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Not-so-Firm Rules

**Ethical issues when nonlawyers own interests in law firms; and
continuing challenges to existing rules and practices.**



TAKEAWAYS >>

- Some states and jurisdictions, such as Utah, Arizona, and Washington, D.C., are experimenting with or adopting rules allowing nonlawyers to have ownership in law practices and legal services providers. But opposition to such policies remains widespread across the U.S.

- Illinois and American Bar Association rules of professional conduct foreclosing nonlawyer ownership and fee sharing remain virtually identical.

- Lawyers should keep abreast of their involvement in firms and legal services providers operating in multiple jurisdictions where nonlawyer-involvement policies are in conflict.

RULES GOVERNING NONLAWYER OWNERSHIP OF

LAW FIRMS and lawyer ownership of or involvement with entities that provide ancillary services to clients have changed in several jurisdictions. There are recent proposals for similar changes in Illinois.¹ They present serious issues under the Illinois Rules of Professional Conduct (IRPC), and the nearly identical ABA Model Rules.

Advocates view rule changes permitting nonlawyer ownership and the expanded use of technology-based legal products as necessary to making legal services more widely available and cost-effective.² Applicable Illinois Rules and the ABA Model Rules largely foreclose nonlawyer ownership of law firms and sharply limit lawyer ownership of ancillary service providers. Rules barring the unauthorized practice of law may also bar technology providers from combining with lawyers to sell blended legal and technology services.

Not surprisingly, there are fierce opponents to nonlawyer ownership of law firms and fee sharing with nonlawyers, as reflected by recent statements of the Illinois and New York State bar associations.³ In response, the ABA recently confirmed its commitment to the core values of Rule 5.4 (barring the sharing of fees with nonlawyers) while also confirming its commitment to promoting regulatory innovation (as stated in ABA Resolution 115, adopted in 2020 and reaffirmed in 2022).⁴ But, whether Illinois changes its Rules, Illinois lawyers and law firms practicing in more than one jurisdiction can be faced with conflicting rules and the need to navigate a path between them.

[Editor's note: To read about the Illinois State Bar Association's role in the ABA's reaffirmation of Resolution 115, see page 22.]

To assist in understanding the debate—which is likely to continue—we describe the rule changes adopted by other jurisdictions, those recently proposed in Illinois, ethical issues

1. See, e.g., CBA/CBF Task Force on the Sustainable Practice of Law & Innovation, Task Force Report (Sept. 28, 2020), available at law.isba.org/33x8rtk. (hereinafter “CBA/CBF Task Force Report”).

2. See, e.g., *id.*

3. See, e.g., *ISBA President Rory Weiler Applauds the Adoption of ABA Resolution 402*, The Bar News (Aug 9, 2022), law.isba.org/3SG6vqk.

4. American Bar Association, Resolution 402 (2022), available at law.isba.org/3ULoAVZ.



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ISBA RESOURCES >>

- Rory T. Weiler, *Protecting Our Values and Profession*, 110 Ill. B.J. 8 (Oct. 2022), law.isba.org/3rfSzaV.
- Richard L. Thies & John E. Thies, *ISBA Leadership Continues Association's Opposition to Greater Non-Lawyer Involvement in Delivery of Legal Services*, Senior Lawyers (Nov. 2020), law.isba.org/3dWtNcR.
- ISBA website, Unauthorized Practice of Law, isba.org/advocacy/upl.

UNDER IRPC 1.7 AND 1.8 ANY TIME A LAWYER PROPOSES THAT A CLIENT PAY FOR ANCILLARY SERVICES FROM A BUSINESS IN WHICH THE LAWYER HAS AN INTEREST, THE LAWYER NEEDS TO CONSIDER WHETHER THE LAWYER'S DISCLOSURES TO THE CLIENT AND THE CLIENT'S CONSENT ARE SUFFICIENT TO MEET THE REQUIREMENTS OF THE RULES.

that arise under proposed and adopted new rules, and the multi-jurisdictional conflicts that inconsistent rules can generate. The issues arise in several contexts:

- 1) when a lawyer seeks to use or have an ownership interest in an ancillary service provider that sells services to the lawyer's clients;
- 2) when a nonlawyer seeks to acquire an ownership interest in a law firm; and
- 3) when a technology provider proposes to sell services to a lawyer's clients that may be deemed the practice of law.

The first context—lawyer ownership of an ancillary service provider—is subject to several Illinois Rules that significantly limit or foreclose the lawyer's ability to own an interest in the provider. The second situation, nonlawyer ownership of an Illinois law firm, is not permitted by the IRPC, but is permitted in several other jurisdictions and has been the subject of recent proposed amendments to the IRPC.⁵ The third situation, technology providers selling services to lawyers' clients, involves whether the provider is engaged in the unauthorized practice of law.

A common theme in the three situations is that technology providers may be able to assist lawyers to serve more clients (and more economically) than would

otherwise be the case—a desirable goal. A common issue is whether the IRPC and the limitations on the unauthorized practice of law by nonlawyers permit the proposed structure or activity.

Technology providers & the unauthorized practice of law

Proponents of rules changes cite the importance of making new technology available to reduce the cost of providing legal services and to enhance client outcomes.⁶ Technology providers can, however, run afoul of the prohibition on nonlawyers engaging in the practice of law. A recent Florida case, *Florida Bar v. TIKD Services, LLC*,⁷ illustrates the competing interests when nonlawyer ownership of legal service providers is combined with technology that benefits clients, but existing rules preclude the arrangement.

The Florida Bar sued TIKD Services, LLC, which operated a website and provided a smartphone app by which a driver could upload a traffic ticket and arrange to purchase a defense and payment of any fine for a fixed amount. TIKD applied an algorithm to determine whether it made sense to challenge the ticket. If it did, TIKD referred the driver to a Florida lawyer on its panel. If it made the referral, TIKD charged the driver a percentage of the potential fine, and, in exchange, assumed responsibility to employ a lawyer, contest the ticket, pay the fine, and pay the lawyer's fee. TIKD paid its panel lawyers a flat rate per case. The selected lawyer communicated directly with the driver. Either lawyer or driver/client could decline the relationship.

The Florida Bar charged TIKD with the unauthorized practice of law. A majority of the Florida Supreme Court agreed, reasoning that TIKD could “substantially affect whether a driver timely receives legal representation and the quality of the representation . . .,” yet the Court could not regulate TIKD, as it could a lawyer.⁸ Also, there were “no protections in place to safeguard the money” clients paid TIKD.⁹ The majority found a “risk [of] a conflict between the profit demands

of the nonlawyer and the professional obligations of attorneys to act in the interests of a client.”¹⁰ TIKD, the majority concluded, “lacks the skill or training to ensure the quality of the legal services provided to the public through the licensed attorneys it contracts with . . .”¹¹

A dissenting judge viewed the decision as motivated by protectionist concerns—to prevent nonlawyers from eroding the legal market: “Today’s majority winds up protecting . . . the traditional way people find, or fail to find, satisfactory counsel for traffic tickets, and the business interests that have come to rely on the way things have generally been.”¹² “TIKD offered not legal services, but a business proposition: hire a lawyer we introduce, at a fee we set, and you will not bear the risk that the lawyer’s services, or indeed your ticket, will cost you more than our fee. Offering that bargain does not constitute the practice of law.”¹³ A concurring judge concluded that the majority correctly read the precedents to find TIKD engaged in the unauthorized practice of law, but that a change should be explored by revising the rules.

The case illustrates the tensions between current law and client benefits from use of technology: TIKD offered convenience and cost certainty in contesting a traffic ticket. It did not give legal advice or represent the driver. It identified traffic tickets that could economically be defended and arranged for licensed lawyers to do so. TIKD did not interfere with the lawyer-client relationship once created. If the lawyer accepted the referral there would be a separate engagement letter between the lawyer and the client. TIKD paid the lawyer a flat fee. There were no complaints by anyone about the quality of the representation provided. Although none appears to have occurred, there are risks posed by the TIKD model

5. See CBA/CBF Task Force Report, *supra* note 1, at 11.

6. See *id.*

7. *Florida Bar v. TIKD Services, LLC*, 326 So. 3d 1073 (2021).

8. *Id.* at 1078.

9. *Id.*

10. *Id.* at 1078-79.

11. *Id.* at 1079.

12. *Id.* at 1085.

13. *Id.* at 1083.

that were noted by the majority. We discuss below whether the outcome in this case would have been different under existing rules in other jurisdictions.

Jurisdictions changing the rules

IRPC 5.4(d) forbids an Illinois lawyer from participating in a law firm “authorized to practice law for a profit” if “a nonlawyer owns any interest” in the firm or is a “corporate director or officer ... or occupies the position of similar responsibility” in the firm.¹⁴ ABA Model Rule 5.4(d) is virtually the same. These rules would likely preclude an Illinois lawyer from working for TIKD since that firm would likely be viewed as practicing law and employing the lawyer.

Four jurisdictions—the District of Columbia, Utah, Arizona, and California—are at the forefront of change in this area. They have amended their rules or are considering rule amendments to address issues raised by nonlawyer ownership or involvement in the delivery of legal services, including through technology providers. A 2020 task force of the Chicago Bar Association (CBA) and Chicago Bar Foundation (CBF) also has made recommendations for changes.¹⁵

The tensions between competing interests are reflected in ABA resolutions. Notably, ABA Resolution 115, adopted in 2020, encouraged regulatory innovations to increase access to legal services but specifically did not recommend changes to Model Rule 5.4 to permit nonlawyer ownership of law firms.¹⁶ In August 2022, the ABA reaffirmed Resolution 115 in its Resolution 402, but also confirmed its view that the sharing of legal fees with nonlawyers is “inconsistent with the core values of the legal profession.”¹⁷

Regarding nonlawyer ownership, the District of Columbia Bar leads the pack, having amended its Rule 5.4 in 1991 to permit nonlawyer ownership of law firms. D.C. Rule 5.4(b) permits a lawyer “to practice law in a partnership or other form of organization” with nonlawyer ownership or management but only if:

- 1) “the organization’s sole purpose is

providing legal services to clients”;

- 2) “all persons having such managerial authority or holding a financial interest undertake to abide by” the D.C. Rules; and
- 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.”¹⁸

TIKD’s business model would not appear to pass muster under the three requirements of D.C. Rule 5.4(b):

- 1) Guaranteeing the outcome of a traffic ticket (as opposed to defending a client) likely does not constitute “providing legal services to clients,” defeating the “sole purpose” requirement.
- 2) D.C. Rule 5.4(b) contemplates a single entity comprising lawyers and nonlawyers; the TIKD model does not. Under its model, the lawyers defending the tickets are not employed by or owners of TIKD.
- 3) The nonlawyers who own and manage TIKD have not undertaken to abide by lawyer disciplinary rules, although that could be handled by agreement (also, in TIKD there are no lawyer-owners or managers to assume disciplinary oversight over the nonlawyers).

The TIKD model might lead to a different outcome in the other jurisdictions that have changed their rules. It would likely pass muster in Arizona. Unlike D.C., Arizona simply eliminated Rule 5.4, and now permits nonlawyers to own law firms through licensed entities called “alternative business structures.”¹⁹

Utah likewise modified its Rule 5.4(d) to permit nonlawyer ownership.²⁰ However, Utah has not abandoned all oversight. Its newly revised rules require the firm to notify clients in writing that nonlawyers hold a financial interest in or exercise managerial authority over the firm and to disclose in writing “the financial and managerial structure of the organization in which the lawyer

REGARDING NONLAWYER OWNERSHIP, THE DISTRICT OF COLUMBIA BAR LEADS THE PACK, HAVING AMENDED ITS RULE 5.4 IN 1991 TO PERMIT NONLAWYER OWNERSHIP OF LAW FIRMS.

practices.”²¹ The adequacy of such written notice and disclosure seems like ripe areas for dispute. Unlike Arizona, Utah’s modified Rule 5.4 is also subject to evaluation by means of a seven-year “regulatory sandbox”—shorthand for an experimental process with oversight by its Office of Legal Services Innovation, an entity specially created for the purpose.

California has not yet modified its rules but has extensively considered the issues through a bar task force. The task force sought to “determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.”²² As in Illinois, lack of access to legal services drove the effort. The California task force report includes important data on lack of access to legal services, similar to data used by the CBA/CBF task force.

According to studies done for the State Bar of California, its residents receive no or inadequate legal help for 85 percent

14. Ill. R. of Prof’l Conduct 5.4(d).

15. CBA/CBF Task Force Report, *supra* note 1.

16. American Bar Association, Resolution 115 (2020), available at law.isba.org/3rhJa2S.

17. American Bar Association, Resolution 402 (2022), available at law.isba.org/3ULoAVZ.

18. D.C. R. of Prof’l Conduct 5.4.

19. Ariz. R. Sup. Ct. 31.1.

20. *Id.*

21. law.isba.org/3TttAgn.

22. The State Bar of California, Strategic Plan 2022-2027, law.isba.org/3SFDew9.

of their legal problems.²³ Residents seek help for fewer than one in three legal problems. Lack of access to legal services results from a service gap (insufficient supply) and a knowledge gap (insufficient knowledge of need). According to the task force, Californians do not seek legal help primarily because they are unsure whether the problems they are experiencing are legal in nature. Among low-income Californians, 60 percent experience at least one civil legal problem in their household each year.

Similar concerns underlie the CBA/CBF task force report of September 2020, which noted that “today’s legal market for consumer and small business services is not working well for most involved. Most legal consumers do not even recognize they have a legal problem, and when they do know that their problem is legal in nature, they don’t know how or where to find affordable legal help”²⁴

The California task force focused on rule changes to address the concerns that current rules restrict a lawyer’s ability to compensate a nonlawyer for referring a client (see rules 5.4 and 7.2) and that “[I]nnovative referral activity carries the potential of enhancing the ability of consumers to consult with a qualified lawyer, particularly on the basic issue of whether a consumer is facing a civil justice legal problem, and ... existing laws should be reviewed for possible revisions that are in the public interest.”²⁵

The California task force recommended amending rules dealing with lawyer advertising. Studies indicate, it concluded, that “some of the rules were outdated” and “unreasonably restrict[] the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet, including social media, and other forms of electronic media.”²⁶

The California task force proposed a multifaceted approach to address these issues. It proposed: 1) adopting a new Rule 5.7 to address delivery of nonlegal services by lawyers and businesses owned or affiliated with lawyers; 2) instituting

a new paralegal licensing program permitting nonlawyers to provide limited legal services; and 3) setting up a pilot program or “regulatory sandbox” to allow experimentation and to provide data on potential benefits and harms if prohibitions on the unauthorized practice of law are changed.²⁷

The California task force explained: [A] sandbox would be to gather data on any potential benefits to accessing legal services and evaluate any consumer harm when existing restrictions on [unauthorized practice of law], fee sharing with nonlawyers, and partnerships with nonlawyers are temporarily modified or suspended for sandbox participants. A key feature of the sandbox would be to give each applicant an opportunity at the outset to present a proposal for a new delivery system that demonstrates to the sandbox regulator that the proposal would satisfy the applicant’s burden of proof that anticipated access to legal services benefits are likely to significantly outweigh the potential risks of harm.²⁸

The California Task Force would preserve the Rule barring nonlawyers from owning interests in entities that provide legal services. But it would permit lawyers to own interests with nonlawyers in entities that provide technology and other nonlegal services to clients under a proposed new Rule 5.7. That proposed rule would apply to nonlegal services “that might reasonably be performed in conjunction with the practice of law.”²⁹ Lawyers who provide “nonlegal services” through a law firm would be subject to California’s other Rules of Professional Conduct and other requirements. If services are provided by “an organization other than a law firm” the lawyer must disclose in writing “that (i) the services are not legal services and (ii) that the protections of the lawyer-client relationship do not exist.”³⁰ If there is reason to think the recipient of the services won’t understand, “the lawyer shall explain the difference between the lawyer’s role with respect to the provision of nonlegal services and the lawyer’s role as one who represents a client.”³¹

To address concerns about lawyers providing both legal and nonlegal services

to the same client, proposed California Rule 5.7 would provide protections similar to those found in existing Rule 5.3. Under that Rule a lawyer who has managerial authority is responsible for the conduct of nonlawyers providing services to clients. Illinois Rule 5.3 is much the same.

The California Task Force also drafted comments to its proposed Rule 5.7 that recognize that it may be impossible in some instances to disentangle legal and nonlegal services. In that case, the disclosure requirements cannot be met. It also requires the lawyer to “accord recipients of nonlegal services the full protection of the rules ... addressing conflicts of interest ..., the requirements of rules ... relating to the protection of client confidential information, and lawyer advertising rules”³²

TIKD’s algorithm for predicting the outcome of traffic tickets would appear to qualify as nonlegal services under the proposed California rules. So would other services that are nonlegal but routinely needed in connection with legal services, such as real estate title insurance, analysis of economic data, online document hosting, filling out bankruptcy schedules, preparing visa applications, and selling forms for standard legal transactions.

Finally, it must be noted that just prior to this article going to press, California adopted a new law amending its Business and Profession Code to prohibit the State Bar of California from exploring nonlawyer ownership of law firms, among other things. Under the new law, “any entity of the State Bar” that is exploring a regulatory sandbox must “[e]xclude corporate ownership of law firms and

23. The State Bar of California, California Justice Gap Study, law.isba.org/3Cff2v4.

24. CBA/CBF Task Force Report, Executive Summary at 4.

25. State Bar of California Task Force on Access Through Innovation of Legal Services, Final Report and Recommendations (Mar. 6, 2020) at 43-44, law.isba.org/3E2e7Qe.

26. *Id.* at 45.

27. *Id.*

28. *Id.* at 31.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

splitting legal fees with nonlawyers, which has historically been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients.”³³ The new law also limits the ability of the California bar to expand the scope of paralegal practice.

The CBA/CBF task force

The 2020 CBA/CBF task force’s proposals have not been adopted, but are likely to be considered with other proposals if and when the Illinois Supreme Court considers changes to the IRPC that would permit nonlawyer ownership or technology providers combining with lawyers to serve clients.

The task force proposes revising Rule 5.4(b) to provide that “a lawyer may enter into a partnership or other business association with a nonlawyer for purposes of establishing and/or operating an Approved Legal Technology Provider.”³⁴ An “Approved Legal Technology Provider” is an individual or entity that delivers technology-based legal products and services; and has been approved as having practices that meet criteria deemed warranted to provide consumer protection.³⁵

Rather than define the required protections for clients of such providers, the task force recommended deferring that task to a proposed Legal Technology Regulation Board that would “develop criteria and procedures for registration, approval and regulation of Legal Technology Providers.”³⁶ The task force also proposed a new Rule 5.4(a)(6) stating that “[a] lawyer may share fees with an Approved Legal Technology Provider for products or services provided by or in coordination with the Approved Legal Technology Provider.”³⁷

The task force would permit lawyers to share legal fees with referral sources, called “Intermediary Entities” that connect potential clients with lawyers, provide

other business and administrative services supporting lawyer practices, and to split fees with lawyers or law firms in accordance with the proposed Rule 5.4(a)(5). That proposed Rule would require that the fee sharing not interfere with the lawyer’s “professional independence of judgment” and that the amount charged be a “standard, reasonable charge for marketing, business, or administrative services; is paid at the time of connection to the client; and ... is not contingent on the merits or outcome of any individual matter.”³⁸ The services provided could not “involve the practice of law; and ... the entity [would have to be] ... registered under [a new] Rule 801.”³⁹

The task force also recommended creating a paralegal licensing structure to permit licensed paralegals to provide limited legal services to clients under lawyer supervision “in high-demand (and often high-volume) proceedings [that] do not require significant legal analysis and judgment” such as “simple status hearings, or preparing routine pleadings and documents.”⁴⁰ It cited “family law, evictions, and small consumer debt matters” as areas “where this proposed rule would authorize Licensed Paralegals to assume an expanded role.”⁴¹ Licensed paralegals would be lawyer-supervised, have malpractice insurance, and be subject to Illinois Supreme Court regulations.

Detailed discussion of the task force’s many recommendations is beyond the scope of this article. There was dissent to the task force’s proposed expansion of Rule 5.4 and its creation of the technology-provider business exception. Dissenters correctly identified issues that would need to be addressed before the task force’s recommendations are likely to gain traction. The dissenters expressed concerns with the “greater influence [under proposed Rule 5.4] by non-lawyers in the operation of law firms, or the handling of particular client matters,” the lack of standards for the technology provider business model, and its focus on providing one-lawyer-to-many-clients legal services.⁴²

The Washington Supreme Court has already tried and rejected one of the

proposed CBA/CBF task force’s innovations—a paralegal licensing program.⁴³ After authorizing the program in 2012, the Washington Supreme Court terminated it in 2020. Under its brief program, Washington’s “limited license legal technicians” (LLLTs) were permitted to provide advice and assist people in addressing family law matters, including issues involving divorce and child custody. They could complete and file court documents and assist *pro se* clients at certain types of hearings and settlement conferences. The Court cited cost and lack of interest as factors causing it to end the experimental program: “After careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs, and voted to sunset the program.”⁴⁴

According to an article in the ABA Journal of July 9, 2020: “[D]irect and indirect costs for administering the LLLT license had exceeded revenues the [Washington] program had generated by nearly \$1.4 million. ... Though the initial LLLTs were licensed in 2015, a late June [2020] search of the bar’s legal directory revealed just 45 LLLTs, with 39 listed as active.”⁴⁵ There was also disagreement over the reasons for termination of the program. A former Washington bar association president stated that “the opposition stemmed from lawyers who feared ‘that their market share [would] be eroded’

33. CA Assembly Bill No. 2958 Regular Session (adding Section 6034.1 to the California Business and Professions Code) (Ca.2021-2022).

34. CBA/CBF Task Force Report, *supra* note 1, at 32.

35. *Id.*

36. *Id.* at 34.

37. *Id.* at 44.

38. *Id.*

39. *Id.*

40. *Id.* at 67.

41. *Id.*

42. Letter of John E. Thies to Hon. Mary Anne Mason (ret.) of June 22, 2020, (on file with authors).

43. See Washington State Bar Association, Sunset of LLLT Program, law.isba.org/3y2SKKZ.

44. Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, ABA Journal (June 8, 2020), law.isba.org/3E4nzmF.

45. Lyle Moran, *How the Washington Supreme Court’s LLLT Program Met Its Demise*, ABA Journal (July 9, 2020), law.isba.org/3SkBmch.

by nonlawyer technicians.”⁴⁶ However, a Washington Supreme Court justice, who had voted in favor of establishing the LLLT license, stated that “the LLLT board’s proposed new practice areas ... ‘seemed ill-conceived.’”⁴⁷ He cited immigration law, “which would have required the approval of federal immigration authorities and is what he called a high-stakes, complicated area of law.”⁴⁸

Illinois Rules bearing on ancillary legal services

Several Illinois Rules of Professional Conduct impact proposals to allow lawyers to be involved with entities that provide services to clients and pay referral fees to lawyers, or with entities in which ownership is shared with nonlawyers.

Rule 7.2(b) limits what lawyers are permitted to do *vis-a-vis* businesses that sell services to the lawyer’s clients, including businesses in which the lawyer has an economic interest. It provides that: [a] lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may ... 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.⁴⁹

These requirements likely would effectively preclude many lawyer-owned ancillary service providers. If a lawyer owns an interest in an ancillary business that provides services that the lawyer’s law clients may need, the lawyer would have a financial incentive to recommend that the client use the lawyer’s ancillary business. But, under Rule 7.2 a lawyer cannot have an exclusive referral arrangement with the ancillary business; the lawyer must tell the client the terms of the lawyer’s economic relationship with the business, including what the lawyer and any nonlawyer owner is each paying or receiving. Those requirements are likely to make such a referral arrangement impractical.

Other Illinois Rules also are in play. When the nonlegal business proposes

to provide services to a lawyer’s existing client, Rule 1.8 applies if the lawyer has an economic interest in the referral arrangement. Rule 1.8 governs business transactions between lawyers and their clients. Its requirements are significant. To satisfy Rule 1.8, the lawyer must show that the transaction’s terms are fair and reasonable to the client and “fully disclosed” in writing, the client must be told, in writing, that the client may seek independent legal counsel, and the client must give informed consent in a writing signed by the client.⁵⁰

If the client later challenges the arrangement under Rule 1.8, the burden is on the lawyer to prove that the transaction is “fair and reasonable to the client,” including its terms and costs.⁵¹ And to obtain “informed consent,” defined in Rule 1.0(e), the lawyer must have “communicated [to the client] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁵² Practically speaking, that means that the lawyer must inform the client about other ancillary service providers, including business competitors of the nonlegal service provider that the lawyer proposes the client hire.

Violations of Rule 1.8 can result in discipline. Illinois State Bar Association Ethics Opinion 13-04 includes a list of matters where lawyers had been disciplined because they were involved in ancillary businesses that dealt with clients, but did not satisfy the requirements of the IRPC:

***In re Imming*, 131 Ill. 2d 239 (1989).** A lawyer’s “partial ownership and senior positions within a business entity is sufficient to require compliance with the predecessor to RPC 1.8. As president and sole shareholder of company, the lawyer was suspended for soliciting investments in the company from clients.

***In re Rukavina*, 07-CH-96 (Review Board, Nov. 18, 2009).** Steering business to companies owned, and partially owned, by a lawyer is improper without satisfying the requirements of Rule 1.8.

***In the Matter of Childs*, 07-CH-95 (Review Board, July 26, 2010).** A lawyer was disciplined for inducing clients to invest in a company on whose board the lawyer was a member.

***In re Twohey*, 191 Ill. 2d 75 (2000).** A lawyer was suspended for soliciting client investment in a company for which he served as the general counsel.⁵³

The conflict provisions of Rule 1.7 also come into play when a lawyer recommends that the lawyer’s client use the services of an entity in which the lawyer has a financial interest. Although Rule 1.7 mainly focuses on conflicts between clients, it also applies to potential conflicts between the client’s interests and the lawyer’s personal interests. If a conflict exists, the lawyer needs to make disclosures and obtain informed client consent. Unlike Rule 1.8 (and ABA Model Rule 1.7), consent does not have to be in writing or signed by the client, although both would be a good idea. Note, however, that even with disclosure some conflicts under Rule 1.7 are not consentable, as the ISBA concluded in Opinion 13-04:

Rule 1.7(a)(2) addresses situations where a lawyer’s personal interests or responsibility to a third person may pose a significant risk that the lawyer’s representation of a client will be materially limited. [In this inquiry] Lawyer clearly has fiduciary responsibilities to [the business in which he is an 8 percent owner] as well as his own personal financial interests in the [business’s] success Given these interests, a very reasonable concern is that Lawyer might structure a [business]—[client] transaction in such a way that favors Lawyer’s interests at the expense of the [client] It is clearly a concurrent conflict of interest⁵⁴

The lesson to be drawn is that under IRPC 1.7 and 1.8 any time a lawyer proposes that a client pay for ancillary services from a business in which the lawyer has an interest, the lawyer needs to consider whether the lawyer’s disclosures to the client and the client’s consent are sufficient to meet the requirements of the rules.

46. *Id.*

47. *Id.*

48. *Id.*

49. Ill. R. of Prof’l Conduct 7.2(b)(4).

50. Ill. R. of Prof’l Conduct 1.8(a).

51. *Monco v. Janus*, 222 Ill. App. 3d 280, 294 (1991).

52. Ill. R. of Prof’l Conduct 1.0(e).

53. Illinois State Bar Association, ISBA Professional Conduct Advisory Opinion No. 13-04 (May 2013), law.isba.org/Op13-04.

54. *Id.* at 4.

Inconsistent rules

So long as some states permit nonlawyer ownership and other states prohibit such structures, lawyers and law firms will face complications created by such inconsistent requirements. This is particularly true where law firms with nonlawyer owners want to provide legal services in a state that does not permit such ownership structures.

ABA Formal Opinion 499 (Sept. 8, 2021) addresses whether a lawyer licensed in a jurisdiction that does not allow nonlawyer ownership may invest in a business or law firm that operates in a jurisdiction that does allow nonlawyer ownership (referred to as an alternative business structure or ABS). The ABA opinion concluded that the lawyer may make such an investment, subject to important caveats, including that the lawyer be a silent, passive investor. Specifically:

- 1) the lawyer must not practice law through the ABS;
- 2) the lawyer must not be held out as a lawyer associated with the ABS;
- 3) the lawyer cannot have access to information protected by Model Rule 1.6 without the ABS client's informed consent, or compliance with an applicable exception to Rule 1.6 adopted by the ABS jurisdiction; and
- 4) if, however, at the time of the investment the lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the lawyer must refrain from the investment or appropriately address the conflict under Model Rule 1.7(b).⁵⁵

Apart from the passive-investor-lawyer, when a lawyer wants to practice law in two jurisdictions and only one permits nonlawyer ownership, other requirements apply. A Virginia ethics opinion dealing with a lawyer licensed both in D.C. and Virginia tackled the issue and split

the baby.⁵⁶ Basically, it concluded that what happens in D.C. must stay in D.C. The opinion stated that the lawyer may provide legal services to Virginia clients in the District of Columbia through a nonlawyer-owned D.C. firm because D.C. rules permit it (and the lawyer was also licensed in D.C.). But the Opinion concluded that the arrangement would not be permitted if any part of the Virginia lawyer's practice *in Virginia* was conducted through the D.C. firm that had nonlawyer owners.


Another jurisdictional conflict is presented when a law firm with permitted nonlawyer owners seeks to acquire a firm in another jurisdiction that does not permit nonlawyer owners. The New York State Bar Association addressed this issue in an ethics opinion considering whether an English law firm with nonlawyer owners (as permitted in the U.K.) could acquire a New York law firm and employ its lawyers.⁵⁷ The opinion also considered whether a New York-licensed lawyer could assume a senior management role in the English law firm while working in England. The short answers were no and yes.

We start with the “yes.” The New York Opinion looked to Rule 8.5, which addresses choice-of-rules issues, for guidance on the second issue. Like the Virginia Opinion, New York concluded that the lawyer could assume a senior management role so long as the lawyer resided in England. If the lawyer “principally practices in the U.K. and his activities do not clearly have their predominant effect in New York, then we see no problem with this role.”⁵⁸ Thus, the Opinion concluded that a foreign jurisdiction's rules can authorize action that would violate the New York rules, so long as the lawyer does not “principally” practice in New York, and the “predominant effect” of the lawyer's conduct is not in New York.⁵⁹

But the Opinion reached a different conclusion on the first issue—whether the English firm with nonlawyer owners could acquire a New York law firm and employ New York lawyers. It concluded that New York Rule 5.4 (like Illinois' Rule) forecloses nonlawyer ownership. It interpreted Rule 5.4's prohibition as extending to indirect ownership as well as direct ownership. The Opinion stated:

We did not find the answer to this question directly in Rule 5.4, but we concluded [in a prior Opinion] that such indirect ownership by nonlawyers would be prohibited, because Rule 8.4(a) prohibits a lawyer from violating the Rules indirectly ‘through the acts of another.’ If a New York law firm were owned by a non-New York firm with nonlawyer owners, the New York firm would be violating Rule 5.4(d) indirectly, through the acts of non-New York lawyers who permitted their firm to have nonlawyer owners.⁶⁰

Conclusion

Issues like those discussed in this article are likely to proliferate as other jurisdictions adopt rule changes to permit nonlawyer ownership of law firms and lawyer ownership of businesses that sell ancillary services to clients. The changes may well be justified by the need to make legal services more widely available, and by the benefits of adopting technology that saves clients' money. But all proposed rule changes need to be evaluated against the important client protection interests that underlie many of the relevant rules. The issues are not easily resolved, nor are they likely to go away. 

55. American Bar Association, Formal Opinion 499 (Sept. 8, 2021), law.isba.org/3Sn6GqO.

56. Virginia Legal Ethics Opinion 1584 (Approved Nov. 2, 2016).

57. NY State Bar Opinion 1234 (Dec. 7, 2021).

58. *Id.* at 5.

59. *Id.*

60. *Id.* at 4.