RRC2 – Rule 5.4 [1-310][1-320][1-600]
E-mails, etc. – Revised (September 23, 2015)
Drafting Team: Harris (Lead), Chou, Kehr, Rothschild, Tuft

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September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on 1-310/1-320/1-600 [5.4] was received and is attached. Please consider these comments prior to the September meeting.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

* * *

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

1. 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.

2. 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.

September 3, 2015 Difuntorum Email to Drafting Team, cc Mohr, Andresen, McCurdy & Lee:

I consulted with Prof. Mohr and we agree that only one report is needed in this instance for the September meeting. This is because the drafting team was specifically asked by the full Commission in May to consider the ABA approach to this area that combines the concepts in 1-310, 1-320 and 1-600 in a single rule, namely Model Rule 5.4. That is precisely why the team has wisely used the first Commission's proposed rule 5.4 as the starting place for this study.

So, the bottom line is to please proceed with presenting the team's proposed rule in a single report. To do this, you can use the draft report that was originally intended for addressing rule 1-310 as the starting template. When Mimi is back next week, she can provide redlines of the team's proposed rule to each of the three California rules and these can be attachments to your report, but the content of the report can key off the team's proposed rule 5.4 rather than the individual California rules. Of course, the main task is to fill out the concepts accepted/rejected and the pros and cons sections of the report in light of the team's deliberation's and substantive decisions. Thanks.

September 16, 2015 Martinez Email to Harris & Kehr, cc Difuntorum & Mohr:

1. What is the rationale for deleting the language in current Rule 1-320(A)(2) which allows lawyers or law firms to pay to the estate of the deceased member legal fees generated from the deceased lawyer's services? Is there an explanation in the report? I can envision a situation where the deceased lawyer's estate is entitled to fees for legal services which the

firm would refuse to pay, claiming that doing so would result in sharing fees with a non-lawyer.

2. The words “in California” at the end of paragraph (a)(4) seem unnecessary since the sentence already references “California’s minimum standards.”

3. Paragraph (c) is troubling in the context of law firms (including government offices and in house legal departments) since it would allow a rogue associate or staff counsel to overrule a partner’s or general counsel’s decision on how to handle a matter. I would recommend deleting the phrase “or otherwise to interfere with the lawyer’s independence of professional judgment.” These words give too much “license” to a subordinate lawyer and I note this phrase is not in the ABA rule.

4. Does paragraph (d) conflict with State Bar Rules governing law corporations and the Corporations Code which state that the shares of a law corporation may be issued only to lawyers? Corporations Code section 13406 states: “(a) Subject to the provisions of subdivision (b), shares of capital stock in a professional corporation may be issued only to a licensed person or to a person who is licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices, and any shares issued in violation of this restriction shall be void.” Rule 3.157 (C) states: “The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death.” Our proposed Rule should be consistent with these requirements.

   Also, what is the purpose of allowing a fiduciary representative of a lawyer’s estate to hold the stock since shares in law corporation are not freely transferrable? (See also below re Comment [4].)

5. Paragraph (d)(2) is a bit hard to follow. I think I prefer the RRC-1 formulation better. It stated: “(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation.”

   Also, the word “corporate” is unnecessary. It could instead read: “~~corporate~~ director or officer of the corporation.”

6. Comment [4] seems unnecessary. First, is this consistent with the Law Corporation Rules or the Corporations Code? Can shares be transferred to a trust? See Rule 3.157(B) (“The shares of a law corporation must be owned only by that corporation or a shareholder.”) Second, do lawyers as a practical matter ever transfer shares in a law corporation to their family trust? Per Rule 3.157(C), the shares of a deceased shareholder “must be sold or transferred to the law corporation or its shareholders” within six months of death of the shareholder.

NOTE TO READER: The following email exchange from 9/19 to 9/21/15 took place among members of the Drafting Team and Commission member Raul Martinez. Each person participating in the exchange interlineated his comments among the previous. It should be most expedient to go directly to the 9/22/15 email denominated as "September 22, 2015 Chou & Rothschild Emails to Drafting Team, cc Difuntorum, Mohr, Andresen & Lee:" where you can read in succession each person's comment as to each issue raised.
That email is followed by four more emails, one from Mr. Martinez, with replies from Mr. Chou and Mr. Rothschild. Each is recorded below.

September 19, 2015 Kehr Email to Martinez, cc Chou, Harris, Rothschild, Difuntorum, Mohr, Andresen & Lee:

The agenda materials dropped off two of the drafters, who I've copied on this message so that they will have your comments. I have interlineated my thoughts.

1. What is the rationale for deleting the language in current Rule 1-320(A)(2) which allows lawyers or law firms to pay to the estate of the deceased member legal fees generated from the deceased lawyer's services? Is there an explanation in the report? I can envision a situation where the deceased lawyer's estate is entitled to fees for legal services which the firm would refuse to pay, claiming that doing so would result in sharing fees with a non-lawyer.
   Is your concern not adequately handled by paragraph (a)(1)? I can't speak for the other drafters on this point, but my thinking was that current paragraph (A)(2) is a veiled reference to 1.17_2-300 that should be made explicit.

2. The words "in California" at the end of paragraph (a)(4) seem unnecessary since the sentence already references "California's minimum standards." Agreed.

3. Paragraph (c) is troubling in the context of law firms (including government offices and in house legal departments) since it would allow a rogue associate or staff counsel to overrule a partner's or general counse decision on how to handle a matter. I would recommend deleting the phrase "or otherwise to interfere with the lawyer's independence of professional judgment." These words give too much "license" to a subordinate lawyer and I note this phrase is not in the ABA rule.
   You have seen a connection that I did not, but I think the solution would be to add in a Comment a reference to Rule 5.2.

4. Does paragraph (d) conflict with State Bar Rules governing law corporations and the Corporations Code which state that the shares of a law corporation may be issued only to lawyers? Corporations Code section 13406 states: "(a) Subject to the provisions of subdivision (b), shares of capital stock in a professional corporation may be issued only to a licensed person or to a person who is licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices, and any shares issued in violation of this restriction shall be void." Rule 3.157 (C) states: "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death." Our proposed Rule should be consistent with these requirements.
   Quite right (and RRC-1 did the same thing). My comment follows your next sentence.

Also, what is the purpose of allowing a fiduciary representative of a lawyer's estate to hold the stock since shares in law corporation are not freely transferrable? (See also below re Comment [4].)

Raul, I've never played organized football, but I'm beginning to see the wisdom of the punt. Yes, Rule 3.157(C) of the Bar's rules governing law corporations says what you have quoted, but the governing statute is Corp. C. § 13407, and it does not contain the requirement that the transfer be to the corporation or its shareholders. Instead, it also permits sale of the deceased shareholder's shares to another licensed person. Despite this, Rule 3.157(C) is comforting in its recognition that things don't happen overnight although the Rule conflicts with the governing statute. Leaving aside this checkered background, how could the personal representative of a deceased law corporation shareholder sell the decedent's shares and convey good title without having legal title (as the personal representative would have over any real estate held in a decedent's name)? Should the personal representative not be permitted to vote during the six-month period if the remaining shareholders were to attempt to take actions that would reduce the value of the decedent's shares? Although Corp. C. § 13407 does not recognize problems of this sort, the world seems to have moved along without too many glitches as I can find no published appellate authority raising any question of this sort regarding a deceased shareholder of any sort of professional corporation. It might be prudent to remove "…,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" in the hope that no great problem will result. An alternative solution would be to leave (d)(1) as it is but add a Comment along these lines: "Regarding the sale of a deceased lawyer's law corporation shares, see Rule 3.157(C) of the Bar's rules governing law corporations."

5. Paragraph (d)(2) is a bit hard to follow. I think I prefer the RRC-1 formulation better. It stated: "(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation."

   I'm fine with changing "a person who is not a lawyer" to "a nonlawyer" (as I think we did at our last meeting with another Rule). The only other difference between this version and the earlier RRC-1 version is that "in any form of organization other than a corporation" would become "in any other form of organization". I prefer the new version as more economical.

   Also, the word "corporate" is unnecessary. It could instead read: "~~corporate~~ director or officer of the corporation."

   I wouldn't remove this word. "corporate" is paired with "other", and I think we need both to make sense. Also, non-corporate organizations sometimes use labels normally associated with corporations.

6. Comment [4] seems unnecessary. First, is this consistent with the Law Corporation Rules or the Corporations Code? Can shares be transferred to a trust? See Rule 3.157(B) ("The shares of a law corporation must be owned only by that corporation or a shareholder.") Second, do lawyers as a practical matter ever transfer shares in a law corporation to their family trust? Per Rule 3.157(C), the shares of a deceased shareholder "must be sold or transferred to the law corporation or its shareholders" within six months of death of the shareholder.

   Assets that commonly are referred to as being owned by a trust actually are owned by the trustees in their representative capacities. If Lawyer Jones transfers her law corporation to herself, as trustee of the Jones trust, she remains the owner. You asked whether this ever happens, and the answer is, yes, I saw it done by a lawyer (who I think did his own estate

planning) and who named another lawyer as the successor trustee. The deceased lawyer's wife, a nonlawyer, never was a trustee of what he referred to as "the law trust" or something of that sort.

September 19, 2015 Mohr Email to Drafting Team, cc Difuntorum, Andresen, McCurdy & Lee:

It turns out that three members of the drafting team, who were added after the May meeting, were not included in Raul's email. As you recall, when the assignment expanded to cover not only rule 1-310, but also rules 1-320 and 1-600, and with them a request that the drafting team consider Model Rule 5.4, three new members were added to the drafting team: Danny Chou, Toby Rothschild and Mark Tuft. I've added Mark Tuft to this email so he can follow the discussion.

Mark: The only comment received by the Drafting Team was Raul's 9/16/15 email, which Bob pasted below w/ his comments. Our apologies for any misunderstandings. Thanks,

September 21, 2015 Harris Email to Mohr, cc Drafting Team, Martinez, Difuntorum, Andresen & Lee:

Kevin, thank you for forwarding Raul's comments and Bob's reply to the relevant folks. I believe that so far these are the only two post drafting email comments. I have added my thoughts into the chain in blue.

Lee and Bob, below are my comments on this Rule:

1. What is the rationale for deleting the language in current Rule 1-320(A)(2) which allows lawyers or law firms to pay to the estate of the deceased member legal fees generated from the deceased lawyer's services? Is there an explanation in the report? I can envision a situation where the deceased lawyer's estate is entitled to fees for legal services which the firm would refuse to pay, claiming that doing so would result in sharing fees with a non-lawyer.
   Is your concern not adequately handled by paragraph (a)(1)? I can't speak for the other drafters on this point, but my thinking was that current paragraph (A)(2) is a veiled reference to 1.17_2-300 that should be made explicit.
   I agree with Bob, that paragraph (A) (1) and (A) (2) adequately address Raul's concern.

2. The words "in California" at the end of paragraph (a)(4) seem unnecessary since the sentence already references "California's minimum standards."
   Agreed.
   I am presuming we are looking for meeting the State Bar of California's minimum standard for lawyer referral services, not where the service is located. If that is the case, I am fine with Raul's suggestion.

3. Paragraph (c) is troubling in the context of law firms (including government offices and in house legal departments) since it would allow a rogue associate or staff counsel to overrule a partner's or general counsel's decision on how to handle a matter. I would recommend deleting the phrase "or otherwise to interfere with the lawyer's independence of professional judgment." These words give too much "license" to a subordinate lawyer and I note this phrase is not in the ABA rule.

You have seen a connection that I did not, but I think the solution would be to add in a Comment a reference to Rule 5.2.
I don't see that having "otherwise to interfere with the lawyers independence of professional judgment." would improperly enable a subordinate lawyer. I defer on Bob's suggestion regarding Rule 5.2.

4. Does paragraph (d) conflict with State Bar Rules governing law corporations and the Corporations Code which state that the shares of a law corporation may be issued only to lawyers? Corporations Code section 13406 states: "(a) Subject to the provisions of subdivision (b), shares of capital stock in a professional corporation may be issued only to a licensed person or to a person who is licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices, and any shares issued in violation of this restriction shall be void." Rule 3.157 (C) states: "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death." Our proposed Rule should be consistent with these requirements.
   Quite right (and RRC-1 did the same thing). My comment follows your next sentence.
   See my comment below.

   Also, what is the purpose of allowing a fiduciary representative of a lawyer's estate to hold the stock since shares in law corporation are not freely transferrable? (See also below re Comment [4].)
   Raul, I've never played organized football, but I'm beginning to see the wisdom of the punt. Yes, Rule 3.157(C) of the Bar's rules governing law corporations says what you have quoted, but the governing statute is Corp. C. § 13407, and it does not contain the requirement that the transfer be to the corporation or its shareholders. Instead, it also permits sale of the deceased shareholder's shares to another licensed person. Despite this, Rule 3.157(C) is comforting in its recognition that things don't happen overnight although the Rule conflicts with the governing statute. Leaving aside this checkered background, how could the personal representative of a deceased law corporation shareholder sell the decedent's shares and convey good title without having legal title (as the personal representative would have over any real estate held in a decedent's name)? Should the personal representative not be permitted to vote during the six-month period if the remaining shareholders were to attempt to take actions that would reduce the value of the decedent's shares? Although Corp. C. § 13407 does not recognize problems of this sort, the world seems to have moved along without too many glitches as I can find no published appellate authority raising any question of this sort regarding a deceased shareholder of any sort of professional corporation. It might be prudent to remove "…,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" in the hope that no great problem will result. An alternative solution would be to leave (d)(1) as it is but add a Comment along these lines: "Regarding the sale of a deceased lawyer's law corporation shares, see Rule 3.157(C) of the Bar's rules governing law corporations."
   I would leave the Rule the way it is drafted and add a Comment as suggested by Bob. Also, I think one can argue that there is a difference between "issuing" stock as set forth in Corporations Code section 13406 and "holding" the stock as set out in section (d) (1) which says "hold the lawyer's stock or other interest". I also think that under the current circumstances "for a reasonable time during administration" would be capped by the time limit of the statute. That is, the time period of the statute would be the definition of "reasonable".

5. Paragraph (d)(2) is a bit hard to follow. I think I prefer the RRC-1 formulation better. It stated: "(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation."
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   I defer to Bob's personal experience on this question.

September 21, 2015 Martinez, Chou, Rothschild, Martinez_2, Chou_2 & Rothschild_2 Emails to Drafting Team, cc Difuntorum, Mohr, Andresen & Lee:

Numbered black comments are Mr. Martinez's original points. Red comments are Mr. Kehr's responses. Blue comments are Mr. Harris's responses. Yellow highlighted comments are Mr. Martinez's replies.

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Is your concern not adequately handled by paragraph (a)(1)? I can't speak for the other drafters on this point, but my thinking was that current paragraph (A)(2) is a veiled reference to 1.17_2-300 that should be made explicit.
I agree with Bob, that paragraph (A) (1) and (A) (2) adequately address Raul's concern.

2. The words "in California" at the end of paragraph (a)(4) seem unnecessary since the sentence already references "California's minimum standards."
Agreed.
I am presuming we are looking for meeting the State Bar of California's minimum standard for lawyer referral services, not where the service is located. If that is the case, I am fine with Raul's suggestion.

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You have seen a connection that I did not, but I think the solution would be to add in a Comment a reference to Rule 5.2.
I don't see that having "otherwise to interfere with the lawyers independence of professional judgment." would improperly enable a subordinate lawyer. I defer on Bob's suggestion regarding Rule 5.2.
A cross-reference to Rule 5.2 won't resolve this concern since Rule 5.2 addresses the situation where the subordinate lawyer acts in accordance with the supervisor's judgment, whereas the proposed draft of this rule allows the subordinate lawyer—who believes the supervisor is interfering with the subordinate lawyer's independence of professional judgment--to do precisely the opposite. ABA Rule 5.2 (b) states: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." In contrast, proposed Paragraph (c) states that "a lawyer shall not permit…a person who …employs… the lawyer… to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment." The two rules are inconsistent. In fact, a larger concern is that Paragraph (c) goes too far in that it states <u>expressly</u> that a law firm or legal department "may not direct.. the lawyer's provision of legal services…." This turns employment and agency principles on their head.

4. Does paragraph (d) conflict with State Bar Rules governing law corporations and the Corporations Code which state that the shares of a law corporation may be issued only to lawyers? Corporations Code section 13406 states: "(a) Subject to the provisions of subdivision (b), shares of capital stock in a professional corporation may be issued only to a licensed person or to a person who is licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices, and any shares issued in violation of this restriction shall be void." Rule 3.157 (C) states: "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death." Our proposed Rule should be consistent with these requirements.
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Also, what is the purpose of allowing a fiduciary representative of a lawyer's estate to hold the stock since shares in law corporation are not freely transferrable? (See also below re Comment [4].)

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I would leave the Rule the way it is drafted and add a Comment as suggested by Bob. Also, I think one can argue that there is a difference between "issuing" stock as set forth in Corporations Code section 13406 and "holding" the stock as set out in section (d) (1) which says "hold the lawyer's stock or other interest". I also think that under the current circumstances "for a reasonable time during administration" would be capped by the time limit of the statute. That is, the time period of the statute would be the definition of "reasonable".

Rule 3.157(B) is explicit: "The shares of a law corporation must be owned only by that corporation or a shareholder." If the line of demarcation is whether someone "holds" the shares then, why do we care? What is the legal significance of the word "hold" in a scheme where ownership or ability to transfer is the key? This fuzzy language is typical of some ABA rules. We should let the Corporations Code and the Law Corporation Rules deal with these issues and not follow the ABA rule blindly.

5. Paragraph (d)(2) is a bit hard to follow. I think I prefer the RRC-1 formulation better. It stated: "(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation."

   I'm fine with changing "a person who is not a lawyer" to "a nonlawyer" (as I think we did at our last meeting with another Rule). The only other difference between this version and the earlier RRC-1 version is that "in any form of organization other than a corporation" would become "in any other form of organization". I prefer the new version as more economical.

   I prefer nonlawyer which I believe we have used before. I also prefer the "more economical" language.

   As to whether the word "corporate" in the phrase "a nonlawyer is a <u>corporate</u> director or officer of the <u>corporation</u>" is necessary, I suggest we submit resolution of this dispute to the "Department of Redundancy Department."

Also, the word "corporate" is unnecessary. It could instead read: "~~corporate~~ director or officer of the corporation."
I wouldn't remove this word. "corporate" is paired with "other", and I think we need both to make sense. Also, non-corporate organizations sometimes use labels normally associated with corporations.
I prefer keeping the language as we drafted it. Bob makes a good point regarding the use of labels by non-corporate organizations.

6. Comment [4] seems unnecessary. First, is this consistent with the Law Corporation Rules or the Corporations Code? Can shares be transferred to a trust? See Rule 3.157(B) ("The shares of a law corporation must be owned only by that corporation or a shareholder.") Second, do lawyers as a practical matter ever transfer shares in a law corporation to their family trust? Per Rule 3.157(C), the shares of a deceased shareholder "must be sold or transferred to the law corporation or its shareholders" within six months of death of the shareholder.
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I defer to Bob's personal experience on this question.
I suggest we leave these issues alone and let the Corporations Code and Law Corporation Rules deal with them. I am not convinced that when a lawyer transfers shares to a trust that the lawyer still owns them. The shares are owned by the trust. At best, the trustee has legal title and the beneficiary has equitable title. The lawyer can administer the trust as trustee but the shares are transferred to the trust.

September 22, 2015 Chou & Rothschild Emails to Drafting Team, cc Difuntorum, Mohr, Andresen & Lee:

Numbered black comments are Mr. Martinez's original points. Red comments are Mr. Kehr's responses. Blue comments are Mr. Harris's responses. Yellow highlighted comments are Mr. Martinez's replies. Green comments re Mr. Chou's responses. Purple comments are Mr. Rothschild's responses.

1. What is the rationale for deleting the language in current Rule 1-320(A)(2) which allows lawyers or law firms to pay to the estate of the deceased member legal fees generated from the deceased lawyer's services? Is there an explanation in the report? I can envision a situation where the deceased lawyer's estate is entitled to fees for legal services which the firm would refuse to pay, claiming that doing so would result in sharing fees with a non-lawyer.
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I agree with Bob, that paragraph (A) (1) and (A) (2) adequately address Raul's concern.
I agree.
Agree.

2. The words "in California" at the end of paragraph (a)(4) seem unnecessary since the sentence already references "California's minimum standards."
Agreed.
I am presuming we are looking for meeting the State Bar of California's minimum standard for lawyer referral services, not where the service is located. If that is the case, I am fine with Raul's suggestion.
I agree.
I think the reason for having "in California" at the end is that the official name of the document is "Minimum Standards for Lawyer Referral Services in California." Under the rules, at least ½ of the governing committee must be members of the state bar, and all of the panel members must be, so it is hard to imagine a service that operates "in accordance with" the rules that is not in California. It might be better to delete the reference to the State Bar of California, and just state that it must be in accordance with the Minimum Standards for Lawyer Referral Services in California.

3. Paragraph (c) is troubling in the context of law firms (including government offices and in house legal departments) since it would allow a rogue associate or staff counsel to overrule a partner's or general counsel's decision on how to handle a matter. I would recommend deleting the phrase "or otherwise to interfere with the lawyer's independence of professional judgment." These words give too much "license" to a subordinate lawyer and I note this phrase is not in the ABA rule.
You have seen a connection that I did not, but I think the solution would be to add in a Comment a reference to Rule 5.2.
I don't see that having "otherwise to interfere with the lawyers independence of professional judgment." would improperly enable a subordinate lawyer. I defer on Bob's suggestion regarding Rule 5.2.
A cross-reference to Rule 5.2 won't resolve this concern since Rule 5.2 addresses the situation where the subordinate lawyer acts in accordance with the supervisor's judgment, whereas the proposed draft of this rule allows the subordinate lawyer—who believes the supervisor is interfering with the subordinate lawyer's independence of professional judgment--to do precisely the opposite. ABA Rule 5.2 (b) states: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." In contrast, proposed Paragraph (c) states that "a lawyer shall not permit…a person who …employs… the lawyer… to direct or regulate the lawyer's provision of legal services, or otherwise to interfere with the lawyer's independence of professional judgment." The two rules are inconsistent. In fact, a larger concern is that Paragraph (c) goes too far in that it states expressly that a law firm or legal department "may not direct.. the lawyer's provision of legal services…." This turns employment and agency principles on their head.
I see Raul's point. As literally written, paragraph (c) arguably implies that a lawyer must ignore his employer or supervisor if he or she believes that his or her independence of professional judgment is impaired. This could theoretically include situations where a subordinate lawyer simply disagrees with strategic decisions being made by the supervising lawyer. But it's not clear to me whether paragraph (c) will actually create the problem that Raul is raising. I think that it will depend on how courts construe the terms "direct" and "interfere." Given that there is room for interpretation, a comment may be helpful, and I agree that a reference to 5.2 doesn't address Raul's concern. Maybe Raul has a proposal?

I agree with Danny. I think we could use a comment here, but I haven't come up with one. Do we know if this has caused any problems in any of the states that have adopted 5.4?

4. Does paragraph (d) conflict with State Bar Rules governing law corporations and the Corporations Code which state that the shares of a law corporation may be issued only to lawyers? Corporations Code section 13406 states: "(a) Subject to the provisions of subdivision (b), shares of capital stock in a professional corporation may be issued only to a licensed person or to a person who is licensed to render the same professional services in the jurisdiction or jurisdictions in which the person practices, and any shares issued in violation of this restriction shall be void." Rule 3.157 (C) states: "The shares of a deceased shareholder must be sold or transferred to the law corporation or its shareholders within six months and one day following the date of death." Our proposed Rule should be consistent with these requirements.
Quite right (and RRC-1 did the same thing). My comment follows your next sentence.
See my comment below.

Also, what is the purpose of allowing a fiduciary representative of a lawyer's estate to hold the stock since shares in law corporation are not freely transferrable? (See also below re Comment [4].)
Raul, I've never played organized football, but I'm beginning to see the wisdom of the punt. Yes, Rule 3.157(C) of the Bar's rules governing law corporations says what you have quoted, but the governing statute is Corp. C. § 13407, and it does not contain the requirement that the transfer be to the corporation or its shareholders. Instead, it also permits sale of the deceased shareholder's shares to another licensed person. Despite this, Rule 3.157(C) is comforting in its recognition that things don't happen overnight although the Rule conflicts with the governing statute. Leaving aside this checkered background, how could the personal representative of a deceased law corporation shareholder sell the decedent's shares and convey good title without having legal title (as the personal representative would have over any real estate held in a decedent's name)? Should the personal representative not be permitted to vote during the six-month period if the remaining shareholders were to attempt to take actions that would reduce the value of the decedent's shares? Although Corp. C. § 13407 does not recognize problems of this sort, the world seems to have moved along without too many glitches as I can find no published appellate authority raising any question of this sort regarding a deceased shareholder of any sort of professional corporation. It might be prudent to remove "…,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" in the hope that no great problem will result. An alternative solution would be to leave (d)(1) as it is but add a Comment along these lines: "Regarding the sale of a deceased lawyer's law corporation shares, see Rule 3.157(C) of the Bar's rules governing law corporations."
I would leave the Rule the way it is drafted and add a Comment as suggested by Bob. Also, I think one can argue that there is a difference between "issuing" stock as set forth in Corporations Code section 13406 and "holding" the stock as set out in section (d) (1) which says "hold the lawyer's stock or other interest". I also think that under the current circumstances "for a reasonable time during administration" would be capped by the time limit of the statute. That is, the time period of the statute would be the definition of "reasonable".
Rule 3.157(B) is explicit: "The shares of a law corporation must be owned only by that corporation or a shareholder." If the line of demarcation is whether someone "holds" the shares then, why do we care? What is the legal significance of the word "hold" in a scheme where ownership or ability to transfer is the key? This fuzzy

language is typical of some ABA rules. We should let the Corporations Code and the Law Corporation Rules deal with these issues and not follow the ABA rule blindly.
Although not ideal, I am comfortable with Lee and Bob's proposal to add a comment.
I agree with Danny et al.

5. Paragraph (d)(2) is a bit hard to follow. I think I prefer the RRC-1 formulation better. It stated: "(2) a person who is not a lawyer is a corporate director or officer thereof or occupies a position of similar responsibility in any form of organization other than a corporation."
I'm fine with changing "a person who is not a lawyer" to "a nonlawyer" (as I think we did at our last meeting with another Rule). The only other difference between this version and the earlier RRC-1 version is that "in any form of organization other than a corporation" would become "in any other form of organization". I prefer the new version as more economical.
I prefer nonlawyer which I believe we have used before. I also prefer the "more economical" language.

Also, the word "corporate" is unnecessary. It could instead read: "~~corporate~~ director or officer of the corporation."
I wouldn't remove this word. "corporate" is paired with "other", and I think we need both to make sense. Also, non-corporate organizations sometimes use labels normally associated with corporations.
I prefer keeping the language as we drafted it. Bob makes a good point regarding the use of labels by non-corporate organizations.
As to whether the word "corporate" in the phrase "a nonlawyer is a <u>corporate</u> director or officer of the <u>corporation</u>" is necessary, I suggest we submit resolution of this dispute to the "Department of Redundancy Department."
I am fine with deleting "corporate." I don't think we need it to make sense since the word "director" is already modified by the clause "of the corporation." I also don't think the use of similar labels by non-corporate organizations is a problem because the second half of (d)(2) deals with that. But I do not feel strongly about this.
I think we can get rid of either one of the "corporations." I don't think we need both.

6. Comment [4] seems unnecessary. First, is this consistent with the Law Corporation Rules or the Corporations Code? Can shares be transferred to a trust? See Rule 3.157(B) ("The shares of a law corporation must be owned only by that corporation or a shareholder.") Second, do lawyers as a practical matter ever transfer shares in a law corporation to their family trust? Per Rule 3.157(C), the shares of a deceased shareholder "must be sold or transferred to the law corporation or its shareholders" within six months of death of the shareholder.
Assets that commonly are referred to as being owned by a trust actually are owned by the trustees in their representative capacities. If Lawyer Jones transfers her law corporation to herself, as trustee of the Jones trust, she remains the owner. You asked whether this ever happens, and the answer is, yes, I saw it done by a lawyer (who I think did his own estate planning) and who named another lawyer as the successor trustee. The deceased lawyer's wife, a nonlawyer, never was a trustee of what he referred to as "the law trust" or something of that sort.
I defer to Bob's personal experience on this question.
I suggest we leave these issues alone and let the Corporations Code and Law Corporation Rules deal with them. I am not convinced that when a lawyer transfers shares to a trust that the lawyer still owns them. The shares are owned by the trust. At best, the trustee has legal

title and the beneficiary has equitable title. The lawyer can administer the trust as trustee but the shares are transferred to the trust.
I do as well.
I think Bob has this one right.

September 22, 2015 Martinez Email to Drafting Team, cc Difuntorum, Mohr, Andresen & Lee:

As to paragraph (c), as a compromise, it maybe be safer simply to follow the ABA 5.4(c) formulation, which reads:

> (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.

One difference is that in the ABA rule the words "direct or regulate" modify "the lawyer's professional judgment," whereas those same words in the proposed draft modify "the lawyer's provision of legal services." Our draft thus has much broader import.

September 22, 2015 Chou Email to Drafting Team, cc Martinez, Difuntorum, Mohr, Andresen & Lee:

I am comfortable with Raul's proposed compromise. I agree that the phrase "lawyer's provision of legal services" may be too broad. Arguably, I am directing another lawyer's provision of legal services whenever I revise one of their briefs that will be filed. Limiting (c) to a "lawyer's independence of professional judgment" makes sense to me.

September 22, 2015 Rothschild Email to Drafting Team, cc Martinez, Difuntorum, Mohr, Andresen & Lee:

I'm not sure that Raul's proposal actually solves the problem. Aren't you directing another's independence of professional judgement when you revise the brief? Another possible solution is to make clear, either in the rule or a comment, that this provision only refers to someone outside the law firm interfering, etc.

September 23, 2015 Rothschild Email to Drafting Team, cc Martinez, Difuntorum, Mohr, Andresen & Lee:

One last(?) thought on this.. Would a cross reference to 3-310 (f) [1.8 (f)] make it clear what this refers to? Both refer to interference with "the independence of professional judgment." Comment 11 of 1.8 cross-references 5.4 (c). Just thought.