

FINAL

ETHICS ADVISORY PANEL  
OPINION # 95-1, REQUEST # 558  
Issued March 6, 1995

The inquiring attorney asks whether Rule 5.4(b) prohibits a partnership between an attorney and a therapist for the purpose of providing mediation services in family law matters. The inquiring attorney states that both the attorney and therapist would specifically disclose to both parties in the mediation that the attorney was acting as counsel to neither party, and if the matter was litigated, each party would need to seek their own counsel. They would disclose to both parties that the therapist was acting as counselor to neither party, that no professional privilege would protect communications of either party and the parties would be encouraged to seek independent professional guidance concerning any litigation.

Rule 5.4 addresses the "Professional Independence of a Lawyer." That Rule states in pertinent part:

(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 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; and

(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.

(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 . . .

(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 if 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

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

The Panel recognizes the inquiring attorney's attempt to protect all parties involved. Rule 5.4(b) prohibits the attorney from conducting a law practice and also participating with a nonlawyer in a business capacity to provide mediation services. It appears to the Panel that the inquiring attorney would be perceived as a lawyer in rendering mediation services. A lawyer who serves as a mediator is subject to the Rule of Professional Responsibility. See, Ethics Advisory Panel Opinion # 92-57 (Issued July 23, 1992) where the Panel stated that "an attorney must at all times comply with all applicable Rules whether or not he/she is acting in a professional capacity."

Rule 5.4(a) prohibits a lawyer or law firm from sharing fees with a nonlawyer except in certain cases involving a deceased lawyer or for retirement plans for nonlawyer employees. This Rule avoids the possibility of a nonlawyer's interference with a lawyer's independent professional judgment and avoids encouraging nonlawyers from engaging in the unauthorized practice of law.