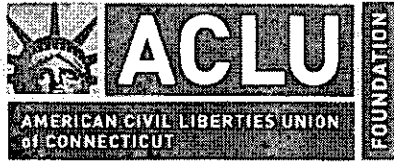


5-8

Proposal by the ACLU of Connecticut to amend Rules 1.0 and 5.4 of the Rules of Professional Conduct. On 10-15-18, RC referred matter to SGC, OCDC, CBA, and CT Legal Services for review and comment. Received comments from CBA (Marcy Stovall), SGC, OCDC, CT Legal Services.



5-8a

Honorable Andrew J. McDonald
Connecticut Supreme Court
Chair, Superior Court Rules Committee
231 Capitol Avenue
Hartford, CT
06106

January 9, 2019

Re: Proposed Amendment of Conn. R. Prof'l Conduct 5.4(a)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
OF CONNECTICUT
765 ASYLUM AVENUE
HARTFORD, CT 06185
T/860.523.9146
F/860.586.8900
WWW.ACLUCT.ORG



Dear Justice McDonald,

I write to respectfully request that the Rules Committee place the proposal to amend Rule 5.4(a) on the agenda for its consideration at the Committee's January 22nd meeting.

Yours sincerely,

Dan Barrett
Legal Director
legal@acluct.org
(860) 471-8471

cc via email: Joseph DelCiampo
Bill Chapman
Marcy Tench Stovall

5-8a
2-10
Revised

Del Ciampo, Joseph

From: Dan Barrett <DBarrett@acluct.org>
Sent: Monday, October 15, 2018 11:02 AM
To: Del Ciampo, Joseph
Subject: Re: request to the Rules Committee
Attachments: 2018-10-15 amended letter to Justice McDonald with enclosures.pdf

Mr. Del Ciampo:

Attached is a revised version of the ACLU Foundation's October 4th letter to Justice McDonald that I hope you will substitute for the one I sent on that date.

The reason for the revision is that I neglected to include a phrase in our proposed update to Rule 5.4, specifically, to make clear that a lawyer may share fees with the non-profit organization that referred the matter to the lawyer OR that employs the lawyer. The revised text, as reflected in the attached letter and text of proposed Rule 5.4(a)(4), reads:

(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 a qualified legal assistance organization that employs the lawyer or that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

I have also updated the proposed comment to Rule 5.4 to match, adding the mention of a lawyer employed by a non-profit organization, such that the proposed text reads:

Rule 5.4(a)(4) explicitly permits a lawyer, with the client's consent, to share certain fees with a qualified legal assistance organization that employs or has referred the matter to the lawyer. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers. Should abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(4). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5(e).

I apologize for failing to include this language in the first letter.

Yours sincerely,
Dan Barrett

Dan Barrett
Legal Director | ACLU of Connecticut
(860) 471-8471
2425 75BC B172 7466 3FFF 9A67 870F D7B6 110F 0A36
pronouns: he / him / his
(I have no control over the thinly veiled advertising appended by our spam filter)



Honorable Andrew J. McDonald
Connecticut Supreme Court
Chair, Superior Court Rules Committee
231 Capitol Avenue
Hartford, CT
06106

October 4, 2018

Re: Proposed Amendment of Rule 5.4 of the Connecticut Rules of Professional Conduct

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF CONNECTICUT
765 Asylum Avenue, 1st Floor
Hartford, CT 06105
(860) 523-9146
acluct.org

Dear Justice McDonald,

In accordance with Conn. Gen. Stat. § 51-14(c), and on behalf of the ACLU Foundation of Connecticut (“the ACLU Foundation”), I write to submit for the Rules Committee’s consideration a proposed amendment to the text and commentary of Rules 5.4 and 1.0 of the Connecticut Rules of Professional Conduct.

Specifically, the ACLU Foundation asks the Committee to approve an amendment of Rule 5.4 to add subsection (a) (4) as follows (addition underlined):

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

.....

(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 a qualified legal assistance organization that employs the lawyer or that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

We also ask that the following be added to the Official Commentary:

Rule 5.4(a)(4) explicitly permits a lawyer, with the client’s consent, to share certain fees with a qualified legal assistance organization that employs or has referred the matter to the lawyer. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers. Should

abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(4). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5(e).

Additionally, we ask that the definitional rule, 1.0, be amended to define "qualified legal assistance organization" as:

a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

Finally, we ask that Rule 1.0's commentary be expanded to explain that:

[t]he definition of qualified legal assistance organization requires that the organization "receives no profit from the rendition of legal services." That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a "profit" from that particular lawsuit. An award of attorney's fees that leads to an operating gain in a fiscal year does not create a "profit" for purposes of a being a qualified legal services organization.

I enclose a copy of the proposed amended Rules 5.4 and 1.0, showing all the changes that the ACLU Foundation seeks.

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. Our 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. We employ lawyers to prosecute cases, and we also rely upon volunteers from the private bar to do so.

In its present form, Connecticut's Rule 5.4 does not address a lawyer's 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) (enclosed). Both the Virginia and District of Columbia authorities reached identical conclusions about their then-existing Rule 5.4. See D.C. Bar, Ethics Op. 329 ¶¶ 16-17 (2005) (enclosed; please note that because the opinion is not paginated or subdivided in its original form, we have supplied paragraph numbers in brackets for your convenience); Va. State Bar Standing Comm. on Legal Ethics, Ethics Op. 1744 (June 27, 2000) (copy enclosed).

In 2001, the ABA’s Commission on Evaluation of the Rules of Professional Conduct (“ABA Evaluation Commission”) surveyed state ethics 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 Prof’l Conduct 5.4 (2004).

In contrast to each of its New England neighbors, Connecticut has yet to adopt any version of Model Rule 5.4(a)(4). See Me. R. Prof’l Conduct 5.4(a)(4) (adopting Model Rule 5.4(a)(4) verbatim); Mass. R. Prof’l Conduct 5.4(a)(4) (codifying Model Rule 5.4 with additional qualifications); N.H. R. Prof’l Conduct 5.4(a)(4) (verbatim adoption); R.I. R. Prof’l Conduct 5.4(a)(4) (codifying Model Rule 5.4 with additional qualifications); Vt. R. Prof’l Conduct 5.4(a)(4) (verbatim adoption).

[†] The Committee did not collect citations to such decisions; we have located two. See *ACLU of E. Missouri Fund v. Miller*, 803 S.W.2d 592, 594 (Mo. 1991), *abrogated by* Mo. R. Prof’l Conduct 5.4(a)(5)(2007); Texas Bar Ass’n Comm. on Prof’l Ethics, Op. 503 (June 1994) (enclosed).

The ACLU Foundation of Connecticut shares the ABA Evaluation Commission's concern that the text of Connecticut's existing rule may cause non-profit lawyers to question whether they may properly share a recouped fee with their employer. We therefore ask the Committee to adopt Model Rule 5.4, albeit with narrowing provisions added by Massachusetts.

Those additional provisions limit the fee-sharing scope to "qualified legal assistance organization[s]" (defined as non-profit organizations within certain parameters); require informed consent of the client to the division of fees; and extend the authorization for fee-sharing to fees obtained in settlement of fee-eligible claims.

Our proposal to adopt the Massachusetts version of Rule 5.4(a)(2) would not change the safeguard of our existing Rule 5.4(c), which forbids Connecticut lawyers from "permit[ting] a person who recommends, employs, or pays the lawyer . . . for another to direct or regulate the lawyer's professional judgment in rendering . . . legal services." We do not propose an alteration of Rule 5.4(c).

On behalf of the ACLU Foundation, I respectfully request that the proposed amendment of Rules 5.4 and 1.0 be added to the Rules Committee's October 15, 2018 agenda. I will be present October 15 as the Foundation's representative to answer any questions about the proposed amendment, and would be pleased to provide, in advance of the meeting, any additional information to assist you in your deliberations.

Yours sincerely,



Dan Barrett
Legal Director
legal@acluct.org
(860) 471-8471

cc: Joseph DelCiampo, counsel to the Rules Committee (via email)

**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 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 a qualified legal assistance organization that employs the lawyer or that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

(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).

Rule 5.4(a)(4) explicitly permits a lawyer, with the client's consent, to share certain fees with a qualified legal assistance organization that employs or has referred the matter to the lawyer. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers. Should abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(4). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5(c).

**Proposed amendment of Rule 1.0
(additions underlined; deletions in brackets)**

Rule 1.0. Terminology

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Client" or "person" as used in these Rules includes an authorized representative unless otherwise stated.
- (c) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See subsection (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
- (d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (h) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (i) A "qualified legal assistance organization" is defined as a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or

beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

[(i)j] "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

[(j)k] "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

[(k)l] "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

[(l)m] "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

[(m)n] "Substantial," when used in reference to degree or extent denotes a material matter of clear and weighty importance.

[(n)o] "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

[(o)p] "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Official Commentary

Confirmed in Writing.

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm.

Whether two or more lawyers constitute a firm within subsection (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud.

When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is

not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent.

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see subsections (o) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see subsection (o).

Qualified legal services organizations.

The definition of qualified legal assistance organization requires that the organization "receives no profit from the rendition of legal services." That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a "profit" from that particular lawsuit. An award of attorney's fees that leads to an operating gain in a fiscal year does not create a "profit" for purposes of a being a qualified legal services organization.

Screened.

The definition of "screened" applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer shall acknowledge in writing to the client the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Formal and Informal Ethics Opinions

1983 -1998

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Standing Committee on
Ethics and Professional Responsibility
American Bar Association

In Informal Opinion 86-1521, this Committee concluded that "[W]hen there is any doubt whether a contingent fee is consistent with the client's best interest, which can normally be determined only in light of all the facts and circumstances after consultation with the client, the lawyer must offer the client the opportunity to engage counsel on a reasonable fixed fee basis before entering into a contingent fee arrangement." The lawyer contemplating a "reverse" contingent fee agreement should advise the client in accordance with the opinion of this Committee in Informal Opinion 86-1521.

Conclusion

The Committee concludes that the Model Rules do not prohibit contingent fee agreements for representation of defendants in civil cases based on the amount of money saved a client—*provided* the amount of the fee is reasonable under the circumstances, and the client has given fully informed consent.

Formal Opinion 93-374

June 7, 1993

Sharing of Court-Awarded Fees With Sponsoring Pro Bono Organizations

It is not ethically improper for a lawyer who undertakes a pro bono litigation representation at the request of a non-profit organization that sponsors such pro bono litigation to share, or agree in advance to share, with the organization court-awarded fees resulting from the representation. Such sharing of the court-awarded fees does not constitute either a prohibited sharing of fees with a nonlawyer under Rule 5.4(a), or a prohibited payment for a referral under Rule 7.2(c).

The Committee has been asked to opine on the ethical propriety of a lawyer who undertakes a pro bono litigation representation at the instance of an organization that is engaged in sponsoring such pro bono litigation sharing with the sponsoring organization court-awarded fees resulting from the representation.¹ There are two principal situations where the issue may arise: *first*, where the lawyer to whom the representation is referred by a sponsoring organization (commonly termed a "cooperating lawyer") and whose services are the basis of court-awarded attorney's

1. We understand the phrase "pro bono," in this context, to have essentially the same meaning as it has in Rule 6.1 of the Model Rules of Professional Conduct, referring to litigation (in the present context) without fee from the client, directed to advancing the representation of the poor, civil rights or civil liberties, public rights, the representation of charitable organizations or the administration of justice.

fees contributes those fees to the sponsoring organization voluntarily or agrees in advance with the sponsoring organization to turn over all or part of any court-awarded attorney's fees; and *second*, where the lawyer is an employee of the sponsoring organization and is required, as a condition of employment, to turn over to the organization any court-awarded attorney's fees that may result from the attorney's handling of cases on the organization's behalf. For reasons to be explained, the Committee concludes that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization in either of these circumstances, whether the sharing consists of dividing the fees or turning them over in their entirety to the sponsoring organization.

There are two ethical prohibitions that might be viewed as prohibiting the sharing of fees in the circumstances here addressed: the first is, in those frequent cases where the referring organization has a membership or a governing body not solely composed of lawyers, the prohibition on sharing fees with a nonlawyer in Rule 5.4(a) of the Model Rules of Professional Conduct (1983, amended 1993) and its substantially identical predecessor DR 3-102(a) of the Model Code of Professional Responsibility (1969, amended 1980);² and the other is the prohibition on

2. Rule 5.4 reads in its entirety as follows:

(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.

(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

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

a lawyer's paying for a referral, under Rule 7.2(c)³ or its predecessor DR 2-103(B).⁴ In the Committee's view, neither of these prohibitions can properly be found applicable in either of the circumstances under consideration. This is so because although each of the two rules could be read literally as applying in these circumstances, in no instance would such an application be necessary or appropriate to accomplish the purposes that the rules are intended to serve. Two features of the circumstances here addressed underscore the appropriateness of this result. The first is that the entity with which such fees are shared is a non-profit entity—a fact that has weight both in relation to the letter and purposes of the Model Rules and as a legal matter. The second feature is that the fee in question is court-awarded, which means both that it does not come from the client, and thus present a risk of burdening the client with excessive fees; and that it results from the successful pursuit of some type of litigation that is recognized as serving a public purpose, and that is intended to be encouraged by such fee awards.

**Contribution or Surrender of Court-Awarded Fees to a
Sponsoring Pro Bono Organization Is Not Improper
Fee Sharing With Nonlawyers**

The caption of Rule 5.4, "Professional Independence of a Lawyer," announces, and its very brief Comment confirms, that the purpose of each of the four provisions in its component paragraphs is "to protect the lawyer's professional independence of judgment."⁵ The most obvious threat to the lawyer's independent judgment is intervention of a non-lawyer in the attorney-client relationship.⁶

3. Rule 7.2(c) provides:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may (1) pay the reasonable costs of advertising or written communication permitted by this Rule; (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

4. Disciplinary Rule 2-103(B) provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

5. See also C.W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.4, at 510 (1986).

6. The concern of the rule with protecting the attorney-client relationship "amounts to protecting the attorney-client relationship from injurious lay interference." R. Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1110 (1989). Thus, DR 2-103(D)(4)(d) emphasized that "[t]he member or beneficiary to whom the legal services are furnished, and not such [non-profit referring] organization, is recognized as the client of the lawyer in the matter." See also Model Rule 5.4(c).

The four paragraphs of the Rule⁷—in each instance substantially identical to a provision in the predecessor Model Code of Professional Responsibility—must accordingly each be viewed as addressed to one or another circumstance or course of conduct that, by reason of a nonlawyer's having an economic interest in what the lawyer is doing for another who is the lawyer's client, may significantly threaten interference in the lawyer-client relationship.⁸ Thus, paragraph (b) prohibits a lawyer's forming a partnership with a nonlawyer if any of the partnership's activities consist of the practice of law; and paragraph (d) provides that a lawyer "shall not practice [law] with or in the form of a professional corporation or association authorized to practice law for a profit" if, in specified respects, a nonlawyer has a financial interest or right of direction in the organization: these two provisions, taken together, address the risk of undue influence that may be exercised by a lay partner, principal or stockholder in a firm in which a lawyer practices law—but in the case of a corporation or association makes exception for a law firm that is not *for profit*.⁹

Paragraph (c), providing that 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," addresses circumstances where a lawyer may entertain a sense of economic obligation to a lay person or organization that has recommended or employed the lawyer on behalf of another.

Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a layperson, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership arrangement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the

We note that Professor Simon concludes (contrary to the conclusion reached in this Opinion) that the prohibition of Rule 5.4(a) applies in the circumstances here discussed, and recommends that the rule be amended so as to make explicit exception for such circumstances. Simon, *supra*, at 1076, 1133.

7. See note 2, above.

8. Two of the four predecessor provisions were under Canon 5 of the Model Code, which declared that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." These provisions were DR 5-107(B), the model for paragraph (c) of Rule 5.4, and DR 5-107(C), the model for paragraph (d). The other two were under Canon 3, which declared that "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." These provisions were DR 3-102(A) and DR 3-103(A), the models for paragraphs (a) and (b) of Rule 5.4, respectively.

9. The reason for the exemption from paragraph (d) of Rule 5.4 of corporations or associations engaged in the practice of law other than for profit is to allow for lawyers' participation in prepaid legal services plans. See G.C. HAZARD AND W.W. HODES, *THE LAW OF LAWYERING*, § 5.4:500.03; C.W. WOLFRAM, *supra* note 5, § 16.5.5.

fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

The prohibition against fee sharing also may be viewed as addressing six other possible points of ethical concern: stirring up litigation; improper methods of solicitation; unauthorized practice of law; excessive fees; referrals to incompetent lawyers; and unethical litigation practices.¹⁰

The Committee has previously opined that the prohibition against fee sharing has no application in circumstances where such underlying concerns would not be involved. *See* ABA Formal Op. 88-356 (1988) (finding ethically permissible a law firm's payment to a temporary lawyer placement organization of a percentage of the fee received by the lawyer for work performed for the client). Examination of the concerns that have been identified as underlying the prohibition on sharing fees with non-lawyers suggests that the prohibition should not apply in the circumstances to which this opinion is addressed.

Preventing Lay Interference in the Attorney-Client Relationship

This most serious of the considerations underlying the prohibition on fee-sharing in Rule 5.4(a) must, as has been pointed out, rest on a concern that the fee-sharing arrangement enables the lay third party to intervene in the attorney-client relationship. Thus the fee-sharing arrangement must give rise not only to an economic incentive on the part of the lay third party to intervene, but also to an economic incentive on the part of the lawyer to allow such intervention. Absent such an economic incentive on both sides generated by the fee-sharing arrangement, the danger of actual intervention is minimal.

In the case of the cooperating lawyer, we do not believe that there are likely to be such mutually reinforcing incentives arising from the fee-sharing arrangement. Even conceding that a sponsoring lay organization may have an economic incentive to control the course of litigation where it has an expectancy of a fee award, this does not mean that a lawyer who contemplates turning over to the organization all or part of the fee award (whether voluntarily or by prior agreement) has an incentive by virtue of this financial arrangement to yield to pressures brought by the sponsoring organization. While it might be argued that a cooperating lawyer has an incentive to please the referring organization by the manner in which she conducts the referred case, in the interest of getting future referrals, this incentive does not arise from the fee-sharing arrangement, and is not made greater or less by it. In any event, this threat is one that is

10. These seven concerns were identified in Professor Simon's article. *See* Simon, *supra* note 6, at 1105; *see also* WOLFRAM, *supra* note 5, § 9.2.4, at 509-10; James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why, Ask When?*, 6 GEO. J. LEGAL ETHICS 1, 25 (1992).

addressed directly by paragraph (c) of Rule 5.4, prohibiting a lawyer from allowing a person who recommends, employs, or pays a lawyer to represent another to direct or regulate the lawyer's judgment.

In the second kind of circumstance requiring consideration—a staff lawyer paid a fixed salary by a sponsoring pro bono organization—the lawyer is undeniably subject to financial control by the sponsoring organization that generally does not exist in the case of a cooperating lawyer, and hence arguably she has an incentive to allow the organization to intervene in litigation by virtue of her desire to keep her job. However, it is not the fee-sharing agreement itself that gives rise to the incentive to allow lay control, since the staff lawyer has no expectancy in the fee award and is not economically dependent on it. The question is whether the prohibition in paragraph (c) of Rule 5.4 is sufficient in these circumstances—where the employing organization is a non-profit one—to assure the staff lawyer's independence of judgment. The Committee believes that it is.

Even though the prospect of a fee award gives the organization an economic interest in a case, that economic interest is not likely to be a predominant factor but at most a subsidiary one in the non-profit organization's sponsorship of the litigation. For the non-profit organization, any incentive to intervene in sponsored litigation is much more likely to relate to the merits of the case, rather than the expectancy of a fee award; the element of a fee, in other words, does not provide a reason why the prohibition of paragraph (c) is not sufficient in the circumstances. That consideration is what distinguishes the case of a staff lawyer working for a non-profit organization from the case of a lawyer employed by a for-profit organization sponsoring litigation, at least for purposes of the prohibition on fee-sharing in Rule 5.4(a).

We believe it is highly relevant in this regard that, in the circumstances to which this opinion is addressed, the fees potentially shared with the sponsoring lay organization are only court-awarded fees. Not only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose. This underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.

Our conclusion about the intended applicability of Rule 5.4(a) to litigation sponsored by a non-profit organization is supported by the provisions of paragraph (d) of the Rule, which applies its prohibition on lay participation in the practice of law only to corporations and associations "organized to practice law for a profit." This provision recognizes that even though a non-profit organization may well have an economic interest in securing

sources of funds, including court-awarded attorney fees, to support its otherwise economically disinterested activities, the danger of improper lay interference in such circumstances is minimal. Consequently, in the absence of evidence that a non-profit lay organization is improperly interfering in the relationships between its staff lawyers and their clients, in violation of Rule 5.4(c), we do not believe that the differences between the economic circumstances of cooperating lawyers on the one hand and staff lawyers on the other provide a basis for holding that conduct that is ethically permissible for one is ethically impermissible for the other.

While it is unnecessary to our conclusion under the ethics rules, we note that it is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate categories of third persons. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963). In the *United Mine Workers* case, the Supreme Court described the difference between a cooperating lawyer and a staff lawyer on a non-profit organization as one of "virtually imperceptible degree" that cannot justify different treatment in the absence of evidence of actual conflict. See 389 U.S. at 224.

Following the Supreme Court's decision in *United Mine Workers*, numerous courts have awarded attorney fees to non-profit organizations for legal services performed by staff attorneys.¹¹ These many decisions implicitly reject the notion that the prohibition on fee-sharing applies in this context.¹² Moreover, the existence of this extensive and well-established body of case law at the time the Model Rules were adopted supports the Committee's conclusion here that Rule 5.4(a) does not bar fee awards to non-profit organizations where staff attorneys conduct the litigation, and that such fee awards are thus ethically permissible in the absence of evidence that the organization has improperly interfered in the litigation, in violation of Rule 5.4(c).

11. *E.g.*, *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139, 1154 (2d Cir. 1983); *McLean v. Arkansas Bd. of Educ.*, 723 F.2d 45, 47 (8th Cir. 1983); *Oldham v. Ehrlich*, 617 F.2d 163, 165 n.3, 168-69 (8th Cir. 1980); *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980) (citing *Reynolds v. Coomey*, 567 F.2d 1166, 1166-67 (1st Cir. 1978)); *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

12. We recognize that one court has held that a former staff attorney of a non-profit organization was prohibited by Rule 5.4(a) from complying with a term of his contract of employment that obligated him to remit court-awarded fees to the non-profit organization that employed him. See *American Civil Liberties Union/Eastern Missouri Fund v. Miller*, 803 S.W.2d 592 (Mo.), *cert. denied*, 111 S. Ct. 2239 (1991). We also note, however, that opinion has been undercut by a subsequent decision of the relevant U.S. District Court, permanently enjoining the State of Missouri from enforcing its ethics rules so as to invalidate terms in contracts between the American Civil Liberties Union/Eastern Missouri Fund and its staff attorneys calling for the staff attorneys to remit all court-awarded fees, *Susman v. Missouri*, No. 91-4429-CV-C-5 (W.D. Mo. June 1, 1992).

We conclude, in sum, that where the sponsoring organization is a non-profit one, and the litigation it sponsors is litigation in which, if the client prevails, there may be a court-awarded fee, the organization's potential interest in that fee does not present a sufficiently significant threat of interference in the relationship between the cooperating or staff lawyer and her client to invoke the prohibition of Rule 5.4(a) to the sharing of such court-awarded fees.

We do not doubt that Rule 5.4(a) would be usefully and properly applied to a transaction in which every pertinent motive was predominantly profit-oriented: for example, a for-profit corporation sponsoring personal injury litigation in return for a share of the contingent fees. Where both the sponsoring organization and the lawyer are primarily motivated by the expectation of financial gain, the organization has a powerful motive deriving from that expectation to try to control the litigation, and the lawyer's incentive to yield to that control is correspondingly greater. We need not for present purposes address, and express no view upon, the obvious intermediate situations, such as a for-profit entity sponsoring litigation in which its only recompense would be a share of a statutory court-awarded fee, or a non-profit organization sponsoring personal injury litigation, and sharing in contingent fees paid by the client. We only conclude that in the circumstances here addressed the sharing of court-awarded fees with sponsoring non-profit organizations does not present a threat to the lawyer's independence of judgment sufficient to invoke the prohibition of Rule 5.4(a).

Finally, it also deserves note that there are other specific prohibitions, in addition to Rule 5.4(c), that directly and sufficiently address the problem of lay interference in the attorney-client relationship. Rule 1.2(a) requires a lawyer to "abide by a client's decisions concerning the objectives of representation." And Rule 1.7 prohibits a lawyer from representing a client if the lawyer's responsibilities to a third person create a conflict of interest.

While the lawyer who contracts with a sponsoring pro bono organization to turn over all or part of any court-awarded fee to the sponsoring organization is aware of the terms of his or her contract and the attendant ethical obligations, the Committee is of the view that both parties to the lawyer-client relationship should be aware of the possibility of improper lay interference. Consequently, cooperating lawyers and staff lawyers who enter into such contracts should disclose the arrangement to their client.¹³

Other Concerns Served By the Prohibition of Fee Sharing

The Supreme Court has observed that "regulations which reflect hostil-

13. Model Rule 1.5(e) imposes a similar disclosure requirement on lawyers who agree to split fees with other lawyers.

ity to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for *private gain, serving no public interest.*" *Button*, 371 U.S. at 440 (emphasis added). In contrast, "truly non-pecuniary arrangements involving the solicitation of legal business have been frequently upheld." *Id.* at 440 n.19. Thus, the Court has indicated that both lawyers and nonlawyers may solicit cases on behalf of pro bono organizations, provided that the solicitor will receive no personal financial benefit from the solicitation.

In matters where the client is charged a fee the prohibition on fee sharing may tend to deter the use of improper methods of solicitation since nonlawyers receiving a share of a lawyer's fees would have a financial incentive to solicit potential clients. In the pro bono setting, the same financial incentive is not likely to be found. Moreover, Rule 7.1(a) prohibits false or misleading statements in solicitations. Thus, in the context here addressed, a limitation on fee sharing as a second, indirect deterrent to improper solicitations is not required.¹⁴

In a for-profit context, it has been suggested, the prohibition on fee sharing may tend to deter the unauthorized practice of law because in the absence of the prohibition nonlawyer intermediaries might be tempted to handle matters themselves rather than pay a lawyer a larger portion of the client's fee.¹⁵ The Committee here addresses only a situation where the client is charged no fee. In that setting the nonlawyer has no such incentive to engage in unauthorized practice of law.¹⁶

In a for-profit context the prohibition on fee sharing may tend to discourage excessive fees by eliminating a possible additional interest in the lawyer's profits.¹⁷ In the present context, however, this concern is simply inapplicable: the only fee that either the lawyer or the non-profit organization may receive is a fee paid by the opposing party, and the court awarding the fee will have independently determined its reasonableness.

In a for-profit context the prohibition on fee sharing may prevent referrals to incompetent attorneys since nonlawyers would have an incentive to refer a matter to the lawyer offering to share the largest percentage of the fee regardless of the lawyer's competence. We are concerned here, howev-

14. Protection of constitutional interests such as the rights of free speech, association, and petition in pro bono litigation requires that ethical rules be narrowly tailored to address demonstrable harms. In *In re Primus*, 436 U.S. 412 (1978), the Court explained that where a lawyer's solicitation was not for the lawyer's own pecuniary gain the lawyer "may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition [of solicitation] is said to be directed." *Id.* at 434.

15. See WOLFRAM, *supra* note 5, § 9.2, at 510; Simon, *supra* note 6, at 1107.

16. Moreover, there are separate specific prohibitions on the unauthorized practice of law. See Model Rule 5.5(b); see also Rule 5.3(c).

17. See Simon, *supra* note 6, at 1107-08.

er, only with a situation where the client is charged no fee. In such a setting, a concern about referrals to incompetent lawyers has no application. If the only fees that may be recovered are fees awarded to a prevailing party, nonlawyers would have no incentive to refer matters to incompetent attorneys since incompetent attorneys would presumably be less likely to prevail and hence the nonlawyer would not receive any compensation.¹⁸

The prohibition on fee sharing may also be viewed as serving to prevent unethical practices in litigation. Nonlawyers with a financial interest in the outcome of litigation could be tempted to engage in unethical practices to increase the chance of collecting fees. In the no-fee context, however, there is no likelihood of such a financial incentive.¹⁹

Contribution or Surrender of Court-Awarded Fees to a Sponsoring Pro Bono Organization Is Not Payment For a Referral

Turning over court-awarded fees to a sponsoring *pro bono* organization²⁰ does not appear to the Committee to fall under the prohibition of Model Rule 7.2(c) and DR 2-103(D) on "giv[ing] anything of value to a person for recommending the lawyer's services." When the cooperating lawyer turns over the entirety of the court-awarded fee there is no financial quid pro quo for which it could be said that a fee is paid: in these circumstances, the cooperating lawyer has no financial interest in receiving the referral.

Even where the court-awarded fees are shared rather than turned over in their entirety, however, the Committee believes these rules have no applicability when the only fee involved is a court-awarded one, paid not by the client but by the opposing party. Viewed from the time the lawyer accepts the representation, the fact that court-awarded fees are available to prevailing parties only, with the attendant risk that the case will generate no fee at all, is a significant factor limiting the potential for abuse.²¹ One of the considerations underlying the prohibition is that if a lawyer paid a third party for a referral the total fee charged would likely be higher, increasing the probability that the lawyer's client would be charged an unreasonable fee. But since in the case of a court-awarded fee a court has reviewed the fee

18. In addition, the ethical rules directly address the issue of attorney competence. *See, e.g.*, Model Rule 1.1.

19. Again, specific ethical limitations already address this concern. *See, e.g.*, Model Rules 3.1, 3.3(a), and 3.4.

20. Many non-profit organizations may qualify as "legal service organizations" within the meaning of Rule 7.2(c) and as "bona fide organization[s] that recommend[], furnish[] or pay[] for legal services" within the meaning of DR 2-103(D)(4), so as to come within the specific exemption in those rules for payment of the "usual charges" for a referral, in cases where they in fact make a charge for referrals.

21. Clients with cases manifesting a high probability of success are likely to find lawyers willing to accept their cases without having to turn to non-profit organizations for assistance.

and determined that it is reasonable, the interest in prohibiting unreasonable fees is satisfied without application of the prophylactic rule against payment for referrals.²² This careful scrutiny of any fee paid eliminates any remaining possibility of speculation for financial gain by either the cooperating lawyer or the non-profit referring organization. Other considerations underlying the rule include deterrence of improper methods of solicitation and avoiding referrals to incompetent attorneys. Both of these concerns also underlie Rule 5.4(c) and were discussed above in that context. See text accompanying notes 14 & 18, above. As demonstrated above, these concerns have little, if any, applicability in the pro bono, non-profit context.

The Committee also deems it significant in this context, as well as in that of the prohibition on sharing of fees with lay persons, that there are a good many court decisions awarding fees to non-profit organizations rather than to the lawyer or lawyers who provided the legal services that formed the basis for the award.²³ These numerous decisions implicitly reject the notion that there is any ethical inhibition on a lawyer's court-awarded fees going directly to a sponsoring pro bono organization rather than to the individual lawyers who actually provided the sponsored representation. And, as the Supreme Court has observed, "Congress endorsed . . . decisions allowing fees to public interest groups when it was considering, and passed, [42 U.S.C. § 1988]." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 n.9 (1980).

* * *

We conclude, in sum, that none of the policy considerations underlying the prohibition of Rule 5.4(a), Rule 7.2(c) or their predecessor provisions in the Model Code, would be served by precluding a lawyer who undertakes a pro bono representation either on referral from a sponsoring pro bono organization or as an employee of such an organization, and whose services are the basis of court-awarded attorney's fees, from contributing those fees to the sponsoring organization. We also conclude that it is ethically permissible for a cooperating lawyer or a staff lawyer to agree in advance to remit all such fees to the organization as long as this arrangement is disclosed to the client. This is not to say, of course, that cooperating lawyers, or staff lawyers, are excused from compliance with any other specific ethical obligations that may be applicable in the circumstances.²⁴

DISSENT

I dissent from the Committee's Opinion. Model Rule 5.4(a) is clear. It says in part: "A lawyer or law firm shall not share legal fees with a non-lawyer"

22. This concern also underlies Rule 5.4(a) and was discussed above in that context. See *supra* text accompanying note 17.

23. See note 11, *supra*.

24. Mr. Coquillette did not participate in the Committee's decision on this opinion.

If the ethical principles are to have meaning, that meaning must be found in the words that state the principle. In the matter before the Committee, the Model Rule stating the principle is clear. Lawyers *shall not* share fees with nonlawyers. The Rule provides for three exceptions. None of the exceptions include sharing fees with a nonlawyer organization simply because it is not-for-profit or pro bono.

My first concern is over the use of the words "shall not" in the Rule. Shall not means shall not to me. Or, if that is not clear enough, "don't do it." The majority think this needs to be explained. The Committee's 11 page Opinion implies that when they use a word it means what they choose it to mean—neither more nor less.²⁵

The Committee seeks to justify inferring an additional exception to Model Rule 5.4 because the purposes served by the Rule are not served when applied in not-for-profit situations. As support, the Committee relies on Rule 5.4(d), which expressly applies only to professional corporations for-profit, reasoning that "[t]he four paragraphs of the Rule . . . must accordingly each be viewed as addressed to one or another circumstance or course of conduct that, by reason of having an economic interest in what the lawyer is doing for another who is the lawyer's client, may significantly threaten interferences in the lawyer-client relationship." Opinion at p.3.

This rationale is flawed. Such a matter of "statutory" construction is reserved for matters not clear on their face. Rule 5.4(a) is clear on its face: it says what it means, it means what it says. The House of Delegates did not fail to consider whether there should be any exceptions to the Rule. It expressly provided three exceptions. Further, regarding the distinction in paragraph (d), that the Rule only applies to for-profit organizations illustrates that the House of Delegates was aware of the distinction but did not choose to apply it to Rule 5.4(a).

The Committee's interpretation of Model Rule 7.2(c) is similarly flawed. That Rule prohibits lawyers from paying referral fees. The only exceptions in the Rule apply to costs of permissible advertising and usual charges of a not-for-profit legal referral service. The fees contemplated by this opinion do not fall within either category, as "usual charges" can only be reasonably interpreted to mean a cost per referral, not an amount contingent on a court award.

The Committee relies on two arguments: (1) that turning over the award is not "giv[ing] anything of value to a person for recommending the lawyer's services"; and (2) that because the money is paid by the losing party, the purpose of the Rule would not be served.

25. Compare: "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." LEWIS CARROLL, THROUGH THE LOOKING GLASS 112 (Heritage Press 1941) (1871).

The basis of the first argument is the suggestion that no true referral exists if the entire award is transferred because the lawyer had no financial interest in receiving the award. However, the definition of the word "referral" is not based on any person's financial interest in the referral itself; a referral is simply "the act of . . . referring," which is simply "to direct attention, usu[ally] by clear and specific mention." *Webster's New Collegiate Dictionary* 971, 972 (Henry Bosely Woolf ed. 6.8 C. Merriam Co. 1977). Here, the Committee is adding meaning to the plain reading of the Rule. The plain language of the Rule prohibits a lawyer from giving either all or part of a fee award to a party who refers a client to a lawyer.

The second argument may be based on good policy, but has nothing to do with the plain language of the Rule. The Rule does not say that a lawyer shall not pay a referral fee if he is paid by his client; it says that a lawyer shall not pay a referral fee, period, with two exceptions. The omission of the not-for-profit referring organization scenario leads to only one conclusion: that the scenario falls within the general prohibition.

I am also concerned with the Committee's ultimate conclusion that lawyers working for or with not-for-profit organizations are inherently less likely to be pressured by lay parties for whom they work, and that not-for-profit organizations do not pose the same threats as others in fee-sharing arrangements.

The Rule does not, and it should not, draw a line between classes of lawyers based on their clients. Lawyers are held to strict ethical standards regardless of client attempts to convince the lawyers to violate the standards. Given that lawyers who work for not-for-profit organizations and lawyers who work for for-profit organizations must focus on the client's needs, the attempts by an employer or referrer to convince the lawyer otherwise should not matter.

Rather than issue an opinion in obvious derogation of the Model Rules, I would have chosen from the following options. (1) Recommend to the House of Delegates that Model Rule 5.4 be abolished; (2) recommend to the House of Delegates that Model Rule 5.4 be amended to carve out exceptions for not-for-profit organizations; (3) do none of the above, but suggest to inquiring minds that if they wish to take court awarded legal fees generated in pro bono cases and give them to the agencies, that they should do that by accepting the fee and voluntarily writing the agencies a check for a like amount.

If Model Rule 5.4 is not one for our times, the Committee ought to recommend it be changed. Undermining it as the majority does may be politically correct but it is not delivered from the ethical high ground expected of opinions of the Ethics Committee of the American Bar Association.

The Rules of Procedure under which this Committee operates contain the following statement in paragraph 1. "The Model Rules of Professional Conduct and the Code of Judicial Conduct, as they may be amended or

superseded, contain the standards to be applied." Applying the standards found in 5.4 of the Model Rules of Professional Conduct, the answer to the question posed is that it is improper to share court-awarded fees with sponsoring pro bono organizations. Only under the world view of Mr. H. Dumpty, where words mean only what he chooses them to mean,²⁶ can the Committee's conclusion be reached.

Richard C. McFarlain
Member, Standing Committee on Ethics
and Professional Responsibility

Formal Opinion 93-375

August 6, 1993

**The Lawyer's Obligation to Disclose
Information Adverse to the Client in the
Context of a Bank Examination**

In representing a client in a bank examination, a lawyer may not under any circumstances lie to or mislead agency officials. However, the lawyer is under no duty to disclose weaknesses in her client's case or otherwise reveal confidential information protected under Rule 1.6. The lawyer must also take steps necessary to avoid assisting the client in a course of action she reasonably believes to be fraudulent, including if necessary withdrawing from the representation.

The Committee has been asked its views on a lawyer's obligations under the Model Rules of Professional Conduct (1983, amended 1993) to disclose facts adverse to a client bank in the course of an examination of the client by a bank regulatory agency. This inquiry requires us once again¹ to consider the interplay between a lawyer's duties to her client, including her obligation to preserve client confidences under Rule 1.6,² and her duty

26. See footnote 25.

1. See Formal Opinion No. 92-366, "Withdrawal When a Lawyer's Services will Otherwise be Used to Perpetrate a Fraud" (August 8, 1992).

2. Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

**D.C. Bar Ethics Opinion 329:
Non-Profit Organization Fee Arrangement with an Attorney to whom it
Refers Matters**

[¶ 1] An arrangement by a non-profit organization to pay an attorney an annual \$10,000 retainer fee for handling small compensation claims for day laborers on a contingent fee basis and then receive back the first \$10,000 the attorney receives each year in fees to cover the organization's costs does not violate Rule 5.4(a) so long as the reimbursements are restricted to recouping out of pocket expenses and are not tied to the amount of fees collected by the attorney in the representation of a particular client or clients.

Applicable Rules

[¶ 2] Rule 5.4(a) (Lawyer May Not Share Legal Fees With a Non-Lawyer)
Rule 7.1(b)(5) (Consideration May be Paid by a Lawyer to an Intermediary for the Referral of Legal Business)

Inquiry

[¶ 3] The inquirer, a District of Columbia non-profit entity, would like to assist day laborers in pursuing small workers' compensation claims. The non-profit has learned from experience that the day laborers have a difficult time finding competent counsel who are willing to provide representation in these types of cases. To help facilitate adequate representation, the non-profit proposes to pay a qualified attorney a \$10,000 annual retainer for handling these matters; allow the attorney to take a 10 percent contingency fee from client awards; and then require the attorney to pay the non-profit the first \$10,000 he receives in contingent fees each year to permit it to recoup its out-of-pocket retainer costs. Other than recouping out-of-pocket costs, the financial arrangement the non-profit has with the attorney is not in any way tied to the amount of fees collected by the attorney in the representation of a particular client. The non-profit has asked the Committee to opine whether this arrangement complies with the DC Rules of Professional Conduct. The Committee concludes that it does for the reasons set forth below.¹

Discussion

[¶ 4] Rule 5.4(a) of the DC Rules states that "a lawyer or law firm shall not share legal fees with a non-lawyer" except in certain narrow circumstances not pertinent to this inquiry. This provision could be interpreted to preclude a lawyer from ever sharing a portion of the fees that the lawyer receives from a client with an

¹ For the purposes of this Opinion, the Committee is assuming that the non-profit is not otherwise profiting from its relationship with the attorney. Under § 32-1530 of the D.C. Code, it is unlawful for a person to make it a "business" to solicit employment for a lawyer in respect of any claims or award for workmen's compensation. The arrangement as described to the Committee would not be proscribed by this Code provision.

organization that made the referral. DC Rule 7.1(b)(5), however, indicates otherwise. It specifies that referral fees arrangements with intermediaries can be proper if the lawyer "takes reasonable steps to ensure that the potential client is informed of: a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and b) the effect, if any, of the payment to the intermediary on the total fee to be charged." In addition, Comment 6 to Rule 7.1 notes that "a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs."

[¶ 5] There appears to be an inherent conflict, therefore, between the flat prohibition on fee-sharing between lawyers and non-lawyers found in Rule 5.4 and the implied acceptance of sharing fees with non-lawyers found in Rule 7.1. Numerous ethics opinions here and in other jurisdictions have examined this conflict to determine whether fee-sharing arrangements are permitted under certain circumstances. Generally, these opinions have looked to the public policies that underlie Rule 5.4 and have determined that the arrangements are permissible if they comply with them. In reaching this conclusion, the ethics opinions, including one by this Committee, have focused on two of the policy considerations: 1) whether a proposed arrangement would interfere with a lawyer's independent judgment; and 2) whether refusing to permit the arrangement would result in fewer legal resources being available for those in need of them.

[¶ 6] This Committee opined in 2001 that a lawyer may "participate in a federal government referral service that negotiates contracts to provide legal services to federal agencies where that program requires the lawyer to submit one percent of the legal fees received through the service to the government office in order to fund the program." D.C. Legal Ethics Comm., Op. 307 (2001). The Committee concluded that the arrangement was acceptable even though it would involve fee-sharing between lawyers and non-lawyers because of the policy considerations underlying the rule. *Id.* The Committee noted that Comment 6 to Rule 7.1 "suggests that the drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely on them for business referrals to influence those lawyers' professional independence of judgment." (citing Rule 5.4 cmt. 1). The Committee then concluded that the proposed arrangement obviated this concern because the inquiring organization presented "no risks of interfering with participating lawyers' independent professional judgment." *Id.*² In

2 D.C. Legal Ethics Comm., Opinion 233 also addresses the policies behind the ban on fee-sharing: "The bans on fee-sharing and partnerships with nonlawyers have long been a feature of codes of legal ethics. They were motivated by a number of concerns, chiefly that nonlawyers might through such arrangements engage in the unauthorized practice of law, that client confidences might be compromised, and that nonlawyers might control the activities of lawyers and interfere with the lawyers' independent professional judgement." In the opinion, payments of "success" fees to non-lawyer consultants were acceptable even though the payments were passed through a law firm because the payment procedure was "a formality of

addition, the Committee pointed out that the referring organization “is a non-profit service aimed at achieving important public policy objectives, including holding down the cost to taxpayers of legal services provided to government agencies.” *Id.*³

[¶ 7] Opinion 307 cited several opinions from other jurisdictions that have also permitted fee-sharing between lawyers and non-lawyer non-profits. For example, it referred to a Michigan decision that held that “a not-for-profit lawyer referral service registered with the state bar may charge as a referral fee a percent of the fee collected by the referred.” Mich. State Bar Comm. on Prof. and Judicial Ethics, Op. RI-75 (1991). In rendering its opinion, the Michigan committee pointed to the same policy reasons for its decision, noting that so long as the referral service takes measures to protect against undue influence on the lawyers, “the professional judgment of the lawyer is not interfered with and the rule against fee-splitting with nonlawyers is not violated.” *Id.*

[¶ 8] Opinion 307 also referred to Pennsylvania, Arkansas and Virginia opinions which concluded that lawyer referral services operated by local bar associations may accept a percentage of fees earned by lawyers from referred clients. *See* Pa. Bar Assoc. Ethics Op. 93-162 (1993); Ark. Bar Assoc. Op. 95-01 (1995); and Va. Legal Ethics Comm. Op. 1744 (2001). These opinions noted that a number of jurisdictions help fund their legal referral services through the return of fees from referred lawyers. The Arkansas Bar Association further stated that “the increase in revenue produced for the Bar Association will help maintain this public service.” Ark. Op. 95-01 The Virginia opinion also provides support for the idea that fee-sharing is permissible when the arrangement would not interfere with a lawyer’s professional judgment and furthers the public policy of providing legal services to those in need of them. It concluded that a private practitioner who received pro bono work from a non-profit association could return court-awarded attorney’s fees to the association. Va. Legal Ethics Comm. Op. 1744 (2001) In reaching this conclusion, the committee pointed out that “a legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding.” *Id.*⁴

[¶ 9] The American Bar Association has indicated on at least three occasions that similar fee sharing arrangements did not violate its earlier Code of Professional Responsibility. In Formal Opinion 291, the ABA determined that “a bar association may require members of a lawyer referral panel to help finance the

no consequence.” D.C. Legal Ethics Op. 233 (1993).

3 *See also* D.C. Legal Ethics Comm., Op. 253 (1994) (holding that a referral arrangement between an insurance company and a law firm that involved payments made for each referred case “would not run afoul” of rules 5.4 and 7.1 even though the referral fee “would be paid by the firm from its percentage contingency fee,” but that the arrangement could fail if there are potential conflict of interest problems under rules 1.7 and 1.3).

4 *See also* Va. Legal Ethics Comm. Op. 1751 (2001) (noting that many jurisdictions accept arrangements permitting a referral service to receive a percentage fee from referred attorneys, and stating that this widespread acceptance “indicates a strong support by the various bars for increasing public access to legal services”).

service either by a flat charge or a percentage of fees collected.” ABA Formal Op. No. 291 (1956) In addition, the ABA concluded that it was “ethically proper” for a lawyer referral service to require attorneys to return all or part of consultation fees, as well as a percentage of fees earned, to the service. ABA Informal Op. 1076 (1966). Finally, Formal Opinion 93-374 noted that a lawyer may perform pro bono litigation services and then share a portion of any court awarded fees with the non-profit organization that referred the lawyer to the client. ABA Formal Op. 93-374 (1993).

[¶ 10] The Restatement of the Law Governing Lawyers reflects the same view that concerns about fee-sharing are not present when fees are shared with a referring non-profit organization. The Restatement contains a provision similar to Rule 5.4(a) of the D.C. Rules. See Restatement (Third) of The Law Governing Lawyers § 10(3) (1998) (“a lawyer or law firm may not share legal fees with a person not admitted to practice as a lawyer,” except in certain irrelevant circumstances). Comments to Section 10 indicate that the fee-sharing prohibition should only be interpreted strictly where policy concerns warrant a narrow interpretation. Comment b notes, for example, that “this section should be construed so as to prevent non-lawyer control over lawyers’ services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that non-lawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons.” *Id.* § 10 cmt. b. In addition, the comments note that although fee-sharing gives power to the non-lawyer referrer, “that incentive is not present when the referral comes from a nonprofit referral service.” *Id.* at cmt. d.⁵

[¶ 11] Case law provides further support for the view that sharing fees between a lawyer and a referral service is acceptable under the various rules of professional conduct. In *Emmons v. State Bar of California*, 6 Cal. App. 3d 565 (1970), for example, a California court denied the plaintiff’s request for a declaratory judgment that would allow the plaintiff to avoid paying a one-third referral fee to the bar association’s lawyer referral service.⁶ See *Id.* Similar to the opinions issued by the various states’ ethics committees, the court in *Emmons* relied on policy reasons for permitting this fee-splitting. The court noted that “there are wide differences - in motivation, technique, and social impact - between the lawyer reference service of the bar association and the discreditable fee-splitting” prohibited by the rules. *Id.* at 573. Fee-splitting that should not be allowed

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- 5 Other provisions of the Restatement that address fees similarly indicate concern with arrangements that might compromise a lawyer’s independence. See e.g. *id.* § 47 cmt. b (“the traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than the lawyer’s qualifications”); *id.* § 134 cmt. c (noting that a lawyer’s loyalty to a client must not be compromised by a third party source of payment).
- 6 This case has been widely cited by ethics committee opinions. See e.g. D.C. Legal Ethics Comm., Op. 307; Va. Op. 1751; Ark. Op. 95-01; Pa. Op. 93-162; Mich. Op. RI-75.

“carries with it the danger of competitive solicitation; poses the possibility of control by the lay person, interested in his own profit rather than the client’s fate; facilitates the lay intermediary’s tendency to select the most generous, not the most competent, attorney.” *Id.* at 573-74. On the other hand, fee-splitting with the bar association’s lawyer reference service was permissible because “the bar association seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public.” *Id.* at 574.⁷

[¶ 12] While these opinions, court decisions, and standards suggest strong support for the proposed arrangement, there is one aspect, namely the fact that the attorney will be representing the day laborers on a contingent fee basis, that requires further analysis. In an opinion rendered in 1998, this Committee determined that Rule 5.4 precluded a lawyer from making payments to a referral service if the payments are “contingent upon, and tied to, the lawyer’s receipt of revenue from the referred legal business and is tied to the amount of those fees.” D.C. Legal Ethics Comm., Op. 286 (1998) According to this Opinion, the only departure from the ban on fee-sharing that Rule 7.1 permits is the authorization of payments to referring organizations when the payments are non-contingent and “paid regardless of the success or outcome” because that does not represent a division of legal fees. *Id.*⁸ A later opinion from this Committee relating to soliciting plaintiffs for class action lawsuits or obtaining legal work through Internet-based web pages expressed approval of this interpretation of the rules. *See* D.C. Legal Ethics, Op. 302 (2000) (agreeing with the view that “any fee a law firm pays to a service provider [on the internet] cannot be linked to or contingent on the amount of legal fees the lawyers obtain from a posted project, since such an arrangement would violate D.C. Rule 5.4’s prohibition against lawyers sharing legal fees with non-lawyers”).

[¶ 13] These two opinions could be interpreted to preclude any fee-sharing arrangement where the fees are contingent upon a lawyer’s receipt of revenue from a referred client. But the opinions are narrower than that and do not address whether a non-profit that refers its clients to lawyers may recoup its out-of-pocket costs in situations where the lawyer collects sufficient funds to pay them from the various contingent fees he or she receives.⁹ This fee arrangement is different from

7 *Kean v. Stone*, 966 F.2d 119 (3rd Cir. 1992), also supports the idea that fee-splitting between a lawyer referral service and a lawyer may be permissible. *Kean* holds that a union may “benefit indirectly from the proceeds of law practice” where litigation fees are “paid into a separate account used solely by lawyers for litigation purposes.” 966 F.2d at 123.

8 This opinion relied in part on an opinion issued by the Florida Bar Professional Ethics Committee, which held that “a nonlawyer hired to engage in permissible marketing activities on behalf of a lawyer may be paid a straight salary,” but that “if commissions would be tied to legal fees derived from business brought to the firm by the nonlawyer’s efforts, payment of those commissions would constitute a violation of [the Florida rule that] forbids a lawyer to divide a legal fee with a nonlawyer.” Fla. Bar Prof. Ethics Comm., Op. 89-4 (1989).

9 The Committee does not address the question whether the attorney must return any portion of the retainer that is not utilized to provide legal services to day laborer clients. The situations in which all or a portion of the retainer needs to be returned are governed by the Committee’s

the one precluded in Opinion 286 and referred to in Opinion 302 because it is not tied to the amount of fees collected by the lawyer in his or her representation of a particular client. In addition, both of these opinions pre-dated Opinion 307 which supports a fee-splitting arrangement which is far more analogous to our situation than those referred to in Opinions 286 or 302.

[¶ 14] This Opinion, however, is limited to the specific facts of this Inquiry and should not be interpreted as a deviation from previously-expressed concerns about contingent fee-sharing arrangements which are explicitly linked to the amounts of fees collected by an attorney in the representation of a specific client or specific clients.

[¶ 15] It is the opinion of the Committee that Rule 5.4's prohibition on fee-sharing does not preclude a non-profit from recouping its out-of-pocket expenses by requiring a lawyer to whom cases are referred to repay the expenses if sufficient funds are received from contingent fees obtained from various representations. Opinion 307 makes it clear that:

'[T]he drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely upon them for business referrals to influence those lawyers' professional independence of judgment.'

D.C. Rule 5.4, Comment [1].

[¶ 16] Because the particular structure of the relationship between the non-profit and the lawyer here is comparable to that which normally exists with a lawyer and a non-profit referral service, the Committee concludes that the Committee's rationale for its Opinion 307 applies equally to this type of arrangement because it: 1) does not interfere with the lawyer's independent judgment;¹⁰ and 2) will benefit the public by facilitating the provision of legal services to those who are in need of them.¹¹ As pointed out in the Committee's Opinion 225, which concluded

Opinion 264. It is our understanding that this is a retainer to ensure availability which is explicitly permitted in that Opinion.

10 That the non-profit in question does not appear to be affiliated with any bar association should not affect the non-profit's ability to receive a portion of fees from referred lawyers. *See* Prof. Ethics Comm. of the State Bar of Tex., Op. 502 (1994) (holding that a non-profit service that was not established by a bar association may refer clients to a lawyer and then receive a portion of the fee collected by the lawyer in part because Texas public policy supports the establishment of lawyer referral services, and the fees received through this arrangement would benefit this policy).

11 It should also be noted that both ethics committees and courts have indicated that if an attorney were to raise a client's fee to cover the cost of returning some of the funds to a referral service, the arrangement would be ethically unacceptable. *See, e.g.,* Cal. State Bar Ethics Op. 1983-70

that a prepaid legal services plan complied with the Rules of Professional Conduct:

“Nothing in the Rules of Professional Responsibility purports to limit or discourage the use of innovative ways of providing legal services ..
'Innovative approaches and fresh ideas in this area may result in the availability of necessary low-cost legal services to individuals who could not previously afford to employ an attorney’

[¶ 17] As part of the arrangement, however, the inquiring non-profit and the attorney providing the services, must comply with the notice provisions set forth in Rule 7.1(b)(5).

May 2005

(1983) (holding that a lawyer referral service may require attorneys to return to the service a percentage of all fees above a minimum threshold that the attorney receives from referred clients, but that the attorney may not raise the legal fees to cover the amount paid to the service, as “such arrangements should be structured in order to avoid the risk of increased costs to the clients”); *Alpers v. Hunt*, 86 Cal. 78, 88 (Cal. 1890) (holding that a contract made with a non-lawyer through a third party who would receive one third of any recovered funds was invalid in part because “such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person”). In addition, The D.C. Rules of Professional Conduct require that any fee charged to a client be reasonable. *See* D.C. Rules of Professional Conduct R. 1.5. *See also* American Bar Association Formal Op. 00-420 (2000); *Blum v. Stenson*, 465 U.S. 886 (1984). However, by allowing an attorney only a 10% contingency fee and by requiring the attorney to return only the \$10,000 that had been advanced, the proposed arrangement avoids offending these fee-based concerns.

Committee Opinion
June 27, 2000

LEGAL ETHICS OPINION 1744

ATTORNEY, IN PRO BONO
REPRESENTATION, RETURNING COURT-
AWARDED FEES TO CLIENT.

You have presented a hypothetical situation in which Lawyer A is an employee of a non-profit corporation which brings legal actions on behalf of clients. Lawyer B, a private practitioner, sometimes handles these cases at the request of the non-profit corporation on a pro bono basis, alone or as co-counsel with Lawyer A. Although no fee is charged, in some instances the legal actions result in court-awarded attorney's fees.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 5.4(a) of the Virginia Rules of Professional Conduct¹ providing that:

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 undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; 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.

The committee has previously opined that it is unethical for a lawyer who accepts a pro bono referral from a non-profit organization to charge or collect a contingent fee for the representation. Legal Ethics Op. 1691 (1996). Thus, in the facts you present, it would be improper for the staff attorney (Lawyer A) or the pro bono lawyer (Lawyer B) to claim the court-awarded fees. In some situations, however, a cooperating attorney may contract for a reduced fee with the nonprofit organization and therefore be entitled to a part of the court-awarded legal fees. The issue remains, then, whether the lawyer may ethically agree to turn over all or part of the fees awarded by the court to the non-profit organization that has sponsored the litigation. Rule 5.4(a) is implicated because non-profit organizations or public interest groups are controlled, in whole or in part, by

¹ The prohibition in Rule 5.4 (a) on sharing fees with a nonlawyer is substantially identical to its predecessor, DR 3-102 (A) of the Code of Professional Responsibility.

Committee Opinion
June 27, 2000

boards or governing bodies composed of nonlawyers.

Attorney's fees awarded to successful plaintiffs pursuant to statute are a significant source of funding for non-profit public interest organizations. Typically, all such organizations require staff or cooperating attorneys to turn over all or a part of any court-awarded legal fees arising out of successful litigation sponsored by the organization. Roy Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L. J. 1069, 1070-71 (1989)(hereinafter "Simon"). A legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding.²

The committee opines that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization. Rule 5.4 (d) states that a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if nonlawyers are in a position to exercise control over the professional judgment of a lawyer. Given the rule's history, development and reference to *for profit* associations of lawyers and non-lawyers, the committee believes that Rule 5.4(a) does not prohibit an attorney sharing or turning over court-awarded attorneys fees to a *non-profit* public interest group which sponsored the litigation.³

The primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence. The fact that the entity with which legal fees are shared is a non-profit organization is significant given Rule 5.4 (d)'s language. In addition, the legal fees in question are court-awarded rather than paid by the client. In Legal Ethics Op. 1598 (1994), the committee concluded that the thrust of DR 3-102 (A) is that a lawyer and a nonlawyer enter into an agreement where fees received from one or more clients are shared with the nonlawyer. In the facts you present, there is no issue that the client will be charged an excessive fee, due to the nonlawyer's influence or involvement, since the client does not pay the fee and the court hears evidence and determines the amount of the fee to be awarded.

This Committee is of the opinion that it is not unethical for an attorney to participate with a nonprofit organization that requires participating attorneys to turn over court-awarded fees to the organization, notwithstanding Rule 5.4 (a) or DR 3-102 (A).⁴

² Professor Simon cited a study of non-profit public interest groups revealing that at least nine percent (9%) of their budgets were funded by court-awarded attorneys fees. Simon, *supra* at 1074.

³ In Formal Opinion 93-374 issued by the ABA's Standing Committee on Legal Ethics, the committee analyzed Rule 5.4, reasoning that:

Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a lay person, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership agreement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

⁴ See, ABA Formal Op. 93-374 (1993); Cleveland Bar Ass'n Op. 141 (1979)(staff attorney for organization dedicated to legal rights for women could agree to remit court-awarded fees as condition of employment); *But see*,

Committee Opinion
June 27, 2000

Therefore, under the facts you have presented, Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation. Such conduct does not violate Rule 5.4 (a) of the Virginia Rules of Professional Conduct.

ACLU v. Miller, 803 S.W.2d 592 (Mo. 1991) (organization had no enforceable right to court-awarded attorneys fees because this would constitute fee-splitting between participating lawyer and a non-lawyer); Maine Comm'n on Legal Ethics, Op. 69 (1986).

Opinion 503

June 1994

Tex. Comm. on Professional Ethics, Op. 503, V. 58 Tex. B.J. 632 (1995)

(92-7)

QUESTION PRESENTED

Whether the Texas affiliate of a national non-profit public interest law organization can require cooperating attorneys to share a portion or all of their fees collected in civil rights cases with the Texas affiliate?

STATEMENT OF FACTS

The Texas affiliate of a national non-profit public-interest law organization contracts with cooperating attorneys to handle referred civil rights cases. If the case involves substantial constitutional or civil rights issues, is likely to have precedential value and there is a strong probability of a favorable result through litigation the Texas affiliate will then accept the case and agree to pay all or most of the costs of the litigation and to provide the complainant with an attorney who will volunteer his or her services pro bono publico. The cooperating attorney agrees to share some or all of any attorney's fees earned in the case with the Texas affiliate, which maintains a separate fund into which these attorney's fees are deposited. This dedicated fund is used exclusively for litigation purposes.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct (hereinafter "the Rules") do not undertake to define the standards of civil liability of a lawyer's professional conduct, nor are they designed to be legal standards for procedural decisions.

This Committee does not, therefore, issue any opinion regarding the respective legal obligations and responsibilities of the parties, nor whether or not their fee sharing agreement is legally enforceable.

Rule 5.04 captures the ethical concerns raised by the fee-sharing arrangement under discussion. That rule prohibits an attorney or law firm from sharing or promising to share legal fees with a non-lawyer, subject to exceptions not applicable here.

Comment 1 to Rule 5.04 discloses that the principal reasons for the prohibition on fee sharing as expressed in the Rule codify traditional limitations on fee sharing, namely, preventing impermissible solicitation of cases and avoiding encouraging the unauthorized practice of law by non-lawyers. The paramount consideration is the protection of the integrity of the professional independence of the lawyer.

The Texas affiliate advances several arguments that Rule 5.04 is not violated by the fee-sharing arrangement; specifically (1) the retention of the fee is not profit within the meaning of the Rule; (2) the express policy of the Texas affiliate assures the professional independence of the lawyer; (3) the traditional limitations codified in Rule 5.04 are not offended by the protection and promotion of constitutional rights and civil rights by the Texas affiliate and (4) the clients are not exposed to excessive fees since all attorney fees are paid by the losing party.

It is the judgment of this Committee that Rule 5.04 cannot be construed to permit the fee sharing agreement between the affiliate organization and the cooperating attorney.

There is not an exception stated in Rule 5.04 descriptive of the relationship between the affiliate organization and the cooperating attorney.

CONCLUSION

A cooperating attorney ethically cannot agree to share legal fees with a non-profit public interest organization where the non-profit public interest organization has referred a case to the cooperating attorney and that attorney has been awarded attorney's fees by judgment or settlement.