

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2016-05
Issued May 19, 2016**

FACTS

The inquiring attorney, a sole-practitioner, states that the focus of his/her practice is general business counsel, federal and state compliance, and governance. An individual who graduated from law school, but who is not licensed to practice law, has approached the inquiring attorney about working together in a specific compliance area. The individual has knowledge and experience in the specific compliance area. The individual would conduct research, draft training and compliance materials, and visit client sites to conduct compliance audits and training. The pertinent government regulations do not require that compliance audits or training be conducted by licensed attorneys. The inquiring attorney wants to expand his/her law practice in the specified compliance area. He/she does not contemplate an employer-employee arrangement with the individual. Rather the inquiring attorney seeks the Panel's guidance about what ethics issues he/she should consider when developing a plan to include the services of the individual in this area of his/her law practice.

ISSUE PRESENTED

What ethics issues must be considered when the inquiring attorney enters into a business relationship with a nonlawyer who will provide services relating to the government compliance portion of his/her law practice?

OPINION

In developing a business plan for his/her law practice which incorporates the services of an individual who is a nonlawyer, the inquiring attorney must comply with Rule 5.3 and Rule 5.4, and may be further guided by Provisional Order No. 18, as well as Rule 10 of Article II of Rhode Island Supreme Court Rules.

REASONING

The individual with whom the inquiring attorney seeks to collaborate, although a law-school graduate, is not licensed to practice law, and is a nonlawyer for purposes of the Rules of Professional Conduct. Rule 5.4 contains several prohibitions which the inquiring attorney must consider when developing a business arrangement with the individual. Specifically, Rule 5.4 prohibits a lawyer from sharing fees, and from forming partnerships, with nonlawyers. Rule 5.4(a) and (b). The Rule also prohibits a lawyer from practicing law in the form of a corporation

or other entity in which a nonlawyer owns an interest, is a director or officer, or controls the lawyer's professional judgment. Rule 5.4(d). Rule 5.4 states as follows.

Rule 5.4. Professional independence of a lawyer. (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if: (i) the organization is one that is not for profit; (ii) the organization is tax exempt under federal law; (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax-exempt; and (iv) the tribunal approves the fee-sharing arrangement.

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

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

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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

The prohibition against fee-sharing with nonlawyers extends to consultants and independent contractors that lawyers retain in furtherance of their clients' matters. In the instant inquiry for example, amounts paid to the individual for auditing or training the law firm's compliance-client must not be tied to attorney's fees generated by the client's matter. Rule 5.3 is particularly instructive if the individual is retained as a consultant or an independent contractor.

It states:

Rule 5.3 Responsibilities regarding nonlawyer assistants. With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 is concerned with the conduct not only of nonlawyers who are employees, but also with the conduct of nonlawyers who are "retained by or associated with a lawyer". Pursuant to Rule 5.3, the inquiring attorney must ensure that the individual's conduct comports with the Rules of Professional Conduct when he or she provides services relating to a compliance-client

of the law firm. This should not be difficult because the individual is a law school graduate. Nevertheless, the Panel believes that the inquiring attorney must address the risk that clients may presume the individual to be a lawyer. Additionally, the individual must make clear to the firm's clients his or her nonlawyer status, and must refrain from providing legal services. Failure to do so would subject the inquiring attorney to discipline for the nonlawyer's unlawful practice of law. See Rule 5.5 (lawyer shall not assist another in unauthorized practice of law).

The Panel refers the inquiring attorney to Rhode Island Supreme Court Provisional Order No. 18, entitled "Use of Legal Assistants." The Order is set forth after the commentary to Rule 5.3, and may further assist the inquiring attorney in formulating a business plan which incorporates the services of the individual in the inquiring attorney's law practice. Finally, Rhode Island Supreme Court Rules, Article II, Rule 10, which sets forth the licensing requirements for professional corporations and other limited liability entities, may provide further guidance.

The Panel concludes that in developing a business plan for his/her law practice which incorporates the services of the individual who is a nonlawyer, the inquiring attorney must comply with Rule 5.3 and Rule 5.4, and may be further guided by Provisional Order No. 18, as well as Rule 10 of Article II of Rhode Island Supreme Court Rules.