**RRC2 – Rule 1-310 [5.4]**
**E-mails, etc. – Revised (5/26/15)**
**Drafting Team: Harris (Lead), Kehr**

## Table of Contents

## Intra-Commission Emails Following Agenda Mailing:

**May 20, 2015 Cardona Email to Drafting Team, cc Difuntorum & Mohr:**

I agree with the changes you propose. I suggest a few minor language changes to the discussion that I think are consistent with those changes. Proposed changes in bold below:

> **Rule 1-310 Entering into Business with a Non-Lawyer**
>
> A lawyer shall not enter into business with a non-lawyer if any of the activities of the business consist of the practice of law, unless permitted by law.
>
> Discussion:
>
> [1] Rule 1-310 is not intended to govern members' activities that cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer. The intent is to encompass all business **associations** ~~**organizations**~~ of any type with non-lawyers where the activities **of the business association** include the practice of law, unless **that practice of law** ~~**the activity**~~ is permitted by law.
>
> [2] Examples ~~**of associations**~~ **where the practice of law by a business association that includes a non-lawyer is** permitted by law include in-house counsel for companies and other entities (see rule 9.46 of the California Rules of Court.); governmental entities; authorized legal service programs (see rules 1-600 [legal service programs] and 1-650 [limited legal services programs]; certain public advocacy groups (see NAACP v. Button (1963) 371 U.S. 415, 433 – 444 [83 S.Ct. 328]); and registered legal services attorneys (see rule 9.45 of the California Rules of Court). This rule also is not intended to abrogate case law regarding the relationship between insurers and lawyers **retained or employed by the insurer to provide** ~~**providing**~~ legal services to insureds. Gafcon, Inc v. Ponsor and Associates (2002) 98 Cal.App.4th 1388, 1406 [120 Cal.Rptr.2d 392].

**May 20, 2015 Harris Email to Cardona, cc Kehr, Difuntorum & Mohr:**

I think the essential possible substantive difference in your discussion suggestion is changing the word "organizations" to "associations". Use of "associations" was originally considered and then changed to organizations. The basis for this is contained in the April 30th exchange (excerpted below) of the email chain referenced in the Drafting Team Report and Recommendation. The concept was to clarify the Rule's protection to the public without interfering with office efficiency or degrading access to legal services. As set out in the email, I thought "associations" is slightly broader than "organizations" and could potentially create issues for lawyers working with vendors, such as answering services, accounting and billing services, IT services, etc. that routinely support law firms. Might these types of relationships be "associations" with lawyers or law firms? I would be interested in your thoughts regarding the potential business combinations that might be missed, or other problems that might arise, if organizations is used instead of associations. Lee

---

A case you cite in your second email contains a description of law practice that I believe is helpful in the review of Rule 1-310 and the prohibition regarding business combinations involved in the practice of law. "[I]n a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court." *People v. Merchants Protective Corp*. (1922) 189 Cal. 531, 535. This language was restated in *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667.

I agree with you that the Rule should continue to ensure that legal services are provided by lawyers. In addition to the statutory prohibition you mention against non-lawyers practicing law, failing to update the language preventing non-lawyers from business combinations with lawyers risks compromised legal judgment and protection for clients. Included in this are the protections against revelation of confidential information contained in Rule 3-100 and California Business and Professions Code Section 6068.

In drafting the Rule I think we should be careful to remove ambiguities and clarify the Rule's protection without broadening it to the point of interfering with office efficiency or access to legal services. Language that is too broad could possibly raise questions regarding contractual arrangements with support providers. Lawyers routinely work with vendors and others to provide their services. Participation with vendors and outsourcing has been the subject of much comment.[1] A leading ethics ABA ethics opinion on the subject notes, in part, "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or non-lawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them. In addition, appropriate disclosures should be made to the client regarding the use of lawyers or non-lawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or non-lawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.[1]" (Aug 25, 2008) ABA Comm. on Ethics and Professional Responsibility Formal Opinion 08-451.

You mentioned the topic of third party litigation funding. I see providers of legal financing and lines of credit as vendors or suppliers. Focusing on litigation versus non litigation would, in my mind, be misplaced. I believe you raise the same issue. The relevant question that I see is whether the lawyer remains ultimately responsible for rendering competent legal services to the client and whether the arrangement impairs or infringes on the ability of the lawyer to provide legal advice and counsel. Approached in the wrong way, restrictions on legal financing could impair the ability of lawyers to provide competent legal services. At present this is an issue that would at the least need significantly more study with specific data provided before determining whether there was a need for additional modifications. I am fine with your suggestion that we

[1] See ABA Formal Opinion. No. 08-451; California State Bar Formal Opinion No. 2010-179; California State Bar Formal Opinion No. 1971-25; Los Angeles County Bar Assn. Formal Opinion No. 374 (1978)).

mention the topic of third-party financing and recommend that it not be dealt with in this Rule revision.

I note, as you pointed out, at least one jurisdiction, the District of Columbia, authorizes certain business combinations between lawyers and non-lawyers. As also noted, this position is a true outlier, not adopted by other states or the MR. Some legal commentators have however critically examined the issue of lawyer / non-lawyer combinations with an eye towards expanding access to legal services for middle and lower income individuals. Professor Deborah L. Rhode of Stanford Law School has written extensively on the subject.[2]

I don't suggest adopting the DC position or otherwise allowing non-lawyer business combinations that deliver legal services. My thought is to carefully remove ambiguities in Rule 1-310 so as to clarify the Rule's protection to the public without creating new ambiguities that might interfere with office efficiency or otherwise degrade access to legal services. I modified the proposed comment by substituting a word I had previously used, "associations" with "organizations" to create greater clarity in this regard.

**May 21, 2015 Kehr Email to Harris & Cardona, cc Difuntorum & Mohr:**

I'm afraid that I'm at sea here. The draft Comment at the foot of this message is not the same as what I have as the version to be submitted to the Commission, so I'm going to hold any further comments until the agenda materials are distributed.

**May 21, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:**

I offer the following comments regarding this proposed rule:

1. Entering into "business" with a nonlawyer should be entering into "a" business. Otherwise, the Rule can arguably be read to prohibit entering into a business transaction with a nonlawyer, a subject covered by Rule 3-300.

2. I suggest using the term "business organization."

3. Still, the Rule seems too vague and too broad as to what it prohibits. The last clause "except as permitted by law" is a telltail sign, as are the number of exceptions noted in Comment [2]. Per the Charter, the Supreme Court states that we should "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards."

4. Comment [1] is disconnected from the Rule in that it refers to activities of the member "that cannot be considered to constitute the practice of law." The rule itself addresses the practice of law by the business entity, not the lawyer.

5. The second sentence of Comment [1]--that the rule "is intended solely to preclude a member from being involved in the practice of law with a person who is not a lawyer"—is vague and adds elements that are not in the black letter, specifically "being involved" in the

[2] See *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement (2014)* 82 Fordham L. Rev. 2587.

practice of law. The Rule expressly refers to "entering into" a business with a nonlawyer, not "being involved" in one.

6. Comment [2] is not tethered to the Rule in that it refers to "associations," a term not used in the Rule.

7. The statement in Comment [2] that the Rule is not intended to "abrogate" case law regarding the relationship between insurers and insureds is cryptic and seems out of context under the new standards.

**May 22, 2015 Cardona Email to Drafting Team, cc Difuntorum & Mohr:**

**[Responding to 5/21/15 Kehr Email]** I pulled the rule/discussion on which I commented from the agenda materials.

**[Responding to 5/20/15 Harris Email]** With respect to "organization" v. "association," I understand the concern that "association" may be too broad and encompass situations that the rule should not, namely, as you reference, contracting associations with vendors that routinely provide services to law firms. But if this is the concern, then I think the language of the rule itself may be too broad since "enter into business" arguably would encompass these same type of associations. Thus, if the intent is to limit the rule to "organizations" as suggested by the comment, I think the rule itself should be changed to match that limitation. With this in mind, I would propose the following (changes from the rule/discussion in the agenda materials again marked in bold):

> Rule 1-310 Entering into **a Partnership or Other** Business **Organization** with a Non-Lawyer
>
> A lawyer shall not enter into **a partnership or other** business **organization** with a non-lawyer if any of the activities of the business **organization** consist of the practice of law, unless permitted by law.
>
> Discussion:
>
> [1] Rule 1-310 is not intended to govern members' activities that cannot be considered to constitute the practice of law. It is intended solely to preclude a member from being involved in **a business organization that engages in** the practice of law with a person who is not a lawyer. The intent is to encompass all business organizations of any type with non-lawyers where the activities **of the business organization** include the practice of law, unless **that practice of law ~~the activity~~** is permitted by law.
>
> [2] Examples **~~of associations~~ where the practice of law by a business organization that includes a non-lawyer is** permitted by law include in-house counsel for companies and other entities (see rule 9.46 of the California Rules of Court.); governmental entities; authorized legal service programs (see rules 1-600 [legal service programs] and 1-650 [limited legal services programs]; certain public advocacy groups (see NAACP v. Button (1963) 371 U.S. 415, 433 – 444 [83 S.Ct. 328]); and registered legal services attorneys (see rule 9.45 of the California Rules of Court). This rule also is not intended to abrogate case law regarding the relationship between insurers and lawyers **retained or**

**employed by the insurer to provide ~~providing~~** legal services to insureds. Gafcon, Inc v. Ponsor and Associates (2002) 98 Cal.App.4th 1388, 1406 [120 Cal.Rptr.2d 392].

**May 22, 2015 Tuft Email to Drafting Team, cc Difuntorum & Mohr:**

I offer the offering comments on the report and recommendation on Rule 1-310:

1. Section VIII of the report lists several alternatives that were considered in place of the phrase "entering into a business with a nonlawyer" and were rejected but does not give the reasons for the rejection. The proposed wording of the rule does not appear to have an antecedent in lawyer conduct codes whereas several of the alternatives more closely track the current rule and the comparable rule in other states.

2. I wonder why, for example, the alternative "A lawyer shall not form a partnership or other (entity/organization) with a person who is not a lawyer if any of the activities of the partnership or other (entity/organization) consist of the practice of law" was rejected. Since our charge includes eliminating unnecessary differences between California's rule and (in this case) the rule used in all other jurisdictions except D.C., I wonder whether one of these alternatives would better achieve this objective.

3. I also wonder whether the phase "entering into a business" fosters rather than eliminates ambiguities and uncertainties. I am not sure what the term "business" includes. Is it intended to include strategic alliances, joint ventures with other professional service providers, law related services (in-house or as a separate entity) and other associations? I am unclear whether national and international firms that have non-lawyer members, including firms in California structured as Swiss Verins, would be violation of this rule? Would this proposed rule permit a California lawyer to practice in a law firm with foreign lawyers*? Would it permit a California lawyer to have a business relationship with a law firm that has non-lawyer members?

4. Comment [2] creates broad exceptions to the rule. I wonder whether the exceptions should be part of the rule rather than a comment. If the exceptions are not intended to be inclusive, I wonder where the average lawyer would find guidance on whether a particular business arrangement violates the rule.

5. The purpose of rule 1-310 is to protect the lawyer's independence of professional judgment. Several other rules such as rule 1-320 (sharing fees with a non-lawyer) and Rule 1-600 (legal services programs) have the same purpose. All three of these rules (1-310, 1-320 and 1-600) are found in Rule 5.4. Since every jurisdiction has adopted some version of Rule 5.4, I wonder if consideration should be given to having a version of Rule 5.4 rather than having three independent rules.

*(foreign lawyers may be shareholders in law firms registered as a professional law corporation in California; however, ethics opinions in a number of states conclude that foreign lawyers who are not authorized to practice law in the U.S. should be treated as "non-lawyers" to avoid engaging or assisting in UPL)

**May 25, 2015 Eaton Email to Drafting Team, cc Difuntorum & Mohr:**

I have reviewed the thoughtful and thorough report of this drafting committee on Rule 1-310. These are my thoughts:

- I agree with the basic point that the existing rule needs to be expanded beyond the formation of partnerships. I am concerned about unintended ambiguities in, and the overbreadth of, the proposed revised rule.
- I would suggest that the proposed rule be revised to read: "A lawyer shall not enter into a business arrangement with a non-lawyer if any activities of that business arrangement consist of the practice of law, unless permitted by law."
- My primary concern is that, as the drafting committee has worded it, the term "business" may be construed as being used in two different ways within the rule. The phrase "enter into business with" may be construed as the equivalent of the colloquial expression "do business with," which is much broader than intended. The proposed revised rule as framed could be construed as addressing a lawyer entering into a business transaction with any entity that has in-house counsel, that is, a business part of whose activities consist of the practice of law. Narrowing it to "a business arrangement" will cure that ambiguity. I don't think the phrase "unless the activity is permitted by law" does much to help this. It may lead a lawyer needlessly to search for some express or implied legal authorization for a transaction that is beyond the intent of the drafters.
- The second sense in which the word "business" is used is "any activities of the business." I believe this should be revised to reflect the greater certainty of the existing rule by reading "any activities of that business arrangement" to make it clear that it is the resulting business arrangement, or the pre-existing business arrangement that the attorney is entering, to which the rule applies and not somehow the lawyer's own professional business in any way.
- One more point: Discussion comment 1 preserves the use of the term "member" in the comment to the current rule. I believe that should be changed to lawyer.

Thank you for your consideration of these comments.