

**McCurdy, Lauren**

RE: Rule 5.4  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.DDD.

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Thursday, June 17, 2010 3:56 PM  
**To:** Difuntorum, Randall; Kevin Mohr  
**Cc:** McCurdy, Lauren; Raul L. Martinez; Ellen Peck; Harry Sondheim; Kevin Mohr G  
**Subject:** RE: RRC - 5.4 [1-310X] - III.DDD. - 6/25-26/10 Materials

Again, I am not opposed to having Kevin's suggestion regarding rule 5.4 submitted to the Commission as part of or in addition to Toby's suggestion (although I am still puzzled by RAC's decision not to recommend adoption of rule 6.1).

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**From:** Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]  
**Sent:** Thursday, June 17, 2010 2:37 PM  
**To:** Kevin Mohr; Mark Tuft  
**Cc:** McCurdy, Lauren; Raul L. Martinez; Ellen Peck; Harry Sondheim; Kevin Mohr G  
**Subject:** RE: RRC - 5.4 [1-310X] - III.DDD. - 6/25-26/10 Materials

Mark & Kevin:

This will still need some level of discussion in connection with 5.4 or 6.1 because of the testimony we received from Toby at the 6/10 public hearing. See also below, my prior message to Kevin about input from State Bar Office of Legal Services staff. -Randy D.

Kevin:

The staff in the State Bar’s Office of Legal Services (“OLS”) has asked that I convey a friendly amendment to Rule 6.1. In the Rule 6.1 chart below, you can see that the Commission has deleted the last sentence of MR 6.1 Cmt.[4] which expressly encourages pro bono program lawyers to share court-awarded fees with the pro bono program that hired them. OLS staff believes (and I agree) that the Commission’s version of Cmt.[4] would be improved by a cross reference to proposed Rule 5.4 Cmt.[8] which states: “Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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.)” Because the Commission did not adopt MR 5.4 (a)(4) (w/c flatly states that a lawyer may share court-awarded fees w/ a nonprofit) and has stricken the last sentence of MR 6.1 Cmt.[4] (encouraging such fee sharing), it is quite possible that the Commission’s position on the issue of sharing court-awarded fees may be misunderstood. Adding the suggested cross reference would help avoid a misreading. Do you agree? -Randy D.

P.S.

The RRC response in the 6.1 chart below also could be clarified by deleting the last sentence (w/c says “Thus, such fee sharing would violate proposed Rule 5.4.”) as that is an overstatement of the Commission’s approach. The Commission’s approach is to commend the *Frye* case to lawyers and let them make their own decision on whether a fee sharing is permitted under California law. Thus, unlike the ABA (in MR 5.4(a)(4)), the Commission is not making a definitive statement in the rules on the permissibility of such fee sharing. To me, the Commission’s approach is consistent with Standard 3.5-6 of the ABA’s STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (see attached) because that standard says the law of the specific jurisdiction must be considered in making pro bono program policies for fee sharing. Lastly, there is a nit in the proposed Rule 5.4 Model Rule Comparison Chart. The RRC explanation of the deletion of MR 5.4(a)(4) refers to the *Frye* discussion in Rule 5.4 Cmt.[5] but the correct updated reference should be to Rule 5.4 Cmt.[8]. Please help me remember to correct this nit in the next version of the Rule 5.4 Model Rule Comparison Chart.

<p align="center"><u>ABA Model Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 6.1 Voluntary Pro Bono Publico Service Comment</p>	<p align="center"><u>Explanation of Change</u></p>
<p>[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.</p>	<p>[4] Because service must be provided without <del>fee or expectation of fee</del> <u>compensation</u>, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. <del>Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.</del></p>	<p>Comment [4] is based on Moc "compensation" has been substituted for "fee" to conform to the proposed rule. See Explanation of Changes. The last sentence has been deleted. Model Rule 5.4(a)(4), which prohibited lawyers from sharing court-awarded legal fees with a nonprofit organization, is no longer recommended. Thus, such fee sharing is permitted under Rule 5.4.</p>

**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Thursday, June 17, 2010 2:26 PM  
**To:** Mark Tuft  
**Cc:** McCurdy, Lauren; Difuntorum, Randall; Raul L. Martinez; Ellen Peck; Harry Sondheim; Kevin Mohr G  
**Subject:** Re: RRC - 5.4 [1-310X] - III.DDD. - 6/25-26/10 Materials

Mark:

I'll withdraw my request but someday I would like someone to explain to me how including MR 5.4(a)(4) will enable the frauds and schemes of dishonest lawyers. Seems they're already successfully engaging in such practices and our inclusion of a provision that has been widely adopted around the country will have little if any effect. We can't solve all the problems of the profession but we can help out the access to justice folks by including the provision. Again, however, I'll withdraw my request that the Commission reconsider the provision. Thanks,

Kevin

Mark Tuft wrote:

But then we run into all the frauds and other schemes lawyers have been able to perpetrate against the public. If we do as you suggest, there needs to be a well written comment defining what is and what is not permitted.

I cannot help but observe that by the time we finish wrestling with this rule, the ABA will have revised it substantially. We seem destined to write rules for the past and not for the future.

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**From:** Kevin Mohr [<mailto:kemohr@charter.net>]  
**Sent:** Thursday, June 17, 2010 12:16 PM  
**To:** Mark Tuft  
**Cc:** Lauren McCurdy; Randall Difuntorum; Raul L. Martinez; Ellen Peck; Harry Sondheim; Kevin Mohr G  
**Subject:** Re: RRC - 5.4 [1-310X] - III.DDD. - 6/25-26/10 Materials

Mark: It's done indirectly at best. Why can't we just spell out what we mean? I don't read *Frye* as preventing the inclusion of the Model Rule provision in the Rule. KEM

Mark Tuft wrote:  
Don't we cover this issue in Comment [8]?

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**From:** Kevin Mohr [<mailto:kemohr@charter.net>]  
**Sent:** Thursday, June 17, 2010 9:14 AM  
**To:** Lauren McCurdy; Randall Difuntorum  
**Cc:** Raul L. Martinez; Ellen Peck; Mark Tuft; Harry Sondheim; Kevin Mohr G  
**Subject:** RRC - 5.4 [1-310X] - III.DDD. - 6/25-26/10 Materials

Greetings Lauren & Randy:

I've attached the following:

1. Public Comment Chart, XDFT1 (6/17/10);
2. Rule, Post-public comment draft [#15] (6/17/10), redline, compared to PCD [#14.1] (10/17/09).
3. Rule, Post-public comment draft [#15] (6/17/10), clean landscape version.

Notes & Comments:

1. Nothing in the public comment warrants any changes to the rule.
2. Nevertheless, because representatives of the access to justice community have requested the restoration of the fourth sentence of MR 6.1, cmt. [4] to that rule, I've asked that the Commission reconsider its decision, made years ago, not to include MR 5.4(a)(4), which permits a lawyer to "share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."
  - a. I am familiar with the reason for not including that provision (i.e., the "sham" non-profits which lawyers purportedly use to avoid the prohibition on fee-sharing w/ non-lawyers, though I'm still not certain how not including 5.4(a)(4) prevents a lawyer from engaging in prohibited fee-sharing), but given the Commission's charge not to diverge unnecessarily from the Model Rules, is the sham-nonprofit rationale really compelling? I know some members of the Commission feel strongly about it, but is it a realistic concern?
  - b. Note that the last sentence of MR 6.1, cmt. [4] provides: "Lawyers who do receive fees in such cases [i.e., statutory fees in a case taken on as pro bono] are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means."
3. My co-drafters have not had input on this issue but if they think this is a bad idea, or a lost cause, I ask them to speak up now and I'll withdraw the request that the RRC reconsider the provision. We have enough to chew on at the June 25-26 meeting already.

Thanks,

Kevin

Attached:

- RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT1 (06-17-10).doc
- RRC - 1-310X [5-4] - Rule - Post-PCD [15] (06-17-10) - Cf. to PCD [14.1] (10-17-09) - LAND.doc
- RRC - 1-310X [5-4] - Rule - Post-PCD [15] (06-17-10) - CLEAN-LAND.doc



**Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence.**  
**[Sorted by Commenter]**

TOTAL = 5 Agree = 1  
 Disagree =     
 Modify = 1  
 NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		Comment [1] more appropriately belongs in a treatise, law review article, or ethics opinion.	The Commission disagrees with the commenter. Comment [1] Comment [1], which is based on Model Rule 5.4, cmt. [1], has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment – and thus provides guidance in applying the Rule.
1	San Diego County Bar Association (Heather L. Rosing)	A	Yes		Adopt rule in interest of uniformity	No response necessary.
3	<i>COPRAC</i>	<i>A</i>	<i>Yes</i>		<i>support rule as drafted.</i>	<i>No response necessary.</i>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence**  
(Commission's Proposed Rule – Post-PCD [#15] (6/17/10) – CLEAN VERSION)

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) any payment authorized by Rule 1.17;
  - (3) a lawyer or law firm including 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 sharing court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; or
  - (5) 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.
- (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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization 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 organization other than a corporation; or
  - (3) a person who is not a lawyer has the right to direct or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.
- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's

independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

#### COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in 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 independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. 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.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. 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 matters that have been concluded that the third party collects on the lawyer's behalf.

- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] 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. See also Business and Professions Code section 6155.
- [8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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.)

[9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

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

**Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence**  
(Commission's Proposed Rule – Post-PCD [#15] (6/17/10) – COMPARED TO PCD [#14.1] (10/17/09))

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) any payment authorized by Rule 1.17;
  - (3) a lawyer or law firm including 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 sharing court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter,<sup>1</sup> or
  - (45) 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.
- (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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization 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 organization other than a corporation; or
  - (3) a person who is not a lawyer has the right to direct or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and

<sup>1</sup> KEM: Please reconsider including MR 5.4(d) in the Rule. Including this Rule would facilitate the inclusion of the last sentence of Model Rule 6.1, cmt. [4], which representatives of the access to justice community have requested.

Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.

- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

#### COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in 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 independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. 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.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. 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 matters that have been concluded that the third party collects on the lawyer's behalf.
- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] 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. See also Business and Professions Code section 6155.

- [8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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.)
- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.
- [10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)



**Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence**  
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) any payment authorized by Rule 1.17;
  - (3) a lawyer or law firm including 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; or
  - (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.
- (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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization 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 organization other than a corporation; or
  - (3) a person who is not a lawyer has the right to direct or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.
- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

## COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in 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 independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. 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.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. 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 matters that have been concluded that the third party collects on the lawyer's behalf.
- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] 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. See also Business and Professions Code section 6155.
- [8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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].)
- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

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



**June 9, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synthesizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.6 (Agenda Item III.I)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr
- 1.18 (Agenda Item III.FF)
- 7.1 (Agenda Item III.MMM)
- 7.2 (Agenda Item III.NNN)
- 7.3 (Agenda Item III.OOO)
- 7.4 (Agenda Item III.PPP)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - MOHR - DFT1 (06-09-10).pdf
- RRC - [1-18] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10)2.doc
- RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM22.doc
- RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.pdf
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.doc
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).pdf
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.doc
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.doc

**June 16, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

It's finally your turn . . . you have exactly 40 minutes to complete this work J . . . I'm sure you're way ahead of me, but just in case . . .

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule> .

- 1.6 (Agenda Item III.I) OCTC (sent with Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr - OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 1.8.2 (Agenda Item III.L) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.18 (Agenda Item III.FF) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 5.4 (Agenda Item III.DDD) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.1 (Agenda Item III.MMM) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.2 (Agenda Item III.NNN) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.3 (Agenda Item III.OOO) OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 7.5 (Agenda Item III.QQQ) OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - [1-18] - 06-14-10 COPRAC Comment.pdf

**June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:**

I've attached the following:

1. Public Comment Chart, XDFT1 (6/17/10);

2. Rule, Post-public comment draft [#15] (6/17/10), redline, compared to PCD [#14.1] (10/17/09).
3. Rule, Post-public comment draft [#15] (6/17/10), clean landscape version.

Notes & Comments:

1. Nothing in the public comment warrants any changes to the rule.
2. Nevertheless, because representatives of the access to justice community have requested the restoration of the fourth sentence of MR 6.1, cmt. [4] to that rule, I've asked that the Commission reconsider its decision, made years ago, not to include MR 5.4(a)(4), which permits a lawyer to "share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."
  - a. I am familiar with the reason for not including that provision (i.e., the "sham" non-profits which lawyers purportedly use to avoid the prohibition on fee-sharing w/ non-lawyers, though I'm still not certain how not including 5.4(a)(4) prevents a lawyer from engaging in prohibited fee-sharing), but given the Commission's charge not to diverge unnecessarily from the Model Rules, is the sham-nonprofit rationale really compelling? I know some members of the Commission feel strongly about it, but is it a realistic concern?
  - b. Note that the last sentence of MR 6.1, cmt. [4] provides: "Lawyers who do receive fees in such cases [i.e., statutory fees in a case taken on as pro bono] are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means."
3. My co-drafters have not had input on this issue but if they think this is a bad idea, or a lost cause, I ask them to speak up now and I'll withdraw the request that the RRC reconsider the provision. We have enough to chew on at the June 25-26 meeting already.

***Attached:***

RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT1 (06-17-10).doc  
RRC - 1-310X [5-4] - Rule - Post-PCD [15] (06-17-10) - Cf. to PCD [14.1] (10-17-09) - LAND.doc  
RRC - 1-310X [5-4] - Rule - Post-PCD [15] (06-17-10) - CLEAN-LAND.doc

**June 17, 2010 Tuft E-mail to KEM, cc Drafters, Chair & Staff:**

Don't we cover this issue in Comment [8]?

**June 17, 2010 KEM E-mail to Tuft, cc Drafters, Chair & Staff:**

It's done indirectly at best. Why can't we just spell out what we mean? I don't read Frye as preventing the inclusion of the Model Rule provision in the Rule.

**June 17, 2010 Tuft E-mail to KEM, cc Drafters, Chair & Staff:**

But then we run into all the frauds and other schemes lawyers have been able to perpetrate against the public. If we do as you suggest, there needs to be a well written comment defining what is and what is not permitted.

I cannot help but observe that by the time we finish wrestling with this rule, the ABA will have revised it substantially. We seem destined to write rules for the past and not for the future.

**June 17, 2010 KEM E-mail to Tuft, cc Drafters, Chair & Staff:**

I'll withdraw my request but someday I would like someone to explain to me how including MR 5.4(a)(4) will enable the frauds and schemes of dishonest lawyers. Seems they're already successfully engaging in such practices and our inclusion of a provision that has been widely adopted around the country will have little if any effect. We can't solve all the problems of the profession but we can help out the access to justice folks by including the provision. Again, however, I'll withdraw my request that the Commission reconsider the provision.

**June 17, 2010 Tuft E-mail to KEM, cc Drafters, Chair & Staff:**

I'll withdraw my request but someday I would like someone to explain to me how including MR 5.4(a)(4) will enable the frauds and schemes of dishonest lawyers. Seems they're already successfully engaging in such practices and our inclusion of a provision that has been widely adopted around the country will have little if any effect. We can't solve all the problems of the profession but we can help out the access to justice folks by including the provision. Again, however, I'll withdraw my request that the Commission reconsider the provision.

**June 17, 2010 Difuntorum E-mail to Tuft & KEM, cc Drafters, Chair & Staff:**

This will still need some level of discussion in connection with 5.4 or 6.1 because of the testimony we received from Toby at the 6/10 public hearing. See also below, my prior message to Kevin about input from State Bar Office of Legal Services staff.

***May 7, 2010 Difuntorum E-mail to KEM re Rule 6.1:***

The staff in the State Bar's Office of Legal Services ("OLS") has asked that I convey a friendly amendment to Rule 6.1. In the Rule 6.1 chart below, you can see that the Commission has deleted the last sentence of MR 6.1 Cmt.[4] which expressly encourages pro bono program lawyers to share court-awarded fees with the pro bono program that hired them. OLS staff believes (and I agree) that the Commission's version of Cmt.[4] would be improved by a cross reference to proposed Rule 5.4 Cmt.[8] which states: "Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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.)" Because the Commission did not adopt MR 5.4 (a)(4) (w/c flatly states that a lawyer may share court-awarded fees w/ a nonprofit) and has stricken the last sentence of MR 6.1 Cmt.[4] (encouraging such fee

**RRC – Rule 5.4 [1-310X]  
E-mails, etc. – REVISED (6/21/2010)**

sharing), it is quite possible that the Commission’s position on the issue of sharing court-awarded fees may be misunderstood. Adding the suggested cross reference would help avoid a misreading. Do you agree? -Randy D.

P.S.

The RRC response in the 6.1 chart below also could be clarified by deleting the last sentence (w/c says “Thus, such fee sharing would violate proposed Rule 5.4.”) as that is an overstatement of the Commission’s approach. The Commission’s approach is to commend the *Frye* case to lawyers and let them make their own decision on whether a fee sharing is permitted under California law. Thus, unlike the ABA (in MR 5.4(a)(4)), the Commission is not making a definitive statement in the rules on the permissibility of such fee sharing. To me, the Commission’s approach is consistent with Standard 3.5-6 of the ABA’s STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (see attached) because that standard says the law of the specific jurisdiction must be considered in making pro bono program policies for fee sharing. Lastly, there is a nit in the proposed Rule 5.4 Model Rule Comparison Chart. The RRC explanation of the deletion of MR 5.4(a)(4) refers to the *Frye* discussion in Rule 5.4 Cmt.[5] but the correct updated reference should be to Rule 5.4 Cmt.[8]. Please help me remember to correct this nit in the next version of the Rule 5.4 Model Rule Comparison Chart.

ABA Model Rule Rule 6.1 Voluntary Pro Bono Publico Service Comment	Commission’s Proposed Rule* Rule 6.1 Voluntary Pro Bono Publico Service Comment	Explanation of Changes to the ABA Model Rule
[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys’ fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.	[4] Because service must be provided without <del>fee or expectation of fee</del> compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys’ fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. <del>Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.</del>	Comment [4] is based on Model Rule 6.1, cmt. [4]. The word “compensation” has been substituted for “fee or expectation of fee” to conform to the proposed language of the introductory clause. See Explanation of Changes for the introductory clause. The last sentence has been deleted because the adoption of Model Rule 5.4(a)(4), which permits sharing of “court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer,” has not been recommended. Thus, such fee sharing would violate proposed Rule 5.4.

**Attached:**

RRC - 1-310X [5-4] - ABA Pro Bono Standard 3.5-6 (Atty Fees) (1996).doc

**June 17, 2010 Tuft E-mail to KEM, cc Drafters, Chair & Staff:**

Whoa. I did not mean you should withdraw your request. I was merely giving you my reaction. I am happy to have the Commission consider it.

**June 21, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

The moment you’ve been anticipating . . .

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter

**RRC – Rule 5.4 [1-310X]  
E-mails, etc. – REVISED (6/21/2010)**

chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)  
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)  
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc  
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc  
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc (A, R)  
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT3.2 (06-21-10)KEM.doc

**June 22, 2010 KEM E-mail to McCurdy re 1.7, 1.8.2, 5.4 & 7.5:**

I've reviewed the charts you sent and updated them where necessary. Please substitute the following files for the files you sent me:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2].

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT2.doc [document you sent me was not alphabetized, which I've done; also note that I will review Bob's revisions to the chart and send in my responses later].

RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2 and it's been alphabetized].

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10).doc [Draft # should have been 2.3, also alphabetized and response to LACBA Access to Justice Committee].

**Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence.  
[Sorted by Commenter]**

TOTAL = 3    Agree = 2  
 Disagree =     
 Modify = 1  
 NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	A	Yes		COPRAC supports the adoption of Proposed Rule 5.4 and the Comments to the Rule.	No response necessary.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		Comment [1] more appropriately belongs in a treatise, law review article, or ethics opinion.	The Commission disagrees with the commenter. Comment [1] Comment [1], which is based on Model Rule 5.4, cmt. [1], has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment – and thus provides guidance in applying the Rule.
1	San Diego County Bar Association (Heather L. Rosing)	A	Yes		Adopt rule in interest of uniformity	No response necessary.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence**  
**(Commission's Proposed Rule – Clean Version)**

- (a) A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate to provide for the payment of money or other consideration at once or over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) any payment authorized by Rule 1.17;
  - (3) a lawyer or law firm including 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; or
  - (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.
- (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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or organization 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 organization other than a corporation; or
  - (3) a person who is not a lawyer has the right to direct or control the professional judgment of a lawyer.
- (e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Governors of the State Bar.
- (f) A lawyer shall not practice with or in the form of a non-profit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, to practice law unlawfully.

## COMMENT

- [1] A lawyer is required to maintain independence of professional judgment in rendering legal services. The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.
- [2] The prohibition against sharing fees "directly or indirectly" in 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 independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. 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.
- [3] Paragraph (a) also does not prohibit the payment to a nonlawyer third party for goods and services to a lawyer or law firm even if the compensation for such goods and services is paid from the lawyer's or law firm's general revenues. 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 matters that have been concluded that the third party collects on the lawyer's behalf.
- [4] Other rules also protect the lawyer's independence of professional judgment. See, e.g., Rule 1.5.1, Rule 1.8.6, and Rule 5.1.
- [5] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.
- [6] The distribution of legal fees pursuant to a referral agreement between lawyers who are not associated in the same law firm is governed by Rule 1.5.1 and not this Rule.
- [7] 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. See also Business and Professions Code section 6155.
- [8] Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit 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.)
- [9] This Rule applies to group, prepaid, and voluntary legal service programs, activities and organizations and to non-profit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

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