INTRODUCTION

Proposition for Discussion & Debate

Rule 5.4 is not itself a rule of legal ethics, and it does not belong in the Model Rules. While the term “independence” has multiples meanings in the context of lawyer ethics and regulation, the stated purpose of Rule 5.4 is primarily to protect a lawyer’s exercise of professional judgment in providing legal services to clients from interference based on personal interests and improper influences/motivations. It effectively operates as one of the few conflict of interest rules for which informed client consent is not permitted.

It is, at best, questionable to characterize “professional independence” in this context as a core value of the legal profession, but in any event the obligation of client loyalty and avoidance of conflicts of interest derived from agency and fiduciary duty law substantially overlaps with and embodies the concept of lawyer professional independence, and the conflict of interest rules (Rules 1.7 – 1.11) provide sufficient protection for clients and the public in this context. The question of whether any notion of independence should be included as a regulatory objective for regulating legal services by lawyers and nonlawyers is a separate issue that is worthy of discussion.

But because the strict prohibitions in Rule 5.4 are not based on any meaningful, separate ethical or fiduciary principle or principle of professional responsibility not included elsewhere in the ethics rules, but rather reflect a policy choice about with whom lawyers should be permitted to practice and how fees can be shared, as well as the structure of entities permitted to provide legal services, Rule 5.4 should be deleted from the Model Rules of Professional Conduct.

Model 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;

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

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

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

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

2. a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

Other Relevant Rules

- Rule 1.7 (personal interest conflicts)
- Rule 1.8(f) (accepting compensation from non-client)
- Rule 2.1 (requiring lawyers to “exercise independent professional judgment and render candid advise” in representing a client)
- Rule 1.2(a) (client has authority to determine objectives of representation)
- Rule 7.2(b) (prohibition on giving value for recommending the lawyer’s services)

The Stated Purpose of Model Rule 5.4: Protecting Professional Independence

- The Rule’s title refers only to the lawyer’s “professional independence”

- Also, Rule 5.4(c): prohibiting a lawyer from permitting one 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”

- Also, Rule 5.4(d)(3): prohibiting law practice in the form of a professional corporation or association authorized to practice law for a profit if “a nonlawyer has the right to direct or control the professional judgment of a lawyer”

- Rule 5.4, cmt. [1]: the limitations on sharing fees with a nonlawyer “are to protect the lawyer's professional independence of judgment.”

- Rule 5.4, cmt. [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.”

- Terry, at 874: “Interestingly, the Comment to ABA Model Rule 5.4 provides only one rationale for this rule: it observes that the traditional limitations on sharing fees are to protect the
lawyer's independence of judgment.’ Commentators cite as additional rationales concerns that fee sharing would undermine lawyer confidentiality and create conflicts of interest.”

- Perlman, at 98: “Some commentators raise the concern that people who are not lawyers cannot offer clients the same protections as lawyers. For example, people who are not lawyers are not bound by the rules of professional conduct, and communications are not necessarily covered by the attorney-client privilege. It is also argued that, in the absence of a law license, people will not exercise professional independence and will cut corners in order to increase profits at the expense of protecting clients.”

**Other Notions of “Independence,” Including as a Basis for Self-Regulation**

- Model Rule Preamble, ¶¶11, 12:

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

- Wilkins, at 854-74:

“[P]articipants in the various regulatory debates often seek to link their arguments about professional independence to some more general conception of the public good. These arguments fall into two categories. The first posits that an independent legal profession is necessary to maintain the separation of powers among the three branches of government. The second claims that an independent legal profession plays an essential role in preserving the rights of citizens in a democracy. . . . Lawyer independence is frequently linked to the preservation of democracy. The argument takes several forms. In the most familiar claim, opponents of state regulation assert that only an independent legal profession can adequately protect the rights of individuals against state power. . . . At other times, the fact that citizens in a democracy have a right to use the public resources of the state to achieve their private purposes is said to require that lawyers be independent from any source of authority, public or private, that might limit their clients’ access to the public goods encoded in law. . . . According to this argument, an independent legal profession acts as a mediating force between the interests of private clients and the public purposes of the legal order. . . .

“According to the traditional view, to exercise [the] form of discretionary [professional] judgment [in which a person has fully integrated the values of the legal system – including all of the conflicts and ambiguities – and is honestly struggling to discover and implement the
approach that best effectuates its underlying purposes], lawyers must be ‘independent’ from all potentially corrupting influences that might cloud or distort their considered assessment of what legality requires. This was generally thought to require ‘self-regulation.’ Once we examine the actual operation of this and other enforcement systems, however, it is clear that additional controls will often promote, rather than undermine, a lawyer’s willingness to take appropriate actions under conditions of uncertainty.

Robert Gordon on “independence” as “a bundle of several related, and yet very different, notions of how lawyers may be understood to operate independently” (from May 21, 1999 Letter to MDP Commission):

“First, independence means the bar’s freedom to regulate its own practices without outside interference. . . . Lawyers also traditionally seek to benefit from a second type of independence, the discretion to determine the conditions of their work. Ideally, independent lawyers freely decide which clients and causes they will represent, how to divide their time between paying clients and other commitments, what strategies and tactics to follow in pursuit of the clients’ ends, and so forth. The client dictates (as moderated by the lawyer’s advice) the results to be sought and has the final say on major decisions, but there are large areas of often crucial choices reserved for the professional’s discretion. . . . The most often stressed form of independence, and the most relevant to the issues the [MDP] Commission is considering, is that which enables the lawyer to make an objective and disinterested assessment of the law and facts of the client’s situation, in order to render the best possible legal advice. Disinterested judgment can be compromised when it is unduly distracted or distorted by extraneous concerns, in particular, the universal and unavoidable concern with making a profitable living in competition with other providers. . . . The lawyer also needs to protect his or her ability to represent the law to the client as well as representing the client to the law: that is, to make clear if and when necessary that there may be legal constraints on a client’s course of action that the lawyer cannot, in good faith and consistently with his or her obligations to the legal system, assist the client to transgress, in particular, aiding the client to plan or continue a course of conduct that the lawyer has reason to believe is fraudulent or otherwise unlawful, that stretches the boundaries of applicable law beyond plausible good faith interpretation, or that if pursued would effectively nullify the purposes of a legal regime set up to prevent such conduct. Finally, there is what may be called political independence -- the ability of the lawyer, in his or her role as a citizen with special responsibilities to preserve the well-being of the framework of law and regulation, to take an independent position on the merits of existing laws and proposed reforms. . . .”

OVERVIEW OF THE HISTORY OF RULE 5.4

Early Development of the Rule, Including First ABA Canon Provisions in 1928


“The petitioner was a business corporation organized for profit to provide legal services to its subscribers by the employment of ‘a staff of competent attorneys and counsellors at law.’ The court concluded that the corporation was illegal even under the law as it existed prior to the
amendment of the 1909 New York statute, which explicitly prohibited corporations from offering such services. The court gave four principal grounds for this conclusion: (1) corporations cannot become members of the bar and they should not be able to do indirectly what they cannot do directly; (2) an attorney employed by a corporation would be responsible to the corporation rather than to the client of the corporation; (3) the corporation might be controlled wholly by nonlawyers and organized simply to make money; (4) the public would have no remedy to protect itself from the corporation. *Co-operative Law* has been widely influential since 1910 both in result and reasoning. Its conclusion that corporations owned or controlled in part by nonlawyers may not offer the services of lawyers to the public has been followed, in one form or another, in practically every American jurisdiction.”

- Green I, at 1136-39:

  “Although the original Canons [enacted in 1908] were silent on whether lawyers could be employed by corporations or otherwise collaborate with laymen, this was not an intractable problem. The organized bar devised another vehicle for formally elaborating professional standards: opinions published by a bar association concerning the propriety of specific lawyer conduct. . . . [After New York and ABA ethics opinions were issued on the subject,] [i]n 1928, a special committee appointed to propose supplements to the Canons sought to codify the earlier opinions. Its proposals, which the ABA approved, provided for the adoption of new canons prohibiting a lawyer from entering into a partnership with a nonlawyer, from dividing fees for legal services with anyone other than another lawyer or from being employed by a corporation or other organization to render legal services to others. . . .

  “The special committee’s report did not offer much justification for the proposed Canons other than to explain that considerable work went into developing them. However, a member of the special committee . . . offered that the proposals did not embody ‘fundamental ethical principles,’ but comprised ‘rules of conduct which, while they may be advisable, are yet rules of professional policy or expediency which are considered necessary or important to retain and protect the public confidence in the bar as a part of the administration of justice.’”

- Canon 33 (1928): “In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. No person should be held out as a practitioner or member who is not so admitted .... Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.”

- Canon 34 (1928): “No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.”

- Canon 35 (1928): “The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer .... He should avoid all relations which direct the performance of his duties in the interest of such intermediary.”
Model Code of Professional Responsibility (1969)

- Retained restrictions on dividing fees with nonlawyers (DR 3-102(a)), forming partnerships with nonlawyers (DR 3-103(A)), and practicing in an entity owned by a nonlawyer (DR 5-107(c)) (Canon 3 was titled “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law”; Canon 5 was titled “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”)
- Also, DR 5-107(B) prohibited a person who recommends, employs, or pays a lawyer to render legal service for another “to direct or regulate his professional judgment.”
- Lawyer are Different/Special Rationale in the Model Code:
  - EC 3-3: “A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. [footnote 1, see below] The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.”
- Andrews, at 589-91:
  “An important addition in the Model Code was the attempt to provide some justification for the bans on nonlawyer involvement in the business of law. Because nonlawyers were not subject to ‘the requirements and regulations imposed upon members of the legal profession’ the bans were considered necessary to assure the public of integrity, competence, loyalty, and confidentiality in the delivery of legal services.

…

“[I]n 1975 the Model Code was amended to permit profitmaking entities to furnish legal services to members or beneficiaries provided that the entity does not derive any profit from the legal services. . . . According to the drafting committee, however, the prohibition on the derivation of profit by the lay organization was based on a concern that otherwise the lay organization might interfere with the exercise of the lawyer’s professional judgment.”

Kutak Commission Proposal/Adoption of Model Rules (1983)

  A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:
(a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6;

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and

(d) The arrangement does not result in charging a fee that violates Rule 1.5.


  “To prohibit all intermediary arrangements is to assume that the lawyer’s professional judgment is impeded by the fact of being employed by a lay organization .... The assumed equivalence between employment and interference with the lawyer's professional judgment is at best tenuous .... Applications of unauthorized practice principles, only tenuously related to substantial ethical concerns raised by intermediary relationships, may be viewed as economic protectionism for traditional legal service organizations ....

  “The exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.”


  Bob Hawkins: “I cannot conceive that a lawyer can maintain his independence and his independent judgment over a period of time when he’s on a salary from a corporation that’s looking over his shoulder at his results in terms of profit. Now if you wish to destroy our profession as we’ve known it... if you want to destroy it, the young lawyer’s opportunities in this country to enjoy the same professional independence that you and I have known, then ... support the Commission.”

  Al Conant: “The one who has the gold makes the rules, and the one [who] has the gold under [proposed] 5.4, is going to be a non-lawyer. ... I cannot tell you what [the effects on the profession of enacting proposed rule 5.4] are, but I don’t believe anyone can .... It also authorizes anyone else in the business world to get into the law business. Now is that good or bad? I don’t know. Will it result in cheaper services to the consumer? I don’t know, but nobody can tell you that it will. Will it result in better services to the consumer? I don’t know. I doubt it, but no one can tell you that it will. Will it destroy the economic existence of individual lawyers? I don't know, but nobody can tell you that it won’t. Will it affect the lawyer’s independence of judgment? I don’t know, but nobody can assure that it won’t ... No one can tell you what the impact of 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law.”
Charles Kettlewell (an APRL Founder): “Is it cost-effective to provide full representation? Is it cost-effective to zealously represent your client? Is it cost-effective to spend enough time with your client to get the job properly done? I think the answer is no. But clearly as lawyers, as professionals, we must get the job done properly, and we must spend that time and we must do those things. But what about the business venturer who owns this firm, he who hires or fires the lawyers? They needn’t view it that way. Now if the safeguards of the Commission were adequate, . . . fine. But [they] won’t be, and I submit who is in trouble if there is a violation of these rules? Is it the venturer or the lawyer? It’s the lawyer; the venturer isn’t even under the jurisdiction.”

Frank Rosiny: “the rule as proposed by the Commission is very unwise policy because if nothing else, it is demeaning to the profession, and this would wound the profession in a way, I submit, very similar to that which is occurring every day by virtue of lawyer advertising, but with a difference ... [t]his Rule 5.4 ... will be a self-inflicted wound.”

• Kutak Proposed Rule 5.4 was rejected by the ABA House of Delegates; Rule 5.4 adopted in Model Rules in 1983 retained the prior Code provisions; still in place in substantially the same form, enacted in virtually every jurisdiction (except the District of Columbia)

“Professional Independence” as a “Core Value” (from the 1999-2000 MDP Commission Debate)

• Paragraph 2 of MDP Commission’s Final Recommendation (2000) (proposing that lawyers be “permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services . . . , provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services”): “This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations.”

• Larry Fox on Permitting MDPs and Losing the Soul of the Profession:
  - Written Remarks to MDP Commission, Feb. 4, 1999: “‘It’s the money.’ Follow the money and you’ll follow the power. Follow the power and you’ll know who is in control. And as soon as the power rests with non-lawyers not trained in, not dedicated to, and not subject to discipline for our ethical principles, you will see the independence of the profession fall away. . . . It reminds me of what happens when the biggest company in a town gets purchased by folks from far way. The new buyer may give lip service to giving back to the community. But the reality is the town will soon learn it has lost its soul.”
  - Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84 MINN. L. REV. 1097, 1103, 1106 (2000): Rule 5.4 guards against “interference by nonlaw trained masters who wish us to take short cuts to maximize profits”; “We are not just another set of service providers. We are not just another cohort of business consultants. . . [W]e are a priesthood.”
MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud, 44 ARIZ. L. REV. 547, 556 (2002). “The ABA’s Multijurisdictional Practice Commission’s [proposal] depends on the invidious notion, often advanced in the pre-Enron era by the now not-so-Big Five, that lawyers really are just another set of service providers, that there is nothing special — in the sense of special responsibility — about being lawyers, that our rules of professional conduct are not all that important, and that the sooner we lawyers got off our high falutin’ horses the better off we will be.”

- ABA Formal Op. 01-423, at 4, n.6: “In February and August 2000, concern that admission of nonlawyer professionals as partners in law firms would interfere with lawyers’ professional independence and the preservation of the core values of the profession led the House of Delegates to reject proposals to allow partnerships with nonlawyer professionals and to direct that no change be made to Rule 5.4.”

- Report by Illinois State Bar in Support of 2012 ABA Resolution to preempt consideration of Rule 5.4 reforms (not adopted): “Affirmation of these core principles and values is important now, particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence. ... The evils of fee sharing with nonlawyers in jurisdictions that permit nonlawyer ownership can have the same deleterious effect on lawyer independence and control as any other fee sharing with nonlawyers. The American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.”

- ABA Futures Report (2016), at 42: “Many of the comments opposing ABS focused on the commenters’ belief that ABS poses a threat to the legal profession’s ‘core values,’ particularly to the lawyer’s ability to exercise independent professional judgment and remain loyal to the client. Specifically, opponents of ABS fear that nonlawyer owners will force lawyers to focus on profit and the bottom line to the detriment of clients and lawyers’ professional values.”

- Wolfram’s Skepticism of Professional Independence as “Core Value,” at 1626-27: “ABA President Philip S. Anderson, who directly appointed the ABA’s MDP Commission, warned early on that while the Commission was considering whether to redo the ABA’s prohibitory rules on lawyer relationships with closely allied professions, they should take great care in their work to preserve the core values of the legal profession. As with many other subsequent orators, Mr. Anderson was suitably vague about what exactly those values might be, exactly what importance they had and to whom, what threats they might confront, and what measured or more radical measures might reasonably be considered necessary to address real risks. The tag-line of ‘core values’ has since been endlessly flung about, by parties including the Commission itself, in an attempt to demonstrate that the utterer has kept well in mind the traditional aspirations of the organized American legal profession.”

- Schneyer’s Skepticism of Professional Independence as “Core Value,” at 1470-71: “The Commission regards loyalty, competence, confidentiality, and independent professional judgment as the legal profession’s ‘core values.’ One can hardly disagree. But core values and useful regulatory concepts are two different things. The bar and the courts have spent decades giving legal meaning and regulatory significance to three of these values but not the fourth. Conflict-of-interest rules and disqualification decisions have defined the lawyer’s duty of loyal and spelled out its implications. Malpractice decisions have fleshed out the duty of competence.
Ethics opinions and case law have elaborated on the duty of confidentiality. By contrast, the regulatory history of ‘independent judgment’ is so thin that the value is dismissed in some quarters as a professional ‘shibboleth.’ The sorts of interference lawyers must resist or be shielded from to play their proper role remain particularly unclear. In academic parlance, ‘independent judgment’ and ‘interference’ are under-theorized legal concepts.”

- Green’s Skepticism of Professional Independence as “Core Value,” (Green II, at 618):

  “First, one can rationalize almost any procedural measure as a safeguard of ‘independence.’ For example, in England, the requirement that barristers accept all cases, the ‘cab rank principle,’ without regard to their view of the merits has been justified on this ground: ‘The relationship with the independence of the bar lies in the impossibility for the most part of associating certain barristers or chambers with certain causes or attitudes.’ In contrast, in the United States, the ability to turn down an unworthy client is regarded as an expression of independence, and lawyers are permitted to ally themselves with particular clients (as in the case of in-house counsel) and causes (as in the case of lawyers for interest groups). Likewise, in England, the requirement that barristers be individual practitioners, not members of partnerships, is thought to promote their independence. In contrast, in the United States, we assume that working in a firm makes lawyers better regulated.

  “Second, as I discussed in an article at the time of the MDP debate, what passes as a protection for lawyer independence may largely be designed to protect lawyers’ monopoly. Rule 5.4 originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public. The proponents of the legislation had no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers’ business.”

- Perlman’s Skepticism of Professional Independence as “Core Value,” at 98: “[L]awyers already have an incentive to prioritize profits over client needs. Lawyers who charge flat fees can make more money if they cut corners. Lawyers who charge contingent fees have an incentive to settle a case before spending a substantial amount of money on trial preparation, even if the client might recover more money by going to trial. And lawyers who bill by the hour regularly spend more time than is necessary to solve a client’s problems. In other words, lawyers are also susceptible to the pressures of increased profits at a client’s expense.”

- Andrews’s Skepticism of Professional Independence as “Core Value,” at 606-08:

  “The possibility of interference with a lawyer’s independent judgment cannot be denied. But our present system contains similar possibilities. Many lawyers work for a salary as associates for law firms in which they have no control or ownership interest. Their employers—the partners or lawyer shareholders—may be looking over the shoulders of those associates ‘in terms of profit’ just as aggressively as would nonlawyers offering the services of these same lawyers. Notwithstanding these pressures, monetary and nonmonetary, we require and expect that such associates will comply with their professional duties. . . . Moreover, nonlawyers are allowed to exercise a comparable kind of control over lawyers in other contexts. Many lawyers working in the private sector, for example, are paid by nonlawyers to provide legal services to another. This
may happen when a parent pays for a lawyer to assist a child; when insurance companies provide counsel to defend an insured; or when corporations pay the legal expenses to defend their employees. In these situations, the attorney looks to one party for payment, but owes her professional duties to another. While these relationships undoubtedly present potential conflicts of interest, they are not prohibited altogether.

. . .

“Another very different type of control over lawyers by nonlawyers occurs when a law firm in need of capital borrows funds from an institutional lender. Such borrowing on occasion can be vital to the economic survival of a firm. If a debtor firm wished to embark on a potentially costly piece of litigation—perhaps on a pro bono or contingency basis—there would be a potential for conflict with an institutional lender who concluded that the costly representation jeopardized the firm's ability to repay the loan. But again, such borrowing is not prohibited. We assume that the general conflicts rules will be sufficient to protect against interference with the lawyer’s professional judgment in such cases.”

• Robert Gordon’s Skepticism of Professional Independence in as Basis to Reject MDP Reform (from May 21, 1999 Letter to MDP Commission): “The independence of lawyers in all its forms, autonomy in work conditions; ability to exercise independent judgment in advising clients, both in their own best interests and that of the integrity of the legal system; the ability as a citizen, official and law reformer to rise above parochial interests, is a social good of potentially high value, and one well worth trying to promote against the many pressures that have combined to erode it. But there are surely better ways of protecting professional independence than by restricting the development of forms of multi-disciplinary practice that promise many benefits in innovative and cost-effective services to clients and consumers.”

• Professional independence as a “core value” is codified in NY RPC 5.8 (which permits strategic alliances with nonlawyer under specified conditions, enacted in 2001): “The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed ‘independent professional judgment and undivided loyalty uncompromised by conflicts of interest.’ Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State. Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values.”

• See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §10 & cmts. b, c (ALI 2000): Section 10 “is based on lawyer-code limitations on law-firm structure and practices. Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer’s fees is likely to attempt to influence the lawyer’s activities so as to maximize those fees. That could lead to inadequate legal services. The Section should be construed so as to prevent nonlawyer control over lawyers’ services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that
nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons. . . . [T]he traditional set of restrictions is intended to protect the professional independence of lawyers. Here also the concern is that permitting such ownership or direction would induce or require lawyers to violate the mandates of the lawyer codes, such as by subjecting the lawyer to the goals and interests of the nonlawyer in ways adverse to the lawyer’s duties to a client.”

**Rule 5.4 Today**

- HH&J, §48.10, at 48-18:

Since the MDP effort in 1999 and 2000, “ironically enough, the pressure to adopt MDP arrangements has continued relentlessly, and a variety of ‘workarounds’ have been developed at the state and local level. For example, although literal ‘one stop shopping’ for, say, legal and accounting services is still impossible, the rules as they stand permit a law firm to set up shop immediately next door—which today can mean electronically adjacent—to an accounting or financial consulting firm and exchange clients between the two. The two firm simply submit parallel bills to the clients—electronically and seamlessly, no doubt.

“Under the rules as they stand, people who hold law degrees may lawfully work in accounting and financial services firms, so long as they do not hold themselves out as being in law practice and available to provide services to the general public. They may lawfully state that they are providing legal assistance to their firms, as their firms provide accounting or financial services to the firm’s client—just as in-house lawyers now are engaged by banks, insurance companies and similar organizations. The lawyer-specific conflict of interest rules will continue to apply to lawyers, and will be imputed to other lawyers with whom they associate . . ., but other professions—especially accounting—have no such traditional [rules] and will remain unaffected. The adoption of a more forgiving rule on the provision of law-related services, see Model Rule 5.7, . . . will only accelerate the development of arrangements that are MDP arrangements in everything but name (and sans direct investment by non-lawyers).”

- State variations of Rule 5.4 are rare and very limited; see, e.g., DC RPC 5.4 (permitting lawyer to practice in “a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients” under specified conditions); NY RPC 5.8 (permitting contractual relationships/alliances with nonlawyers under specific conditions, include disclosure and inclusion of nonlawyer on a court-maintained list; expressly overrides RPC 1.7, but Rule 5.4 remains in full force and effect); GA RPC 5.4(e) (permitting lawyers to “[p]rovide legal services to clients while working with other lawyers or law firms practicing in, and organized under the rules of, other jurisdictions, whether domestic or foreign, that permit non-lawyers to participate in the management of such firms, have equity ownership in such firms, or share in legal fees generated by such firms”; the association is not permitted to “compromise or interfere with the lawyer’s independence of professional judgment, the client-lawyer relationship between the client and the lawyer, or the lawyer’s compliance with these Rules,” and the rule does not affect “the lawyer’s obligation to comply with other applicable Rules of Professional Conduct, or to alter the forms in which a lawyer is permitted to practice, including but not limited to the creation of an alternative business structure in Georgia”).

12
THE OPERATION OF RULE 5.4 IN PRACTICE

Rule 5.4 as a Conflict of Interest Rule

- Green II, at 616: “Rule 5.4 is essentially a conflict of interest rule.”

- Model Code of Professional Responsibility, EC 3-3, provided that “A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.” A footnote on this proposition in EC 3-3 stated:

  “The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests.’ Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar, 12 U.C.L.A. L. REV. 438, 439 (1965).”

- HH&J, §48.03, at 48-7: Concern about lawyer independence for permitting nonlawyer entities to provide legal services is legitimate, “but it has been addressed adequately in several other Rules that could easily be brought to bear. For example, Rule 1.7 on conflict of interest requires fidelity to the client’s interests, and does not allow the interests of others . . . to ‘materially limit’ the representation that will be provided; . . . Rule 1.8(f) specifically addresses the conflicts of interest that can arise when a non-client third party pays for the lawyer’s services. . . . Rule 1.2(a) confirms that the client alone has the final decisionmaking authority as to the objectives of the representation, which should mean that the [non-lawyer] organization could not require a lawyer to pursue different objectives.”

- Andrews, at 610: “Those who claim that lay involvement in the business of law would be attended by grave conflicts of interest and interference with professional judgment, should be challenged to show why the potential problems are any more serious here than they are in the kinds of law practice currently allowed. Absent this showing, there is little reason to suppose that the existing conflicts rules will not serve to police lawyers who would engage in the business of law with nonlawyers.”

- See also Rule 1.7(a)(2) (a concurrent conflict of interest exists if there is a significant risk that the lawyer’s representation of a client will be materially limited by, among other things, “a personal interest of the lawyer”); Rule 1.7, cmt. [1] (“Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.”); id., cmt. [8] (the critical questions in determining whether there is a significant risk of a material limitation in a representation under Rule 1.7(a)(2) “are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client”); id., cmt. [13] (“A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.”) (citing Rule 1.8(f)); Rule 1.8, cmt. [11] (“Because third-party payers frequently have interests
that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client.” (also citing Rule 5.4(c)).

- See also HH&J, §25.02, at 25-3: “The first sentence of Model Rule 2.1 [that requires a lawyer to exercise independent professional judgment and render candid advice in representing a client] is a mandatory rule of conduct. The language ‘shall exercise independent professional judgment’ was carried forward from Canon 5 of the Model Code of Professional Responsibility, and also evokes the duty to avoid improper influence by others (Model Rule 1.7 – 1.9), whether those ‘others’ are other clients, third parties, or the lawyer himself.”

- Taking Rule 5.4 as being essentially a conflict of interest rule, it appears that the only other “nonconsentable as a matter of law” conflict in the rules themselves is Rule 1.7(b)(3), which prohibits in all situations a representation involving “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal”

- There is precedent for deleting what was essentially a conflict of interest rule as “unnecessary” in ABA Ethics 2000’s removal of the Rule 2.2 “Intermediary” rule; See Reporter’s Explanation of Changes:

“The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.”

“Burden of Proof” to Ease/Remove/Justify Restrictions

- Andrews, at 607-08 & n.165:

“In order to justify a prophylactic rule prohibiting all involvement by nonlawyers in the business of law, those opposing nonlawyer involvement must show that somehow nonlawyer control is more pernicious, or more efficacious, in interfering with a lawyer’s professional independence, than the control by supervising or employer attorneys that is allowed currently. Otherwise the general injunctions on professional independence should suffice. Yet, there is no evidence of such increased power in nonlawyers.
“Professor Rhode has observed that attorneys are not ‘well, let alone ideally, situated to determine the risk that consumers are willing to assume in return for less expensive services.’ Perhaps this is an area in which the burden should be on the profession to show why it should not leave the choice up to the consumer in the marketplace.”

• **Green I, at 1118, 1157-58:**

> “Perhaps it would be fair to assign reformers this burden [to ease restrictions] if the applicable disciplinary restrictions had been devised in response to demonstrated harm caused by nonlawyers’ exercise of influence over lawyers. A presumption in favor of the existing rules might also be warranted if the actual motivation for the restrictions had been to protect the legal profession’s basic values rather than to thwart competition, or if the need for restrictions of this nature could fairly be characterized as a matter of popular wisdom, given the persuasiveness of the core values rationale for the restrictions or, at the very least, the legal profession’s undivided and undeviating adherence to this rationale. As this Article discusses, however, the restrictions on multidisciplinary practice and the core values rationale for them have a more equivocal history.

> “Given this equivocal history, it might be argued that opponents of change should have the burden of proving that the existing provisions are essential in their present form. At the very least, the question ought to be debated openly, honestly and fair-mindedly, without any presumptions one way or the other. At the same time, however, the history suggests that fair-minded debate is not inevitable: when it comes to matters of lawyer self-governance, reason easily becomes the servant of economic self-interest.”

• **See also Chambliss (2019) (forthcoming), noting the Supreme Court’s antitrust decision in North Carolina Board of Dental Examiners v. Federal Trade Commission as imposing a burden of production to justify regulatory action, and arguing for “evidence-based regulation”**

**The “Overregulation” Problem: Interpreting Rule 5.4 in Light of its Purpose**

• **ABA Formal Op. 01-423, at 3-4 & n.7:** “The prohibitions in Rule 5.4 are directed mainly against entrepreneurial relationships with nonlawyers and primarily are for the purpose of protecting a lawyer’s independence in exercising professional judgment on the client’s behalf free from control by nonlawyers. This Committee consistently has interpreted Rule 5.4 with this purpose in mind, and on occasion has rejected a literal application of its provisions that did not accord with the purpose for the Rule. Rule 5.4 accomplishes this purpose by requiring that lawyers, to the exclusion of nonlawyers, own and control law practices, which thus helps assure that clients are accorded the protections of the professional standards lawyers must maintain.”

[The opinion cites ABA Formal Op. 93-374 for the proposition that Rule 5.4 is not violated by a lawyer’s sharing court-awarded fees with a pro bono organization that sponsors the litigation, in part because of the absence in such fee-sharing of any threat to the lawyer’s independent professional judgment; and ABA Formal Op. 88-356 for the proposition that paying a service fee
to a temporary lawyer agency based on a percentage of lawyer’s wages did not constitute illegal fee-splitting under Rule 5.4(a) or a violation of Rule 5.4(c).]

- HH&J, §48.04.1, at 48-12 – 12-1 & n.3.1 (discussing the prohibition on sharing fees with nonlawyers under Rule 5.4(a)): “A better way to approach the proper application of Rule 5.4 is to consider its title, ‘Professional Independence of a Lawyer.’ And the statement in Comment [1] should be considered as well: that the purpose of limiting fee-sharing under this rule is ‘to protect the lawyer’s professional judgment.’ It would be plausible, in other words, to interpret Rule 5.4(a) so that it prohibited the sharing of legal fees only in situations where it could be reasonably anticipated that a lawyer’s exercise of independent professional judgment would be impaired. That would also be consistent with Comment [14] to the Scope section as well; the Model Rules ‘are rules of reason’ that ‘should be interpreted with reference to the purposes of legal representation and of the law itself.’ Unfortunately, however, . . . the failure to adjust the basic text of the rule has led to a potpourri of inconsistent results, seemingly dependent on nothing more than how a particular transaction or relationship is characterized.

. . .

“Other paragraphs of Model Rule 5.4 also support an interpretation that focuses on possible interference with a lawyer’s independence. . . . In each of the [Rule 5.4 subsection] instances, the objective sought by the rule is to prohibit nonlawyers from making or unduly influencing decisions that should be made by lawyers. It should follow that when these risks are not present, the reason for the prohibition disappears.”

- Litigation Funding example: NYC Bar Ethics Opinion 2018-5 (noting that Rule 5.4(a) should be interpreted in light of the purpose of the rule to protect lawyer independence, but holding that lawyers are prohibited from borrowing funds from a nonlawyer litigation funder where repayment is contingent on the lawyer earning from fees from the case, regardless of how fees are computed); criticized for, among other things, ignoring the purpose of the rule to protect lawyer independence, at HH&J, §48.05, at 48-12.5 – 48-12.6 (also noting that the opinion “is certainly correct that a revision to Rule 5.4 that puts its policy underpinning directly into the text of the rule would be beneficial”); Peter Jarvis & Trisha Thompson, The Case for Lawyer-Directed Litigation Funding in NY, Parts I & II, LAW360, January 10, 11, 2019.

Shift in Discussion of Professional Independence from “Core Values” to “Regulatory Objectives”

- Terry, Mark & Gordon, at 2736: In setting regulatory objectives for the legal profession, “lawyer independence is important because it promotes a rule-of-law culture, which will impact both the individual client the lawyer serves as well as the larger society.”

- Also, Terry, at 897-98: “It is indisputable that if MDPs are permitted, there is a risk that a lawyer’s professional judgment could be pressured and perhaps compromised. Any loss of independence potentially has consequences not only for the individual client being served, but also for the entire society and, potentially, the rule of law in that country. . . . [A] regulator might adopt a special rule for MDP lawyers that provides guidance about how to protect independence in an MDP setting. This new rule could address issues such as direction of an MDP lawyer’s judgment and who sets the MDP lawyer’s compensation, among other issues.”
ABA Resolution 105, approved by ABA House of Delegates at the February 2016 Midyear Meeting in San Diego, as proposed by the ABA Futures Commission, adopts a set of model regulatory objectives for state regulators considering how to regulate nontraditional legal service providers; Objective H: “Independence of Professional Judgment”; per the Report on the Resolution, at 3-4:

“Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the ‘legal profession.’ By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide. The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.”

CONCLUSION

Andrews, at 656, writing in 1989:

“It is only a matter of time before the business canons will be changed to meet the needs of contemporary society. Change may come as a result of federal preemption. It may come as a result of litigation and public outcry against the legal monopoly. Or it may come as a result of leadership by the bench and bar. The legal profession has always had something of a tarnished reputation with the public. Perhaps if lawyers were to take the initiative and acknowledge that they are prepared to work with others as full partners that reputation would be improved.”
CITED TREATISES/LAW REVIEW ARTICLES:


Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate,* 84 MINN. L. REV. 1115 (2000) [Green I]


