

## McCurdy, Lauren

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**Subject:** FW: [Fwd: RRC - 1-310X [5.4] - III.SS - October 16-17, 2009 Meeting Materials - Draft 1 (9/23/09)]

**Attachments:** RRC - 1-310X [5-4] - Compare - Rule & Comment Explanation - DFT1 (09-23-09)KEM.doc; RRC - 1-310X [5-4] - Compare - Introduction - DFT1 (09-24-09)KEM.doc; RRC - 1-310X [5-4] - Dashboard - ADOPT - DFT1 (09-23-09)KEM.doc; RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - DFT2.1 (09-24-09)RD-KEM.doc; RRC - 1-310X [5-4] - Dash, Intro, Rule, Comment, Pub Com - COMBO - DFT1 (09-23-09)KEM-Marked.pdf; RRC - 1-310X [5-4] - Rule - DFT14 (09-24-09) - Cf. to TDB [13.2].pdf

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

**Subject:**RRC - 1-310X [5.4] - III.SS - October 16-17, 2009 Meeting Materials - Draft 1 (9/23/09)

**Date:**Fri, 25 Sep 2009 08:46:42 -0700

**From:**Kevin Mohr <[kemohr@charter.net](mailto:kemohr@charter.net)>

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Greetings:

I've attached the following:

1. A single scaled PDF that includes the following documents:
  - a. Dashboard, Draft 1 (9/23/09);
  - b. Introduction, Draft 1 (9/24/09)KEM;
  - c. Rule & Comment Comparison Chart, Draft 1 (9/23/09)KEM;
  - d. Public Comment Chart, Draft 2.1 (9/24/09)RD-KEM.
2. Word versions of each document in item #1.
3. A PDF showing the changes I've recommended to Draft 13.1, the draft that is the basis for the Rule & Comment comparison chart. My recommendations are primarily to align the Rule's language more closely to that of the Model Rule and to reduce verbiage.

**KEM Notes:** I've added highlights to the attached COMBO PDF with Adobe's highlight tool to focus you on the changes to the rule I've proposed [that's why the file is named "Marked" at the end; it does not mean that Mark Tuft has had his way with the file. :-)]. Here are the issues:

1. Dashboard. We'll enter the vote after the October meeting. However, there are two issues:
  - a. Do you agree that there is no dissent? I know Nace has consistently voted against the rule as a whole, so we should give him an opportunity to submit a dissent to be included in the Introduction.
  - b. Aside from Nace's dissent, I think the Rule is not controversial, especially given our revisions following public comment. However, to hedge our bets, we might want to mark it as "moderately controversial" in the event that our addition of Comments [1A] and [1B] do not assuage the commenters who raised concerns over "directly or indirectly."
2. Introduction. Please review to see if you agree with how I have characterized the Rule. I've added the paragraph on public comment because, of all the rules we've circulated for public comment, we made the most changes to the rule following public comment. I don't think it hurts to let the Board and Supreme Court know that we are responsive.
3. Rule & Comment Comparison Charts. I've highlighted those parts where I have questions. In particular, I think we should substitute "nonlawyer" for "a person who is not a lawyer." There is no compelling reason to change the MR language. Aside from that, I have specific suggestions at the following footnotes & related text:
  - a. Notes 2 and 3. Is there any reason why we are not using the Model Rule construction in (a)(1). I don't see that it really improves the readability of the subparagraph. I think that originally, the construction did improve readability but we put subparagraph (a) through so many revisions that we eventually ended up with the substance of the Model Rule. As our substance is now the same, we should use the MR syntax.
  - b. Note 5. Please reconsider our deletion of MR 5.4(a)(4). I know Stan was particularly concerned w/ this but in light of our recommended adoption of Comment [5], should we continue to leave (a)(4) deleted?
  - c. Note 10. I don't see the need to add "authority" here. See my explanation in the footnote. Do you agree w/ its deletion.
  - d. Note 11. Similarly, I don't see the need to add "influence" here. It's belt & suspenders, but I question whether you need a "right" or "authority" to influence someone. Do you agree w/ its deletion?
  - e. Notes 12 & 14. I think this was simply an oversight and we used the wrong term in these two places.
  - f. Note 13. We use the term "nonlawyer third party" later in the Comment, so I recommend the substitution here as well. It will also make Comment [1B] parallel to [1A] (where we use "nonlawyer employee" throughout).
4. Public Comment Chart. The only change I've made to Randy's fine public comment chart is the

first row of the first page. See highlighted material.

5. Proposed Draft 14. As to the proposed Draft 14, I've included it so you can quickly see the revisions I've suggested.

6. All the Word documents are clean versions.

**DEADLINE**. The agenda submission due date is next **Wednesday, September 30, 2009**. I realize you're all under the gun with your own rules (e.g., that little item Raul is preparing, 4.2). Nevertheless, I've tried to identify the issues so you can review the attached in relatively quick fashion. If I don't hear from you by **Tuesday, September 29, 2009 at noon**, I'll assume you're OK my proposed changes and will implement them. You'll still have an opportunity to object during the e-mail comment period but I have several items to prepare for the agenda and I want to submit them in a timely fashion so I can start working on items for the November agenda. Keep them doggies rollin'

Please let me know if you have any questions. Thanks,

Kevin

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Kevin

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

(Draft # 13.1, 1/8/09)

**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.

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<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	

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

Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

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## Stakeholders and Level of Controversy

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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

September 2009

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 5.4 closely follows the black letter 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 relationships 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 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)).

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\* Proposed Rule 5.4, Draft 13.2 (1/8/09).

*INTRODUCTION (Continued):*

*Public Comment.* Following public comment, the Commission revised the Rule extensively to provide better guidance to lawyers not only on 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> 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>(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 <del>nonlawyer,</del><sup>1</sup> <u>except 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</p>	<p>(1) <del>an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for</del><sup>2</sup> <u>the payment of money; or other consideration at once or</u> over a reasonable</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>

<sup>\*</sup> Proposed Rule 5.4, Draft 13.2 (1/8/09). Redline/strikeout showing changes to the ABA Model Rule

<sup>1</sup> **Consultant's Note:** I recommend we restore the MR's “nonlawyer” in place of “person who is not a lawyer”?

<sup>2</sup> **Consultant's Note:** To simplify the Explanation, I recommend we return to the MR's syntax. We say the same thing but I'm not sure that it is any clearer that the MR formulation. If you agree, I would also delet the second paragraph of the Explanation.

<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>lawyer's estate or to one or more specified persons;</p>	<p>period of time after <del>the a</del> lawyer's death, to the lawyer's estate or to one or more specified persons; <a href="#">pursuant to an agreement between the lawyer and either the lawyer's law firm or another lawyer in the firm.</a></p>	<p>The revision of the opening clause to Model Rule 5.4(a)(1) placement at the end of the subparagraph has been made to increase the <b>readability of the provision.</b><sup>3</sup></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><del>(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;</del> <a href="#">any payment authorized by Rule 1.17.</a><sup>4</sup></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 <del>may include</del> <a href="#">including</a> nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; <del>and,</del> <a href="#">provided the plan does not violate these Rules or the California State Bar Act.</a></p>	<p>The word "including" has been substituted for "may include" to conform to the Commission's recommend 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>

<sup>3</sup> **Consultant's Note:** If you agree w/ my recommendation in footnote 2, then this paragraph will be deleted.

<sup>4</sup> **Consultant's Note:** Now that the Commission has voted to have a single rule concerned w/ the sale of a law practice or part of a law practice, I've deleted the reference to "[Rules 1.17.1 and 1.17.2] [2-300]" that appeared in the previous draft of this 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>(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><del>(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.</del></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."<sup>5</sup></p>
	<p><u>(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.</u></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>(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 <u>nonlawyer person who is not a lawyer</u><sup>6</sup> 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>

<sup>5</sup> **Consultant's Note:** Is the Commission's deletion of Model Rule 5.4(a)(4) warranted in light of Comment [5], below? If we provide an exception, shouldn't it be in the rule itself?

<sup>6</sup> **Consultant's Note:** Same recommendation as in footnote 1.

<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>(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 <a href="#">provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship</a>, 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 <del>association</del> <a href="#">organization</a> 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 <del>nonlawyer</del> <a href="#">person who is not a lawyer</a><sup>7</sup> 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>

<sup>7</sup> **Consultant's Note:** Same recommendation as footnote 1. If you agree, then the "except" clause in the Explanation will be deleted.

<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) <b>a nonlawyer person who is not a lawyer<sup>8</sup></b> is a corporate director or officer thereof or occupies <del>the</del> position of similar responsibility in any form of <del>association</del> <u>organization</u> 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) <b>a nonlawyer person who is not a lawyer<sup>9</sup></b> has the right <del>or</del> <u>authority<sup>10</sup></u> to direct, <u>influence<sup>11</sup></u> 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><u>(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</u></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>

<sup>8</sup> **Consultant's Note:** Same recommendation as footnote 1. If you agree, then the first part of the "except" clause in the Explanation will be deleted.

<sup>9</sup> **Consultant's Note:** Same recommendation as footnote 1. If you agree, then the "except" clause in the Explanation will be deleted.

<sup>10</sup> **Consultant's Note:** Is it necessary to add "or authority" here? If a person is authorized "to direct, influence or control" under the organization's bylaws, doesn't that person necessarily have the right to do so? I would delete it.

<sup>11</sup> **Consultant's Note:** Should we have "influence" here? I don't think you need a "right or authority" to "influence" someone. I would remove the word. Direct or control cover the territory adequately.

<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><a href="#">Services as adopted by the Board of Governors of the State Bar.</a></p>	
	<p>(f) <a href="#">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.</a></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 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] A lawyer is required to maintain professional independence of judgment<sup>12</sup> in rendering legal services. The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of professional judgment. Where someone other than by restricting the client pays the lawyer's fee or salary, or recommends employment sharing 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 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.</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><del>[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).</del></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 [3] 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.</p>

<sup>12</sup> **Consultant's Note:** Shouldn't the term be "lawyer's independence of professional judgment"? I recommend making that change to conform to earlier usages in this Rule.

<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>[1A] <a href="#">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 non-lawyer 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 non-lawyer 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.</a></p>	<p>Comment [1A] 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>[1B] <a href="#">Paragraph (a) also does not prohibit the payment to a third party who is not a lawyer<sup>13</sup> 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 non-lawyer 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 non-lawyer 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.</a></p>	<p>Comment [1A] 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>

<sup>13</sup> **Consultant's Note:** See footnote 1. I recommend substituting "nonlawyer third party" for "third party who is not a lawyer."

<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>[2] <a href="#">Other rules also protect the lawyer's professional independence of judgment.</a><sup>14</sup> (See, e.g., <a href="#">Rule 1.5.1</a>, <a href="#">Rule 1.8.6</a>, and <a href="#">Rule 5.1</a>.)</p>	<p>Similar to Model Rule 5.4, cmt. [2], proposed Comment [2] 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>[3] <a href="#">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 trustee to direct or control the activities of the professional law corporation.</a></p>	<p>Comment [3] 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>[3A]<a href="#">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.</a></p>	<p>Comment [3A] 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>[4] <a href="#">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.</a></p>	<p>Comment [4] 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>

<sup>14</sup> **Consultant's Note:** Shouldn't the term be "lawyer's independence of professional judgment"? I recommend making that change to conform to earlier usages in this Rule.

<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>[5] <a href="#">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].)</a></p>	<p>Comment [5] has no counterpart in the Model Rule. Comment [5] and [5A] have been added to clarify the holding in the Supreme Court's decision in <i>Frye</i>.</p>
	<p>[5A] <a href="#">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.</a></p>	<p>See Explanation of Changes for Comment [5].</p>
	<p>[6] <a href="#">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].)</a></p>	<p>Comment [6] 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.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M			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.  Add a comment to clarify that the prohibitions contained in current 1-320(B) and (C) are addressed in other proposed rules.	Commission revised language in Comment [1] and split the Comment into three comments, with Comment [1A] addressing the limits on compensation paid to a nonlawyer employee, and Comment [1B] addressing the limits on compensation to a nonlawyer contractor or consultant.  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.
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			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.	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 [5] for discussion of one narrow fee award issue that is governed by recent California Supreme Court precedent.
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			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	Added Comment [3A] 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

<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.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					valid referral fee arrangement.	Rule."
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			In subsection (a), use term "share or divide" instead of just "share."	Commission did not make the requested revision, in part, because "share" is the term used in the Model Rule counterpart.
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			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)	Commission did not make the requested revision, in part, because "direct or regulate" is the phrase used in the Model Rule counterpart.
2	Orange County Bar Association	M			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.  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.	Added Comment [3A] 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."  Commission did not make the requested revision, in part, because the scenario described may depend on a specific factual context.

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

**TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	San Diego County Bar Association (Heather L. Rosing)	A			Adopt rule in interest of uniformity	No response necessary.
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. &amp; 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>



## 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.”

**RRC – Rule 5.4 [1-310X]  
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**August 27, 2009 McCurdy E-mail to Tuft, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

**ASSIGNMENTS FOR SEPTEMBER MEETING**

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

1. **III.A. Rule 1.0 Purpose and Scope of the Rules [1-100]** (Post Public Comment Rule Draft #7 dated 6/18/07)

**Codrafters:** Julien, Lamport, Melchior, Ruvolo

**Assignment:** (1) a chart comparing proposed Rule 1.0 to relevant parts of the MR Preamble and Scope; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.M. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers [N/A]** (June 2009 Comparison Chart - Post Public Comment Rule Draft #9 dated 6/1/09)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.1 to MR 5.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.N. Rule 5.2 Responsibilities of a Subordinate Lawyer [N/A]**  
(Post Public Comment Rule Draft #5.2 dated 6/16/07)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.2 to MR 5.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.O. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants [N/A]** (Post Public Comment Rule Draft #9.1 dated 6/16/07)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.3 to MR 5.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

**Assignments Due: Wed., 9/30/09**

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

**Assignments Due: Wed., 11/28/09**

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100]** (Post Public Comment Draft #17.4 dated 1/5/09)

**Codrafters:** MARTINEZ (Co-lead), Voogd

**Assignment:** (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a]** (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e))

**Codrafters:** MARTINEZ (co-lead), Voogd

**Assignment:** (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.SS. Rule 5.4 Professional Independence [1-310][1-320][1-600]** (Post Public Comment Draft #13.2 dated 1/8/09 to be revised following the January 2009 meeting)

**Codrafters:** Martinez, Peck

**Assignment:** (1) a chart comparing proposed Rule 5.4 to MR 5.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

**Codrafters:** MARTINEZ, Voogd

**Assignment:** (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

5. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

**Codrafters:** MARTINEZ (co-lead), Voogd

**Assignment:** (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

6. **IV.R. Rule 3-410 Insurance Disclosure** [adopted by the Sup. Ct. operative 1/1/10)

**Codrafters:** Foy, Julien, Kehr, Martinez

**Assignment:** (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

**September 18, 2009 McCurdy E-mail to Drafters (KEM, Tuft, Martinez & Peck), cc RRC:**

Kevin & Codrafters (Mark, Raul & Ellen):

This message provides the assignment background materials for Rule 5.4 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

***Attachments:***

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

**September 19, 2009 KEM E-mail to Drafters, cc RRC:**

I've attached a revised Introduction template for Rule 5.4 (all I did was add the rule title and draft number & date in the footnote on the first page).

**September 25, 2009 KEM E-mail to Drafters, cc Chair & Staff:**

I've attached the following:

1. A single scaled PDF that includes the following documents:
  - a. Dashboard, Draft 1 (9/23/09);
  - b. Introduction, Draft 1 (9/24/09)KEM;
  - c. Rule & Comment Comparison Chart, Draft 1 (9/23/09)KEM;
  - d. Public Comment Chart, Draft 2.1 (9/24/09)RD-KEM.
2. Word versions of each document in item #1.
3. A PDF showing the changes I've recommended to Draft 13.1, the draft that is the basis for the Rule & Comment comparison chart. My recommendations are primarily to align the Rule's language more closely to that of the Model Rule and to reduce verbiage.

**KEM Notes:** I've added highlights to the attached COMBO PDF with Adobe's highlight tool to focus you on the changes to the rule I've proposed [that's why the file is named "Marked" at the end; it does not mean that Mark Tuft has had his way with the file. :-)]. Here are the issues:

1. Dashboard. We'll enter the vote after the October meeting. However, there are two issues:
  - a. Do you agree that there is no dissent? I know Nace has consistently voted against the rule as a whole, so we should give him an opportunity to submit a dissent to be included in the Introduction.
  - b. Aside from Nace's dissent, I think the Rule is not controversial, especially given our revisions following public comment. However, to hedge our bets, we might want to mark it as "moderately controversial" in the event that our addition of Comments [1A] and [1B] do not assuage the commenters who raised concerns over "directly or indirectly."
2. Introduction. Please review to see if you agree with how I have characterized the Rule. I've added the paragraph on public comment because, of all the rules we've circulated for public comment, we made the most changes to the rule following public comment. I don't think it hurts to let the Board and Supreme Court know that we are responsive.
3. Rule & Comment Comparison Charts. I've highlighted those parts where I have questions. In particular, I think we should substitute "nonlawyer" for "a person who is not a lawyer." There is no compelling reason to change the MR language. Aside from that, I have specific suggestions at the following footnotes & related text:
  - a. Notes 2 and 3. Is there any reason why we are not using the Model Rule construction in (a)(1). I don't see that it really improves the readability of the subparagraph. I think that originally, the construction did improve readability but we put subparagraph (a) through so many revisions that we eventually ended up with the substance of the Model Rule. As our substance is now the same, we should use the MR syntax.
  - b. Note 5. Please reconsider our deletion of MR 5.4(a)(4). I know Stan was particularly concerned w/ this but in light of our recommended adoption of Comment [5], should we continue to leave (a)(4) deleted?
  - c. Note 10. I don't see the need to add "authority" here. See my explanation in the footnote. Do you agree w/ its deletion.
  - d. Note 11. Similarly, I don't see the need to add "influence" here. It's belt & suspenders, but I question whether you need a "right" or "authority" to influence someone. Do you agree w/ its deletion?
  - e. Notes 12 & 14. I think this was simply an oversight and we used the wrong term in these two places.
  - f. Note 13. We use the term "nonlawyer third party" later in the Comment, so I recommend the substitution here as well. It will also make Comment [1B] parallel to [1A] (where we use "nonlawyer employee" throughout).
4. Public Comment Chart. The only change I've made to Randy's fine public comment chart is the first row of the first page. See highlighted material.
5. Proposed Draft 14. As to the proposed Draft 14, I've included it so you can quickly see the revisions I've suggested.

6. All the Word documents are clean versions.

**DEADLINE.** The agenda submission due date is next **Wednesday, September 30, 2009**. I realize you're all under the gun with your own rules (e.g., that little item Raul is preparing, 4.2). Nevertheless, I've tried to identify the issues so you can review the attached in relatively quick fashion. If I don't hear from you by **Tuesday, September 29, 2009 at noon**, I'll assume you're OK my proposed changes and will implement them. You'll still have an opportunity to object during the e-mail comment period but I have several items to prepare for the agenda and I want to submit them in a timely fashion so I can start working on items for the November agenda. Keep them doggies rollin'

Please let me know if you have any questions.

**September 27, 2009 Peck E-mail to Drafters, cc Chair & Staff:**

I agree with your approach in comments 1-14. I would like to move closer to the MR version.

As to the dashboard: I do not know of a dissent, although Nace may want to have one. Do you want to send the draft to Nace and see if he wants to dissent? He may not have time to draft a dissent prior to the meeting, but at least we could note his dissent and leave a placeholder. I don't know if this is one that Raul is a dissenter on.

I agree that this is not otherwise controversial.

I look forward to receiving Mark's and Raul's comments.

**October 9, 2009 Kehr E-mail to RRC:**

**I vote to send these materials on to the Board but subject to the following suggestions:**

1. Some words appear to have been omitted from the second sentence of the Introduction. I suggest (with the added words in bold font and underlined): "(i) broader prohibitions on a lawyer's conduct and **on** relationships **into which** a lawyer might enter that would pose a threat to the lawyer's exercise of independent professional judgment, ...."
2. There also is a word missing after "(5)". I would insert "explicitly" after "forward".
3. I join in Kevin's fn. 1, 6, 7, 8, 9, and 13 recommendations (but in come of the explanations we then shouldn't remove the "except" clause but instead move the second paragraph into that spot).
4. I also join in Kevin's fn. 2 recommendation, but we can't use the MR language exactly b/c of our change to paragraph (a). I suggest: "(1) an agreement by a lawyer with the lawyer's firm or another lawyer in the firm for the payment of money or other consideration, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons." I don't think we need to retain the "at once" b/c "at once" is a reasonable

period of time. I think the point is that the payments shouldn't go on so long that they amount to a continuing profit participation that would violate the spirit of the rule against partnerships with non-lawyers, so there should be no issue as to a single payment. If the Commission makes this change, the explanation needs to omit the "at once" reference" and the reference to the reorganization of the subparagraph.

5. B/c of the colon at the end of paragraph (a), shouldn't the subparagraphs be separated by semicolons rather than periods (as is done in the MR)? The same structure exists later in the Rule.
6. Kevin's fn. 5 recommendation leaves me unclear about the meaning our Comment [5]. MR paragraph (a)(4) permits a lawyer to **share** fees with a non-profit while Comment [5] permits **the payment of court-awarded legal fees** to a non-profit. Is [5] intended to permit sharing? If so, that isn't what it says.
7. I join in Kevin's fn. 10 and 11 recommendations.
8. I join in Kevin's fn. 14 recommendation.

**October 12, 2009 Sapiro E-mail to RRC List:**

1. In the Introduction, second line, I would insert the word "rule" after the word "letter."
2. In the rule, paragraph (a)(3), I think a word is missing. I think the word "otherwise" should follow the word "not" and precede the word "violate" in the next to last line of paragraph (3) at page 2 of 10.
3. Also at page 2 of 10, in the explanation of changes for paragraph (a)(3), first paragraph, second line, the word "recommend" should be "recommended."
4. Responding to footnote 1, I do not have strong feelings about the restoration. However, I think it would be a mistake for two reasons. First, using "person" is to me a good contrast with the "organization" clause that follows it. Second, and more important, an organization is not a lawyer. It is a nonlawyer. A lawyer should be able to share fees with an organization that is permitted to practice law. The Model Rule language would prohibit the legitimate practice of a lawyer sharing fees with a law corporation because a law corporation is not a lawyer. Our wording is correct, and the Model Rule is not.
5. Responding to footnotes 2 and 3, I would not change the black letter rule just to simplify the explanation. In addition, I think the wording we have proposed makes the rule more explicit. As we have seen with *Fonte*, our words will be interpreted literally. I therefore would not make the change Kevin recommends.
6. I agree with the change Kevin recommends at footnote 4.
7. Footnote 7 exposes a gap in paragraph (d)(1). We prohibit a person who is not a lawyer from owning an interest in a professional corporation. However, we do not prohibit an organization that is not licensed to practice law from owning such an interest. Rather than

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make the change reflected in footnote 7, I would add a clause prohibiting an organization that is not licensed to practice law from owning an interest in a law corporation.

8. I would oppose Kevin's changes in footnotes 8 and 9. A law corporation is not a "lawyer," but it could have a fully owned subsidiary that may exercise rights with respect to the subsidiary law corporation. However, I do agree with Kevin's recommendations reflected in footnotes 10 and 11.
9. In paragraph (f), to me the phrase "third person" is not clear. Do we mean a person who is not a lawyer? If a director of a nonprofit legal aid society interferes with the independence of professional judgment, is that a violation, or is the director part of the controlling entity and therefore not a "third person"? We should make the paragraph explicit.
10. At page 10 of 10, in the last paragraph of the explanation column, the word "doe" should be "does."
11. If this rule will come back to us for further review, I vote that it go to the Board. If not, I reluctantly put "no."