

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 464**

**August 19, 2013**

**Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers**

*Lawyers subject to the Model Rules may work with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with nonlawyers. Where there is a single billing to a client in such situations, a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer, provided that there is no interference with the lawyer's independent professional judgment.*

This opinion considers whether a lawyer subject to the Model Rules may divide a legal fee with another lawyer or law firm practicing in a jurisdiction where the other lawyer or law firm might eventually distribute some portion of that fee to a nonlawyer.<sup>1</sup> In contemporary practice, lawyers routinely work with lawyers from other law firms, including lawyers and law firms in other jurisdictions, to represent clients in particular matters. The August 2012 amendments to the Model Rules expressly recognize these common arrangements. New Comment [6] to Model Rule 1.1 explains that a lawyer may retain or contract with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client and describes how a lawyer should approach these relationships with both the client and the other lawyers.<sup>2</sup>

Sometimes the other lawyers with whom a lawyer may work are admitted and practice in other jurisdictions, both within and outside the United States, a situation that has become more common with the growth of national and international commerce. Those other jurisdictions may have professional conduct rules identical or similar to Model Rules 1.5(e) and 5.4(a), which deal with the allocation of legal fees among lawyers and nonlawyers. But some jurisdictions, like the District of Columbia and the United Kingdom, have rules that differ significantly from Model Rules 1.5(e) and 5.4(a).

Model Rule 1.5(e) permits the division of a legal fee between lawyers who are not in the same firm, but only if: (1) the division is in proportion to the services performed by each lawyer

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<sup>1</sup> This opinion is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdiction are controlling.

<sup>2</sup> Comment [6] to ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 reads:

*Retaining or Contracting With Other Lawyers*

Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. Comment [7] to Model Rule 1.5 explains that a “division of fee” is a single billing to a client covering the fee of two or more lawyers who are not in the same firm; and the comment also notes that this kind of fee arrangement “... facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well....” Inter-firm division of legal fees is clearly contemplated by the Model Rules.

Model Rule 5.4(a) provides generally that “a lawyer or law firm shall not share legal fees with a nonlawyer” but recognizes four distinct exceptions: payments to the survivors or estates of deceased lawyers; payments made under Model Rule 1.17 to purchase the practice of a deceased, disabled or disappeared lawyer; firm compensation and retirement plans; and sharing court-awarded fees with nonprofit organizations. The exception for firm compensation and retirement plans depends on whether the profits being shared are “tied to particular clients or particular matters.”<sup>3</sup>

In contrast to the Model Rule, District of Columbia Rule 5.4(b) permits “an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients” to hold an ownership interest in a law firm; and District of Columbia Rule 5.4(a) permits the sharing of legal fees with such persons.<sup>4</sup> ABA Formal Opinion 91-360 (July 11, 1991) addressed the question of what rule should govern a lawyer’s conduct when the lawyer is admitted in the District of Columbia and a partner in a District of Columbia firm that includes nonlawyer partners, but is also admitted in another jurisdiction that follows Model Rule 5.4(b),

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<sup>3</sup> Ellen J. Bennett, Elizabeth J. Cohen & Martin Whittaker, *Annotated Model Rules of Professional Conduct* 461 (7th ed. 2011). See Ill. State Bar Ass’n, Advisory Op. 89-05 (1989) (firm profit-sharing plan may include nonlawyer employees provided shares based on overall firm profit and not specific matters); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Advisory Op. 917 (2012) (firm may pay bonus to nonlawyer marketer based on number of clients obtained through advertising provided amount paid not calculated with respect to fees paid by clients).

<sup>4</sup> DC RULES OF PROF’L CONDUCT R. 5.4, Professional Independence of a Lawyer, states that:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) An agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. 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.

which forbids such partnerships. The opinion concluded that the lawyer “should not be subject to the prohibition of the jurisdiction where the lawyer does not practice” and should follow the rules where the lawyer is engaged in practice. Formal Opinion 91-360 did not directly address fee sharing.

A fee-sharing issue may arise when a lawyer undertakes the representation of a client in a matter that involves the services of another lawyer or law firm governed by different rules. For example, a lawyer in a Model Rules jurisdiction may reasonably conclude that the client requires the assistance of a specific lawyer in a District of Columbia firm, in which a nonlawyer happens to hold an ownership interest, on a matter involving federal government contracts because that lawyer is uniquely qualified in such matters. With informed client consent, the two lawyers may work together on the matter. If the requirements of Model Rule 1.5(e) are met, a typical fee arrangement in such matters is for the client to receive a single billing for the work of both lawyers. In this situation, there may be a question whether the lawyer from the Model Rules jurisdiction, by participating in this common inter-firm fee arrangement, shares a legal fee in violation of Model Rule 5.4(a) because the District of Columbia firm’s portion of the fee will presumably become part of that firm’s overall revenues, revenues from which distributions may ultimately be made to the nonlawyer who holds an ownership interest.

In the situation assumed above, however, the lawyer from the Model Rules jurisdiction does not violate Model Rule 5.4(a). That lawyer divided a legal fee only with “another lawyer,” and a lawyer may divide legal fees with a lawyer admitted in another jurisdiction.<sup>5</sup> Any concerns of the lawyer subject to the Model Rules regarding inter-firm division of legal fees should end at that point.

The possibility that the District of Columbia firm may, or may not, eventually “share” some fraction of that firm’s portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline. The lawyer subject to the Model Rules has complied with those rules. The compensation system of the District of Columbia firm does not threaten the application of Model Rule 5.4(a) within the Model Rules jurisdiction, and there is no reason to attempt to enforce Model Rule 5.4(a) in the District of Columbia.<sup>6</sup>

This situation is different from that considered in Formal Opinion 91-360, noted above, which dealt with the prohibition of partnerships with nonlawyers expressed in Model Rule 5.4(b) rather than the fee-sharing provision of Model Rule 5.4(a). However, the conclusions are consistent. Formal Opinion 91-360 decided that a lawyer licensed both in a Model Rules jurisdiction and the District of Columbia should adhere to the restrictions of the jurisdiction where the lawyer actually practiced. The conduct of each lawyer and law firm involved in the current hypothetical situation took place in only one jurisdiction and was permitted there. The lawyer subject to the Model Rules divided a fee only with another lawyer in conformance with the Model Rules; and the District of Columbia firm could choose to allocate its portion of the fee

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<sup>5</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 316 (1967) (not necessary that both lawyers be admitted in same jurisdiction to divide legal fees; lawyer admitted in one jurisdiction is lawyer everywhere for purposes of ethics rules). *See also O'Brien, P.C. v. Snyder*, 601 A.2d 1056, 1058 (Del. 1990) (members of New Jersey bar were “lawyers” for purposes of Delaware Rule 5.4(a)); ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 01-423 (2001) (members of recognized legal profession in foreign jurisdictions are “lawyers” for purposes of Model Rule 5.4.).

<sup>6</sup> *See Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (jurisdiction should not apply its law to judge conduct that occurs only in another jurisdiction when conduct creates no serious risk of interference with first jurisdiction’s ability to regulate its own affairs).

to a compensation plan that included distribution to the nonlawyer holding an ownership interest as authorized by the District of Columbia rules.

In summary, a division of a legal fee by a lawyer or law firm in a Model Rules jurisdiction with a lawyer or law firm in another jurisdiction that permits the sharing of legal fees with nonlawyers does not violate Model Rule 5.4(a) simply because a nonlawyer could ultimately receive some portion of the fee under the applicable law of the other jurisdiction.

This conclusion is consistent with the purposes of the Model Rules because the concerns underlying the prohibition in Model Rule 5.4 are not implicated. As explained in Comment [1] to Model Rule 5.4: “These limitations are to protect the lawyer’s independence of professional judgment.” The rule protects a lawyer’s independent professional judgment by limiting the influence of nonlawyers on the client-lawyer relationship.<sup>7</sup> In the typical situation discussed above, there is no reason to believe that the nonlawyer in the District of Columbia might actually influence the independent professional judgment of the lawyer in the Model Rules jurisdiction, who practices in a different firm, in a different jurisdiction. And that lawyer remains subject to the Model Rules, so this conclusion does not compromise any prohibitions on nonlawyer ownership and fee sharing in the Model Rules jurisdiction.<sup>8</sup>

A contrary conclusion, as noted above, would place the lawyer in the Model Rules jurisdiction at the mercy of the organization and compensation practices of the District of Columbia firm. For example, as discussed above, if the District of Columbia firm’s compensation plan that included nonlawyers were not “tied to particular clients or particular matters,” then there would be no violation of Model Rule 5.4(a) in any event. And even if the District of Columbia firm’s compensation plan permitted it to pay a nonlawyer a portion of fees received that were in fact “tied to particular clients or particular matters,” but the firm decided for any reason not to do so in a given year, then there could be no concern for allegedly improper fee sharing for that year. Thus, the exposure of the lawyer in the Model Rules jurisdiction to discipline for improper fee sharing would essentially depend on the organization, bookkeeping practices, and annual compensation decisions of the District of Columbia firm.

Presumably, lawyers in Model Rules jurisdictions could always avoid any potentially improper fee sharing by refusing to work with firms in the District of Columbia or other countries unless the clients themselves separately retained and paid the District of Columbia or foreign law firms. But this tactic would likely annoy clients and add unnecessary complexity to a common arrangement with no constructive purpose.

A contrary conclusion would also unreasonably impair the ability of lawyers to work alongside lawyers in firms that may be best suited to serve a particular client or resolve a particular matter. If a lawyer in a Model Rules jurisdiction cannot work with other lawyers from the District of Columbia or the other jurisdictions where law firms are permitted to share fees with nonlawyers, clients would be deprived of the services of those lawyers with no real benefit to those clients or the legal system.

Finally, this conclusion carries an important limitation. Lawyers must continue to comply with the requirement of Model Rule 5.4(c) to maintain professional independence. Even

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<sup>7</sup> Bennett et al., *supra* note 3, at 456.

<sup>8</sup> This conclusion is also in accord with the only other opinion that has directly addressed the question. See Philadelphia Bar Ass’n Prof’l Guidance Comm., Advisory Op. 2010-7 (2010) (Pennsylvania law firm may divide legal fee from joint representation of a client with District of Columbia firm which has nonlawyer partner).

if the other law firm may be governed by different rules regarding relationships with nonlawyers, a lawyer must not permit a nonlawyer in the other firm to interfere with the lawyer's own independent professional judgment. As noted above, the actual risk of improper influence is minimal. But the prohibition against improper nonlawyer influence continues regardless of the fee arrangement.

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