

Proposed Rule 5.4 [1-310][1-320][1-600] “Duty to Avoid Interference with a Lawyer’s Professional Independence”

(Draft # 14.1, 10/17/09)

Summary: Proposed Rule 5.4, which is based on Model Rule 5.4, gathers together in a single rule, concepts which are intended to promote the independence of a lawyer’s professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules	RPC 1-310, 1-320, 1-600
Statute	Business & Professions Code § 6155.
Case law	<i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 5.4* Duty to Avoid Interference with a Lawyer's Professional Independence

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 5.4 closely follows the black letter rule of Model Rule 5.4, which is intended to protect the independence of a lawyer's professional judgment. However, the Commission recommends revisions and additions to the black letter, as well as addition of commentary, to afford greater client protection by providing (i) broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that would pose a threat to the lawyer's exercise of independent professional judgment, and (ii) better guidance on the exceptions to these prohibitions that are permitted under the Rule. These revisions include: (1) a prohibition on sharing legal fees either "directly or indirectly" with a nonlawyer (see Explanation for paragraph (a)); (2) extending that prohibition to sharing legal fees with an organization not authorized to practice law (id.); (3) extending the prohibition on practicing law with nonlawyers in a "partnership" to practicing law with nonlawyers in any kind of "organization" (see Explanation for paragraph (b)); (4) cautioning that a lawyer must avoid interference not only with the lawyer's independence of judgment but also with the lawyer-client relationship (see Explanation for paragraph (c)); (5) carrying forward explicitly the implied prohibition in current rule 1-320(A)(4) on a lawyer accepting referrals from a lawyer referral service that does not comply with the Board of Governors Minimum Standards on lawyer referral services; and (6) adding an express provision that clarifies the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that permits third parties to interfere with a lawyer's independence of judgment. (see Explanation for paragraph (f)).

* Proposed Rule 5.4, Draft 14.1 (10/17/09).

INTRODUCTION (Continued):

Minority. A minority of the Commission takes the position that proposed Rule 5.4 expands the monopoly granted lawyers contrary to *Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 919. The minority contends that the Rule prevents large organizations such as Target from providing low-cost legal services in the same manner as they provide other professional services.

Public Comment. Following public comment, the Commission revised the Rule extensively to provide better guidance to lawyers not only as to what conduct and relationships are prohibited under the Rule, but also as to the kinds of conduct and relationships that are expressly allowed. See Public Comment Chart, below.

Current California Law and Variations in Other Jurisdictions. Proposed Rule 5.4 gathers together in a single rule concepts which are intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.

Every jurisdiction has adopted some version of Model Rule 5.4. Model Rule 5.4(a)(4) (sharing of court-awarded legal fees with a nonprofit organization), has been rejected or modified in numerous jurisdictions. For example, Connecticut, Illinois, Indiana, Iowa, and New York have rejected the provision. Minnesota and Rhode Island require court approval for such arrangements. Florida adds that such fees can also be shared with a "pro bono legal services organization." The District of Columbia and New Hampshire permit such sharing, whether or not court-awarded. The District of Columbia, perhaps because of the extensive government lobbying engaged in by law firms in that jurisdiction, is unique in broadly permitting a lawyer to practice in a partnership or organization with nonlawyers. See "Selected State Variations," below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 5.4 Professional Independence Of A Lawyer</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:</p>	<p>(a) A lawyer or law firm shall not share legal fees <u>directly or indirectly</u> with a nonlawyer, except <u>person who is not a lawyer or with an organization that is not authorized to practice law. This paragraph does not prohibit:</u></p>	<p>The introductory paragraph to paragraph (a) is based on Model Rule 5.4(a), but has been modified in two important respects. First, the Rule carries forward the prohibition in current California rule 1-320 against sharing fees with a nonlawyer either directly or indirectly. The inclusion of the adverbs “directly or indirectly” was originally included in rule 1-320 to preclude lawyers from avoiding application of this client-protective rule by creatively structuring relationships with nonlawyers who send them clients. Proposed Comments [1A] and [1B] elaborate on the application of that term to lawyer’s payment of nonlawyer employees and contractors. Second, paragraph (a) has been modified to add a prohibition against sharing legal fees with an organization not authorized to practice law. This same prohibition is found in current California rule 1-600, which regulates legal services programs. See also State Bar of California Minimum Standards for Lawyer Referral Services.</p>
<p>(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;</p>	<p>(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may to provide for the payment of money, <u>or other consideration at once or</u> over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;</p>	<p>Subparagraph (a)(1) is based on Model Rule 5.4(a)(1), but with a change to clarify that the payment permitted under the provision need not be made over a period of time but can be made at once, and that consideration other than money may be paid.</p>

* Proposed Rule 5.4, Draft 14.1 (10/17/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;</p>	<p>(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; any payment authorized by Rule 1.17;</p>	<p>Model Rule 5.4(a)(2) has been simplified by including a reference to proposed Rule 1.17.</p>
<p>(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and</p>	<p>(3) a lawyer or law firm may include 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; and, provided the plan does not otherwise violate these Rules or the State Bar Act; or</p>	<p>The word "including" has been substituted for "may include" to conform to the Commission's recommended syntax for the introductory clause to this Rule ("does not prohibit").</p> <p>The proviso clause has been carried forward from current California rule 1-320(A)(3).</p>
<p>(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.</p>	<p>(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.</p>	<p>The Commission recommends that Model Rule 5.4(a)(4) not be adopted because of the demonstrated potential for abuse by lawyers who form issue-specific nonprofit organizations primarily to generate legal fees. However, see proposed Comment [5], which permits 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."</p>
	<p>(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.</p>	<p>Paragraph (a)(4) carries forward current California rule 1-320(A)(4). It is intended to provide an exception for lawyer's paying certain fees to lawyer referral services that are in compliance with the cited minimum standards.</p>

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.</p>	<p>(b) A lawyer shall not form a partnership <u>or other organization</u> with a nonlawyer <u>person who is not a lawyer</u> if any of the activities of the partnership <u>or other organization</u> consist of the practice of law.</p>	<p>Paragraph (b) is based on Model Rule 5.4(b). The phrase "or other organization" has been added so a lawyer cannot avoid application of the Rule by entering a non-partnership arrangement with a nonlawyer.</p>
<p>(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.</p>	<p>(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 <u>provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship,</u> in rendering such legal services.</p>	<p>Paragraph (c) is based on Model Rule 5.4(c). The Model Rule provision has been revised to clarify that it is generally interference with a lawyer's decisions concerning the legal services that are being provided that interfere with the lawyer's professional judgment. In addition, to enhance client protection, a prohibition on permitting interference with the lawyer-client relationship has been added.</p>
<p>(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:</p>	<p>(d) A lawyer shall not practice with or in the form of a professional corporation or association <u>organization</u> authorized to practice law for a profit; if:</p>	<p>The introductory clause to paragraph (d) is based on Model Rule 5.4(d). The term "organization" has been substituted for "association" because the former term is broader in scope.</p>
<p>(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;</p>	<p>(1) a nonlawyer <u>person who is not a lawyer</u> 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;</p>	<p>Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer".</p>

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or</p>	<p>(2) a nonlawyerperson who is not a lawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of associationorganization other than a corporation; or</p>	<p>Subparagraph (d)(2) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer" and "organization" for "association." See Explanation of Changes for paragraph (d).</p> <p>The word "a" has been substituted for "the" because it refers back to the non-specific "director or officer."</p>
<p>(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.</p>	<p>(3) a nonlawyerperson who is not a lawyer has the right or authority to direct, influence or control the professional judgment of a lawyer.</p>	<p>Subparagraph (d)(1) is identical to Model Rule 5.4(d)(1), except that "person who is not a lawyer" has been substituted for "nonlawyer".</p> <p>The word "influence" has been added to reach those situations where a nonlawyer might, by indirect means, seek to "influence" a lawyer's exercise of professional judgment.</p>
	<p>(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.</p>	<p>Paragraph (e) has no counterpart in the Model Rule. It carries forward the implied prohibition current found in California rule 1-320(A)(4).</p>
	<p>(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.</p>	<p>Paragraph (f) has no counterpart in the Model Rule. It has been added to address the concerns raised by the California Supreme Court in <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].</p>

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>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.</p>	

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.</p>	<p>[1] <u>A lawyer is required to maintain independence of professional judgment in rendering legal services.</u> The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of <u>professional</u> judgment. Where someone other than <u>by restricting</u> the client pays the lawyer's fee or salary, or recommends employment <u>sharing</u> of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere <u>fees</u> with <u>a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling</u> the lawyer's professional judgment <u>when rendering legal services to another.</u></p>	<p>Comment [1] is based on Model Rule 5.4, cmt. [1]. It has been modified to focus on the policy that underlies the Rule – protecting the lawyer's independence of professional judgment.</p>
<p>[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).</p>	<p>[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).</p>	<p>The Commission recommends that Model Rule 5.4, cmt. [2], not be adopted. The Model Rule simply restates language from the black letter rule that is self-explanatory. The cross-reference to Rule 1.8(f) in the second sentence appears in Comment [4] as a reference to proposed Rule 1.8.6, the counterpart of Model Rule 1.8(f), together with references to other proposed Rules concerned with protection a lawyer's exercise of judgment. See also Explanation of Changes for Comment [4], below.</p>

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	<p>[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.</p>	<p>Comment [2] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate nonlawyer <i>employee</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.</p>
	<p>[3] Paragraph (a) also does not prohibit the payment to a third party who is not a lawyer 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.</p>	<p>Comment [3] has no counterpart in the Model Rule. It was added following public comment to address concerns that the phrase "directly or indirectly" was too broad and might sweep within it legitimate <i>nonlawyer consultant and contractor</i> compensation methods and plans that do not pose a threat a lawyer's independence of judgment.</p>

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	<p>[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.)</p>	<p>Similar to Model Rule 5.4, cmt. [2], proposed Comment [4] provides a cross-reference to Rule 1.8.6, as well as other Rules that operate to safeguard a lawyer's independence of professional judgment.</p>
	<p>[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.</p>	<p>Comment [5] has no counterpart in the Model Rule. It has been added to provide important guidance to lawyers in dealing with a situation involving firm ownership that often arises in estate planning.</p>
	<p>[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.</p>	<p>Comment [6] has no counterpart in the Model Rule. It has been added to provide a cross-reference to the Rule that governs fee divisions among lawyers.</p>
	<p>[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.</p>	<p>Comment [7] has no counterpart in the Model Rule. It has been added to clarify that a lawyer is not only permitted to participate in a lawyer referral service that complies with California law, but is also encouraged to do so, as such services contribute to increase access to justice.</p>

<p align="center"><u>ABA Model Rule</u> Rule 5.4 Professional Independence Of A Lawyer Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[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 <i>Frye v. Tenderloin Housing Clinic, Inc.</i> (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].) (See also Rule [6.3].)</p>	<p>Comment [8] has no counterpart in the Model Rule. Comment [8] and [9] have been added to clarify the holding in the Supreme Court's decision in <i>Frye</i>.</p>
	<p>[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.</p>	<p>See Explanation of Changes for Comment [9].</p>
	<p>[10] This Rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See <i>Gafcon, Inc. v. Ponsor Associates</i> (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)</p>	<p>Comment [10] has no counterpart in the Model Rule. It has been carried over from the Discussion to current California rule 1-600. It is an important clarification that the Rule does not override common arrangements between lawyers and insurers in providing legal services to insureds.</p>

Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~is~~does not ~~intended to~~ 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~~lawyer's death, to the ~~lawyer's~~lawyer's estate or to one or more specified persons ~~pursuant to an agreement between a lawyer and either the lawyer's law firm or another lawyer in the firm;~~
 - (2) any payment authorized by ~~Rules [1.17.1 or 1.17.2]~~ [Rule 2-300].1.17;
 - (3) a lawyer or law firm including ~~non-lawyer~~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 ~~California 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~~California's minimum standards for a lawyer referral service in California.
- (b) A lawyer shall not form a partnership or other organization with a ~~person who is not a lawyer~~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, regulate or regulate the lawyer's provision of legal services, or otherwise to~~ interfere with the ~~lawyer's~~lawyer's independence of professional judgment, or with the ~~client-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 ~~or authority~~ to ~~direct, influence~~ or control the professional judgment of a lawyer.
- (e) A lawyer shall ~~comply~~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 ~~professional~~ 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 ~~non-lawyer~~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.

[24] Other rules also protect the lawyer's ~~professional~~ independence of professional judgment. (See, e.g., Rule ~~4.5(e)~~ [Rule 2-200]1.5.1, Rule ~~4.8(f)~~ [Rule 3-310(F)]1.8.6, and Rule 5.1.)

[35] 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 ~~non-lawyer~~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.

[47] 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.

[58] ~~This Rule is intended to apply to group, prepaid, Paragraphs (a) and voluntary legal service programs, activities and organizations and to~~

~~non-profit legal aid, mutual benefit and advocacy groups but nothing in this Rule shall be deemed to authorize the practice of law by any program, organization or group. This Rule is (b) do not intended to~~ 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.

[610] 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 1-320 Financial Arrangements With Non-Lawyers~~
Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence

(Comparison of the Current Proposed Rule to Current California Rule)

~~(a)(A) Neither member nor a~~ A lawyer or law firm shall ~~directly or indirectly~~ not share legal fees directly or indirectly with a person who is not a lawyer, ~~except~~ or with an organization that is not authorized to practice law. This paragraph does not prohibit:

~~(1)(1) An~~ an agreement ~~between by a member and a law~~ lawyer with the lawyer's firm, partner, or associate may to provide for the payment of money ~~after the member's death to the member's estate or to one~~ other consideration at once or ~~more specified persons~~ 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;

~~(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~

~~(3)(3) A~~ member a lawyer or law firm ~~may~~ include non-member including nonlawyer employees in a compensation, ~~profit sharing,~~ or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~ provided the plan does not ~~circumvent~~ otherwise violate

~~these rules~~ Rules or ~~Business and Professions Code section 6000 et seq.~~ the State Bar Act; or

~~(4)(4) A member may pay~~ 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~~ minimum standards for a ~~Lawyer Referral Service~~ lawyer referral service in California.

~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

~~(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the~~

~~member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

Discussion:-

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment. (Amended by order of Supreme Court, operative September 14, 1992.)~~

Rule 1-310—Forming a Partnership With a Non-Lawyer

(b) A ~~member~~lawyer shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization consist of the practice of law.

Discussion:-

~~Rule 1-310 is not intended to govern members' activities which cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer~~

Rule 1-600 Legal Service Programs

(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) A ~~member~~lawyer shall not ~~participate in a nongovernmental program, activity, practice with or organization furnishing, recommending, or paying for~~in the form of a non-profit legal services aid, which mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the ~~member's~~lawyer's independence of professional judgment, or with the ~~client~~lawyer-client relationship, or allows ~~unlicensed persons or aids any person, organization or group that is not a lawyer or not otherwise authorized to practice law, or allows any third person or organization to receive~~

~~directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules~~practice law unlawfully.

~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~

COMMENT*Discussion:-*

- [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] ~~The~~A lawyer's participation ~~of a member~~ 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 rules~~ this Rule. See also Business and Professions Code section 6155.

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[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].)

Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 1-310 forbids lawyers to form partnerships with non lawyers if “any of the activities of that partnership consist of the practice of law.” Rule 1-320 forbids sharing legal fees with non lawyers with exceptions, including those described in Rules 5.4(1) and (3).

Colorado: Colorado restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Colorado Rule 5.4(d) provides that a lawyer shall not practice with or in the form of a professional corporation, association, or limited liability company, authorized to practice law for a profit, “except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court.”

Connecticut: Connecticut omits ABA Model Rule 5.4(a)(4) (relating to fee sharing with nonprofit organizations).

District of Columbia: D.C. Rules 5.4(a)(4) and (b), which are unique in the United States, permit fee sharing between lawyers and nonlawyers “in a partnership or other

form of organization which meets the requirements of paragraph (b).” Paragraph (b) provides:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

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

Florida: In place of ABA Model Rule 5.4(a)(2), Florida retains the language from the 1983 Model Rule providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.”

Florida Rule 4-8.6 describes the business entities through which lawyers may practice law and forbids practice other than through “officers, directors, partners, agents, or employees who are qualified to render legal services in this state.” Further, only persons who are so qualified may serve as “a partner, manager, director, or executive officer” of such an entity. Florida has substantially adopted Rule 5.4(a)(4).

Georgia adopts the pre-2002 version of ABA Model Rule 5.4 verbatim, but also restores language from the 1983 Model Rule permitting a lawyer who completes the unfinished business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.”

Illinois: Rule 5.4(a)(2) permits a lawyer who undertakes to “complete unfinished legal business of a deceased lawyer” to pay the deceased lawyers estate “that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer,” or to make payments in accordance with Rule 1.17, which governs the

sale of a law practice by a deceased or disabled lawyer (but Illinois makes no reference to a “disappeared” lawyer). Illinois omits ABA Model Rule 5.4(a)(4). Illinois Rule 5.4(d)(2) permits a nonlawyer to serve as secretary for a professional corporation or for-profit association authorized to practice law “if such secretary performs only ministerial duties.”

Indiana deletes ABA Model Rule 5.4(a)(4).

Iowa deletes ABA Model Rule 5.4(a)(4).

Kansas: Kansas replaces ABA Model Rule 5.4(a)(2) with language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Kansas makes no reference to the purchase of a law practice or to Rule 1.17, which Kansas has not adopted.

Maryland restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased, retired, disabled, or suspended lawyer may pay to that lawyer or that lawyer’s estate the proportion of the total compensation which fairly represents the services rendered by the former lawyer.”

Massachusetts: Rule 5.4(a) allows a lawyer or law firm to share “a statutory or tribunal-approved” legal fee with “a qualified legal assistance organization that referred the matter to the lawyer or law firm” if the organization is not for profit and tax-exempt, the fee is made in connection with a proceeding to advance the organization’s purposes, and the client consents. The Comment to this rule explains that the “financial needs of these organizations, which serve important public ends, justify a limited exception to the

prohibition against fee-sharing with nonlawyers.” The Comment also explains that the exception does not extend to fees generated in connection with proceedings unrelated to the organization’s tax-exempt purpose, “such as generating business income for the organization.” Massachusetts Rule 5.4(b) prohibits a lawyer from forming a partnership “or other business entity” with a nonlawyer if any of the activities of the “entity” consist of the practice of law. “

Minnesota: Rule 5.4(a)(4) permits a lawyer to share court-awarded fees with a nonprofit organization only “subject to full disclosure and court approval,” and Rule 5.4(a)(5) restores language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer the proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

Missouri: Missouri restores language from the 1983 version of ABA Model Rule 5.4(a) permitting a lawyer who completes unfinished legal business of a deceased lawyer to pay the deceased lawyer’s estate “that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

New Hampshire: Rule 5.4(a)(4) permits a lawyer to “share legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter,” whether or not the fees are “court-awarded.”

New York: DR 1-107 permits lawyers and law firms to have a contractual relationship with certain categories of nonlawyers “for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal

professional services.” DR 1-107(D) provides that notwithstanding the rule prohibiting lawyers from sharing legal fees with non lawyers (DR 3-102), “a lawyer or law firm may allocate costs and expenses with a non-legal professional... pursuant to a contractual relationship permitted by DR 1-107(A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.”

North Carolina omits ABA Model Rule 5.4(d)(2) and adds Rule 5.4(a)(3), which permits a lawyer who undertakes to complete unfinished legal business of a deceased lawyer “or a disbarred lawyer” may pay to the estate of the deceased lawyer “or to the disbarred lawyer” that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer “or the disbarred lawyer.”

Ohio: Rule 5.4 permits a lawyer to “share legal fees with a non-profit organization that recommended employment of the lawyer in the matter,” whether or not the fees are court-awarded, provided that the nonprofit organization complies with Ohio’s Supreme Court Rules governing lawyer referral and information services.

Oklahoma: Rule 5.4(2A) adds language from the 1983 version of ABA Model Rule 5.4 providing that “a lawyer who undertakes to complete unfinished legal business of a deceased, lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.” Oklahoma Rule 5.4(d) says, in brackets: “The concept of this subsection of the ABA Model Rule is addressed in the Comment.” Oklahoma’s Comment says that Rule 5.4(a) “does not prohibit a lawyer from voluntarily sharing court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the

lawyer in the matter. This shall not be deemed a sharing of attorneys fees.” (Emphasis added.)

Oregon adds a new Rule 5.4(e) providing that a lawyer “shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.”

Pennsylvania adds Rule 5.4(d)(4), which provides that “in the case of any form of association other than a professional corporation, the organic law governing the internal affairs of the association provides the equity owners of the association with greater liability protection than is available to the shareholders of a professional corporation.” Rule 5.4(d) concludes by stating that subparagraphs (d)(1)-(3) “shall not apply to a lawyer employed in the legal department of a corporation or other organization.”

Rhode Island: After some uncertainty over whether Rhode Island would subscribe to the position in Rule 5.4(a)(4), as described in Selected State Variations for our 2008 edition, Rhode Island has adopted the following version of ABA Model Rule 5.4(a)(4):

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if:

(i) the organization is one that is not for profit;

(ii) the organization is tax-exempt under federal law;

(iii) the fee award or settlement is made in connection with a proceeding to advance one or

more of the purposes by virtue of which the organization is tax-exempt; and

(iv) the tribunal approves the fee-sharing arrangement.

Texas: Under Texas Rule 5.04(a)(1), either a lawyer’s agreement or a lawful court order may provide for the payment of money over time to the lawyer’s estate “to or for the benefit of the lawyer’s heirs or personal representatives, beneficiaries, or former spouse, after the lawyer’s death or as otherwise provided by law or court order.”

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

TOTAL = 5 **Agree = 1**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M			<p>5.4(a): unclear what sharing fees “indirectly” is. Commission can address this at end of Comment [1] by specifying that the rule is not intended to prohibit lawyers or firms from paying to employees who are not lawyers salaries, hourly wages, etc. even though such compensation is paid out of revenues generated by collecting fees for legal services.</p> <p>Add a comment to clarify that the prohibitions contained in current 1-320(B) and (C) are addressed in other proposed rules.</p>	<p>Commission revised language in Comment [1] and split the Comment into three comments, with Comment [2] addressing the limits on compensation paid to a nonlawyer employee, and Comment [3] addressing the limits on compensation to a nonlawyer contractor or consultant.</p> <p>Commission did not make the requested revision, in part, because this is a matter that will be addressed in the “legislative history” for the proposed Rules.</p>
2	Los Angeles County Bar Association (Toby J. Rothschild)	M			<p>Add a Comment [7] that states that the Rule is not intended to abrogate existing law pertaining to the ownership or allocation between attorney and client, or between the attorney and the attorney's employer, of attorney fee awards derived through litigation.</p> <p>Exception in (a)(1) needs clarification as to whether it is intended to prohibit the payment of a rule 1.5.1 referral fee to the estate of a deceased lawyer pursuant to an otherwise valid referral fee arrangement.</p>	<p>Commission did not make the requested revision, in part, because resolution of the ownership of a fee award often depends upon an applicable statute or a specific court order that is involved. However, see Comment [8] for discussion of one narrow fee award issue that is governed by recent California Supreme Court precedent.</p> <p>Added Comment [6] to clarify that “[t]he 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.”</p>

¹ 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.
[Sorted by Commenter]**

TOTAL = 5 **Agree = 1**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>In subsection (a), use term "share or divide" instead of just "share."</p> <p>Amend (c) to read: "A lawyer shall not permit a person or organization who recommends the lawyer to another, or employs or pays the lawyer to render legal services for another to influence the lawyer's actions on behalf of the client, or to interfere with the client-lawyer relationship or with the lawyer's exercise of independent professional judgment in rendering such legal services." (The terms "direct" and "regulate" are confusing and should be removed)</p>	<p>Commission did not make the requested revision, in part, because "share" is the term used in the Model Rule counterpart.</p> <p>Commission did not make the requested revision, in part, because "direct or regulate" is the phrase used in the Model Rule counterpart.</p>
3	Orange County Bar Association	M			<p>Unclear whether exception in (a)(1) is intended to prohibit the payment of a rule 1.5.1 referral fee to the estate of a deceased lawyer pursuant to an otherwise valid referral fee agreement.</p> <p>Commission should consider whether there should be an exception in the rule to allow payment of a referral fee to the estate of a deceased lawyer who would have been entitled to receive that fee.</p>	<p>The Commission added Comment [6] to clarify that "[t]he 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."</p> <p>Commission did not make the requested revision, in part, because the scenario described may depend on a specific factual context.</p>
4	San Diego County Bar Association (Heather L. Rosing)	A			Adopt rule in interest of uniformity	No response necessary.

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

TOTAL = 5 **Agree = 1**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Santa Clara County Bar Association (Christine Burdick)	M			<p>Comment [4] should state that the rule may apply to internet based "lawyer referral" services to which a lawyer may be paying a fee for referrals.</p> <p>Delete subsection (e) because lawyer referral services are subject to the Rules and Regulations, not all lawyers.</p>	<p>Commission did not make the requested revision, in part, because the concept of internet lawyer referral services is not susceptible to thorough discussion in a comment.</p> <p>Commission did not make the requested revision, in part, because Bus. & Prof. Code section 6155(a) explicitly states a prohibition on all lawyers with regard to acceptance of referrals from a lawyer referral service that is not operated in conformance with State Bar rules.</p>