. For example, church organizations are not required to apply for and obtain recognition of tax exempt status in order to qualify for exemption. (See, <a href="#">IRS Publication 1828</a>, Dept. of the Treasury, Tax Guide for Churches and Other Religious Organizations, p. 2) In addition, this revision is patterned after District of Columbia Rule of Professional Conduct 5.4 (a)(5) which also uses the term "qualifies." The Committee is unaware of any unintended consumer harm as a result of</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
 Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
					this term, and the Committee values maintaining a national standard where possible.
39	Gonzalez, Assemblywoman Lorena (9-10-20)	N	O	I am concerned that the proposed changes will incentivize unscrupulous behavior. Currently, rules around fee sharing mostly only permit fees to be shared with other lawyers, who are required to take and maintain ethics training, and are subject to proceedings regarding any concern for a breach of ethics. In contrast, the proposed amendment would allow lawyers to share fees with any nonprofit that refers them a case, regardless of the nonprofit's mission, purpose, or connection to the case. The nonprofit would effectively gain an economic stake in the outcome of a case, but avoid the rigorous standards of ethics that lawyers are held to. For instance, nonprofits may be created for the sole purpose of advertising and conducting outreach in lucrative areas of law to refer new cases to lawyers, and subsequently share in the fees from any settlement of the case.	<p>Rule 5.4(a)(5) currently permits the sharing of court-awarded fees with specified nonprofit organizations (see, Comment [3] to rule 5.4). The proposed amended rule extends the ability of a lawyer to share fees with these qualified nonprofit organization by adding an exception which provides that where the legal fee is not court-awarded but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the same types of qualified nonprofit organizations, subject to specified circumstances, including a requirement the lawyer obtain the client's consent in writing to the fee division.</p> <p>The laws and rules governing lawyer referral activity, including restrictions on a lawyer paying compensation to a person or entity that is conducting a referral business, are not intended to be changed by the proposed amendments to rule 5.4. (See, Bus. &amp; Prof. Code § 6155 et seq., rule 5.4(a)(4) and rule 7.2(b). See also, <i>Jackson v. LegalMatch.com</i> (2019) 42 Cal.App.5th 760.). To make this clear, the Committee has added a Comment [5] to expressly state that paragraphs (a)(5) and (a)(6) are</p>

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**Proposed Rule 5.4 – Financial and Similar Arrangements with Nonlawyers  
 Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position <sup>1</sup>	Comment	COPRAC Response
					<p>not intended to alter these existing regulations.</p> <p>In addition, Rule 5.4 continues to afford protections against the interference with a lawyer's professional judgment and the attorney-client relationship. (See, current rule 5.4(c) and proposed Comment [4].)</p> <p>It should also be noted that under existing law, a lawyer who is complicit with a sham corporation's activities to collect attorney fees from opposing parties by filing fraudulent claims is subject to discipline. (See, "<a href="#">3 Trevor Lawyers Suspended</a>," June 2003 CalBar Journal.) This significant disciplinary exposure for bad actors will remain unchanged notwithstanding the fee sharing exception under the proposed amended rule.</p>



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## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Megan Zavieh
City	Alpharetta
State	Georgia
Email address	<a href="mailto:megan@zaviehlaw.com">megan@zaviehlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	The edits to the rule are practical and simple. There's no reason to object to it. I do still hope to see much more extensive revisions to this rule, but the current proposed modifications are not objectionable at all.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Joshua R. Furman
City	Encino
State	California
Email address	<a href="mailto:jrf@furmanlawyers.com">jrf@furmanlawyers.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The proposed rule appears to be a logical extension of the policy behind the Tenderloin case and its progeny. The policy of the State Bar should be to continue to incentivize nonprofit involvement in legal representation for underserved persons and areas of the law. For these reasons, I support the proposed rule change.

I note that some anecdotal evidence appears to support that unscrupulous litigants have used nonprofits to make claims in litigation, such as a personal family foundation or other entity that does not comport with what most people would consider to be a nonprofit. The proposed rule includes a backstop requiring the nonprofit to have a current 501(c)(3) status, and I am cognizant that policing nonprofit status is outside the scope of the State Bar's mandate.

However, I suggest that fee arrangements involving nonprofits be subject to close disciplinary scrutiny for a period of time after the rule is changed. Litigants should be made aware that 501(c)(3) status is not a free pass to fee sharing if the purposes of the rule are not served by the fee split.

The rule should be modified to include (1) a requirement that the nonprofit have a confirmable mission aligned with the purposes of the litigation (e.g., Tenderloin obtaining fees in a housing case); and (2) that there be a disciplinary mechanism to deal with unscrupulous actors working under the guise of nonprofits. The restriction on fee sharing between attorneys without court approval has the benefit of both sides of the transaction being subject to State Bar discipline. Nonprofits that are not registered with the State Bar are essentially beyond the reach of the disciplinary system. The State Bar can enforce against attorneys that split fees with nonprofits, but no further. This rule change may be subject to abuse if there is no way to curb fee sharing with sham nonprofits or

nonprofits that will not advance access to justice.

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## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Anonymous
City	Stockton
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

## Public Comment - Proposed Rule 5.4 (2)

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Commenting on behalf of an organization

No

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From the choices below, we ask that you  
indicate your position. (This is a required field.)

---

Oppose

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Anthony Lai
City	Pasadena
State	California
Email address	<a href="mailto:anthony@pasadenalawoffice.com">anthony@pasadenalawoffice.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I oppose the proposed modification the rule. Fee sharing should remain among licensed attorneys.



## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Eric Rowen
City	Los Angeles
State	California
Email address	<a href="mailto:rowene@gtlaw.com">rowene@gtlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>My concern is that no one has explored the consequences to a 501(c)(3) organization of taking in "unrelated business income" and, thereby, destroying the entity's tax exempt status. Generally speaking, a non-profit organization cannot make profits from the conduct of business that otherwise would be earned in the private market. Here, the proposal is to allow referral fees, which fees generally are earned by for-profit referral sources, i.e., lawyer referrals. Allowing non-profit organizations to compete with for-profit organizations for earnings (here, referral fees) is among the quickest ways for a non-profit to lose its tax exempt status. Not sure how to amend the proposed rule to prevent this (it is a federal law), but -- unless a work-around can be created -- I am not in favor of the rule, as it would entice non-profits to act improperly and jeopardize our entire system of non-profit indigent legal defense.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	David Jones
City	Stevenson Ranch
State	California
Email address	<a href="mailto:lawsrj@aol.com">lawsrj@aol.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Terrible idea, does not achieve the intended purpose. A money grab by non-lawyer entities which will erode the quality of legal services provided and create financial conflicts of interest,</p> <p>Where is the State Bar oversight on legal services for those without access? Non-lawyers not adequately bound by rules and no oversight.</p> <p>Strongly oppose.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	MARTIN GOLDMAN
City	ENCINO
State	California
Email address	<a href="mailto:MARTY@MARTYLAW.COM">MARTY@MARTYLAW.COM</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

This is a BAD idea. To many "well intentioned" rules such as this proposal, turn into cottage industries in which litigation clogs the courts with lawsuits that truly provide no MEANINGFUL benefit to the named Plaintiff but turn into churned lawsuits for the sole benefit of "special interest" lawyers or law firms and otherwise do tremendous detriment to targeted small businesses .

The American Disability Act is the perfect example.

Special Interest law firms have been organized against the country, who advertise or worse yet, hire people to find potential targets, of small businesses that unknowingly, and without any intent ], have a place of business that is technically in violation of the ADA rules.

Perhaps a check-out counter that is 39" high as opposed to the required 36". Perhaps a parking lot, that is almost always empty due to the limited patronage of the business, but one in which the lot does not have a specially painted and anointed Handicapped Parking zone.. Perhaps a parking lane that has a parking area that has a slope that is 1 degree above the required slope under the ADA requirements.

Routinely, and without notice to the "targeted" business, form lawsuits are filed, and served upon the business owner. In short order, a follow up letter is sent to the Defendants, advising them that the defense of the claims will be extremely expensive and that they would be far better off to simply agree to correct the problems with the business location AND pay to the law firm upwards of \$10,000-\$15,000, before any work has been done on the file other than the filing of a formatted and word processed Complaint.

Needless to say, if the Defendant concludes that it has become the victim of a civil extortion plot, then further word processed discovery

and Motions are filed ,along with continuing steams of correspondence advising how the attorney fees are rising with each additional segment of the useless and needless churning of the file, for the sole purpose of increasing the claim for prospective attorney fees.

THIS IS A BAD PROPOSAL.....DO NOT OPEN THE FLOOD GATES TO THE UNINTENDED CONSEQUENCES or a proposal that looks good on the surface, but will bring out all of the parasitic members of our Bar..

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## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Arnold Henry Gold
City	Studio City
State	California
Email address	<a href="mailto:judgeagold@aol.com">judgeagold@aol.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>A terrible idea!</p> <p>All of the reasons against fee-sharing in general apply with full force and vigor against this proposal. The need of 501(c)(3) organizations for support pales in contrast to the harm this proposal would generate.</p> <p>Don't let the camel's nose under the tent: What's next? Sharing with all tax-exempt organizations that are deemed "worthy" or "needy," not merely 501(c)(3) ones? Sharing with a school (certainly potentially as needy or more needy than a 501(c) organization) if a highly placed person connected with the school refers the client to the attorney? Sharing with any natural person whose income is below the poverty level? Etc., etc.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Barry Wolf
City	Los Angeles
State	California
Email address	<a href="mailto:wolfappeals@ca.rr.com">wolfappeals@ca.rr.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Hopefully, the revised rule will result in low income people receiving more legal services.

## Public Comment - Proposed Rule 5.4 (2)

Name	Anonymous
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
<p><b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b></p>	<p>This is a terrible rule which will further erode away at the legal profession. It encourages nonlawyers to try to practice in the legal profession, it co-mingles the finances of lawyers with nonlawyers (which will needlessly result in litigation, prolonged disciplinary matters, etc) and basically will cause a cottage industry of nonprofits who drum up business for unethical lawyers. This is a rule in search of a non-existent problem. The only reason bar associations support this rule is because they are largely run by ultra-left lawyers with political agendas, not agendas that want to promote the legal profession. The public and private perception of the profession has already unnecessarily declined over the past several decades (lowering the bar passage rate, reducing the length of the exam, law professors who want to advance a social agenda rather than teach young people how to be the best lawyers they can be). This rule is just another step in the wrong direction.</p>



## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Eric Oren
City	Fresno
State	California
Email address	<a href="mailto:epo@ericorenlaw.com">epo@ericorenlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	although there may be some benefit, I see more possibility of misuse of this proposal. Is there anything to prevent formation of non-profits to simply facilitate referrals to specific attorneys or firms? The potential for abuse seems likely without more defined restrictions.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Robert M. Stone
City	LONG BEACH
State	California
Email address	<a href="mailto:rmstone@mminternet.com">rmstone@mminternet.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>This proposed rule change will lead to more litigation and further clogging of our civil court system. Marginal cases may be filed because the nonprofit hopes to force a settlement for which it will receive a cut.</p> <p>Attorneys should not be using services that will provide them cases if they share their fee. The possibility of corruption in such a situation is real. A non-profit organization looking for operating funds might try and put pressure on a client or an attorney to prematurely settle a case so it can get paid. This rule change brings in other parties who have not had ethical training or legal training to make decisions on how matters are handled, thus practicing law without a license.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Cathleen Norton
City	Los Angeles
State	California
Email address	<a href="mailto:cathleen@cnortonlaw.com">cathleen@cnortonlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I am opposed to the proposed rule change.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Santosh Narayan
City	Pasadena
State	California
Email address	<a href="mailto:snarayan@narayanlegal.com">snarayan@narayanlegal.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	This will encourage "capping" by allowing people to organize non-profits to steer personal injury cases to specific attorneys under the guise of "Injured Persons Network", etc. Fee sharing in this matter will erode trust in the profession and should absolutely be barred.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	John Hinman
City	Long Beach
State	California
Email address	<a href="mailto:john@hinmanlawgroup.com">john@hinmanlawgroup.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I believe that the proposed rule needs to be modified so that the non-profit organization needs to be approved by the State Bar prior to being able to share in fees, specifically so that the mission/purpose of the non-profit can be vetted. My concern would be that 501(c)(3) is actually a fairly relaxed standard to meet and many organizations that are not necessarily carrying out a true "non-profit" mission qualify. I think the idea that a true non-profit, community service based organization, should be able to share fees is a good one as they can help their bottom line potentially. However, I believe as written this rule would allow for significant abuse as a savvy operator could create a lucrative "non-profit" enterprise that had little or no relationship to actual community service and still comply with the rule. In lieu of actual prior state bar approval, something along the lines of a "501(c)(3) organization whose primary purpose IS NOT to provide client referrals to attorneys" or something like that could work too.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Matthew Stidham
City	Torrance
State	California
Email address	<a href="mailto:matts@thelegacylawyers.com">matts@thelegacylawyers.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	United States Marines Corp' Chaplin Office, Career Conuselor
Name	James Blume, USMC Honorable
City	Los Angeles
State	California
Email address	<a href="mailto:jblume065@student.edu">jblume065@student.edu</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	There are many "Legal Business" that do [only] one thing, such as opening a Trust, or doing a will. We dont need Attorneys for simple Filings anymore. This will also bring down prices to the poor and disabled.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Michael Akopyan
City	Burbank
State	California
Email address	<a href="mailto:michaelakopyan@gmail.com">michaelakopyan@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose



## Public Comment - Proposed Rule 5.4 (2)

Name	Ani M. Akopyan
City	Burbank
State	California
Email address	<a href="mailto:ani@akopyanlaw.com">ani@akopyanlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Jeffrey Spencer
City	San Clemente
State	California
Email address	<a href="mailto:jps@spencerlaw.net">jps@spencerlaw.net</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
<p><b>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</b></p>	<p>Non profit organizations should not be allowed to receive a referral fee or percentage of the attorneys' fees from attorneys to whom they refer cases. The rule encourages non-profits to engage in capping and to farm out referrals to firms who agree to pay them the highest referral fees. Although the rule states the non-profit cannot influence the representation, there is a high probability the non-profit will exert indirect or direct influence over the attorney that receives the referral if they have a financial stake in the outcome. If the client's interests diverge from the non-profit it could create a conflict of interest between the attorney and the client. This is especially problematic if the non profit refers multiple cases to the attorney or if has a designated firm or firms it refers cases to - those that have agreed to pay it the highest referral fee. There is nothing presently that discourages non-profits from referring cases to the most qualified attorneys and they do not need a financial incentive to refer cases. No public interest is served by allowing non-profits to receive referral fees or a percentage of attorneys' fees..</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	steven gourley
City	Torrance
State	California
Email address	<a href="mailto:steven@ca.rr.com">steven@ca.rr.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Don't we have enough frivolous lawsuits?

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Ali Hosseini
City	San Clemente
State	California
Email address	<a href="mailto:reachalihosseini@gmail.com">reachalihosseini@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Strongly oppose any changes to regulations concerning our profession. Strongly oppose allowing non-lawyers to share lawyer fees or take any ownership interest in law firms or cases. Do not allow outside interests to ruin our profession. Integrity of our profession depends on it. Further, do not dilute our profession by lowering merit required for admission. Protect our profession please.

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	LaGuardia Law
Name	Eric A. LaGuardia
City	San Diego
State	California
Email address	<a href="mailto:eal@laguardialaw.com">eal@laguardialaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

## Public Comment - Proposed Rule 5.4 (2)

Reference #	13273672
Status	Complete
Commenting on behalf of an organization	No
Name	Darian Bojeaux
City	Beverly Hills
State	California
Email address	<a href="mailto:bojeaux@earthlink.net">bojeaux@earthlink.net</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>There is no good reason for there to be fee-splitting with a nonlawyer of any kind. So what if it is a non profit organization. That just means that they take large salaries so there is no profit. Why doesn't the state bar get these people who stand to gain from such rule changes, out and off of the task force. Really, the State Bar may as well be run by someone of Trump's low moral character.</p> <p>And why does the State Bar make it so difficult to make a public comment. When the option to make a public comment is mentioned, the link should do directly to where one can make that particular public comment. Instead there must be a hunt for the correct place.</p> <p>The State Bar has gone waaaaay downhill and obviously needs new leadership among other things.</p>
Last Update	2020-08-05 14:50:19
Start Time	2020-08-05 14:44:35
Finish Time	2020-08-05 14:50:19
IP	Anonymous
Browser	Other

OS	Other
Referrer	N/A

## Public Comment - Proposed Rule 5.4 (2)

Reference #	13274177
Status	Complete
Commenting on behalf of an organization	No
Name	Grant Kennedy
City	Beverly Hills
State	California
Email address	<a href="mailto:grant@jgrantkennedy.com">grant@jgrantkennedy.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	this is a scam on the public, no attorney should be splitting fees it destroys independence. If you really want to help the public and you think you have solutions, create those without breaking and destroying long established rules. First you will allow "non-profits" then profit. It is such an obvious effort to dupe the public you should be ashamed. What is a "non-profit" like trumps non-profit for ripping off. Opposed.
Last Update	2020-08-05 16:56:37
Start Time	2020-08-05 16:53:32
Finish Time	2020-08-05 16:56:37
IP	Anonymous
Browser	Other
OS	Other
Referrer	N/A



## Public Comment - Proposed Rule 5.4 (2)

Reference #	13275020
Status	Complete
Name	Alyssa B Klausner
City	Agoura Hills
State	California
Email address	<a href="mailto:abk@aklausnerlaw.com">abk@aklausnerlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
Last Update	2020-08-05 20:49:06
Start Time	2020-08-05 20:47:53
Finish Time	2020-08-05 20:49:06
IP	Anonymous
Browser	Other
OS	Other
Referrer	N/A

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Thomas Johnston
City	Los Angeles
State	California
Email address	<a href="mailto:tjj@jhlllp.com">tjj@jhlllp.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I oppose any rule, or the expansion of any existing rule, that allows non-attorneys to share in legal fees.</p> <p>Private equity funds, and large corporations, have spent years trying to break into the California legal market to share in contingency fees in large personal injury and mass tort cases.</p> <p>These funds and corporations are not run by attorneys who have undivided duties of loyalty to clients.</p> <p>Instead, the funds and corporations look at clients only as a means to a legal fee, and more clients, and have divided loyalties between clients and the fund or share-holders.</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Temple Tse
City	San Francisco
State	California
Email address	<a href="mailto:private@nospam.org">private@nospam.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Proposal will lead to less awards to plaintiffs and higher overall higher costs for defendants. Anything distributions/awards that lead to higher legal costs will be detrimental to both Litigants and Defendants.</p> <p>This change will be towards the overall detriment to those involved... it is BAD FOR EVERYONE ... even for lawyers!</p>

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	David Majchrzak
City	San Diego
State	California
Email address	<a href="mailto:DMajchrzak@Klinedinstlaw.com">DMajchrzak@Klinedinstlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
<p><b>ATTACHMENTS</b> You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.</p>	<a href="#">ethics_committee_comments_revised_RPC_5.4.pdf (72k)</a>



August 25, 2020

Board of Trustees  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Proposed Amended California Rule of Professional Conduct 5.4

Dear Trustees:

The California Lawyers Association Ethics Committee has considered the revised proposed changes to Rule 5.4, which restricts fee-sharing with non-lawyers. We continue to support the proposed change to add a limited exception to allow sharing legal fees with non-profits, but suggests that the inconsistencies between subparagraphs (a)(5) and (a)(6) are not supported by policy.

The proposed addition of a requirement to comply with Rule 1.5.1 requirements to subparagraph (a)(6) is inconsistent with subparagraph (a)(5) and would not serve to protect the public. The primary difference between (a)(5) and (a)(6) is that (a)(5) concerns the sharing of court awarded fees with a non-profit organization, whereas (a)(6) applies to sharing of fees that are not court-awarded with a non-profit that is organized under 26 USC 501(c)(3), which largely consist of religious, educational, charitable, scientific, and literary organizations.

But the fact that the fee is court-awarded as opposed to otherwise obtained does not relate to any public protection. We note that, for example, (a)(5) does not require court-approval of the fee-sharing, or even a disclosure to the court that the fee will be shared. In theory, the court could award fees and the lawyer could decide afterward to share a portion or all with the nonprofit that employed, retained, recommended, or facilitated the lawyer's employment.

And the rationale for the Rule of Professional Conduct 1.5.1 requirements would not apply in this situation. The primary reason for them is to safeguard against fee sharing that establishes a disproportionate incentive for the legal services to be provided such that a lawyer that the client prefers be doing the lion's share is doing a smaller portion. This is a concept that arises out of Model Rule 1.5(e), which requires

the division of a fee to be proportional with the services performed by each lawyer or with each lawyer assuming joint responsibility for the matter. Whereas California allows pure referral fees and does not require such proportionality, it requires clients to agree to the arrangement since there is an assumption that the split—outside of pure referrals—will roughly reflect the amount of work each lawyer will be performing.

But that is not a concern when a lawyer shares a fee with a non-profit organization. The lawyer would be providing all of the legal services.

The protection that a court award would provide that may not be in place with other forms of fee recovery is a determination that the fee is reasonable (i.e., not unconscionable). But, since that mandate is already provided in Rule 1.5, we do not believe that including such a provision in Rule 5.4 subparagraph (a)(6) is necessary.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Majchrzak", is positioned above the typed name.

David Majchrzak  
Co-Chair  
California Lawyers Association Ethics  
Committee

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	CodeX - The Stanford Center for Legal Informatics
Name	Roland Vogl
City	Stanford
State	California
Email address	<a href="mailto:rvogl@law.stanford.edu">rvogl@law.stanford.edu</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
<p><b>ATTACHMENTS</b> You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.</p>	<a href="#">CodeX_Letter_to_CA_State_Bar_8-26-20.pdf (126k)</a>

**Roland Vogl**  
Executive Director of CodeX - the  
Stanford Center for Legal Informatics  
Executive Director of the Stanford  
Program in Law, Science and  
Technology

Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
Tel 650 723.8532  
rvogl@law.stanford.edu

August 26, 2020

To  
The Board of Trustees of The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

**Proposed Amended California Rule of Professional Conduct 5.4 - Financial and Similar Arrangements with Nonlawyers**

Dear Board of Trustees:

On behalf of CodeX – the Stanford Center for Legal Informatics the undersigned submit input for your consideration of amendments to CA Rule of Professional Conduct 5.4.<sup>1</sup>

**CodeX Background:** Since 2005, CodeX has been researching computational law and has become an intellectual home to a network of researchers and entrepreneurs in the legal tech community. This community is working towards computerizing the process of discovering, using and improving the law in the public and private sectors in order to increase the public’s and companies’ legal protections and safety. CodeX’s activities range from theoretical and practical research, to teaching students, bringing together stakeholders from the legal innovation ecosystem via conferences and workshops, and developing initiatives aimed at improving delivery of legal services.

California is facing an access-to-justice crisis. Individuals and small business cannot afford basic legal services or they do not know that they need legal assistance. California is also

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<sup>1</sup> The State Bar of California Open Session Agenda Item 54-123 July 13, 2020, Regulation And Discipline Committee III.B, available online at <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000026239.pdf> (hereinafter referred to as “July 13, 2020 Open Session Agenda”), Attachment C, page 1.



running the risk of falling behind other U.S. jurisdictions with regard to legal tech innovation.

Consequently, we believe the State Bar should consider the following important trends in its rule-making efforts:

- The increasing importance of computers in the delivery of legal services
- The need to adequately incentivize legal tech providers to participate in the value they create
- The need to facilitate the move from a “One-to-One” to a “One-to-Many” legal services delivery model for the 21<sup>st</sup> Century
- The importance of fairly distributing legal tech innovation
- The tech competency requirement for lawyers

**The increasing importance of computers in the delivery of legal services:** Increasingly computers - or more specifically applications built by humans – are engaged in augmenting the delivery of legal services. Computers provide lawyers access to statutory and case law research, news, weather, financial market and other information framing the facts of a particular case or controversy. Computers also assist lawyers with research on the presiding judge and opposing counsel and other aspects relevant to a legal matter. For example, computers can offer statistical predictions of the viability of legal strategies and arguments that have been successful or unsuccessful in similar cases. Like human lawyers, as computers gain experience, their recommended strategies improve over time. Unlike human lawyers, computers don’t need sleep and can work at scale on many cases simultaneously on behalf of human clients facing similar challenges. Computers help humans navigate the immigration system, respond to consumer debt collection or eviction proceedings. They even help *pro se* defendants address criminal or civil complaints or small businesses collect receivables from corporate clients, all for a fraction of the cost of a human lawyer, and often offering better outcomes.

**The need to incentivize legal tech providers to participate in the value they create:** The proposed amended California Rule of Professional Conduct 5.4. would expand the existing exception that permits a lawyer to share court awarded attorney fees with a nonprofit organization. Rule 5.4. has to balance the independence of a lawyer’s judgement with the public benefits brought about by legal tech innovation. If a lawyer is assisted by a for-profit legal tech solution and shares fees with that entity, does it violate the State’s Professional Code of Conduct?

We strongly feel that – if promoting access to justice is a policy objective – then legal tech providers should be allowed to share in the social value they help produce by making the legal system accessible to those who cannot afford a lawyer. This should equally apply to both non-profit and for-profit providers of legal tech solutions. In fact, meaningful progress on access to justice will only be possible with market-based solutions that allow for-profit providers to serve consumers and small businesses with one-to-many solutions. For a State that is the home to Silicon Valley, we feel that the State Bar should promote legal tech

innovation. This is why the California State Bar should as soon as possible accelerate its sandbox effort and begin a pilot program, such as Utah has been doing since last year.

**The need to facilitate the move from a “One-to-One” to a “One-to-Many” legal services delivery model for the 21<sup>st</sup> Century:**

The move towards effective one-to-many solutions, will allow Californian individuals and small business to get the legal services they need and they can afford. These solutions will not only empower clients, but they will also help lawyers expand their reach and make their expertise available to larger groups of clients at affordable rates.

Selena Copeland, Executive Director of The Legal Aid Association of California observed:

“Legal technology is increasingly imperative in moving from a one-to-one model of legal services to a one-to-many version, wherein more clients can be served, with quality maintained. For the legal community in general, it presents a commitment to understanding and considering use of technologies that have the potential to serve all clients—including low- and moderate-income clients—as efficaciously as possible.”<sup>2</sup>

There is an increasing number pro-se litigants in California. Such litigants require the assistance of legal tech solutions to effectively and meaningfully use our State’s legal system. Beyond that, legal tech can extend the reach of civil and criminal justice reform efforts by non-profits, and aid in addressing and reducing racial, gender, disability, immigrant, educational, environmental, social and other disparities.

**The importance of fairly distributing legal tech innovation:** Distributing legal tech innovations responsibly is one of the great tasks for the current generation of lawyers, computer scientists and others working on legal tech. The daily weight of compliance with the law can be effectively addressed at scale - for companies as well as individuals - with the help of legal tech, provided that legal tech providers can make a reasonable profit. If the tools of legal tech innovation are primarily in the hands of corporate and government actors, ordinary individuals will be at distinct disadvantage, outgunned by the sheer power of legal tech working against them.

**The tech competency requirement for lawyers:** Proposed Rule 1.1 on Lawyer Competence would add the Comment:

“[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>3</sup>

The lawyer’s duty to learn and use “relevant technology” should be associated with the lawyer’s duty to advise clients when the lawyer knows or should know that a more effective approach pursued by a tech-enabled lawyer or a legal tech solution.

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<sup>2</sup> Letter, dated May 15, 2020, from Selena Copeland to the Standing Committee on Professional Responsibility and Conduct, appearing at page 38, of July 13, 2020 Open Session Agenda.

<sup>3</sup> July 13, 2020 Open Session Agenda, at page 8, Attachment A, page 2.

Since its origins CodeX has been teaching legal technology to students, faculty, judges, judicial staffs, lawyers, law firms and legal tech entrepreneurs from around the world. CodeX stands ready to assist the State Bar and its members in developing Continuing Legal Education (CLE) modules to teach legal practitioners how to deliver tech enabled legal services.

**Conclusion:** CodeX is an established community of academics, legal practitioners, technologists and policy researchers who are available to the State Bar to provide insights and perspective on the risks and benefits of using legal tech. We support the amendments to CA Rule of Professional Conduct 5.4 that allow for fee sharing with non-lawyers. We strongly urge you to expand the rule to apply to for-profit entities as well, and to accelerate the State Bar's regulatory sandbox project. We also welcome the increasing focus of the State Bar to lawyers' tech competence.

We hope to support and inform the thinking of the State Bar and its Committees in providing our state with the most modern and effective legal system.

Sincerely,

Prof. Michael Genesereth, CodeX Research Director  
Bruce Cahan, CodeX Fellow  
Roland Vogl, CodeX Executive Director

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Scott Garner, OCBA President
City	Newport Beach
State	California
Email address	<a href="mailto:sireland@ocbar.org">sireland@ocbar.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
<p><b>ATTACHMENTS</b>You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.</p>	<a href="#">OCBA_Public_Comment_Letter_Rule_5.4.pdf (549k)</a>



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BAR ASSOCIATION**

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P.O. BOX 6130

NEWPORT BEACH, CA 92658

TELEPHONE 949/440-6700

FACSIMILE 949/440-6710

WWW.OCBAR.ORG

August 27, 2020

ATTACHMENT C

Office of Professional Competence, Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, California 94105-1639

**Submitted via online public comment form**

Re: *Orange County Bar Association Public Comment on  
Proposed Amendment of Rule of Professional Conduct 5.4*

Dear State Bar of California:

The Orange County Bar Association respectfully submits the following comments to the Proposed Amendment of Rule of Professional Conduct 5.4. These comments are submitted with the Online Public Comment form indicating that we are opposed to adoption of the proposed rule in its present form.

Founded over 100 years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, which is made up of practitioners from large and small firms with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the Professionalism and Ethics Committee.

We continue to have a general concern about the expansive nature of the proposed rule and the impact that it is likely to have on existing bar associations and certified referral services. The rule will promote the formation of 501(c)(3) organizations whose unstated mission may be to advance the interests of particular practitioners or practice groups who will receive referrals in exchange for the promise of a contribution to the organization through the process of fee sharing. Such organizations may develop a significant financial interest in referring clients to particular lawyers, and be less interested in satisfying the public policy goal of providing a quality recommendation to an experienced lawyer who most appropriately meets the needs of the referred client. The proposed draft of the rule therefore risks that the policy of promoting quality referrals, as well as the long-standing safeguards applicable to *certified* lawyer referral services, will be disregarded. For this reason, we are *opposed* to adoption of the proposed amendments to the existing rule. We are also opposed to adoption because the ability to share fees is not limited to cases in which statutory fee shifting applies. For the reasons stated in our May 14, 2020 public comment letter concerning the prior proposed revisions to rule 5.4, we believe the client-protective measures inherent in the current Rule's limitation on the ability to share fees to fee-shifting cases should be retained. The proposed revisions to rule 5.4 in the current draft, however, would permit fee sharing in any case settled or otherwise resolved.

If the proposed rule is to be further considered for adoption, despite these concerns about broadly opening up the payment of referral fees, we express additional concern with the ambiguities in the current draft. Specific areas of concern are with respect to section (a)(6)(i) of the proposed amendment, which fails to specify how an organization “qualifies” under Section 501(c)(3) of the Internal Revenue Code, or at what point in time it must be qualified.

Section (a)(6)(i) merely states the condition that “the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.” It does not state that such status must *actually have been granted*, and it does not address *when* such exempt status must exist. As presently drafted, a 501(c)(3) organization could be *qualified* merely because the organization is eligible to apply for or receive status as an exempt organization. The rule fails to require with specificity that the organization actually possess a current determination letter of its exempt status under Section 501(c)(3), which is the manner in which such status is granted.

Further, the rule fails to state at what point in time the organization must be qualified under Section 501(c)(3). For example, must it possess a determination letter granting exempt status at the time the referral is made? Must it have exempt status at the time the settlement is made? Will it be sufficient to have been granted exempt status at the time the written fee-sharing agreement required by subdivision (a)(6)(ii) is made? The rule does not explicitly state the timing when 501(c)(3) status must exist, and does not even explicitly require that such status be in place at the time the referral fee payment is made.

These are significant ambiguities which also may lead to the possibility of inconsistent enforcement or unintended disciplinary consequences. To avoid such results, we would recommend that Section (a)(6)(i) of the proposed rule be changed to require that the organization must actually have exempt status under Section 501(c)(3) of the Internal Revenue Code, as established by a current determination letter, and that such status must exist not only at the time of the referral, but also at the time the fee-sharing agreement is made, and at the time the referral fee payment is made.

Fee sharing with an organization should be permissible only if the recipient organization is actually qualified as a 501(c)(3) charitable organization based upon the grant of exempt status, at all times, inclusive from the date of referral, the date of the written agreement and the date of payment.

Re: *Orange County Bar Association Public Comment on Proposed Amendment of Rule of Professional Conduct 5.4*

August 27, 2020

Page | **3**

As always, thank you for your consideration of our comments and suggestions.

Sincerely,

Orange County Bar Association

A handwritten signature in black ink, appearing to read 'S.B. Garner', with a long horizontal flourish extending to the right.

Scott B. Garner  
2020 President

Re: *Orange County Bar Association Public Comment on Proposed Amendment of Rule of Professional Conduct 5.4*

August 27, 2020

Page | **4**



## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	California Attorney General's Office-Charitable Trust Section
Name	Tania M. Ibanez, Senior Assistant Attorney General
City	Los Angeles
State	California
Email address	<a href="mailto:tania.ibanez@doj.ca.gov">tania.ibanez@doj.ca.gov</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	See attached comments
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">CADOJ_comments.pdf (1086k)</a>

**XAVIER BECERRA**  
*Attorney General*

**State of California**  
**DEPARTMENT OF JUSTICE**



300 SOUTH SPRING STREET, SUITE 1702  
LOS ANGELES, CA 90013

Public: (213) 269-6000  
Telephone: (213) 269-6562  
Facsimile: (916) 731-2145  
E-Mail: [tania.ibanez@doj.ca.gov](mailto:tania.ibanez@doj.ca.gov)

August 27, 2020

**Via State Bar Online Public Comment Forum**

California State Bar  
Regulations and Discipline Committee

RE: Proposed Amendment to California Rule of Professional Conduct 5.4 – Oppose  
California State Bar Regulations and Discipline Committee:

The Attorney General has the primary responsibility for supervising charities and charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protecting assets held by charitable trusts and public benefit corporations. (Govt. Code, §12598, subd. (a).). Within the Department of Justice, the Attorney General has a specialized unit, the Charitable Trusts Section, which carries out his regulatory and law enforcement program. I am the Senior Assistant Attorney General in charge of the Charitable Trust Section and I write this letter on behalf of the Attorney General in opposition to the Proposed Amendment to California Rule of Professional Conduct 5.4.

The Charitable Trust Section is comprised of Registry of Charitable Trusts and the Legal and Audit Unit. The Attorney General's Registry of Charitable Trusts (Registry) is responsible for administering the registration and reporting requirements set forth in the Supervision of Trustees and Fundraisers for Charitable Purposes Act (the "Supervision Act"). (Govt. Code, § 12580, et seq.). The Legal and Audits Unit is comprised of attorneys, investigative auditors and legal assistants and this unit performs audits, reviews various nonprofit corporate transactions,

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and brings enforcement actions to stop violations of law, protect donors from fraudulent solicitation, recover charitable assets due to fiscal abuse, enforce the Registry's registration and reporting requirements and obtain other remedies.

We write concerning the proposed amendment to Rule 5.4 that would allow a lawyer or law firm to share or pay a legal fee that is not court-awarded but "arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm in the matter." We believe that greater access to legal services and the justice system is important and support innovative ways to increase access. However, the Attorney General's office has the following concerns with the proposed amendment to Rule 5.4.

First, the requirement that a nonprofit qualify under Section 501(c)(3) of the Internal Revenue Code is an insufficient protection from abuse. As others have commented, it is not difficult to form a nonprofit and to receive 501(c)(3) status. An organization must submit the required paperwork and pay the fee to the Internal Revenue Service. The 501(c)(3) status is not a certification of quality or trustworthiness. The Attorney General has brought enforcement actions against nonprofits who have 501(c)(3) status for violations of law such as deceptive solicitations, breaches of fiduciary duty, and self-dealing.

Charitable organizations are required by state law to register and report to the Registry. (Gov. Code, §§ 12585, 12586.) Therefore, any rule permitting the sharing of lawyer fees with nonprofits should require the nonprofit to be in compliance with the Supervision Act's registration and reporting requirements (as well as be in compliance with any other state regulatory agency such as the Secretary of State and Franchise Tax Board). Over 100,000

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nonprofits are registered with the Registry of Charitable Trusts. Some are delinquent or suspended for failing to file required public reports. Many other nonprofits have never registered, even though many have 501(c)(3) status. Unless nonprofit charitable organizations are statutorily exempt from registration (e.g., schools, churches, and hospitals), they should be current in their registration requirements with the Registry. If not, they are prohibited by law from operating and should not enter into fee sharing arrangements with lawyers. (Title 11, CCR § 999.9.4.)

Second, there should be protection against any self-dealing by lawyers creating nonprofits to take fees or to share fees with persons affiliated with them. (Corp. Code, § 5233.) Some lawyers may use a nonprofit to route fees to themselves or to family, friends or associates who find clients or who work with them. Decisions made by nonprofits must be in the best interest of the nonprofit and its mission. (Corp. Code, § 5231.) Consistent with this, any fee sharing must be solely for the benefit of the nonprofit and its mission. Lawyers should be prohibited from fee sharing with a nonprofit with whom the lawyer, or anyone affiliated with the lawyer, may receive compensation as a result of the fee sharing. Disclosure to the client of the identity of the nonprofit and the division of the fees is insufficient protection for the client as it may fail to disclose the true relationship between the lawyer and the nonprofit.

Third, the proposed amendment provides no connection between the mission or charitable purpose of the nonprofit and the legal matter. Nonprofits are required to be operated and organized to serve public purposes, not private interests. Nonprofits may have an incentive to form relationships with certain attorneys to refer them clients, even if those matters have nothing to do with their charitable mission. Some nonprofits may seek to refer matters to

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lawyers to generate revenue but these types of referrals may lead to unrelated business income which is taxable, or worse, may result in the loss of tax exemption if these referrals are found to serve predominantly private interests. Likewise, these nonprofits may not have the knowledge, expertise, or time to determine if a lawyer is qualified to handle a particular matter. Given the purpose of creating greater access to justice, the State Bar may wish to create a narrower carve out for eligible nonprofits whose mission includes access to justice or provision of services to the poor and minority communities who traditionally lack access to justice and other services.

Finally, the State Bar should have a reporting requirement for lawyers who share fees with nonprofits without court oversight. In this manner, the State Bar will receive information that will assist it in understanding the effect the amended rule will have on fee sharing with non-attorneys. Both the fee sharing agreement and any amounts paid to the nonprofit should be public.

Sincerely,



TANIA M. IBANEZ  
Senior Assistant Attorney General

For XAVIER BECERRA  
Attorney General

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Lisa Perrochet, Horvitz & Levy LLP
City	Burbank
State	California
Email address	<a href="mailto:lperrochet@horvitzlevy.com">lperrochet@horvitzlevy.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Comment on Proposed Amendment to Rules of Professional Conduct, rule 5.4 Regarding Attorney Fee Sharing Practices, and Suggestion for Client Protection Measures to Consider

The proposal by ATILS to expand the existing exception for fee sharing arrangements with qualified nonprofit organizations is designed to improve access to justice by enhancing those nonprofits' ability to identify legal needs and to help find lawyers able and willing to assist in filing those needs. The funds that the lawyers collect as fee payments through court-ordered or negotiated awards and then share with the nonprofits would presumably be put to good use. However, several comments (especially those from the Orange County Bar and Los Angeles County Bar) highlight risks to clients, which the Committee (COPRAC) is already addressing. Regardless of whether the amendment to rule 5.4 is adopted as proposed, the Board of Trustees should consider whether additional measures are needed to ameliorate such risks. One measure to consider is a State Bar rule concerning contemporaneous recording of attorney time on legal services in certain situations.

Increased fee sharing reduces counsels' net recovery and thus has the potential to increase lawyers' incentives to inflate fee claims which—perhaps counterintuitively—may harm clients. For example, in the context of fee payments through settlements (the topic of the proposal currently under consideration), an inflated fee claim made to a defendant can decrease the amount of funds available to the plaintiff. The defendant may go along with whatever the plaintiff's counsel proposes to resolve the case, caring little whether the funds go to the plaintiff or to counsel (and, in part, to the nonprofit). This is a problem aptly outlined in the May 14 comment submitted by the Orange County Bar Association. And many clients will lack the education, language

skills or negotiating power to question the split—if the client is ever even told about the arrangement. I start from the assumption that most lawyers are ethical, but ATILS itself recognized that safeguards are needed to protect clients from the dynamics of fee arrangements that can distract from serving the clients' interests. (Regulation and Discipline Committee III.B report (A. Tuft, July 13, 2020), p. 4.)

Moreover, in the context of settlements or court awards under consumer law fee-shifting statutes, a fee award that is inflated (due to an obligation to share with a nonprofit or for any other reason) may increase the client's federal tax obligations—even when the award was pocketed entirely by the lawyer—to the extent the non-fee part of the award for which the fees were incurred is taxable. (See 26 CFR § 1064-1(f)(2) [even when defendant remits separate checks to plaintiff and plaintiff's attorney after judgment or settlement, defendant must include the sum of both payments on the Form 1099 filed with the IRS with respect to plaintiff]; Polsky, *Taxing Litigation: Federal Tax Concerns of Personal Injury Plaintiffs and Their Lawyers* (2018) 22 Fla. Tax Rev. 120, 133-135 [describing the 2017 law that eliminated the deduction for attorney fees and costs incurred in recovering penalties and punitive damages, and illustrating tax effect of "phantom income" for fees awarded to taxpayer's lawyer]; *Commissioner v. Banks* (2005) 543 U.S. 426 [when a litigant's recovery constitutes income, the litigant's income includes any portion paid to the attorney as a contingent fee under the anticipatory assignment of income doctrine].) This is a problem that, to my knowledge, has not yet been brought to the Board's attention.

In my experience, when defendants alert trial courts to the ethical problem of harm to clients from inflated fee claims, the courts disavow any ability to consider the issue, stating that that is the State Bar's role. And when



defendants alert trial courts to ethical disclosure and conflicts issues raised by the tax implications to the plaintiff for inflated fee claims, the courts say that is matter for the IRS. But plaintiffs never seem to have any involvement in their counsel's fee motion practice; they seldom have the wherewithal to complain to the State Bar; and I have seen plaintiffs' counsel fee agreements impose strict confidentiality rules on clients concerning the terms of engagement. A nonprofit that has performed the public service of matching a client to counsel will often have no further role in scrutinizing the fee arrangements. Some nonprofits might also hesitate to cause trouble for the lawyers who are remitting part of their fee payments to the nonprofit.

One very recent appellate decision highlights a simple way to create some transparency and accountability in connection with fee recoveries by imposing standards for contemporaneous time-keeping, which can serve as a check on unduly inflated fee claims. In *Taylor v. County of Los Angeles* (2020) 50 Cal.App.5th 205, the Court of Appeal addressed the question of "lodestar" based fee recoveries under a consumer statute, and remarked on problems inherent in attorney time-keeping that is not subject to the arm's length review of a client who reviews true invoices reflecting work billed on an hourly basis, and thus is not subject to any check on the reasonableness and accuracy of the attorney's claim for fees. The court recognized inadequacies in post-hoc approximations of work done and time spent as a basis for taking payment of fees, noting both a bias (conscious or unconscious) borne of self-interest, as well as inaccuracies inherent in working from memory. (Id. at 213-214.) The court concluded, "[C]ontemporaneous time records are the best evidence of lawyers' hourly work. They are not indispensable, but they eclipse other proofs. Lawyers know this better than anyone. They might heed what they know." (Id. at 207.)

In some situations where counsel may be sharing fees with a referring nonprofit organization, contemporaneously recorded time can head off complications if there is for any reason a change of counsel during the course of a representation. Lawyers may present competing claims for the payment that in turn provides the funds for sharing with the nonprofit. The Taylor court quoted a treatise that advises, “Pinpointing 'billable hours' spent on a 'partially performed' case is essential to fixing the proper 'pro rata contract share' fraction. Thus, it behooves contingent fee attorneys to keep accurate time records for services rendered. You never know when 'full performance' may be cut short by early discharge or premature withdrawal.” (Cal. Practice Guide Prof. Resp. Ch. 5:1049.) Nonprofits and clients alike benefit from the clarity and transparency that comes with well documented time spent on legal services.

The foregoing observations are just some of the reasons why, at least in cases involving fee-sharing with non-profits and fee-shifting statutes, the Board should consider crafting standards for contemporaneously recording time in matters where lawyers are not billing for fees on an hourly or flat fee basis, negotiated by the party ultimately paying. Those are the cases where trial courts evaluating fee claims should have the best evidence available to evaluate fee claims, and where protection of clients is most needed.

Thank you for considering this comment.

Lisa Perrochet  
Conflicts/Risk Management Partner  
Horvitz & Levy LLP

---

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	No
Name	Thomas Johnston
City	Los Angeles
State	California
Email address	<a href="mailto:alex@ekapr.com">alex@ekapr.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

State Bar Board of Trustees  
State Bar of California  
180 Howard St.  
San Francisco, CA 94105

Dear Members of the Board of Trustees:

The undersigned attorneys are submitting these comments in opposition to the proposed amendment to California Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers). The proposed changes invite abuse and lack the type of controls necessary to preserve the integrity of the legal profession in the State. Although the undersigned generally support the "Access to Justice" initiatives undertaken by the ATILS Committee over the last several months, the proposed fee-sharing structure would jeopardize the ability to provide equal access for litigants to fair and impartial court proceedings. As such, we strongly recommend that the proposed changes to Rule 5.4 be eliminated or modified to require that those non-profit entities that may benefit from fee-sharing arrangements borne out of settlements be restricted to "legal aid organizations".

As currently structured, the proposed changes to Rule 5.4 would allow lawyers or law firms to share settlement fees, directly or indirectly, with ANY nonprofit organization that recommends any matter to them, without limitation. Construed literally, this change means that any 501C(3) registered in the United States (of which there are over 1.5 million) to financially benefit from any matter that it refers or suggests to a lawyer or firm. There are no requirements that the nonprofit be chartered for the purposes of assisting indigent litigants or participate in the delivery of legal services. Rather, the proposed rule would make any nonprofit entity eligible for a fee-splitting arrangement, regardless of their mission or purpose.

Under current State Bar rules, a Lawyer Referral Service must be certified by the State Bar in order to operate and must adhere to stringent guidelines and rules of operation to ensure consumer protections. In addition, such Lawyer Referral Services also have to pay annual fees to the State Bar. Curiously, no such restrictions or requirements exist for those nonprofits that would fall under the proposed changes to Rule 5.4. It is inconceivable that the State Bar would set a series of rigid guidelines for nonprofits aimed at providing legal services but then obviate such requirements for nonprofits not engaged in the practice of providing legal aid.

We are also briefing various members of the California State Assembly and Senate on these issues as they raise matters of public concern. We anticipate that several of them will want to provide comment on the proposed rules as well.

Thank you for your consideration of these matters and look forward to answering any questions you may have.

Regards,

Thomas Johnston, Esq.

John Girardi, Esq.

David Lira, Esq.

Nick Hutchinson, Esq.

Sandra Ribera, Esq.

Michelle West, Esq.

Christopher Aumais, Esq.

---

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	San Diego County Bar Association – Legal Ethics Committee
Name	Olga Blankson
City	San Diego
State	California
Email address	<a href="mailto:oblankson@sdcba.org">oblankson@sdcba.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

From: San Diego County Bar Association –  
Legal Ethics Committee  
Via electronic submission  
Re: San Diego County Bar Association Legal  
Ethics Committee Response to Proposed  
Amendment of Rule of Professional Conduct,  
5.4

The San Diego County Bar Association Legal Ethics Committee provides the following comments in response to the request for public comments regarding the proposed amendments to California Rule of Professional Conduct 5.4.

(5) a lawyer or law firm\* may share with or pay a court-awarded legal fee or a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter.

We do not believe there are adequate grounds to treat fee sharing with a non-profit organization differently depending on whether the fee arises from a court order or from a settlement. While judicial supervision is more likely to be present in the context of court ordered fees, we believe that lawyers' existing duties of loyalty, independent professional judgment and candid communication are adequate to protect client interests in the context of fee sharing as a result of a settlement as well.

More particularly, we do not believe there are adequate grounds to limit fee sharing in the context of settlements to § 501(c)(3) organizations, but to impose no similar limit in the context of court-awarded fees. We believe that the broader range of non-profit organizations should be able to benefit from sharing in fee awards in both contexts.

Similarly, we do not believe it necessary or appropriate to import the fee sharing

requirements from Rule 1.5.1 to the context of settlements. Rule 1.5.1 address fee sharing among lawyers, whereas the current rule addresses fee sharing between lawyers and clients. Also, Rule 1.5.1 is intended to apply prior to a lawyer performing any services on behalf of a client, while the current rule applies at the end of a case, after a lawyer has already provided most, if not all, services for the client. Of course there are Rules that are intended to apply in the settlement context, for example Rules 1.2 and 1.8.7. We believe that these Rules, along with lawyers' broader duties to protect their clients' interests in the settlement context, are sufficient to override the need to import Rule 1.5.1 into a context it was not intended to address.

---



## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	San Diego County Bar Association – Lawyer Referral and Information Service Committee Committee
Name	Olga Blankson
City	San Diego
State	California
Email address	<a href="mailto:oblankson@sdcba.org">oblankson@sdcba.org</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

To: Standing Committee on Professional Responsibility and Conduct  
 From: San Diego County Bar Association – Lawyer Referral and Information Service Committee (LRIS) Committee  
 Via electronic submission

Re: San Diego County Bar Association Lawyer Referral and Information Service Committee Response to Proposed Amendment of Rule of Professional Conduct, 5.4

The San Diego County Bar Association Lawyer Referral and Information Service Committee opposes the proposed amendment to Rule of Profession Conduct, 5.4.

#### Discussion

The San Diego County Bar Association Lawyer Referral and Information Service Committee maintains a certified lawyer referral service. This service to the San Diego and surrounding communities is regulated by oversight of the California Bar Association and other State authorities to ensure that the program meets necessary guidelines to protect both the attorneys and the referred clients. The San Diego County Bar Association invests significantly in lawyer referral certification, compliance, staffing, and quality control.

Under the proposed amendments, these organizations are not directly required to pay the costs of compliance and public protection. This gives them an unfair advantage over more regulated Bar Associations.

A nonprofit would have a significant financial interest in referring clients, and no incentive to ensure a quality recommendation to an experienced and insured lawyer. This is likely to result in a disservice to people seeking legal help. Lawyers competing for referrals from these nonprofits could be induced to compromise their practices to meet requirements set by the non-lawyers,

promising exclusivity, or other practice methods not in the best interest of clients. A lawyer or law firm who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) could be induced to compromise its exercise independent professional judgment in the client's best interest as required under rules 1.7 and 2.1.

Without an ongoing obligation to comply with the safeguards of the State Bar of California's certified lawyer referral services, the quality of the legal services will not be assured.

In the early 2000s there was a debate over a proposal to allow partnerships between disciplines, such as accountants and lawyers. The conclusion was that avoiding sharing fees with non-lawyers is essential to protecting lawyer integrity and professionalism.

The policy underlying the fee-splitting rule is to protect the independent professional judgment of lawyers. Fee splitting prohibitions are one of many rules designed to prevent a lawyer from doing better financially if he/she acts adversely affecting the client or the client's case.

The State Bar Associations reinvest their referral fees into programs for MCLE education for lawyers and educating the public on their legal rights. The proposed changes do not require that nonprofits use the fees they earn to better their referral programs or educate the public. These programs are therefore likely to distract from the work and investment of the Bar Association in disseminating important public information.

To protect the public, any nonprofit organization wishing to take part in a fee-splitting exception should be required to become a certified Lawyer Referral Service and comply with the regulatory scheme that is proven to work and designed to insure the public is protected from unscrupulous efforts to

share fees with lawyers.

#### Vagueness

There are issues of clarity our San Diego brethren have pointed out that we agree need addressing, including

- 1.The timing for qualifying under 501(C)(3)
- 2.Estate planning issues and charitable donations.
- 3.The definition of what constitutes "attorney's fees" "arising from a settlement".

#### Insufficient Remedies

While there is a possibility that a violator would lose their nonprofit status, the law provides the alternative remedy for violation of the fee splitting rule in Section 4958 of the Internal Revenue Code, which imposes an excise tax on excess benefit transactions between a disqualified person and an applicable tax-exempt organization. The disqualified person who benefits from an excess benefit transaction is liable for an excise tax. An organization manager may also be liable for an excise tax on the excess benefit transaction. There are issues as to whether the paying an excise tax would be preferred to the third party keeping a proper distance from the legal issues in a case.

#### Conclusion:

The proposed changes are insufficient. The rules must protect private referrals from competing with existing Bar Association referral system unless they comply with the same protections and requirements for attorney's and potential clients. Compromising the integrity of the attorney-client relationship and creating potential conflicts of interests with creditors should not be a side effect of this legislation.

---

## Public Comment - Proposed Rule 5.4 (2)

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Assn. Professional Responsibility & Ethics Committee
Name	Elizabeth L. Bradley
City	Los Angeles
State	California
Email address	<a href="mailto:ebradley@rosensaba.com">ebradley@rosensaba.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
<p><b>ATTACHMENTS</b>You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.</p>	<a href="#">LACBA_PREC_letter_on_Rule_of_Professiona l_Conduct_5.4.pdf (207k)</a>

STATE CAPITOL  
P.O. BOX 942849  
SACRAMENTO, CA 94249-0080  
(916) 319-2080  
FAX (916) 319-2180

DISTRICT OFFICE  
1350 FRONT STREET, SUITE 6022  
SAN DIEGO, CA 92101  
(619) 338-8090  
FAX (619) 338-8099



COMMITTEES  
CHAIR: APPROPRIATIONS  
CHAIR: CALIFORNIA LATINO  
LEGISLATIVE CAUCUS

September 10, 2020

State Bar of California Board of Trustees  
180 Howard Street  
San Francisco, CA 94105

**Re: California Proposed Rule of Professional Conduct, 5.4**

To Whom It May Concern:

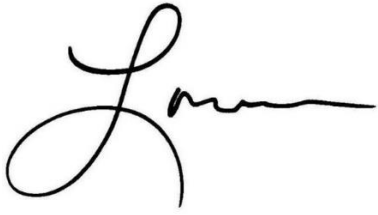
I write in opposition to the proposed amendment to California Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers). The proposed amendment would expand the existing exception for fee sharing arrangements with a nonprofit organization to include the sharing of fees that arise out of a settlement or other resolution of a matter, greatly increasing the potential use of this exemption.

I am concerned that the proposed changes will incentivize unscrupulous behavior. Currently, rules around fee sharing mostly only permit fees to be shared with other lawyers, who are required to take and maintain ethics training, and are subject to proceedings regarding any concern for a breach of ethics. In contrast, the proposed amendment would allow lawyers to share fees with any nonprofit that refers them a case, regardless of the nonprofit's mission, purpose, or connection to the case. The nonprofit would effectively gain an economic stake in the outcome of a case, but avoid the rigorous standards of ethics that lawyers are held to. For instance, nonprofits may be created for the sole purpose of advertising and conducting outreach in lucrative areas of law to refer new cases to lawyers, and subsequently share in the fees from any settlement of the case.

While I support efforts to allow all Californians access to legal services, I do not agree that this proposed rule achieves that outcome, and will dilute the impact of nonprofits that have already been established for the sole purpose of representing indigents and others that have limited access to delivery of legal services. The proposed changes invite abuse and lack the type of controls necessary to preserve the integrity of the legal profession in our great state.

Thank you for your consideration, and please feel free to contact my staff at (916) 319-2080 if you have any questions regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lorena', with a large loop on the 'L' and a horizontal stroke at the end.

LORENA GONZALEZ  
Assemblywoman, 80<sup>th</sup> District

CC: Andrew Tuft, Committee Coordinator  
Lauren McCurdy, Task Force on Access through Innovation of Legal Services