

**RE: RULE 1-310X (LAWYERS INFLUENCING LAWYERS)
12/10/04 Commission Meeting
Open Session Item III.D.**

DATE: September 20, 2004
TO: Commission Members
FROM: IJRuvolo
RE: Rule 5.1 or 1-310X

At the last meeting, the commission decided that my proposed amendment barring attorneys from sharing fees in a manner which interferes with the professional judgment of another member should be considered when we take up the "supervision" series. Having read them (ABA Model Rules 5.1-5.3), I think 5.1 is the best alternative spot for this issue to be implanted. Assuming we were to adopt 5.1, the rule, with my suggested amendment, could appear as follows:

"(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

"(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

"(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

“(d) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm adopt procedures by which the compensation or career advancement of lawyers do not 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.

MEMORANDUM

TO: Members of the Commission

FROM: Mark L. Tuft

DATE: November 15, 2004

RE: Rule 5.1 – Open Agenda Item III.H (11/19/04 Commission Meeting)

The concerns raised by Nace Ruvolo that leads to his proposed amendment to Rule 5.1 are, in my view, largely covered in current 5.1(a), (b), and (c) as revised in 2002. If further clarification is needed, the subject is better treated in a comment to the rule.

Whether the Commission adopts Rule 5.1(d) as proposed, there remains a regulatory hole between the scope of Rule 5.1 and Rule 5.4(c) as amended by the Commission at the August 27-28, 2004 meeting. I had thought that Nace was proposing to apply the concept in Rule 5.4(c) to lawyers [e.g., "a lawyer shall not permit another lawyer who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."] However, Nace's proposed amendment to Rule 5.1, even if approved, would leave the Commission without a rule that protects a lawyer's professional independence of judgment in situations where an outside lawyer recommends, employs or pays for the other lawyer to render legal services and directs or controls that lawyer's professional judgment.

Having considered Nace's proposed amendment, I recommend that (1) the Commission consider adding a comment to Rule 5.1 making it clear that the obligation to have measures in place to insure that lawyers conform to the rules of professional conduct include compensation and career advancement procedures that are not intended or designed to control or interfere with a lawyers exercise of professional judgment, (2) that the term "non-lawyer" in the current draft Rule 5.4 (Rule 1-310X) be changed back to "person" and (3) that the title to Rule 5.4 (Rule 1-310X) be changed to "Maintaining Professional Independence of a Lawyer."

The Scope of Rule 5.1 Covers the Concerns that Nace Has Raised

Rule 5.1 imposes an affirmative obligation on partners and shareholders in the law firm and other lawyers in the firm who have comparable managerial authority over the professional work of the firm (which includes a corporate law department, government agency and a legal services organization) to make reasonable efforts to

establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the rules of professional conduct. This includes, among others, the obligation to exercise independent professional judgment and render candid advice in representing a client (see Model Rule 2.1), avoid conflicts of interest, safeguard client funds and property, and perform legal services with competence. Rule 5.1(a) imposes direct responsibility on lawyers covered by the rule rather than by vicarious liability. See, e.g., Annotated Model Rules of Professional Responsibility (5th ed.) at 445. (ABA 2003).

Several states (New York and New Jersey) apply this supervisory responsibility not just to particular lawyers but also to the law firm itself. See New York DR-1-104 (c) ("a law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm.")

The Annotated Model Rules, *supra*, cites *Davis v. Alabama State Bar*, 676 So.2d 306 (Ala. 1996) as an extreme example of how law firm policies can adversely affect the ability of individual lawyers in the firm to properly represent clients. In *Davis*, both partners in a two partner firm were suspended from practice for imposing conditions on associates, including huge case loads, limits on the amount of time that could be spent with clients and on cases, and a quota system requiring associates to open a specific number of files during a certain time period that the court found prevented the lawyers from provided quality and competent legal services. See also, *Attorney Grievance Committee v. Ficker* 706 A.2d 1045 (MD. 1998) – lawyer's habit of assigning too many cases to few lawyers violated Rule 5.1.

I agree with Nace that the duties imposed by Rule 5.1 have not been adequately enforced, but the duties exist nonetheless. For example, the requirement that firms establish appropriate policies and procedures has recently been applied with respect to mentally impaired lawyers in the firm. See ABA Formal Opinion 03-429.

Rule 5.1(b) imposes a separate duty on lawyers having direct supervisory authority over another lawyer. The "other lawyer" has been interpreted to include of counsel, contract and temporary lawyers as well as associates in the firm. See ABA Formal Opinion 88-356 (duty to supervise temporary lawyers).

Rule 5.1(c) imposes vicarious responsibility for another lawyer's violation of the rules if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved, or if partners or others having comparable managerial authority, or a lawyer having direct supervisory authority over the offending lawyers, knows of the conduct at a time when the consequences can be avoided or mitigated and fails to take reasonable remedial action. I am in favor of California adopting Rule 5.1.

The Subject of Proposed Rule 5.1(d) Should be a Comment to the Rule Rather Than Added as an Amendment to Rule 5.1

Most of the cases applying Rule 5.1 involve the *failure* to have policies and procedures in place that reasonably insure that all lawyers in the firm comply with the rules of professional conduct. Nace's concern, as I understand it, is that a law firm may have policies and procedures in place that *interfere* with the lawyer's professional obligation to exercise professional independence of judgment. A comment to this effect in Rule 5.1 may be appropriate. However, I disagree with the text of Nace's proposed amendment because (1) the proposed amendment does not include lawyers having direct supervisory authority over the other lawyer, (2) it does not include situations where the lawyer orders or ratifies the conduct, and (3) the language is ambiguous.

The following is a suggested comment that attempts to address the concerns Nace has raised:

"This rule applies not only where there is an absence of internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the rules of professional conduct, but also applies where internal policies and procedures, including those involving compensation and career advancement of lawyers in the firm, are intended or designed to control or interfere with a lawyer's exercise of the lawyer's independence of professional judgment in representing a client or are otherwise intended or designed to induce a violation of these rules. See Rule 1-120 and Rule 2.1."

The Concerns Expressed Do Not Warrant the Proposed Departure From the Model Rules.

The text of proposed Rule 5.1(d) has no equivalent to the rules in other jurisdiction so far I am able to determine. Like Rule 5.4, Rule 5.1 has been adopted by virtually every jurisdiction with only slight variations. The concepts in current Rule 5.1 are also consistent with the Restatement Third on the Law Governing lawyers, § 11. Consistency and harmony are important considerations that I believe outweigh the public protections afforded by proposed Rule 5.1(d).

However, as mentioned above, the changes to Rule 5.4(c) [Rule 1-310X] leave a regulatory hole that needs to be addressed. The current version of proposed Rule 5.4(c) limits the prohibition to a non-lawyer who recommends, employs or pays the lawyer to

render legal services for another. Rule 5.1 is designed to impose responsibilities on partners, managers, and supervisory lawyers in a "law firm." The rules should prohibit a lawyer who is not in the same firm and who recommends, employs or pays another lawyer to render legal services for a client from directing or regulating that lawyer's professional judgment in rendering such legal services.

I prefer that Rule 5.4(c) be changed to substitute "person" for "non-lawyer" to eliminate this gap in the rules. I do not have a problem with the heading to ABA Model Rule 5.4, but since others have expressed the concern that the heading does not adequately describe the rule, the heading "Maintaining Professional Independence of the Lawyer" should alleviate the problem.

M E M O R A N D U M

DATE: November 15, 2004
TO: Commission Members
FROM: IJRuvolo
RE: Rule 5.1--Supervision of Lawyers

I have read Mark's comments in his November 15 memorandum. Frankly, I am not sure at this point whether we still agree that we should have a rule that forbids lawyers from dividing fees where one lawyer uses a compensation (read: fee sharing) system or career advancement procedure to effect an interference with the independent judgment of another lawyer. In the hope of clearing up any misunderstanding of what I have proposed, and what I thought Mark favored, I offer the following.

When we were discussing the original form of Rule 1-310X, it was titled "Professional Independence of a Lawyer," and was modeled, at least in part, after ABA Model Rule 5.4. Among other subjects, the rule encompassed the issue of fee sharing with non-lawyers. At that time, I suggested that we draft a rule that allowed fee sharing with non-lawyers if certain safeguards were met. That effort was not fruitful, and I do not intend to address that question here and now.

However, as it related to division of fees by lawyers, I pointed out that proposed subdivision (d)(3) appeared to allow for such a division even where doing so allowed one lawyer to control the independence of another. In this regard, I wrote a memorandum in late April which pointed out: "[D]raft paragraph (e)(3) . . . 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?"

My memorandum then set out several commonplace examples of how lawyers can and do interfere with the professional judgment of lawyers through the very vehicles by which fee divisions are accomplished--partner and associate compensation-setting and partnership advancement procedures. As a result, I recommended that we add a new subdivision (e)(4) which would prohibit fee divisions where: "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.'" *In addition*, I also recommended that we warn 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."

Mark and other members of the commission acknowledged the legitimacy of the problem I raised, and the need to address it in the rules. However, Mark suggested it would be a better fit to consider it as part of Rule 5.1 when we got to that rule. I acquiesced, no modification was made to Rule 1-310X (Rule 5.4) at that time, and we deferred the issue.

We are now considering Rule 5.1, and it seems from Mark's memo that he is re-thinking the need to add language to the rule along the lines that I have proposed. I think it is imperative that we do so, in part because 1-310X now includes the language from 5.4 which only prohibits interference with independent judgment by *non-lawyers*, thereby clearly implying that Rule 5.4 (1-310X(e)(3)) allows for interference if by a lawyer.

Furthermore, 5.1 does not suffice to ban the pernicious practices surrounding lawyer fee divisions that I have illustrated. As I pointed out in my earlier memo: "[T]he 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." But, the rule does not even address the limits of what supervising lawyers may do to interfere with the judgment of subordinates where that interference compels the subordinate to act contrary to the interests of the client. I am not only concerned about seeing that rules

are in place to ensure that subordinate lawyers act ethically, but also that a rule exists ensuring that *supervising lawyers* do so as well, at least to the extent it relates to the manner in which fees are divided.

My earlier memo went on to note: “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.’”

This remains my view. Rule 5.1 does not address the problem I have raised, the existence of which no one denies. Putting a warning in the Discussion by itself is not an adequate solution. Nor is a concern that modifying 5.1 will prevent us from conforming this rule to the ABA analogue. We have done this countless times before where there exists a valid public policy reason to do so. Accordingly, I urge the commission either to add a subdivision to that portion of rule 1-310X which imports 5.1, or amend that portion of the rule which incorporated 5.4, and add the subdivision I have suggested there.

Regrettably, I am not able to attend the November 19 meeting. If there is any doubt remaining as to what we should do, I will be happy to address it at the December 10 meeting.