**CBA LPRC POSITION REQUEST FORM**

The CBA Standing Committee on Professional Ethics (Ethics Committee) **position request** is as follows:

1. Proposed legislative concept:

The Ethics Committee seeks authorization to support the proposal of the ACLU Foundation of Connecticut (the ACLU) to amend Rule 5.4 of the Rules of Professional Conduct (RPC) and recommend to the Rules Committee that Rule 5.4 be amended to add to Connecticut’s version of Rule 5.4 subsection (a)(4) of ABA Model Rule 5.4, with additional language concerning fees recouped via settlements. As proposed by the ACLU, with the support of Greater Hartford Legal Aid, Connecticut Legal Services, and the New Haven Legal Assistance Association (collectively, the legal services groups), the following new subsection would be added to Connecticut’s Rule 5.4(a):

(4) A lawyer may share legal fees from a court award or settlement with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

1. Explanation and rationale for advancing this position:

By way of background, the ACLU Foundation of Connecticut is a non-profit, non-partisan law reform organization that works to litigate and educate in defense of the rights enshrined in the Connecticut and national constitutions. Its litigation not infrequently involves fee-bearing causes of action such as those provided by Connecticut’s public accommodation protections and the federal constitutional tort statute. The ACLU employs lawyers to prosecute cases, and also relies upon volunteers from the private bar to do so.

In its present form, Connecticut’s Rule 5.4 does not address whether a lawyer may sharing a recouped fee with the non-profit organization with which the lawyer has affiliated in prosecuting a client’s claim.

Some twenty-five years ago, the American Bar Association scrutinized its Model Rules of Professional Conduct–including that which formed the basis for our existing Rule 5.4–and concluded that “[i]t is not ethically improper for a lawyer who undertakes a pro bono litigation representation at the request of a nonprofit organization that sponsors such pro bono litigation to share . . . with the organization court-awarded fees resulting from the representation.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-374 (1993). Other state bars reached identical conclusions about their then-existing Rule 5.4. *See* D.C. Bar, Ethics Op. 329 ¶¶ 16-17 (2005); Va. State Bar Standing Comm. on Legal Ethics, Ethics Op. 1744 (June 27, 2000).

In 2001, the ABA’s Commission on Evaluation of the Rules of Professional Conduct (“ABA Evaluation Commission”) surveyed state ethics commission decisions and found that while most followed the ABA opinion, some, “while agreeing with the policy underlying the ABA Opinion, found violations of state versions of Rule 5.4 because the text of the Rule appeared to prohibit such fee-sharing.” Am. Bar Ass’n, *Report of the Comm’n on Evaluation of the Rules of Prof’l Conduct* 340 (Nov. 2000). Concluding that expressly permitting fee-sharing with non-profits is less of a “threat to independent professional judgment . . . than in circumstances where a for-profit organization is involved,” *id.*, the Commission recommended that the ABA promulgate an updated model rule.

The ABA did exactly that as part of its Ethics 2000 package of rule updates. In it, Model Rule 5.4 was amended to provide that:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

. . .

(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.

ABA Model Rules of Professional Conduct 5.4 (2004) (new language underlined).

After the ABA adopted the Ethics 2000 recommendations so as to substantially amend many of the Model Rules, the CBA Ethics Committee created a subcommittee tasked with making recommendations to conform the Connecticut RPC with the revised Model Rules. Attorney Wes Horton, then the Chair of the Ethics Committee, also chaired the subcommittee.

At the Ethics Committee’s November 14, 2018 meeting, members who had participated in the Ethics 2000 subcommittee discussed that there appeared to be no record of any discussion of the amendment of Rule 5.4(a) at the time the Ethics Committee considered the Ethics 2000 revisions of the Rules. As best as could be determined, that was an oversight, not a purposeful decision. The sentiment expressed at the Ethics Committee’s meeting was that the oversight was an unfortunate one, and that it would be appropriate to correct it now by amending Connecticut’s Rule 5.4 to add subsection (a)(4) to the Rule, as proposed by the ACLU and the legal services groups.

1. Is draft legislation or a proposed bill included?

Yes. Attached.

1. What is the date of any legislative hearing, if known?

The next Rules Committee meeting is scheduled for January 14, 2019, and the Rules Committee has requested comment from the CBA on the proposed amendment.

1. Was this position previously approved by the CBA? If so, when does/did it expire?

No.

1. Is the CBA section or committee seeking to join a previously approved CBA section or committee position?

No.

1. Potential or actual CBA opposition from another CBA section or committee?

Unknown, but unlikely.

1. Strength of section position (including process and results of section vote taken on issue):

The members voted to adopt this position at the Committee’s November 4, 2018 meeting, by a vote of 13 to 3, with 1 abstention.

1. Fiscal impact (on the state):

None.

1. Are you seeking “fast-track” approval?[[1]](#footnote-1)

Yes. The next Rules Committee meeting is scheduled for January 14, 2019, and the Rules Committee has requested comment from the CBA on the proposed amendment.

Proposed Amendment of Rule 5.4 (additions underlined; deletions in brackets)

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(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;

(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; [and]

(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

(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.

(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.

(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.

(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:

(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;

(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

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

Official Commentary

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 subsection (c), such arrangements should not interfere with the lawyer’s professional judgment.

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).

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1. A “fast track” recommendation will be submitted to the House of Delegates (HOD) or Board of Governors (BOG) at its next scheduled meeting (or, if between meetings of the HOD or BOG and during the legislative session, to the Executive Committee), and is warranted only when the Legislative Policy & Review Committee concludes that further analysis and study is unnecessary and where there is legitimate time pressure to address pending legislation. [↑](#footnote-ref-1)