OPINION 2008-3

SYNOPSIS:

Lawyer's proposal to share fees with a nonlawyer (mortgage broker) representing clients seeking reduced mortgage payments is impermissible fee-splitting. Nor may Lawyer form an LLC with the nonlawyer, who would own a minority interest in the LLC and be an employee, because to do so could impair Lawyer's independent professional judgment. It is likewise recommended that Lawyer engage the services of the nonlawyer as an independent contractor or employee only with close and adequate supervision of the work product of the nonlawyer.

FACTS:

Lawyer proposes to provide clients with assistance in negotiating and obtaining relief on their current mortgage bills. Lawyer proposes to charge a predetermined flat amount. Lawyer intends to associate with a nonlawyer (e.g., mortgage broker) in this endeavor. The nonlawyer would advertise for the service and obtain the necessary financial information to allow Lawyer to effectively negotiate with lenders, as well as assist the client in preparing the "hardship" letters required by the lender to apply for a reduced mortgage payment. In return, the nonlawyer would receive a set amount of the total flat fee and Lawyer would receive a predetermined amount of the fee for negotiating with the lender.

Lawyer seeks guidance because of concerns that such a joint venture would violate Rule 5.4 of the Vermont Rules of Professional Conduct.[1] If the proposed joint venture is prohibited, Lawyer inquires as to whether Lawyer (1) can create a limited liability company with the nonlawyer, who would own a minority interest in the LLC and be an employee; or (2) engage the services of the nonlawyer as an independent contractor.

QUESTIONS PRESENTED:

1. Whether Lawyer's proposal of fee-splitting with the nonlawyer is ethically permissible.
2. Whether Lawyer may create the LLC with the nonlawyer as an employee; or engage the services of the nonlawyer as an independent contractor.

APPLICABLE RULES:

The relevant provisions of the Vermont Rules of Professional Conduct that are applicable to the questions presented include Rule 5.5(b), Rule 5.3 and Rule 5.4.

Rule 5.5(b) deals with the unauthorized practice of law and provides as follows:

> A lawyer shall not:

[1] Lawyer also cites the proscriptions contained in DR-3-102 ("Dividing Legal Fees with a Nonlawyer") and DR-3-103 ("Forming a Partnership with a Nonlawyer") of the former Vermont Code of Professional Responsibility.

> * * *
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.5 (b).

Rule 5.3 provides in relevant part as follows:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner 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 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.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.3.

Rule 5.4, addressing the independent professional judgment of a lawyer, provides in relevant part as follows:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer . . . .
> (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 profit, if:
> (1) a nonlawyer owns any interest therein . . .;
> (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.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.4.

DISCUSSION:

At the outset and of paramount importance is that the independent professional judgment of a lawyer shall be maintained at all times. Rule 5.4 deals with the professional independence of a lawyer and contains traditional limitations on nonlawyer involvement in the practice of law[2], which include the prohibition against division of fees with nonlawyers (Rule 5.4(a)), and the prohibition against lawyer partnerships with nonlawyers (Rule 5.4(b)). Rule 5.4(c) states duties implicit in Rules 1.2(a), 1.7(b), and 1.8(f). These Rules together undertake to ensure that the lawyer will abide by the client's decisions concerning the objectives of representation and will serve the interests of the client and not those of a third party. See *ABA Formal Opinion 87-355* (1987).

> [T]he purpose of [Rule 5.4] is to safeguard [the lawyer's] independence and prevent problems that might occur when nonlawyers assume positions of authority in business arrangements with lawyers. Among the problems Rule 5.4 seeks to prevent, the most important is interference by lay persons with a lawyer's practice. The involvement of nonlawyers . . . in the legal process is of concern because the lawyer's independent professional judgment can be impaired by the influence and control of nonlawyers who, by definition, are not subject to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important provisions of the profession's code of conduct.

See *ABA Formal Opinion 95-392* (1995).

Addressing the present facts, Lawyer's proposed scheme of fee-splitting with the nonlawyer as referenced in Question 1, above, clearly runs afoul of the plain language of the proscription set forth in Rule 5.4(a). "A lawyer or law firm ***shall not share legal fees*** with a nonlawyer . . . ." See Rule 5.4(a) (emphasis added). "The literal language of Rule 5.4(a) is clear, flatly prohibiting a lawyer from sharing the profits and losses of a law practice with a

[2] The formal prohibitions against lawyer partnerships with non-lawyers date back 80 years. In 1928, the ABA added Canon 33 to the Canons of Ethics. Canon 33 provided in pertinent part that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." Canon 34 prohibited fee splitting with nonlawyers. Canon 35 warned against lawyers being "controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer." In 1969, the Model Code of Professional Responsibility superseded the Canons of Ethics. DR 3-103 carried over Canon 33's prohibition against lawyers forming partnerships with nonlawyers but phrased the prohibition in mandatory language. DR 3-102 continued Canon 34's prohibition against fee-splitting with nonlawyers, with certain limited exceptions. DR 5-107(C) restricted lawyers from practicing law with or in the form of a professional corporation in certain circumstances. In 1983, the ABA Model Rules of Professional Conduct supplanted the Model Code. Model Rule 5.4 incorporated traditional restrictions against lawyer and nonlawyer associations. Rule 5.4(b) reproduced verbatim DR 3-103(A)'s prohibition of lawyer partnerships with nonlawyers. Rule 5.4(a) continued the Code's prohibition against fee-splitting with nonlawyers. Rule 5.4(d) is substantially identical to DR 5-107(C). See *ABA Formal Opinion 91-360* (1991), fn.1.

nonlawyer even when the lawyer retains control over all legal aspects of the business." See *ABA Formal Opinion 95-392* (1995). Accordingly, we are unable to envision any set of facts under which Lawyer would be ethically permitted to undertake the fee-splitting arrangement as suggested. See, e.g., *Cincinnati Bar Assn. v. Mullaney*, ___ N.E.2d ___, 2008 WL 427445 (Ohio 2008) (where three lawyers were disciplined for providing perfunctory legal services to customers of a high-volume mortgage foreclosure counseling firm engaged in the unauthorized practice of law, accepting improper referrals, sharing fees with non-lawyers, surrendering their independent professional judgment by failing to properly evaluate the objectives of individual clients, use of boilerplate correspondence, among other things).

Next, in response to Lawyer's inquiry as to the propriety of forming a limited liability company with the nonlawyer, who would own a minority interest in the LLC and be an employee, the policy considerations at the foundation of Rule 5.4 continue to apply in the context of this scheme. "An examination of the history of Rule 5.4(b), prohibiting lawyers from practicing law in partnership with nonlawyers, provides compelling evidence that the ABA's disapproval of fee sharing historically has been tied to the desire to prevent lay influence of a lawyer's professional judgment." See *ABA Formal Opinion 95-392* (1995). Hence, the creation of an LLC as proposed by Lawyer would likewise not comport with the dictates of Rule 5.4.

Lastly, we are presented with an inquiry as to whether Lawyer may engage the services of the nonlawyer as an independent contractor or employee given these facts. A similar question was posed to the Professional Responsibility Section of the VBA relating to the use of the services of a paralegal. See *Opinion No. 2003-08.* In *Opinion No. 2003-08*, it was determined that while a nonlawyer's proposed business involving the preparation of affidavits and other Court filings constituted the unauthorized practice of law, it was permissible for a lawyer to associate with the nonlawyer in carrying out such business in the following limited circumstances: (1) the lawyer would be required to actually supervise the conduct of the nonlawyer and oversee the work product that is provided to the client; and (2) the lawyer would be required to take appropriate precautions to avoid any improper fee-splitting with the nonlawyer. See *Opinion No. 2003-08.*

In *Opinion No. 2003-08*, we cited to the Reporter's Notes to Rule 5.3: "Rule 5.3 recognizes the expanding role of nonlawyers in the legal field." See VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.3, Reporter's Notes. There is no direct counterpart to Rule 5.3 in the former Vermont Code of Professional Responsibility. *Id.*

The Professional Responsibility Section has recognized that nonlawyers, specifically paralegals, now serve a vital role and provide a very valuable service to the profession, especially in the area of real estate law. See *Opinion No. 2003-08; Opinion No. 1999-03*; and *Opinion No. 1995-10* (paralegals employed by legal services clinic may gather information and prepare such documents as pleadings and affidavits, provided they are subject to lawyer's supervision). Nevertheless, the Professional Responsibility Section has also cautioned as to the potential for unreasonable delegation and over-reliance upon a nonlawyer.

> 'A supervising attorney should never delegate duties which require an attorney's professional judgment, except to another attorney. A supervising attorney should never allow a paralegal to offer legal advice to a client. Steps should be taken to insure that clients know when they are dealing with a paralegal rather than a lawyer and in cases such as this where the paralegal is handling a closing, the client must be informed of the paralegal's role.'

Opinion No. 2003-08, quoting from *Opinion No. 1999-03.*

Under the scenario proposed by Lawyer, we believe that it would be necessary for Lawyer to so closely and adequately supervise the nonlawyer and any work product generated in connection therewith as to render any so-called "independent contractor" relationship essentially a nullity. Thus, if the nonlawyer were to associate with Lawyer's firm, Lawyer would be ultimately responsible for the work product that is provided to the clients. Cf. *Opinion No. 2003-08*.

Given the facts in the present case, so as to avoid the ethical predicaments confronted by either the fee-splitting, LLC and/or independent contractor or employee scenarios, we believe that the better part of prudence would dictate that Lawyer closely associate with the nonlawyer to allow Lawyer to properly and adequately supervise the nonlawyer, provided that appropriate precautions are taken to avoid any improper fee-splitting. [3]

CONCLUSION:

In summary, Lawyer's proposal to share fees with the nonlawyer representing clients seeking reduced mortgage payments is impermissible fee-splitting. Nor may Lawyer form an LLC with the nonlawyer, who would own a minority interest in the LLC and be an employee, because to do so could impair Lawyer's independent professional judgment. It is recommended that Lawyer engage the services of the nonlawyer as an independent contractor or employee only with close and adequate supervision of the work product of the nonlawyer.

[3] Having so decided, we have not addressed in detail Lawyer's proposal that the nonlawyer would advertise for the service. Any close scrutiny of the nonlawyer advertising for the service would likely entail an in-depth analysis of potentially false or misleading communications, Rule 7.1; unauthorized practice of law, Rule 5.4; advertising and "advertising material", Rule 7.2 and Rule 7.3; among others.