

Rule 5.4: Professional Independence of a Lawyer

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; 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; or

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

Supreme Court Commentary

[1]The provisions of this Rule express traditional limitations on sharing fees. These

limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] The term "partnership" in paragraph (b) is a term of art intended to include other associations, such as joint ventures, corporations, and conglomerates.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(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~~ 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 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 a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization not owned or directed by the lawyer that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation

or association authorized to practice law for a profit, if:

(1) A 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

~~(2)~~ (3) A a nonlawyer has the right to direct or control the professional judgment of a lawyer.

~~Supreme Court Commentary~~ Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

~~[2] The term "partnership" in paragraph (b) is a term of art intended to include other associations, such as joint ventures, corporations, and conglomerates.~~

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Rule 7.2 authorizes a lawyer to participate in a not-for-profit or qualified lawyer referral service and the sharing of fees with such service; hence, a lawyer's participation and sharing of fees with such service will not, by itself, constitute an inappropriate interference with the lawyer's professional judgment.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The Committee recommends adoption of MR 5.4 as KRPC 5.4. Note that this will eliminate the current KRPC 5.4 Comment [2] that defines the term "partnership" to include other associations, such as joint ventures, corporations and conglomerates. The Comments to MR 5.4 do not contain this Comment.

(2) Added is new MR Comment [2] and Committee drafted Comment [3].

(3) The ABA Reporter's Explanation of Changes to MR 5.4 expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

ABA Reporter's Explanation of Changes -- Model Rule 5.4

TEXT:

1. Paragraph (a)(4): Permit sharing of court awarded legal fees with nonprofit organization

This addition is proposed to clarify that a lawyer may share court awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter. The propriety of such fee sharing arrangements was upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility. Other state ethics committees, however, 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. The Commission agrees with the ABA Standing Committee that the threat to independent professional judgment is less here than in circumstances where a for profit organization is involved and is therefore recommending this change.

2. Paragraph (d)(2): Broaden to include nonlawyers who occupy positions with responsibilities similar to those of corporate directors or officers

The current Rule is too limited because it employs terminology peculiar to corporate law, and lawyers are now practicing in professional limited liability companies. When applied to a professional limited liability company, paragraph (d)(2) is intended to preclude a nonlawyer from serving as a manager in a company that is managed by managers rather than members and from serving in a position like that of a president, treasurer or secretary

of a corporation.

COMMENT:

[2] This Comment provides a cross reference to Rule 1.8(f) on payment of a client's fee by a third person. No change in substance is intended.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

Committee drafted Comment [3] is added to make it clear that a lawyer's participation in a lawyer referral service does not constitute an inappropriate interference with a lawyer's professional independence.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.