Responsive Law
The Consumer's Voice in the Legal System

Comments on: D.C. Rule of Professional Conduct 5.4

Tom Gordon
Executive Director,
Responsive Law

Comments to the

D.C. Bar Global Legal Practice Committee

March 9, 2020

Responsive Law thanks the Global Legal Practice Committee for the opportunity to present its comments on Rule of Professional Conduct 5.4. Responsive Law is a national, nonprofit, consumer organization based in D.C., working to make the civil legal system more affordable, accessible, and accountable to the public. Our executive director and one of our corporate officers are members of the D.C. Bar.

Last month, the ABA House of Delegates passed Resolution 115, which "encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services" and "to collect and assess data regarding regulatory innovations." The Committee's inquiry into alternative business structures (ABS) can be a useful start in fulfilling this mandate from the ABA.

However, it is important to note that the Committee's inquiry, by centering on the experience with current rule in D.C., can only offer a partial picture of the benefits of ABS. D.C.'s Rule 5.4 allows only limited involvement of non-lawyers. It requires, among other things, that the non-lawyer partners be active service providers in the firm. This is a stark contrast with the proposals being considered in Utah and Arizona, which would allow passive investment in law firms. Exhaustive study and deliberation in Australia and in England and Wales has led to reregulation of the law of legal services to allow such investment there.

Accordingly, we appreciate the Committee's interest in this issue, and hope that this will be the beginning of a general discussion within the D.C. Bar around whether to change Rule 5.4 to allow a wider range of ABS. The Committee's core audience is large corporate law firms, and the questions it asks should yield relevant data about the impact of Rule 5.4 on those firms and their clients. However, as we detail below, the significance of Rule 5.4 changes lies even more in creating new incentives to deliver legal services broadly in new ways, including to the individuals and small businesses (the "PeopleLaw" sector) who cannot currently afford

1380 Monroe St NW, #210
Washington, D.C. 20010
tom@responsivelaw.org
(202) 649-0399

legal help and who are unlikely to be the clients of firms operating as an ABS in D.C.

As Responsive Law's mission is to speak on behalf of the 90% of Americans who can't afford legal help, we are answering several of the Committee's questions below from the perspective of those consumers who might benefit from changes to Rule 5.4.

For those firms that have nonlawyer partners, how has D.C.'s existing Rule 5.4(b) permitting D.C. law firms to have nonlawyer owners been beneficial in providing services to clients? Has the option to offer partnership to nonlawyer professionals been beneficial in retaining skilled and experienced nonlawyer professionals such as mental health professionals, medical doctors or nurse practitioners, economists, lobbyists, accountants, and law firm managers and executive directors?

There are situations where lawyers and other professionals could jointly deliver their services more affordably if they were able to form a partnership, but the question is to whom. Our own experience suggests that ABS is not used much in the PeopleLaw sector in D.C., but we would welcome data from providers about its extent and benefit.

Are the circumstances under which a D.C. Bar member may practice with a nonlawyer partner under Rule 5.4(b) too restrictive? Have these restrictions prevented you from establishing a practice with a nonlawyer that you otherwise would have done?

The current version of Rule 5.4 is undoubtedly too restrictive. Existing law firms may not feel the burden of this restriction, as they may not be looking to develop new sources of capital investment that can support a law practice that meets consumer needs with 21st century efficiency. In contrast, we have spoken with numerous parties who have been prevented by the limits in the present D.C. Rule 5.4 from starting a business providing legal services or expanding an existing business to do so. As a result, consumers are stuck with a business model for bespoke legal help when they could be better served by mass-market services. Those services don't exist because the lawyers who would provide them can't combine with the capital that would support them.

How could your firm benefit if it were permitted to share fees with nonlawyers? Do you think that allowing for outside investment could increase capital or offer greater financial security for your firm? Would this lead to better or more efficient service to your clients or investment in innovation through technology?

We focus on how rule changes can benefit consumers, rather than lawyers, but it's worth noting that permitting less restrictive forms of outside investment would benefit lawyers also. One of the paradoxes of the modern legal market is that there are too many out-of-work lawyers, yet too many consumers unable to afford a lawyer. Mass-market consumer law firms could provide the training ground for many of the thousands of newly minted lawyers who have no visible path to entering the profession.

Additionally, lawyers in existing small or solo practices could benefit from choosing to join a mass-market consumer firm. According to data from the Clio *Legal Trends Report*, the average such lawyer is able to collect on less than two hours per day of legal work.[1] The rest of their time is predominantly spent on running a business, not practicing law. Outside investment could make it possible for process improvements allowing these lawyers to focus on practicing law not running a business, thanks to the business resources and professional networks that a larger organization provides.

If the fee-sharing and nonlawyer ownership provisions of Rule 5.4 were more permissive, should lawyer partners continue to be responsible for the actions of nonlawyer partners as set forth in existing Rule 5.4(b)? Should the Rules of Professional Conduct apply to the nonlawyer partners, including disciplinary prosecution and sanctions for violations of the rules? Or, should there be a different regulatory structure specific to nonlawyers?

There are a number of ways to protect clients while allowing fee sharing and shared ownership with non-lawyers. One such model is the one under consideration in Utah, which would establish a separate regulator for any entities providing legal services with a

---

[1] Lawyers spend only 2.3 hours a day on billable tasks and collect an average of only 1.6 hours of their billable time (Clio 2019 *Legal Trends Report*, https://www.clio.com/resources/legal-trends/, reported on at https://abovethelaw.com/2019/11/clios-latest-legal-trends-report-reveals-a-troubling-truth-about-lawyers/)

combination of lawyer and non-lawyer ownership. All existing rules governing individual attorneys (except the previous Rule 5.4) would still apply. Therefore, clients would still enjoy the benefits of their lawyer's duties of confidentiality, zealousness, competence, professional independence, and everything else covered by the Rules of Professional Conduct. While individual lawyers would continue to be bound by the same rules, the new regulator would provide an *additional* level of regulation over the firms at which these lawyers work.

Another way to provide additional protection to clients is the Australian model, which has protected professional independence by requiring that firms with non-lawyer ownership designate one of their lawyers as a Legal Practitioner Director who is responsible and liable for any violations of lawyers' ethical duties.

Whatever model one chooses, the key to effective consumer protection is to choose the right regulatory goal—which in our view is minimizing the risk of harm to consumers. Rule 5.4 is intended to focus the lawyer's attention solely on client interests, by limiting any competing interests thought possible to arise from firm ownership and management by others. But the means becomes the end and the consumer interest is lost when fee sharing itself becomes the evil that must be prevented, as codified in Rule 5.4 and interpreted by numerous court rulings and ethics opinions.

A better approach would be to assess consumer risk under various business structures for legal services, and to design specific and targeted regulations to protect consumers from the harms foreseen. For example, consumers could potentially be harmed from billable hour requirements, contingency fees, referral fees, and fee sharing with non-lawyers. Rather than taking an all-or-nothing approach to permitting such practices, new regulations of each might design ways to ensure that lawyers and their firms use such practices in a manner that protects their clients.

We recognize that these comments may go beyond the scope of what the Committee is searching for. However, as the Committee is the first D.C. Bar entity to seek comment on Rule 5.4, we believe that it's important to make sure that the voices of consumers—both existing

clients and those that can't afford to be—are heard. We hope that others will follow in the Committee's footsteps and that we'll be able to contribute to a continuing discussion of how to protect consumers of legal services without preventing them from becoming consumers of legal services.