

**RE: Rule 1-310X  
8/27-28/04 Commission Meeting  
Open Session Item III.A.**

**ANTHONIE M. VOOGD**

918 Palomar Lane, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULE 1-310X (III.A.)  
DATE 8-1-04

**1. Introduction**

Absent an exemption, Rule 1-310X appears to violate of Sherman Act (15 U.S.C. §1 et seq.) and the Cartwright Act (Bus. & Prof. Code §16700 et seq.). At the May meeting, I recommended that we brief the anti-competitive issues for the Board of Governors and the Supreme Court. Kurt Melchior brought to my attention Hoover v. Ronwin, 466 U.S. 558 (1984) as establishing the exception.

I have no quarrel with the characterization of Hoover as providing an exception to the Sherman Act. However, after reviewing Hoover and related cases, I still believe that the anti-competitive issues should be briefed before the Commission adopts proposed Rule 310X

**2. Discussion**

Hoover stands for the proposition that the California Supreme Court by approving Rule 310X pursuant to Bus. & Prof. Code §6076 will be acting legislatively and that the Rule will be exempt from Sherman Act liability as state action. However, approval of Rule 310X would be distinctly different from approval of the other rules of professional responsibility where there is no conflicting legislation. It would involve the exercise of what Charles W. Wolfram characterizes as the negative aspect of the inherent powers doctrine. Modern

Legal Ethics, § 2.2.3, pp.27-31, Student Edition, West, 1986. By approving the Rule the Supreme Court would be declaring the Cartwright Act as applied to the legal profession unconstitutional under the separation of powers doctrine. Wolfram suggests good reasons for the Court abjuring such action, stating:

In American democratic theory, popularly elected legislatures are the primary source of law making, whether judges enjoy their secondary lawmaking role or not. Legislatures are specifically the constitutionally preferred source of initiatives for altering the modes of regulating occupations such as the legal profession. As stated earlier, the judiciary should insist upon its own conceptions how to regulate the legal profession only in instances in which yielding to another branch would directly and substantially impair the ability of the courts to adjudicate cases and conduct other business necessarily and properly before them. Any lesser impingement might be deeply regretted but should not for that reason be held unconstitutional.

Moreover, the Supreme Court has in the past indicated its reluctance to exercise the negative aspect of the inherent powers doctrine by refusing to adopt confidentiality rules that might be viewed as inconsistent with the confidentiality provisions legislatively enacted in Bus. & Prof. §6068.

Further, in Cianci v. Superior Court, 40 Cal. 3d 903, 919 (1985), the Supreme Court held that Cartwright Act applies to the professions and rests on “the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions [Citing cases].”

Under these circumstances, the Board of Governors and Supreme Court deserve to know why the Commission believes that the professional independence of lawyers is such an important value as to warrant negating the Cartwright Act. This is particularly true considering that the Rule is so fiercely anti-competitive. The Rule is prophylactic and contextual by analogy the conflict rules. Thus a lawyer cannot enter into a partnership with a non-lawyer even where under the circumstances where there is no risk to the professional independence of the lawyer. Yet Rule 1-310 differs from the conflict rules in that there can be no informed waiver of the Rule. Moreover, the scope of the Rule tracks

its anti-competitive effect. A creditor of a lawyer is just as likely to interfere with the professional independence of a lawyer as a business partner. An overbearing law partner is probably more likely than a business partner to interfere with the professional independence of an associate. The failure of the Rule to cover these risks gives rise to potential contention that the value is pretextual.

**From:** Kevin Mohr [kemohr@comcast.net]

**Sent:** Sunday, August 01, 2004 1:36 PM

**To:** McCurdy, Lauren

**Cc:** Mark Tuft; Karen Betzner; Raul L. Martinez; Anthonie Voogd; Difuntorum, Randall; Harry Sondheim; Kevin Mohr; Kevin Mohr; Kevin Mohr

**Subject:** RRC - 1-310X - Agenda Item III.A.Materials for 8/27 & 8/28/04 Meeting  
Greetings Lauren:

On behalf of Mark, I'm passing on the materials for rule 1-310X that Mark has prepared and I have revised slightly and re-formatted. Unless otherwise indicated, they are in WP. I've attached the following:

1. Rule 1-310X, Draft 5, Annotated.
2. Rule 1-310X, Discussion, Draft 3.
3. Rule 1-310X, Red-line compare Draft 5 to Draft 4.
4. Rule 1-310X, Discussion, red-line compare Draft 3 to Draft 2.
5. April & May 2004 E-mail compilations re rules, PDF (some of e-mails are X-referenced in the Drafter's Notes to the rule.
6. 7/31/04 Rob Sall e-mail to Mark re court-awarded legal fees issue, in Word (file name is "RRC - 1-310X - 07 & 08-2004 E-mails re Rule (080104).doc" in anticipation that there will be other e-mails on this rule before the next meeting.

Thanks,

Kevin

Re: Rule 1-310 X  
~~5/07/04-5/08/04~~8/27/04 – 8/28/04  
Commission Meeting  
Open Session Item III.~~D~~A  
Drafter: Mark L. Tuft

## PROPOSED RULE ON PROFESSIONAL INDEPENDENCE OF A LAWYER

Draft No. ~~4~~5  
Dated: ~~March 25~~August 1, 2004

### RULE 5.4 [~~1-~~310 X] PROFESSIONAL INDEPENDENCE OF A LAWYER-

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or an entity that is not authorized to practice law.
- (b) Paragraph (a) is not intended to prohibit:
- (1) ~~An agreement by a lawyer with the lawyer's firm or another lawyer in the firm that provides for t~~The payment of money; over a reasonable period of time after the lawyer's death; to the lawyer's estate or to one or more specified persons pursuant to an agreement by a lawyer with the lawyer's law firm or with another lawyer in the firm.

(2) ~~A~~ Payment by a lawyer or law firm of the agreed price for purchasing the law practice of a lawyer who is deceased; or who has a conservator or other person acting in a legal representative capacity, that, pursuant to the provisions of Rule 2-300 [Model Rule 1.17] pays, to the lawyer's estate or other legal representative of that lawyer the agreed-upon purchase price.

(3) A lawyer or law firm including non-lawyer employees in a compensation; or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, provided such plan does not violate these rules or the California State Bar Act.

(4) ~~A lawyer sharing court-awarded legal fees with a non-profit organization in which the lawyer has no legal, business, or financial interest and that has employed, retained or recommended employment of the lawyer in the matter.~~

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(5) ~~A lawyer paying~~ The payment of a prescribed registration, referral, or participation other fee by a lawyer to a lawyer

referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California, provided the lawyer has the client's informed written consent.

- (c) A lawyer shall not form a partnership or other business entity with a person who is not a lawyer if any of the activities of the partnership or other entity consist of the practice of law.
- (d) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct, regulate or interfere with the lawyer's independence of professional judgment, or with the client=lawyer relationship, in rendering such legal services.
- (e) A lawyer shall not practice with or in the form of a professional corporation or entity authorized to practice law for a profit if:
  - (1) A person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

- (2) A person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
- (3) A person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.

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[SF:492689.1](#)

-- Kevin E. Mohr Professor Western State University College of Law 1111 N.

State College Blvd. Fullerton, CA 92831 714-459-1147 714-738-1000 x1147

714-525-2786 (FAX) [kevin\\_e\\_mohr@compuserve.com](mailto:kevin_e_mohr@compuserve.com) [kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu)

Re: Rule 1-310 X

2/20/04 Open Agenda Item III.A

Rule 1-310X

August 27-28, 2004

Commission Meeting

Open Session Item III.E

Drafter: Mark L. -Tuft

## DISCUSSION-

Draft No. 23

Dated: FebruaryAugust 10, 2004

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. -The provisions of this Rule protect the lawyer's professional independence of judgment in the sharing of fees with a person or entity that is not authorized to practice law and in permitting a third party to direct or regulatecontrol the lawyer's professional judgment in rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. See e.g., Rule 2-200 and Rule 3-310(f).

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[3] Paragraph (a)(1) is intended to also apply to the payment of a lump sum following the lawyer's death.

[4] A lawyer's shares of stock in a professional law corporation may be held by the lawyer and/or the lawyer's spouse or domestic partner as trustees of a revocable living trust for estate planning purposes during the lawyer's life, provided that no non-lawyer trustee has the right to direct or control professional judgment of the lawyer or the activities of the professional law corporation and the trust instrument expressly so provides.

[5] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of ~~these~~this rules.

[6] This Rule ~~also applies~~is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations.

[7] This Rule is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

— This rule is also not intended to apply to non-profit court-annexed limited legal service programs.—

— This rule was

[8] This rule is not intended to prohibit the payment of court-awarded legal fees to a non-profit public benefit corporation that meets all of the requirements and complies with the provisions of Corporations Code Section 13406(b).

[9] This rule is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

~~Paragraph (a)(1) is also intended to apply to the payment of a lump sum following the lawyer's death.~~

~~**Drafter's Notes to Proposed Discussion to Draft No. 2 to Rule 1-310(X)**~~

~~Paragraph 8 has been added to reflect the consensus of the Commission on Rule 1-310(X)(A)(1) at the December 12, 2003 meeting.~~

SF:489259.1

Open Agenda Item III.A  
Rule 1-310X  
August 27-28, 2004  
Commission Meeting  
Drafter: Mark L. Tuft

## DISCUSSION

Draft No. 3  
Dated: August 1, 2004

[1] A lawyer is required to maintain professional independence of judgment in rendering legal services. The provisions of this rule protect the lawyer's professional independence of judgment the sharing of fees with a person or entity that is not authorized to practice law and in permitting a third party to direct or control the lawyer's professional judgment in rendering legal services to another.

[2] Other rules also protect the lawyer's professional independence of judgment. See e.g., Rule 2-200 and Rule 3-310(F).

[3] Paragraph (a)(1) is intended to also apply to the payment of a lump sum following the lawyer's death.

[4] A lawyer's shares of stock in a professional law corporation may be held by the lawyer and/or the lawyer's spouse or domestic partner as trustees of a revocable living trust for estate planning purposes during the lawyer's life, provided that no non-lawyer trustee has the right to direct or control

professional judgment of the lawyer or the activities of the professional law corporation and the trust instrument expressly so provides.

[5] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this rule..

[6] This rule is intended to apply to group, prepaid, and voluntary legal service programs, activities and organizations.

[7] This rule is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public. This rule is also not intended to apply to non-profit court-annexed limited legal service programs.

[8] This rule is not intended to prohibit the payment of court-awarded legal fees to a non-profit public benefit corporation that meets all of the requirements and complies with the provisions of Corporations Code Section 13406(b).

[9] This rule is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Re: Rule 1-310 X  
8/27-8/28/04  
Commission Meeting  
Open Session Item III.A  
Drafter: Mark L. Tuft

**PROPOSED RULE ON PROFESSIONAL INDEPENDENCE  
OF A LAWYER**

Draft No. 5  
Dated: August 1, 2004

**RULE 5.4 [1-310 X] PROFESSIONAL INDEPENDENCE OF A LAWYER<sup>1</sup>**

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or an entity that is not authorized to practice law.
- (b) Paragraph (a) is not intended to prohibit:
  - (1)<sup>2</sup> The payment of money over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons pursuant to an agreement by a lawyer with the lawyer's law firm or with another lawyer in the firm.<sup>3</sup>
  - (2)<sup>2</sup> Payment by a lawyer or law firm of the agreed price for purchasing the law practice of a lawyer who is deceased or who has a conservator or other

fiduciary representative, pursuant to the provisions of rule 2-300 [Model Rule 1.17], to the lawyer's estate or fiduciary representative.

(3) A lawyer or law firm including non-lawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, provided such plan does not violate these rules or the California State Bar Act.

~~(4) [DELETED paragraph re sharing court-awarded fee w/ non-~~

*profit]*<sup>4</sup>

(4) The payment of a prescribed registration, referral, or other fee by a lawyer to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California, provided the lawyer has the client's informed written consent.<sup>5</sup>

(c) A lawyer shall not form a partnership or other business entity with a person who is not a lawyer if any of the activities of the partnership or other entity consist of the practice of law.

(d) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct, regulate or interfere with the lawyer's

independence of professional judgment, or with the client-lawyer relationship, in rendering such legal services.

- (e) A lawyer shall not practice with or in the form of a professional corporation or entity authorized to practice law for a profit if:
  - (1) A person who is not a lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  - (2) A person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
  - (3) A person who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.<sup>6</sup>

#### **Drafter's Notes**

1. *Title to the rule:* The drafter believes the current title is adequate, particularly in view of paragraph 1 of the discussion which explains the purpose served by the rule. The same title is used by most, if not all, of the jurisdictions that have adopted this rule, and I do not believe it has been a source of confusion. If further clarification is needed, two options have been proposed:

MLT's "Maintaining Professional Independence of a Lawyer"

KEM's "Avoiding Interference by Non-Lawyers in the  
Professional Independence of a Lawyer"

2. Subparagraphs (b)(1) and (b)(2): Subparagraphs (b)(1) and (b)(2) have been redrafted in furtherance of Jerry Sapiro's comment in his 4/16/04 email and my 5/5/04 reply. No substantive change was intended.

3. Separate trust exception: The drafter believes the issues raised in Jerry Sapiro's 5/4/04 email and Robert K. Sall's 4/19/04 email are best treated in the discussion rather than in the rule. See paragraph 3 of my 5/5/04 email to Jerry, included in e-mail compilation attached to these materials.

Draft No. 3 of the proposed Discussion includes new paragraph 4 that clarifies that an attorney's inter vivos trust for estate planning purposes that provides that a non-lawyer trustee shall not direct or control the professional judgment of the lawyer or the activities of the professional law corporation will not violate the rule. In the event of the lawyer's death, paragraph (a)(1) would apply.

An issue for discussion is whether this provision, or one like it, should be in the rule or in the discussion. Either way, the drafter recommends the rule and the discussion be published for public comment with specific request for input from the State Bar estate planning section.

4. Sharing fees with a non-profit organization: Paragraph (b)(4) has been deleted from the current draft of the rule and the issue is treated in the discussion to the rule, specifically paragraphs 7 and 8. While the reasons for recently adding paragraph (a)(4) in Model Rule 5.4 are valid [see ABA Formal Ethics Opinion 93-374 (6/7/1993) and ACLU v. Miller, 803 S.W.2d 5 (Mo. 1991) (Missouri Supreme Court held that fee splitting rule prevented ACLU from forcing its former staff lawyer to give the attorney fee awarded to him for representing civil rights plaintiff on the ACLU's behalf)],

the variations on the rule that have been proposed thus far are either under-inclusive or over-inclusive and provide too many opportunities for abuse.

The Discussion is clear that the rule is not intended to apply to the activities of public agencies providing legal services for the public, which I take to include “qualified legal services projects” and “qualified support centers” under Business and Professions Code section 6213. Does the rule apply to court-annexed public services programs. Paragraph 8 is intended to expand the exclusion to include “non public benefit corporations” that qualify under Corporation Code section 13406(b). The requirement that private non-profit benefit entities register with the State Bar was recently broadened significantly. See, Frye v. Tenderloin Housing Clinic, Inc 200 WL 16651094.

While there are non-profit organizations that fall outside what is covered under paragraphs 7 and 8 of the Discussion, I am not satisfied there are adequate protections in place to expand the exception further.

KEM made an inquiry to the ABA staff as to whether the Ethics 2000 Commission considered the same concerns when it adopted its provision permitting the sharing of court-awarded legal fees with non-profits. The staff forwarded the inquiry to Nancy Moore, who replied the issue of lawyers abusing the rule was never raised. She also wrote:

“As long as the lawyer is not forming the non-profit to avoid the rule banning sharing of fees with nonlawyers, I don’t see a problem. If there is a sham transaction for tax purposes, that’s an issue for the taxing authorities, but it wouldn’t violate (as far as I can tell) the concerns that underlie the ordinary ban on sharing fees with nonlawyers or the exception for court-awarded fees in cases initiated by nonprofits.” March 24, 2004 E-mail from Nancy Moore to KEM, cc to ABA Staff (Becky Stretch, Sue Campbell).

Rob Sall has submitted a draft of a proposed rule provision on this topic, which is attached to these materials. See 7/31/04 Rob Sall E-mail to Mark Tuft, cc to KEM.

5. Subparagraph (b)(4) [formally (b)(5)]: Paragraph (b)(5) has been modified slightly to delete the reference to a “participation” fee, which Toby Rothschild had raised a question about at the May 7 & 8 meeting. Otherwise, the rule remains the same. As of this date, the drafter has not received any alternative language for this provision of the rule.
6. Relationship to Rule 1-300 (“Practice of Law”): This rule should be considered independent of the discussion of rule 1-300 (Open Agenda Item III.B), and any comments regarding Model Rule 5.4 should be addressed under this agenda item.

SF:492689.1

**CalBar – RRC – Rule 1-310X  
July & August E-mails re Rule**

**July 31, 2004 Rob Sall e-mail to Mark Tuft, cc KEM:**

Mark, I'm following up on discussions at the May RRC meeting on Rule 1-310X, with respect to the sharing with nonprofits. I've got a couple of suggested wordings, and pass them on to you for consideration. My concern is that lawyers or their friends or families should not create nonprofit organizations for the purpose of fomenting litigation and sharing fees without a true public benefit purpose. Here are some options.

“A lawyer may share court-awarded legal fees derived in a matter with the nonprofit public benefit organization that employed, retained or recommended employment of the lawyer in such matter, provided that such organization is operated exclusively for educational or charitable purposes and for the public benefit. To satisfy this requirement, the nonprofit organization must have received a determination of exempt status under Section 509(a)(1) or Section 509(a)(2) of the Internal Revenue Code (“Code”) by reason of qualifying as an organization described in Section 501(c)(3) of the Code. Such fees may not be shared if the organization is deemed to be a private foundation.”

Less wordy, and perhaps a little more vague:

“A lawyer may share court-awarded legal fees with a nonprofit public benefit organization that is operated exclusively for educational or charitable purposes and the fees were generated in a matter for which the charitable organization employed or retained the lawyer or recommended his or her employment.”

Best regards,

Rob Sall

**April 19, 2004 Sall E-mail to RRC:**

-----Original Message-----

From: Robert K. Sall [mailto:rsall@Sall-Lawoffice.com]

Sent: Mon 4/19/2004 12:45 PM

To: mtuft@cwclaw.com; Harry Sondheim

Cc: Mohr, Kevin; Sean SeLegue (E-mail); Dominique Snyder (Home) (E-mail); Louisa Lau (E-mail); Dennis Maio (E-mail); JoAnne@Karpman.com

Subject: RRC Proposed Rule 1-310X Open Session Item III.D

Gentlemen, I am COPRAC's liaison for the next RRC meeting, and also attended the last meeting in Los Angeles. We have had discussion at COPRAC regarding proposed Rule 1-310X, and wish to follow up with informal comments from the RRC Subcommittee at this stage (not the official position of COPRAC) regarding some suggested revisions.

First, we write to express our concern about the text in Rule 1-310X, (b)(4) regarding permissive sharing of fees with nonprofit referral organizations. Some COPRAC members believe there is a potential for abuse in connection with sharing fees with private nonprofit organizations, which can be operated as a private toy with an agenda to provide their principals with salaries in the guise of non-profit status. We suggest that such should fee sharing should be limited to public benefit organizations that are primarily charitable or educational in purpose.

As we also discussed at the last RRC meeting, there is no procedure for an attorney to hold law corporation shares in a revocable trust. The following text is proposed as an additional subparagraph for Rule 1-310X, subparagraph (e) (as drafted by COPRAC's RRC Subcommittee members).

"A lawyer and or a non-lawyer spouse or domestic partner, may own shares of professional law corporation stock as trustee(s) of a revocable living trust for the primary benefit of the lawyer and the lawyer's spouse, domestic partner or family members, for estate planning purposes, so long as the trust instrument expressly precludes any non-lawyer trustee or non-lawyer co-trustee from directing, controlling or interfering with the professional judgment of the lawyers employed by the professional corporation. Following the lawyer trustee's death, resignation or removal as trustee, the successor trustees of such trust may hold such shares only for the purposes permitted in Law Corporation Rule 4 C, and may not direct, control or interfere with the professional judgment of any lawyers who are still employed by the professional corporation."

Please note that this rule change would probably also require a change to the Law Corporation Rules, Rule 4C, which reads in part as follows: "C(1) The shares of a law corporation may be owned only by (a) that corporation; (b) an active member of the

**CalBar – RRC – Rule 1-310X  
April & May 2004 E-mails re Rule**

State Bar, or (c) by a person who is licensed to practice law in jurisdiction or jurisdictions in which the person practices." Note that Section C(2) goes on to provide that shares may be held by a disqualified person for up to 90 days (in some circumstances) or six months (i.e. following death) for sale or disposition to a qualified shareholder, after a share owner becomes disqualified. Rule 4C of the Law Corporation Rules would need to be amended to conform to the above.

Randy Difuntorum has informed me that the question comes in from members of the bar, from time to time, about ownership of shares in a revocable trust. State Bar staff has handled these inquiries informally with a letter. The letter tacitly approves ownership of shares by a revocable trust if there is compliance with its terms, while the Law Corporation Rules and the RPC do not expressly permit it. The text of the staff letter is attached as a PDF file. Thank you for your consideration of these issues.

I look forward to seeing you at the May 7-8 meeting.

Robert K. Sall  
(949) 499-2942

**April 22, 2004 Ruvolo E-mail to RRC List (transmitted by Lauren M on 4/26/04):**

From: Ruvolo, Ignazio [mailto:Ignazio.Ruvolo@jud.ca.gov]  
Sent: Thursday, April 22, 2004 12:01 PM  
To: McCurdy, Lauren  
Subject: Rule 1-310X

This email addresses some concerns I have already expressed concerning Rule 1-310X, and a new one. I remain opposed to a rule that categorically prohibits a lawyer from sharing fees with non-lawyers. At a minimum we are perpetuating a double standard when we propose an exception like (a)(3) which allows fee splitting in the form of compensation or retirement "profit sharing arrangements," so long as the non-lawyer is in a law firm, or is an "employee" of a lawyer. Why this limitation? At a minimum, what about solos who wish to share the rewards of a good year with his/her independent contractor researchers, investigators, or clerical help? Why should fee sharing be absolutely banned when it is used to encourage those who help the lawyer provide good services?

If we are simply trying to protect "attorney independence" we can craft a rule that accomplishes this while still allowing lawyers to share fees with non-lawyers. At the last meeting I presented two alternative approaches to accomplish this. If the will of the commission is not to pursue something short of a ban on fee-splitting (except among lawyers, of course), then I will drop the point and move on to a related topic I also feel we need to address.

Introducing this subject is draft paragraph (e)(3) which says lawyers may not practice with someone who has “the authority to direct, influence or control the independent judgment of the lawyer” unless the person is another lawyer. Why draft a rule that institutionalizes the practice of lawyers interfering with the independent judgment of other lawyers? Don't we have enough problems in the profession today on this score already?

Please consider the non-fanciful, indeed commonplace, circumstance where a firm manager goes to another partner and passes on a warning that the “partnership” is concerned because the billings of the lawyer and the lawyer's associates have dropped. In order to maintain the lawyer's interest in the firm, or even to survive, the lawyer is given the stern admonition to “get your hours up and those of your associates too.” Where are those hours going to be found? The lawyer is going to be looking for things to do--bill a file. Presumably, if the work needed to be done, the lawyer would have done it either by being motivated to serve the interests of the client, or , more cynically, in order to avoid the obloquy to which he or she is now being exposed. Yet, the lawyer is being directed to put the economic interest of the lawyer and the firm above the needs of the matter entrusted to the lawyer. Does it matter whether the firm manager who is applying the pressure is a lawyer or not? I do not think so.

Alternatively, consider that law firms typically hand out bonuses based not only on excellent work or results for clients but in many instances simply on the basis of sheer numbers of billable hours. The clear message is “put more time on those files and you'll get more money” (ethically permissible fee sharing per (a)(3)). Also, arguably these bonuses are awarded only where the hours worked have pushed the associates to near exhaustion. Would you want to pay for the last 100 hours of an associates 2400 billable hour year? Do you think this is quality billable time? Is not such a firm pursuing a policy which may promote interference with the judgments of the individual lawyers?

Consider too the common practice of keying lawyer advancement and compensation not to an “hours times billable rate” figure but on a “realization rate” which is the “hours times billable rate” figure reduced by the amount of write downs and write offs the lawyer has made to the bills. In other words, some law firm compensation and advancement processes reward lawyers who exercise discretion in not reducing bills. Again, this is nothing short of institutional interference with the judgment of the lawyer, albeit in a more subtle form.

Lastly, I merely acknowledge here that the State Bar and the courts continue to ignore the reality that in some cases insurance companies do “direct, influence or control” assigned defense counsel's independent judgment in defending insureds.

These practices can find no refuge in rules such as those requiring attorneys to supervise subordinate lawyers, such as ABA Model Rule 5.1, and Rule 5.2 which requires subordinate lawyers to follow the direction of supervisors which does not require unethical conduct, but only involves an “arguable question of professional duty.” First, at this point we have no idea where we are going to end up with the supervising

attorney rules because they have not yet been taken up. Regardless, the manifest intent of these rules is to require some level of hierarchical responsibility to ensure that subordinate lawyers do not violate ethics rules, and that young lawyers defer to more experienced lawyers in the firm on legitimate, but disputed, courses of action. Only to that extent must supervising lawyers interfere with the conduct of those they supervise, and the subordinate lawyer follow the direction of a supervisor. The rules (assuming we adopt them) do not require supervising lawyers to interfere with the performance of legal services by subordinates where that interference directs the subordinate to act unethically.

Moreover, even these rules have no application where the pressure is exerted on a partner in the firm. Surely, no one can advance the position that it would be appropriate for any attorney, partner or associate, to use the right to share fees as a means to interfere with the independent judgment of another lawyer not involving an “arguable question of professional duty.”

While we are not going to stamp out these practices, I am concerned that they not interfere with the independency of counsel, and we should recognize that in our rule making. For without a greater attempt to build into the rule safeguards to meet these potential pernicious effects, I for one, cannot say that “[t]he provisions of this Rule protect the lawyer’s professional independence of judgment . . . in [not] permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another” as we say in the very first paragraph of the draft Discussion.

Therefore, at a minimum, we should add new subdivision (e)(4) to read: “The procedures by which the compensation or career advancement of the lawyer have the effect of directing, controlling, or influencing the professional judgment of the lawyer, unless the procedures involve ‘an arguable question of professional duty.’” We should also consider warning lawyers in the Discussion section about the dangers of fee-sharing compensation programs that reward or punish lawyers financially without due regard for how those programs may interfere with the professional judgment of the lawyer.

**May 4, 2004 Sapiro E-mail to RRC List (transmitted by Lauren M on 4/26/04):**

Dear Mark:

I have several suggestions regarding your March 25th draft.

I could not figure out why I disliked subparagraphs (1) and (2) of paragraph (b), until I realized that what is being prohibited is the payment of money. I think if you start both of those subparagraphs with what is being prohibited, they can be reworded so they both parse better. For example, they could read:

(1) Payment of money, over a reasonable period of time after a lawyer's death, to the lawyer's estate or to one or more specified persons, pursuant to an agreement by a lawyer with the lawyer's firm or with another lawyer in the firm.

(2) Payment to the estate or other representative of a lawyer for purchase of the law practice of a lawyer who is deceased, or who has a conservator or other person acting in a representative capacity, pursuant to the provisions of Rule 2-300.

I am not totally satisfied with what I have drafted, but it illustrates the point that the paragraphs, if reworded to emphasize what is being prohibited by the introductory clause of (b), both paragraphs will be clearer.

In paragraph (b)(3), I would take out the comma after the word "compensation" at the top of page 2.

I am still concerned about the absence of a trust exception. By including an exception permitting ownership of an interest in a law firm by a fiduciary of a probate estate [paragraph (e)(1)], we run the risk that the rule will be interpreted to preclude those things that are not expressly permitted, *inclusio unius est exclusio alterius*. Although that is not the purpose of a rule assuring professional independence of a lawyer, I fear that will be its consequence. We should not cut lawyers off from access to normal, legitimate estate planning tools.

With best regards,

Jerry

**May 5, 2004 Tuft E-mail to RRC List:**

The following is a brief response to your comments on draft rule 1-310X:

1. The problem Jerry points out in paragraph (b) (1) and (2) is the result of the change in format from Model Rule 5.4 (a)(1) and (2) to the current version of the proposed rule. I agree with Jerry's suggested changes except I would begin subparagraph (b)(1) with the word "The" and subparagraph (b)(2) with the word "Payments."
2. I also agree with the change to paragraph (b)(3).
3. I do not agree there should be a separate trust exception in the rule. There are many different kinds of trusts (some rather large and formidable). The normal estate planning situation appears to be covered in the rule. Paragraph (a)(1) permits the payment to the lawyer's estate or to one or more specified persons following the lawyer's death. I do not read (a)(1) to be limited to an attorney's probate estate, and that

point can be clarified in the Discussion to the rule. The rule precludes the sharing of legal fees with a non lawyer during the lawyer's tenure with the firm and not whether an attorney can hold his or her interest in the firm in an inter vivos trust. I do not believe that a trust for estate planning purposes is a separate person or entity. The trustee in a typical inter vivos or family trust is the attorney and perhaps his or her spouse. If we are required to create an express exception for estate planning trusts, do we also need to have one for family partnerships? I think we can best cover your concern with a comment in the discussion section to the rule.

4. Nace, your comments about the vagaries of law practice are valid and deserve our attention. Whatever the influences are on today's lawyers in private practice, the solution is not to do away with rule 5.4, which has been universally adopted with minor variations in every jurisdiction in the Country except for the District of Columbia. The situations you describe exist even in D.C. D.C. rule 5.4(b) requires lawyers to undertake responsibility for nonlawyer participants to the same extent as if they were lawyers under rule 5.1. As a result, nonlawyer ownership in law firms has not caught on very much in Washington. You may recall that the experiment with McKee, Nelson, Ernst & Young did not last very long.

5. Much of what is in 5.4 has been part of the California rules probably as far back as 1928. If we are going to be the first state to go in a new direction, we will have to come up with a very creative rule that adequately deals with all of the problems the MDP Commission faced and we in California faced in wrestling with these issues on the MDP Task Force. As far as I know, no one has come up with a workable rule that adequately substitutes for the protections in the current rule. My sense is that the Supreme Court is not keen on moving in this direction at least at this time. I personally believe that ABA Resolution 10F expresses well where the legal profession is on the issues you raise. With Enron and other recent accounting scandals, I personally am not ready to abridge the protections afforded the public by the current draft of the rule.

**May 6, 2004 Voogd E-mail to RRC List (transmitted by Felicia Soria on 5/6/04):**

The anti-competitive aspects and risks of the rule should be fully briefed for the Board of Governors.

Consider the following limited exception:

(f) This rule shall not be applicable to any entity involving a non-lawyer or non-lawyers if such entity has established reasonable procedures for the protection of the its lawyers' independent professional judgment [and its clients have given their informed written consent to non-lawyer involvement.]