DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5.4 [1-320, 1-310, 1-600]

Lead Drafter: Harris
Co-Drafters: Kehr
Meeting Date: November 13-14, 2015

I. CURRENT CALIFORNIA RULE

Rule 1-320 Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5.4 [1-320, 1-310, 1-600]

Lead Drafter: Harris
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Rule 1-310 Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion

Rule 1-310 is not intended to govern members' activities which 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.

Rule 1-600 Legal Service Programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5.4 [1-320, 1-310, 1-600]

Lead Drafter: Harris
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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was a consensus among the subcommittee members to recommend the proposed rule as amended.

III. PROPOSED RULE (CLEAN)

Rule 5.4 Financial and Similar Arrangements with Nonlawyers

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money or other consideration 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 purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17 [2-300], to the lawyer's estate or other representative;

(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, provided the plan does not otherwise violate these Rules or the State Bar Act;

(4) a lawyer or law firm may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California; or

(5) a lawyer or law firm may pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.

(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization 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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering legal services.

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

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct, influence or control the lawyer's professional judgment.

(e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Trustees of the State Bar.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group to practice law in violation of these Rules or the State Bar Act.

Comment

[1] The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[3] Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services to a lawyer or law firm; however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.

[4] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided

that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.

[5] A lawyer's participation in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of this Rule. See Business and Professions Code § 6155.

[6] Paragraph (a)(5) permits a lawyer to pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].

[7] This Rule applies to a lawyer's participation in group, prepaid, and voluntary legal service programs, activities and organizations, and in nonprofit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

[8] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

IV. PROPOSED RULE 5.4 (REDLINE TO CURRENT CALIFORNIA RULE 1-320, 1-310, 1-600)

Rule 5.4 [1-320] Financial and Similar Arrangements with ~~Non-Lawyers~~Nonlawyers

(~~A~~a) ~~Neither a member nor~~A lawyer or law firm shall ~~directly or indirectly~~not share legal fees ~~with a person who is not a lawyer~~directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(1) an agreement ~~between a member and a law~~by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money or other consideration over a reasonable period of time after the ~~member's~~lawyer's death, to the ~~member's~~lawyer's estate or to one or more specified persons ~~over a reasonable period of time~~; ~~or~~

(2) ~~A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17 [2-300], to the lawyer's estate or other representative;

(3) a ~~member~~lawyer or law firm may include ~~non-member~~nonlawyer employees in a compensation~~, profit-sharing,~~ or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~provided the plan does not ~~circumvent~~otherwise violate these Rules or ~~Business and Professions Code section 6000 et seq.~~the State Bar Act; ~~or~~

(4) ~~A member~~a lawyer or law firm may pay a prescribed registration, referral, or ~~participation~~other fee to a lawyer referral service established, sponsored~~,~~ and operated in accordance with the State Bar of ~~California's~~California's minimum standards for a lawyer referral service in California~~.~~; or

(5) a lawyer or law firm may pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.

~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

~~(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

~~**Rule 1-310 Forming a Partnership With a Non-Lawyer**~~

(b) A ~~member~~lawyer shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization 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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering legal services.

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

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's

estate may hold the lawyer's stock or other interest for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct, influence or control the lawyer's professional judgment.

~~**Rule 1-600 Legal Service Programs**~~

(e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Trustees of the State Bar.

~~(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.~~

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group to practice law in violation of these Rules or the State Bar Act.

~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~

~~**Discussion**~~ **COMMENT**

~~*[Discussion paragraph for Rule 1-320]*~~

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

[1] The provisions of this Rule protect the lawyer's independence of professional judgment. by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[3] Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services to a lawyer or law firm; however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.

[4] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.

~~*[Discussion paragraph for Rule 1-310]*~~

~~Rule 1-310 is not intended to govern members' activities which 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.~~

~~*[Discussion paragraph for Rule 1-600]*~~

[5] ~~The~~A lawyer's participation ~~of a member~~ in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of ~~these rules~~this Rule. See Business and Professions Code § 6155.

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

[6] Paragraph (a)(5) permits a lawyer to pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also

Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].

[7] This Rule applies to a lawyer's participation in group, prepaid, and voluntary legal service programs, activities and organizations, and in nonprofit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

[8] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

V. PUBLIC COMMENTS SUMMARY

- No public comments have been received. OCTC comments are noted in section VI.

VI. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 4/20/15:** Rule 1-310 should be expanded to prohibit not just partnerships with non-lawyers, but any association, incorporation or organization with non-lawyers where the activities include the practice of law unless the activity is permitted by law. (See section VIII for a discussion of rule amendment concepts accepted.)

- **Jayne Kim, OCTC, 09/03/15:** Rules 1-310, 1-320, and 1-600 should be retained, rather than adopting Model Rule 5.4. The California rules provide greater clarity than the Model Rule and there is extensive case law interpreting them. Rule 1-320 should not be revised to permit the payment of court-awarded legal fees to a non-profit organization that employed, retained, or recommended the lawyer unless the revision ensures that the lawyer's independence and loyalty to the client is maintained and the client is advised and consents to any potential conflict created by the arrangement between the lawyer and the non-profit organization.

- **No State Bar Court comments have been received.**

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

ILLINOIS 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.

The ABA State Adoption Chart for Model Rule 5.4, whose paragraph (b) is the counterpart to rule 1-310, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_4.pdf

9 states have adopted 5.4 verbatim (AZ, AR, DE, IL, MT, NE, NH, VT, WI); 38 jurisdictions have adopted something substantially similar to model rule 5.4 (AL, AK, CO, FL, HI, IA, ID, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, NC, ND, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV, WY); and 4 jurisdictions have adopted something substantially different to model rule 5.4 (CA, CT, DC, and GA). The District of Columbia authorizes certain business combinations between lawyers and non-lawyers. Some legal commentators have

critically examined the issue of lawyer / non-lawyer combinations with regard to expanding access to legal services for middle and lower income individuals.[1]

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

- Implement changes to address each of the known issues.
  - Pros: Rule 5.4 gathers together, in a single rule, concepts that are intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600.
  - Improves public protection by providing broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that could pose a threat to the lawyer's exercise of independent professional judgment.
  - A lawyer in a partnership or other organization that engages in law practice with a nonlawyer commits UPL whether the form of the business is a partnership, as stated in the current rule, or any other form of business association. Compromised legal judgment and impairment of the protections against revelation of confidential information could result.
  - Provides guidance on the exceptions to the prohibitions permitted under the Rule (many of which may be found in current rule 1-320) in an effort to articulate a clear and enforceable articulation of disciplinary standards.
  - Ensures California's existing laws permitting lawyers to participate with governmental entities, legal services programs and certain other organizations continues to be honored.
  - Responds to the Supreme Court's concern about possible conflicts between rules and comments.
  - Cons: There are no known cons to adopting the proposed rule.

B. Concepts Rejected (Pros and Cons):

- Retain the existing separate rules 1-310/1-320/1-600 language with no changes.
  - Pros: Comports with and simply states CA's longstanding policy of preventing non- lawyers from practicing law with lawyers.
  - Extensive body of California law interpreting the existing Rules.
  - Cons: Rule 1-320 does not expressly state the rationale that underlies the rule's prohibition on sharing legal fees with a non-lawyer, i.e., avoid interference with the lawyer's exercise of independent professional judgment.
  - Rule 1-320 does not expressly except from its prohibition the payment by a lawyer of court-awarded legal fees to a non-profit organization that employed,

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

retained or recommended the lawyer. These fees are an important source of income for such non-profit organizations.
- Rules 1-320 and 1-600 do not address the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that might permit third parties to interfere with a lawyer's independence of judgment.
- Arguably does not list all types of other organizations contained in the prohibition against lawyers practicing law with non-lawyers.

C. Changes in Duties/Substantive Changes to the Current Rule:
None.

D. Non-Substantive Changes to the Current Rule:
- The proposed rule language is conformed to § 4.3A of the Guidelines for Drafting and Editing Court Rules.

E. Alternatives Considered:
- Keep current rule without any changes (rejected);
- Incorporate language allowing some form of organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services or provides a multidisciplinary practice combination. (rejected)
- The question of third-party case or matter funding was discussed by the Rule 1-310 panel but it was determined that the issue should be deferred. Lawyers routinely work with vendors and others. Participation with vendors and outsourcing has been the subject of much comment.[2] There would need to be significantly more study with specific data before determining if there is a need for modifications of the rule with regard to this topic, and whether any such change would be consistent with the statutory prohibition on UPL.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) It is assumed the Commission will substitute "lawyer" for "member" throughout the Rules.

(2) The Commission has yet to decide the organization and numbering of the new Rules and the numbering should be considered a place holder not an endorsement.

[2] 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)).

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X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Harris

- [04/30/15]: Email Comment

  [T]he 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.

  [F]ailing to update the language preventing non-lawyers from entering business combinations with non-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, remove ambiguities and clarify the Rule's protection without broadening it to the point of interfering with office efficiency or access to legal services. "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" (Aug 25, 2008) ABA Comm. on Ethics and Professional Responsibility Formal Opinion 08-451.

  [P]roviders of legal financing and lines of credit (can be viewed) as vendors or suppliers. The question of harm involves 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.

- [5/11/15]: The email dated 5/11/15 from Lead Drafter Lee Harris to Randall Difuntorum, Kevin Mohr and Co-Drafter Robert Kehr contains within it the content of all of the relevant emails relating to the substantive issues discussed in the drafting of Rule 1-310 prior to the RRC2 meeting of 5/29-30/15

- The emails dated 8/30/15 From Toby Rothschild, 8/19/15 from Robert Kehr and 9/5/15 from Toby Rothschild contain within them the content of all relevant emails relating to the substantive issues discussed by the combined drafting team for Rule 5.4.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5.4 [1-320, 1-310, 1-600]

Lead Drafter: Harris
Co-Drafters: Kehr
Meeting Date: November 13-14, 2015

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

Adopt proposed new rule 5.4 [1-320, 1-310, 1-600].

Proposed Resolution:

RESOLVED: That the Commission adopts proposed new rule 5.4 [1-320, 1-310, 1-600] as set forth in this report.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

Redline Comparison of Proposed Rule 5.4(a) and Comments [1] – [3] & [6] to Current California Rule 1-320

(~~A~~a) ~~Neither a member nor~~A lawyer or law firm shall ~~directly or indirectly~~not share legal fees ~~with a person who is not a lawyer~~directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(1) an agreement ~~between a member and a law~~by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money or other consideration over a reasonable period of time after the ~~member's~~lawyer's death, to the ~~member's~~lawyer's estate or to one or more specified persons ~~over a reasonable period of time~~; ~~or~~

(2) ~~A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or~~
a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to Rule 1.17 [2-300], to the lawyer's estate or other representative;

(3) a ~~member~~lawyer or law firm may include ~~non-member~~nonlawyer employees in a compensation~~, profit-sharing,~~ or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, ~~if such~~provided the plan does not ~~circumvent~~otherwise violate these Rules or ~~Business and Professions Code section 6000 et seq.~~the State Bar Act; ~~or~~

(4) ~~A member~~a lawyer or law firm may pay a prescribed registration, referral, or ~~participation~~other fee to a lawyer referral service established, sponsored~~,~~ and operated in accordance with the State Bar of ~~California's~~California's minimum standards for a lawyer referral service in California~~.~~; or

(5) a lawyer or law firm may pay a court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.

~~(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

~~(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.~~

~~Discussion~~Comment

~~Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.~~

[1] The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[2] Paragraph (a) does not prohibit a lawyer or law firm from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independence of professional judgment of the lawyer or lawyers in the firm and does not violate any other rule of professional conduct. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[3] Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services to a lawyer or law firm; however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.

[6] Paragraph (a)(5) permits a lawyer to pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also Rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see Rule 6.1 Comment [4].

Redline Comparison of Proposed Rule 5.4(b) & (d) and Comments [1], [4], & [8] to Current California Rule 1-310

(b) A ~~member~~lawyer shall not form a partnership or other organization with a ~~person who is not a lawyer~~nonlawyer if any of the activities of ~~that~~the partnership or other organization consist of the practice of law.

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

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct, influence or control the lawyer's professional judgment.

~~Discussion~~Comment

~~Rule 1-310 is not intended to govern members' activities which 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.~~

[1] The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[4] A lawyer's shares of stock in a professional law corporation may be held by the lawyer as a trustee of a revocable living trust for estate planning purposes during the lawyer's life, provided that the corporation does not permit any nonlawyer trustee to direct or control the activities of the professional law corporation.

[8] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

Redline Comparison of Proposed Rule 5.4(c), (e), & (f) and Comments [1], [5], [7], & [8] to Current California Rule 1-600

(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 provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, in rendering legal services.

(e) A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with the Rules and Regulations Pertaining to Lawyer Referral Services as adopted by the Board of Trustees of the State Bar.

~~(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.~~

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person or organization to interfere with the lawyer's independence of professional judgment, or with the lawyer-client relationship, or allows or aids any person, organization or group to practice law in violation of these Rules or the State Bar Act.

~~(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.~~

~~Discussion~~ Comment

[1] The provisions of this Rule protect the lawyer's independence of professional judgment by restricting the sharing of fees with a person or organization that is not authorized to practice law and by prohibiting a nonlawyer from directing or controlling the lawyer's professional judgment when rendering legal services to another.

[5] ~~The~~A lawyer's participation ~~of a member~~ in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of ~~these rules~~this Rule. See Business and Professions Code § 6155.

[7] This Rule applies to a lawyer's participation in group, prepaid, and voluntary legal service programs, activities and organizations, and in nonprofit legal aid, mutual benefit and advocacy groups. However, nothing in this Rule shall be deemed to authorize the practice of law by any such program, organization or group.

[8] This Rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].

~~Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.~~

~~Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.~~

~~For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.~~

THE STATE BAR
OF CALIFORNIA

Date: September 2, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for September 2015 meeting

CONTENTS

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's September 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

[TEXT OMITTED]

E. Rules 1-310, 1-320, 1-600: Professional Independence [Model Rule 5.4]

Rules 1-310, 1-320, and 1-600 should be retained, rather than adopting Model Rule 5.4. The California rules provide greater clarity than the Model Rule and there is extensive case law interpreting them.

Rule 1-320 should not be revised to permit the payment of court-awarded legal fees to a non-profit organization that employed, retained, or recommended the lawyer unless the revision ensures that the lawyer's independence and loyalty to the client is maintained and the client is advised and consents to any potential conflict created by the arrangement between the lawyer and the non-profit organization.

[TEXT OMITTED]

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

CURRENT CALIFORNIA RULES 1-310, 1-320 & 1-600 [Rule 5.4]
Rule 1-310 Forming a Partnership With a Non-Lawyer
Rule 1-320 Financial Arrangements With Non-Lawyers
Rule 1-600 Legal Service Programs

I. Text of Current Rules:

Rule 1-310. Forming a Partnership With a Non-Lawyer

A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion:

Rule 1-310 is not intended to govern members' activities which 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 not licensed to practice law.

Rule 1-320. Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and professions Code section 6000 et seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding

that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

Rule 1-600 Legal Service programs

(A) A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors[1] of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Discussion:

The participation of a member in a lawyer referral service established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California is encouraged and is not, of itself, a violation of these rules.

Rule 1-600 is not intended to override any contractual agreement or relationship between insurers and insureds regarding the provision of legal services.

Rule 1-600 is not intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public.

For purposes of paragraph (A), "a nongovernmental program, activity, or organization" includes, but is not limited to group, prepaid, and voluntary legal service programs, activities, or organizations.

[1] Operative January 1, 2012, Business & Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the "board of governors" shall be deemed to refer to the "board of trustees." In accordance with this law, references to the "board of governors" included in the current Rules of Professional Conduct are deemed to refer to the "board of trustees."

II. Background/Purpose:

A. Introduction

The three rules being considered together under the rubric of a new proposed rule 5.4 that would be patterned after Model Rule 5.4 all deal to some extent with a lawyer's duty of exercising independent professional judgment in representing a client. Specifically, each rule incorporates prohibitions on lawyer conduct that are intended to *avoid interference* by nonlawyers with a lawyer's exercise of independent judgment in providing legal services to a client.

B. History of Current Rule 1-310

The predecessor to current Rule 1-310, former Rule 3-103, became operative on January 1, 1975, under the current title, "Forming a Partnership With a Non-Lawyer." That rule contained the substance of Disciplinary Rule (DR) 3-103 of the ABA Model Code of Professional Responsibility".[2]

In 1992, the proposed amendments to the rule and to the Discussion section, in conjunction with the proposed amendment to rule 1-100(B)(3), intended to correct an ambiguity in the then-operative rules. At that time, rule 1-100(B)(3) defined "lawyer" as a person licensed to practice law somewhere in the United States. Then-operative rule 1-310 was titled "Forming a Partnership With a Non-Lawyer" and prohibited the formation of a partnership "with a person not licensed to practice law" if any of the activities of that partnership consisted of the practice of law. However, lawyers from other countries may be licensed to practice law, but did not fit within the then-operative definition of "lawyer." Thus, an ambiguity existed between the title and the text of rule 1-310 (and the Discussion section) regarding foreign-licensed attorneys.

The amendments to rule 1-310 and to the Discussion section conformed the title of the rule to the text and the Discussion section and conformed the rule to the definition of "lawyer" proposed in rule 1-100(B)(3). These amendments clarified that formation of partnerships (to engage in the practice of law) with foreign-licensed attorneys were not prohibited under rule 1-310.

C. History of Current Rule 1-320

In 1972, the Special Committee to Study the ABA Code of Professional Responsibility recommended the adoption of proposed rule 3-102, which was derived from ABA Code, DR 3-102 (Dividing Legal Fees with a Nonlawyer). The DR was modified to carry forward California Rule 3 (1928), which prohibited *direct or indirect* fee division except with a person licensed to practice law.

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[2] DR 3-103 provided:

DR 3-103 Forming a Partnership with a Non-Lawyer.

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

The rule that was adopted, effective 1975, was identical to the rule with one slight revision.[3]

Amendments were made effective April 1979 to render the rule gender neutral, and also add new paragraphs (B) and (C), concerning payments for referrals or recommendations of the lawyer's services.[4] Further amendments were made effective October 1979 to add a sentence to paragraph (B).[5]

In 1989, several amendments were made. The rule number was changed to 1-320 as part of the comprehensive revision of the Rules. Paragraph (A) continued the prohibition and exceptions found in current rule 3-102(A) regarding sharing legal fees with persons not licensed to practice law. Subparagraph (A)(4) was added to clarify that payments to a State Bar Certified Lawyer Referral Service does not violate the rule. Finally, paragraph (B) was amended to make it consistent with proposed rule 2-200(B).

No amendments have been made to rule 1-320 since 1989.

D. History of Current Rule 1-600

Rule 1-600 was originally adopted and approved as rule 2-102, effective April 1, 1979, in substantially the same form as the current rule. The State Bar explained the rationale for the rule:

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[3] The change was as follows:

(2) A member of the State Bar who undertakes to complete unfinished legal business of a deceased member of the State Bar may pay to the estate of the deceased member of the State Bar or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member of the State Bar.

[4] New paragraphs (B) and (C) provided:

(B) A member of the State Bar shall not compensate or give or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's firm by a client.

(C) A member of the State Bar shall not compensate or give or promise anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member, the member's firm, or any other attorney as such in a news item, but the incidental provision of food or beverages shall not of itself violate this subdivision.

[5] The sentence provided:

A member's offering of or giving a gift or gratuity to any person or entity, which has made a recommendation resulting in the employment of the member or the member's firms, shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

It has long been recognized that "[t]here are situations . . . when an attorney's association with a lay organization fulfills a legitimate interest of the organization or its members, and presents no risk of conflicting interests or other abuses."33

In a series of four landmark decisions, the United States Supreme Court clearly established that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." (United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082; United Mine Workers of America v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S.Ct. 353 [hereinafter "United Mine Workers"]; Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 84 S.Ct. 1113 [hereinafter "Railroad Trainmen"]; National Association of the Advancement of Colored People v. Button (1963) 371 U.S. 415, 83 S.Ct. 328 [hereinafter "NAACP"].) The Court recently reaffirmed this position in In re Primus (1978) ___U.S. ___, 98 S.Ct. 1893.

In doing so, however, the Court did not invalidate the fundamental prohibition against attorneys soliciting professional employment for their own purposes. Instead, the Court recognized a distinction between solicitation and the activities involved in the cases, and held that the prohibition against solicitation could not be applied so as to prohibit legitimate collective activity undertaken to obtain meaningful access to the courts. (See, e.g., United Mine Workers, 389 U.S. at pp. 222-223, 88 S.Ct., at pp. 356-357; Railroad Trainmen, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; NAACP, 371 U.S., at pp. 439-444, 83 S.Ct., at pp. 341-343; In re Primus, ___ U.S. ___, at pp. ___, 98 S.Ct., at p. 1893, 1906.)

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception coexists with the prohibition.

Subdivision (A) is intended to continue and to expand the current exception for attorney participation in legal aid and similar programs for the furnishing of services to indigents (present rule 2-101 (F)), in plans or programs of nonprofit organizations furnishing legal services to persons in respect of their civic, political or constitutional rights (present rule 2-104(F)), and in group and prepaid legal service arrangements (present rule 2-104(D) and (E)).

Proposed rule 2-102(A) also changes the previous rule approach to group and prepaid legal service arrangements by focusing on attorney's conduct rather than on the structure of the arrangement itself.

Given the relatively recent history of group and prepaid legal service programs, we believe that the public interest is best served by permitting flexibility and experimentation, coupled with an on-going study by the Legal Services Section of the need for regulation.

The proposed rule thus eliminates all current distinctions between "group" and "prepaid" programs, open and closed panel programs, and all requirements for reporting to the State Bar the fact of an attorney's participation in a plan contained in present rule 2-104(D) and (E).

In this respect it should be noted that this proposal contemplates the repeal of sections (D) and (E) of existing rule 2-104, relating to open and closed panel programs.

Present rule 2-104(E) sets out certain requirements for open panel programs. Your Committee believes that this provision has not served to foster the growth of legal services programs, and, in light of the change in the advertising rules, it no longer seems viable. Existing requirements in present rule 2-104 for registration with the State Bar by an attorney participating in a group legal service program are also repealed.

Subdivision (B) of proposed rule 2-102 continues the exception for attorneys who participate in lawyer referral services contained in present rule 2-104(C). The extent to which lawyer referral services are constitutionally permitted to solicit cases in-person is unclear. (See appendix F.) Your Committee recommends that you refer this issue to the appropriate committee for further research and study.

It provides for filing of minimum standards for such services with the Court and approval thereof by the Court. This is the same procedure proposed with respect to advertising standards promulgated under proposed rule 2-101(D).

There is no intent, by these changes, to lessen the responsibility of the attorney who participates in such programs to adhere to the requirements of the State Bar Act or of the Rules of Professional Conduct, including, for example, the prohibitions on aiding the unauthorized practice of law (Bluestein v. State Bar (1974) 13 Cal.3d 162; People v. California Protection Corp. (1926) 76 Cal.App. 354; rule 3-101); allowing a third party to receive part of the consideration paid to a member of the State Bar, (including kickbacks or other fees paid in consideration for a union or group representative's having referred legal business to an attorney) (rules 4-101, 5-101, 5-102 and 5-103); and false, deceptive or misleading advertising placed by or on behalf of the member (proposed rule 2-101). In other words, the attorney must not permit a group or its agents to interfere with or control his or her performance of duties owed a client, the courts or the administration of justice.

[1978 Final Report, Pages 37-41]

In 1989 non-substantive amendments were made to the rule for brevity and clarity. In addition, the Discussion to the rule was expanded to include the content in the current rule Discussion.

Since 1989, no further amendments have been made to the rule.

E. The first Commission's proposed Rule 5.4

The first Commission's proposed Rule 5.4 gathered together, in a single rule, concepts that were intended to promote the independence of a lawyer's professional judgment, but which are currently found in three separate California Rules of Professional Conduct: rules 1-310, 1-320, and 1-600. The history of these three rules has been outlined above, in sections A to D.

Differences From Model Rule 5.4. The proposed rule's structure closely followed that of Model Rule 5.4. However, the first Commission recommended revisions and additions to both the black letter and model rule commentary that was intended to afford greater client protection by providing (i) broader prohibitions on a lawyer's conduct and on relationships into which the lawyer might enter that could pose a threat to the lawyer's exercise of independent professional judgment, and (ii) better guidance on the exceptions to these prohibitions that would have been permitted under the Rule (many of which exceptions may be found in current rule 1-320). The revisions of the Model Rule included: (1) a prohibition on sharing legal fees either "directly or indirectly" with a nonlawyer;[6] (2) extending that prohibition to sharing legal fees with an organization not authorized to practice law;[7] (3) extending the prohibition on practicing law with nonlawyers in a "partnership" to practicing law with nonlawyers in any kind of "organization;"[8] (4) cautioning that a lawyer must avoid interference not only with the lawyer's independent judgment but also with the lawyer-client relationship;[9] (5) carrying forward the concept in current rule 1-320(A)(4) that permits a lawyer to accept referrals from a lawyer referral service so long as that service complies with the Board of

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[6] RRC1 explained the proposed amendment:

> The inclusion of the adverbs "directly or indirectly" was originally included in rule 1-320 to preclude lawyers from avoiding application of this client-protective rule by creatively structuring relationships with nonlawyers who send them clients. Proposed Comments [1A] and [1B] elaborate on the application of that term to lawyer's payment of nonlawyer employees and contractors.

[7] RRC1 explained the proposed amendment:

> The prohibition against sharing legal fees with an organization not authorized to practice law was added because the same prohibition is found in current California rule 1-600, which regulates legal services programs. See also State Bar of California Minimum Standards for Lawyer Referral Services.

[8] RRC1 explained the proposed amendment:

> The phrase "or other organization" has been added so a lawyer cannot avoid application of the Rule by entering into a non-partnership arrangement with a person who is not a lawyer. The phrase "person who is not a lawyer" has been substituted for "nonlawyer."

[9] RRC1 explained the proposed amendment:

> The Model Rule provision has been revised to clarify that it is generally interference with a lawyer's decisions concerning the legal services that are being provided that interfere with the lawyer's professional judgment. In addition, to enhance client protection, a prohibition on permitting interference with the lawyer-client relationship has been added.

Trustees' Minimum Standards on lawyer referral services;[10] and (6) adding an express provision that clarifies the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that might permit third parties to interfere with a lawyer's independence of judgment.[11]

Title. In addition to the foregoing changes, the first Commission recommended that the title of the Model Rule be amended to more accurately describe the content of the proposed Rule. Initially, the Commission voted to recommend the following title: "Duty to *Avoid* Interference with a Lawyer's Professional Independence."[12] (Emphasis added.)[13] Ultimately, however, the Commission voted to recommend the following title: "Financial and Similar Arrangements With Nonlawyers".

Non-lawyer ownership of law practice. The first Commission did *not* recommend that the rule be amended to permit non-lawyer ownership interests in a partnership or other organization that practices law, similar to such practice models as are currently permitted in Australia and the United Kingdom. At present, only one jurisdiction in the United States, the District of Columbia, permits non-lawyer ownership of a partnership or other organization that practices law.[14]

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[10] See RRC1 Proposed Rule 5.4(e), attached.

[11] RRC1 explained this proposed addition (proposed Rule 5.4(f)):

> [The provision] has been added to address the concerns raised by the California Supreme Court in *Frye v. Tenderloin Housing Clinic, Inc*. (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].

In addition to paragraph (f), RRC1 also recommended the addition of two comments, proposed comments [8] and [9], "to clarify that this rule is intended to work in concert with the regulatory standards expressed by the Supreme Court in *Frye v. Tenderloin Housing Clinic, Inc*. (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]."

[12] Similar to Model Rule 5.4, Model Rule 1.8(f) (payments by third persons) also requires lawyers to avoid interference with independent judgment. Compare current rule 3-310(F).

[13] The duty *to exercise* independent judgment is found in Model Rule 2.1 (Advisor), which provides:

> **Rule 2.1 Advisor**
>
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[14] D.C. Rule 5.4 provides:

> **D.C. Rule 5.4--Professional Independence of a Lawyer**
>
> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. Jayne Kim (OCTC), April 20, 2015:

Rule 1-310: Forming a Partnership with a Non-Lawyer.

Rule 1-310 should be expanded to prohibit not just partnerships with non-lawyers, but any association, incorporation or organization with non-

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[Footnote continued…]

(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. 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;

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and

(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

(b) A lawyer may practice law 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, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(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.

lawyers where the activities include the practice of law unless the activity is permitted by law.

B. Russell Weiner (OCTC), June 15, 2010:

Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence

Comment 1 more appropriately belongs in a treatise, law review article, or ethics opinion.

C. Mike Nisperos (OCTC), September 27, 2001:

None.

IV. Potential Deficiencies in the Current Rules:

A. See above input from OCTC concerning rule 1-310, specifically that the current rule should not be limited to "partnerships" but should also apply to other organizational types or forms of practice under which lawyers are permitted to practice law. (See section 0, above; cf. first Commission's proposed rule 5.4(b).)

B. Other possible deficiencies in the rules:

1. Concerning rule 1-320, the rule does not expressly state the rationale that underlies the rule's prohibition on sharing legal fees with a non-lawyer, i.e., that a lawyer must avoid interference with the lawyer's exercise of independent professional judgment. (Cf. Model Rule 5.4; current rule 1-600).

2. Concerning rule 1-320, the rule does not expressly except from its prohibition the payment by a lawyer of court-awarded legal fees to a non-profit organization that employed, retained or recommended the lawyer. (Cf. Model Rule 5.4(a)(4); RRC1's proposed rule 5.4(a)(5).) These fees are an important source of income for such non-profit organizations.

3. Concerning rule 1-320, paragraphs (B) and (C) of that rule (as well as paragraph (B) of rule 2-200) more appropriately belong in a rule addressing advertising costs and other payments for recommending a lawyer's services. (Cf. Model Rule 7.2(b)(1), (2) and (4).[15] Cf. RRC1 proposed Rule 7.2(b).)

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[15] Model Rule 7.2(b) provides:

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

4. Concerning rules 1-310, 1-320 and 1-600, the rules do not precisely identify the kinds of prohibited associations with nonlawyers that might lead to interference with a lawyer's professional judgment. (Compare Model Rule 5.4(c) and (d); RRC1 proposed Rule 5.4(c) and (d).)

5. Concerning rules 1-320 and 1-600, the current rules do not address the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that might permit third parties to interfere with a lawyer's independence of judgment. (See footnote 11, above.)

6. Concerning rules 1-310 and 1-320, these rules' restrictions do not permit lawyers to engage in a form of multidisciplinary practice that would provide to clients "one-stop shopping" in satisfying their requirements for professional services.

7. Concerning rules 1-310 and 1-320, the restrictions do not permit non-lawyer ownership of organizations that practice law as is permitted in Australia and the United Kingdom.

V. California Context:

A. Protection of Independent Judgment in the Context of Lawyer Referrals.

Rule 1-600 includes the policy that regulation is needed to assure public protection in lawyer referral activities. This policy is implemented both in statute and in State Bar rules (see: Bus. & Prof. sec 6155 et. seq. regarding State Bar registration; and the Board adopted Minimum Standards for Lawyer Referral Services that are "binding on members"). These regulations prohibit an attorney from participating in a lawyer referral service that is not operated in conformity with applicable rules, codes and standards, and also render unlawful the operation of an unregistered lawyer referral

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[Footnote continued…]

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

service. According to State Bar lawyer referral service staff, the total number of lawyer referral service clients reported from 2013 to 2014 is 156,997.

Over 100 years ago, the Supreme Court articulated the public harm that is triggered by a lawyer's contract with a lay person to secure clients in exchange for a share of the lawyer's fees. In *Alpers v. Hunt* (1890) 86 Cal. 78 [24 Pac. 846], the Court held such a contract to be invalid because it would tend to increase the cost of delivery of legal services. The Court said, "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." About 80 years later, the California Court of Appeal considered the issue of a lawyer's participation in bar association lawyer referral program in *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 Cal.3d 565. The bar association program operated under Minimum Standards adopted by the Board in 1956 (note that the Board's adoption was 30 years before the legislature enacted Bus. & Prof. sec. 6155 in 1987). Citing to *Alpers*, the court held that only certain types of lawyer referral service activities are not rendered illegal due to the ethical duties of lawyers to avoid fee splits with nonlawyers, lay interference with professional independent judgment, and aiding in the unauthorized practice of law. The Court said:

> Whether the Minimum Standards actually work a modification of rules 2 and 3 is a question not affecting entitlement to the money in suit. It is enough that the basic features of the San Joaquin County arrangement do not offend the public policy underlying these canons. There are wide differences - in motivation, technique and social impact - between the lawyer reference service of the bar association and the discreditable fee-splitting featured in the disciplinary decision. Prohibited fee-splitting between lawyer and layman carries with it the danger of competitive solicitation (Crawford v. State Bar, 54 Cal.2d 659, 666 [7 Cal.Rptr. 746, 355 P.2d 490]); poses the possibility of control by the lay person, interested **574* in his own profit rather than the client's fate (Utz v. State Bar, 21 Cal.2d 100, 108 [130 P.2d 377]); facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney (Linnick v. State Bar, 62 Cal.2d 17, 21 [41 Cal.Rptr. 1, 396 P.2d 33]; Hildebrand v. State Bar, 36 Cal.2d 504, 523 [225 P.2d 508], separate opinion of Traynor, J.). Rule 3's prohibition against lay intermediaries seeks to bar both solicitation and the presence of a party demanding allegiance the lawyer owes his client. (People v. Merchants Protective Corp. (1922) 189 Cal. 531, 539 [209 P. 363].) None of these dangers or disadvantages characterizes the San Joaquin County Bar Association's lawyer reference activity. 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. When conducted within the framework conceived for such facilities, its reference service presents no risks of collision with the objectives of the canons on fee-splitting and lay interposition.

(*Emmons* at pp. 573 -574.)

Recent enhancements to the regulation of lawyer referral activities affirm the longstanding tradition of assuring public protection in this area. Enacted in 2013, Evidence Code section 965 et. seq. established the "lawyer referral service-client privilege." This privilege facilitates the confidentiality of information that might ultimately be shared with a lawyer in due recognition of the fact that access to legal services can begin with a client seeking assistance from a lawyer referral service and sharing information with the service's nonlawyer staff.

State Bar Act regulation of lawyer referral services includes express exceptions. Business and Professions Code section 6155(h) provides that: "This section shall not be construed to prohibit attorneys from jointly advertising their services." Paragraph (h) further states that permissible joint advertising, among other things, "identifies by name the advertising attorneys or law firms whom the consumer of legal services may select and initiate contact with." Whether innovative online matching services constitute regulated lawyer referral activity or permissible joint advertising likely depends on the specific facts and circumstances of the service.

B. Aiding in the Unauthorized Practice of Law; Fee Splits with Nonlawyers

Rule 1-600 requires a lawyer to refrain from participating in an activity or program that recommends, pays for, or furnishes legal services, if that participation involves improper fee splits with nonlawyers or allows acts constituting the unauthorized practice of law. These issues of concern are the subject of other general rules not limited to the legal services context of rule 1-600. Rule 1-310 prohibits forming a partnership with a nonlawyer. Rule 1-320 prohibits, with certain exceptions, a lawyer from directly or indirectly sharing fees for legal services with a nonlawyer. Rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et. seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See: *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also: Opinion of the California Attorney General No. 93-303 (August 30, 1993).)

C. Corporations Practicing Law.

Rule 1-300(A) includes a prohibition against aiding an entity in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code sections 6160 et. seq. (re law corporations) and sections 6174 and 6174.5 (re limited liability partnerships).) Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].)

D. Multi-Disciplinary Practice.

In 2001, a State Bar of California Task Force on Multidisciplinary Practice issued a Report and Findings overview of regulatory issues concerning concepts of possible reforms that could permit lawyers and other professionals to offer consumers "one-stop shopping" for professional services.[16] The Office of Professional Competence staff observes that although this concept did not gain traction in California or with the ABA, it is possible that it might be revisited at some time in the future. The drafting team may want to consider whether potential developments in this area might impact the future interpretation of rule 1-310. The ABA also studied MDP. (See section VI.B, below.)

E. Passive Investment in Law Firms.

The State Bar MDP Task Force concluded that passive investment in law firms should not be permitted. (Report, at page 34.) There has been no further study of this issue in California.

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.4: Fees," revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_4.pdf

- Nine jurisdictions have adopted Model Rule 5.4 verbatim.[17] Forty jurisdictions have adopted a slightly modified version of Model Rule 5.4.[18] Two jurisdictions have adopted a version of the rule that is substantially different to Model Rule 5.4.[19]

B. ABA MDP Activities.

The ABA also appointed a Commission to study MDP.[20] The ABA House of Delegates rejected the Commission's recommendations[21] and instead adopted a revised report.[22]

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[16] Posted online at:

http://www.calbar.ca.gov/portals/0/documents/reports/2001_MDP-Report.pdf

[17] The nine jurisdictions are: Arizona, Arkansas, Delaware, Illinois, Montana, Nebraska, New Hampshire, Vermont, and Wisconsin.

[18] The forty jurisdictions are: Alabama, Alaska, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

[19] The two jurisdictions are: California and the District of Columbia.

After the financial debacles of the early millennium, e.g., Enron, interest in advancing MDP lost traction.

C. ABA Study of Nonlawyer Investment in Law Firms.

The ABA MDP Commission recommended in part that nonlawyer passive investment in law firms not be permitted. However, as part of the ABA Ethics 20/20 Commission charge to engage in "a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments," the Commission studied this issue. See "Issues Paper Concerning Alternative Business Structures" (April 5, 2011), available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf

The Ethics 20/20 Commission also studied alternative litigation financing. See "Issues Paper Concerning Lawyer's Involvement in Alternative Litigation Financing" (November 23, 2010), available at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/altl_lit_financing_issuespaper.authcheckdam.pdf

Ultimately, Ethics 20/20 did not submit recommendations on these issues to the ABA House of Delegates, deferring their consideration to the ABA Standing Committee on Professional Responsibility and Ethics.

As noted, the only jurisdiction that permits nonlawyer ownership of a law firm is the District of Columbia. (See footnote 14 and accompanying text, above.)

In addition, the Professional Competence staff notes that both the concept of alternative litigation funding and passive investment in the practice of law can involve a joint business arrangement between a lawyer and a nonlawyer where the joint venture includes a practice of law activity. See: Report on the Ethical Implications of Third-Party Litigation Funding by the Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, April 16, 2013;[23] "Committee Okays Litigation Funding Bill Despite Concerns" by David Gialanella, New Jersey Law Journal, March 18, 2015;[24] and District of Columbia Bar Association Ethics Opinion 362 (re Non-

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[20] The ABA MDP Commission's web page is at: http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html

The Commission's 1999 Final Report is available at: http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalreport.html

[21] The Recommendation and Report is available at: http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html

[22] The revised Report is available at: http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html

[23] Posted online at: http://www.nysba.org/workarea/DownloadAsset.aspx?id=25665.

[24] Posted online at: http://www.njlawjournal.com/id=1202720958062/Committee-OKs-Litigation-Funding-Bill-Despite-Concerns?slreturn=20150316130717

lawyer Ownership of Discovery Service Vendors). See also: ABA Ethics 20/20 Working Group on Alternative Business Structures, April 5, 2011, Issues Paper Concerning Alternative Business Structures.[25] The drafting team may want to consider whether developments in these areas might have an impact on the future application and enforcement of rule 1-310.

VII. Public Comment Received by the First Commission:

The clean text of a proposed new rule 5.4 drafted by the first Commission and adopted by the Board to replace rule 1-310 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 1-310, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-310 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

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[25] Posted online at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf

1. Whether the concepts in rules 1-310, 1-320 and 1-600, all of which are intended to some extent to avoid the interference with a lawyer's exercise of professional judgment, into a single rule similar to Model Rule 5.4 (Professional Independence of a Lawyer).

2. If the rules are merged, whether the title should be changed from the Model Rule to more accurately reflect the rule's content, e.g., "Avoiding Interference with Independent Professional Judgment" or "Financial and Similar Arrangements With Nonlawyers."

3. Whether the reference to the formation of a "partnership" in rule 1-310 should be changed to a broader reference to the formation of a "partnership or other organization."

4. Whether rule 1-320 (a merged rule) should expressly except from its prohibition the payment by a lawyer of court-awarded legal fees to a non-profit organization that employed, retained or recommended the lawyer. (Cf. Model Rule 5.4(a)(4); RRC1's proposed rule 5.4(a)(5).) These fees are an important source of income for such non-profit organizations.

5. Whether paragraphs (B) and (C) of rule 1-320 (as well as paragraph (B) of rule 2-200) should be moved to a rule addressing advertising costs and other payments for recommending a lawyer's services. (Cf. Model Rule 7.2(b)(1), (2) and (4). Cf. RRC1 proposed Rule 7.2(b).)

6. Whether rules 1-310, 1-320 and 1-600 (or a merged rule) should precisely identify the kinds of prohibited associations with nonlawyers that might lead to interference with a lawyer's professional judgment. (Compare Model Rule 5.4(c) and (d); RRC1 proposed Rule 5.4(c) and (d).)

7. Whether rules 1-320 and 1-600 should expressly address the concerns the Supreme Court expressed in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, about lawyers practicing with nonprofit organizations that might permit third parties to interfere with a lawyer's independence of judgment. (See first Commission's proposed Rule 5.4(f) and associated comments, as discussed in footnote 11, above.)

8. Whether rules 1-310 and 1-320 should be amended to permit lawyers to engage in a form of multidisciplinary practice that would provide to clients "one-stop shopping" in satisfying their requirements for professional services.

9. Whether rules 1-310 and 1-320 should be amended to permit non-lawyer ownership of organizations that practice law as is permitted in Australia and the United Kingdom.

IX. Research Resources:

1. In the Matter of Phillips (Rev. Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315
2. In the Matter of Bragg (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615
3. In the Matter of Jones (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411
4. State Bar Formal Op. No. 1999-154
5. State Bar Formal Op. No. 1995-142
6. State Bar Formal Op. No. 1995-141
7. Los Angeles County Bar Association Formal Op. No. 518 (2006)
8. Los Angeles County Bar Association Formal Op. No. 510 (2003)
9. Los Angeles County Bar Association Formal Op. No. 488 (1996)