

AMERICAN BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATIONS

1 RESOLVED, that Rule 5.7 and associated commentary to the Model Rules of Professional
2 Conduct be amended to preserve the core values of the legal profession, as follows:

3
4 **RULE 5.7 RESPONSIBILITIES REGARDING ~~LAW-RELATED~~ NONLEGAL**
5 **SERVICES**

6
7 (a) ~~—A lawyer shall be subject to the Rules of Professional Conduct with respect to the~~
8 ~~provision of law-related services, as defined in paragraph (b), if the law-related services are~~
9 ~~provided:~~

10 (1) ~~—by the lawyer in circumstances that are not distinct from the lawyer's~~
11 ~~provision of legal services to clients; or~~

12 (2) ~~—by a separate entity controlled by the lawyer individually or with others if~~
13 ~~the lawyer fails to take reasonable measures to assure that a person obtaining the law-~~
14 ~~related services knows that the services of the separate entity are not legal services and~~
15 ~~that the protections of the client-lawyer relationship do not exist.~~

16 (b) ~~—The term "law-related services" denotes services that might reasonably be~~
17 ~~performed in conjunction with and in substance are related to the provision of legal services, and~~
18 ~~that are not prohibited as unauthorized practice of law when provided by a nonlawyer.~~

19
20 (a) With respect to lawyers or law firms providing nonlegal services to clients or
21 other persons:

22 (1) A lawyer or law firm that provides nonlegal services to a person that are
23 not distinct from legal services being provided to that person by the lawyer or law firm is
24 subject to these Rules of Professional Conduct with respect to the provision of both legal
25 and nonlegal services.

26 (2) A lawyer or law firm that provides nonlegal services to a person that are
27 distinct from any legal services being provided to that person is subject to these Rules of
28 Professional Conduct with respect to the nonlegal services if a disinterested person would
29 conclude that the person receiving the services could reasonably believe the services are
30 the subject of an attorney-client relationship.

31 (3) A lawyer or law firm that is an owner, controlling party or agent of, or that
32 is otherwise affiliated with, an entity providing nonlegal services to a person is subject to

33 these Rules of Professional Conduct with respect to the nonlegal services if a
34 disinterested person would conclude that the person receiving the services could
35 reasonably believe the services are the subject of an attorney-client relationship.

36 (4) For purposes of paragraphs (a)(2) and (a)(3) above, it will be presumed
37 that the person receiving nonlegal services believes the services to be the subject of an
38 attorney-client relationship unless the lawyer or law firm has advised the person receiving
39 the services in writing that the services are not legal services and that the protection of an
40 attorney-client relationship does not exist with respect to the nonlegal services, or if the
41 interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

42 (b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an
43 owner, controlling party, agent, or is otherwise affiliated with an entity providing nonlegal
44 services to a person shall not permit any nonlawyer providing such services or affiliated with that
45 entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal
46 services to any person, or to cause the lawyer or law firm to compromise its duty under Rules
47 1.6(a) and 1.8(b) not to reveal information relating to the representation of a client receiving
48 legal services.

49 (c) For purposes of Rule 5.7, “nonlegal services” shall mean those services that
50 lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law
51 when provided by a nonlawyer.

52 **Comment**

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54
55 [1] For many years, lawyers have provided to their clients nonlegal services that are
56 ancillary to the practice of law. By participating in the delivery of these services, lawyers can
57 serve a broad range of economic and other interests of clients. When a lawyer performs law-
58 related nonlegal services or controls an organization that does so, there exists the potential for
59 ethical problems. Principal among these is the possibility that the person for whom the law-
60 related nonlegal services are performed fails to understand that the services may not carry with
61 them the protections normally afforded as part of the ~~client-lawyer~~ attorney-client relationship.
62 The recipient of the law-related nonlegal services may expect, for example, that the protection of
63 client confidences, prohibitions against representation of persons with conflicting interests, and
64 obligations of a lawyer to maintain professional independence apply to the provision of law-
65 related nonlegal services when that may not be the case.

66
67 [2] The risk of confusion is especially acute when the lawyer renders both legal and
68 nonlegal services with respect to the same matter. Under some circumstances, confusion by the
69 recipient is likely to be unavoidable as to whether and when the relationship is protected as an
70 attorney-client relationship. Therefore, Rule 5.7(a)(1) requires generally that the lawyer
71 providing nonlegal services adhere to all of the requirements of the Rules of Professional
72 Conduct. Rule 5.7(a)(1) applies to the provision of nonlegal services by a law firm if the person
73 for whom the nonlegal services are being performed is also receiving legal services from the firm
74 that are not distinct from the nonlegal services.

75
76 [2] [3] Rule 5.7 applies to the provision of law-related nonlegal services by a lawyer
77 even when the lawyer does not provide any legal services to the person for whom the law-related
78 nonlegal services are performed. The Rule identifies the circumstances in which all of the Rules
79 of Professional Conduct apply to the provision of law-related nonlegal services. Even when

80 those circumstances do not exist, however, the conduct of a lawyer involved in the provision of
81 ~~law-related~~ nonlegal services is subject to those Rules that apply generally to lawyer conduct,
82 regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.
83

84 ~~[3]~~ [4] Even when the lawyer believes that the provision of nonlegal services is distinct
85 from any legal services being provided, there is still a risk that the recipient of the nonlegal
86 services might believe that the recipient is receiving the protection of an attorney-client
87 relationship. Therefore, Rule 5.7(a)(2) requires that the lawyer providing the nonlegal services
88 adhere to the Rules of Professional Conduct, unless exempted by Rule 5.7(a)(4). ~~When law-~~
89 ~~related services are provided by a lawyer under circumstances that are not distinct from the~~
90 ~~lawyer's provision of legal services to clients, the lawyer in providing the law-related services~~
91 ~~must adhere to the requirements of the Rules of Professional Conduct as provided in Rule~~
92 ~~5.7(a)(1).~~
93

94 ~~[4]~~ [5] Law-related Nonlegal services also may be provided through an entity ~~that is~~
95 ~~distinct from that through which the lawyer provides legal services with which a lawyer is~~
96 ~~affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk~~
97 ~~that the recipient of the nonlegal services might believe that the recipient is receiving the~~
98 ~~protection of an attorney-client relationship. Therefore, Rule 5.7(a)(3) requires that the lawyer~~
99 ~~involved with the entity providing nonlegal services adhere to all the Rules of Professional~~
100 ~~Conduct, unless exempted by Rule 5.7(a)(4). If the lawyer individually or with others has~~
101 ~~control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to~~
102 ~~assure that each person using the services of the entity knows that the services provided by the~~
103 ~~entity are not legal services and that the Rules of Professional Conduct that relate to the client-~~
104 ~~lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct~~
105 ~~its operation. Whether a lawyer has such control will depend upon the circumstances of the~~
106 ~~particular case.~~
107

108 ~~[5]~~ ~~When a client-lawyer relationship exists with a person who is referred by a lawyer to~~
109 ~~a separate law-related nonlegal service entity controlled by the lawyer, individually or with~~
110 ~~others, the lawyer must comply with Rule 1.8(a).~~
111

112 [6] The Rules of Professional Conduct will be presumed to apply to a lawyer who
113 directly provides or is otherwise involved in the provision of nonlegal services unless the lawyer
114 complies with Rule 5.7(a)(4) by communicating in writing to the person receiving the nonlegal
115 services that the services are not legal services and that the protection of an attorney-client
116 relationship does not exist with respect to the nonlegal services. Such a communication should
117 be made before entering into an agreement for the provision of nonlegal services, in a manner
118 sufficient to assure that the person understands the significance of the communication. In certain
119 circumstances, however, additional steps may be required to communicate the desired
120 understanding. For example, while the written disclaimer set forth in Rule 5.7(a)(4) will be
121 adequate for a sophisticated user of nonlegal services, such as a publicly held corporation, a
122 more detailed explanation may be required for someone unaccustomed to making distinctions
123 between legal services and nonlegal services. In taking the reasonable measures referred to in
124 paragraph (a)(2) to assure that a person using law-related services understands the practical
125 effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer

126 should communicate to the person receiving the law-related services, in a manner sufficient to
127 assure that the person understands the significance of the fact, that the relationship of the person
128 to the business entity will not be a client-lawyer relationship. The communication should be
129 made before entering into an agreement for provision of or providing law-related services, and
130 preferably should be in writing.
131

132 ~~[7]~~ The burden is upon the lawyer to show that the lawyer has taken reasonable measures
133 under the circumstances to communicate the desired understanding. For instance, a sophisticated
134 user of law-related services, such as a publicly held corporation, may require a lesser explanation
135 than someone unaccustomed to making distinctions between legal services and law-related
136 services, such as an individual seeking tax advice from a lawyer-accountant or investigative
137 services in connection with a lawsuit.
138

139 ~~[8]~~ Regardless of the sophistication of potential recipients of law-related services, a
140 lawyer should take special care to keep separate the provision of law-related and legal services in
141 order to minimize the risk that the recipient will assume that the law-related services are legal
142 services. The risk of such confusion is especially acute when the lawyer renders both types of
143 services with respect to the same matter. Under some circumstances the legal and law-related
144 services may be so closely entwined that they cannot be distinguished from each other, and the
145 requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be
146 met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and,
147 to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the
148 lawyer controls complies in all respects with the Rules of Professional Conduct.
149

150 ~~[9]~~ A broad range of economic and other interests of clients may be served by lawyers'
151 engaging in the delivery of law-related services. Examples of law-related services include
152 providing title insurance, financial planning, accounting, trust services, real estate counseling,
153 legislative lobbying, economic analysis, social work, psychological counseling, tax preparation,
154 and patent, medical or environmental consulting.
155

156 ~~[10]~~ [7] When a lawyer is obliged to accord the recipients of such services the
157 protections of those Rules that apply to the client-lawyer attorney-client relationship, the lawyer
158 must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules
159 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a), (b) and (f)), and to scrupulously adhere to
160 the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of
161 the law-related nonlegal services must also in all respects comply with Rules 7.1 through 7.3,
162 dealing with advertising and solicitation. In that regard, lawyers should take special care to
163 identify the obligations that may be imposed as a result of a jurisdiction's decisional law.
164

165 ~~[11]~~ [8] Although a lawyer may be exempt from the application of the Rules of
166 Professional Conduct on the face of Rule 5.7(a), the scope of the exemption is not absolute. A
167 lawyer who provides or who is involved in the provision of nonlegal services may be excused
168 from compliance with only those Rules that are dependent upon the existence of a representation
169 or attorney-client relationship. Other Rules, such as those prohibiting lawyers from engaging in
170 unlawful or dishonest conduct (Rule 8.4), requiring lawyers to report certain attorney misconduct
171 (Rule 8.3), and prohibiting lawyers from misusing confidential information of a former client

172 (Rules 1.6 and 1.8(b)), apply to a lawyer irrespective of the existence of a representation, and
173 thus govern a lawyer otherwise exempt under Rule 5.7(a). ~~When the full protections of all of the~~
174 Rules of Professional Conduct do not apply to the provision of law-related services, principles of
175 law external to the Rules, for example, the law of principal and agent, govern the legal duties
176 owed to those receiving the services. Those other legal principles may establish a different
177 degree of protection for the recipient with respect to confidentiality of information, conflicts of
178 interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).
179

180 FURTHER RESOLVED, that a new Rule 5.8 and associated commentary be added to the Model
181 Rules of Professional Conduct to preserve the core values of the legal profession, as follows:
182

183 **RULE 5.8 CONTRACTUAL RELATIONSHIPS BETWEEN LAWYERS AND**
184 **NONLEGAL PROFESSIONALS**
185

186 (a) A lawyer or law firm may enter into and maintain a contractual relationship with a
187 nonlegal professional or nonlegal professional service firm for the purpose of offering to the
188 public, on a systematic and continuing basis, legal services performed by the lawyer or law firm,
189 as well as other professional services, notwithstanding the provisions of Rule 1.7(b), provided
190 that:

191 (1) The profession of the nonlegal professional or nonlegal professional
192 service firm is listed by the [high court of the state] pursuant to Rule 5.8(b); and

193 (2) The lawyer or law firm neither grants to the nonlegal professional or
194 nonlegal professional service firm, nor permits such person or firm to obtain, hold or
195 exercise, directly or indirectly, any ownership or investment interest in, or managerial or
196 supervisory right, power or position in connection with, the practice of law by the lawyer
197 or law firm, nor shares legal fees with a nonlawyer or receives or gives any monetary or
198 other tangible benefit for giving or receiving a referral; and

199 (3) The fact that the contractual relationship exists is disclosed by the lawyer
200 or law firm to any client of the lawyer or law firm before the client is referred to the
201 nonlegal professional service firm, or to any client of the nonlegal professional service
202 firm before that client receives legal services from the lawyer or law firm, and the client
203 has given informed written consent.

204 (b) For purposes of Rule 5.8(a):

205 (1) Each profession on the list maintained by the [high court of the state] shall
206 have been designated sua sponte or approved upon the application of a member of a
207 nonlegal profession upon a determination that the profession is composed of individuals
208 who with respect to their profession:

209 (i) have been awarded a Bachelor's Degree or its equivalent from an
210 accredited college or university;

211 (ii) are licensed to practice the profession by an agency of this State or
212 the United States Government; and

213 (iii) are required under penalty of suspension or revocation of license to
214 adhere to a code of ethical conduct that is reasonably comparable to that of the
215 legal profession.

216 (2) The term “ownership or investment interest” shall mean any such interest
217 in any form of debt or equity, and shall include any interest commonly considered to be
218 an interest accruing to or enjoyed by an owner or investor.

219 (c) Rule 5.8(a)(1) shall not apply to relationships consisting solely of nonexclusive
220 reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal
221 professional or nonlegal professional service firm.

222 (d) Notwithstanding Rule 5.4(a), a lawyer or law firm may allocate costs and
223 expenses with a nonlegal professional or nonlegal professional service firm pursuant to a
224 contractual relationship permitted by Rule 5.8(a), provided the allocation reflects only the costs
225 and expenses incurred or reasonably expected to be incurred by each.

226
227 Comment
228

229 [1] The practice of law has an essential tradition of complete independence and uncompromised
230 loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in this
231 jurisdiction are guaranteed independent professional judgment and undivided loyalty
232 uncompromised by conflicts of interest. Indeed, these guarantees represent the very foundation
233 of the profession and allow and foster its continued role as a protector of the system of law.
234 Therefore, a lawyer must remain completely responsible for his or her own independent
235 professional judgment, maintain the confidences and secrets of clients, preserve funds of clients
236 and third parties in his or her control, and otherwise comply with the legal and ethical principles
237 governing lawyers in this jurisdiction.

238
239 [2] Multidisciplinary practice between lawyers and nonlawyers is generally incompatible with
240 the core values of the legal profession and, therefore, a strict division between services provided
241 by lawyers and those provided by nonlawyers is essential to protect those values. However, and
242 notwithstanding the provisions of Rule 1.7(b), Rule 5.8 permits lawyers to enter into
243 interprofessional contractual relationships for the systematic and continuing provision of legal
244 and nonlegal professional services provided the nonlegal professional or nonlegal professional
245 service firm with which the lawyer or law firm is affiliated does not own, control, supervise or
246 manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm.
247 The nonlegal professional or nonlegal professional service firm may not play a role in, for
248 example, the decision whether to accept or terminate an engagement to provide legal services in
249 a particular matter or to a particular client, determining the manner in which lawyers are hired or
250 trained, the assignment of lawyers to handle particular matters or to provide legal services to
251 particular clients, decisions relating to the undertaking of *pro bono publico* and other public-
252 interest legal work, financial and budgetary decisions relating to the legal practice, or
253 determining the compensation and advancement of lawyers and of persons assisting lawyers on
254 legal matters.

255
256 [3] The contractual relationship permitted by Rule 5.8 may provide for the sharing of premises,
257 general overhead, or administrative costs and services on an arm’s-length basis. Such financial
258 arrangements are permitted in the context of an agreement between lawyers and other
259 professionals to provide legal and other professional services on a systematic and continuing
260 basis notwithstanding that they involve the exchange of value for client referrals subject to Rules
261 7.2(c) and 5.8(d).

263 [4] Similarly, lawyers participating in such arrangements remain subject to general ethical
264 principles in addition to those set forth in Rule 5.8 including, at a minimum, Rules 1.7(a), 1.9,
265 5.4(c), 5.4(d) and 7.5(d). Thus, the lawyer or law firm may not, for example, include in its firm
266 name the name of the nonlegal professional service firm or any individual nonlegal professional,
267 or enter into formal partnerships with nonlawyers, or practice in an organization authorized to
268 practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm
269 may not enter into an agreement or arrangement for the use of a name in respect of which a
270 nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest
271 if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or
272 is entitled to act in a manner inconsistent with Rule 5.8(a)(2). More generally, although the
273 existence of a contractual relationship permitted by Rule 5.8 does not by itself create a conflict of
274 interest violating Rule 1.7(b), whenever a law firm represents a client in a matter in which the
275 nonlegal professional service firm's client is also involved, the law firm's interest in maintaining
276 an advantageous relationship with the nonlegal professional service firm might, in certain
277 circumstances, adversely affect the independent professional judgment of the law firm, creating a
278 conflict of interest.

279
280 [5] Each lawyer and law firm having a contractual relationship under Rule 5.8 has an ethical
281 duty to observe these Rules of Professional Conduct with respect to its own conduct in the
282 context of the contractual relationship. For example, the lawyer or law firm cannot permit its
283 obligation to maintain client confidences as required by Rules 1.6 and 1.8(b) to be compromised
284 by the contractual relationship or by its implementation by or on behalf of nonlawyers involved
285 in the relationship. In addition, the prohibition in Rule 8.4(a) against circumventing a Rule of
286 Professional Conduct through actions of another applies generally to the lawyer or law firm in
287 the contractual relationship.

288
289 [6] The contractual relationship permitted by Rule 5.8 may provide for the reciprocal referral of
290 clients by and between the lawyer or law firm and the nonlegal professional or nonlegal
291 professional service firm. When in the context of such a contractual relationship a lawyer or law
292 firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer
293 or law firm shall observe the ethical standards of the legal profession in verifying the
294 competence of the nonlegal professional or nonlegal professional service firm to handle the
295 relevant affairs and interests of the client. Referrals should only be made when requested by the
296 client or deemed to be reasonably necessary to serve the client. Thus, even if otherwise
297 permitted by Rule 5.8, a contractual relationship may not require referrals on an exclusive basis.

298
299 [7] The lawyer or law firm must disclose the fact that the contractual relationship exists to any
300 client and obtain the client's informed written consent before that client is referred to the
301 nonlegal professional service firm, or to any client of the nonlegal professional service firm
302 before that client receives legal services from the lawyer or law firm. In connection with making
303 the required disclosure and obtaining the informed consent of the client, the client must be
304 advised at a minimum that the lawyer has entered into a contractual relationship with a nonlegal
305 professional or nonlegal professional service firm, in the form of a cooperative business
306 arrangement which may include sharing of costs and expenses, to provide legal and nonlegal
307 services. The client must be further advised that: (a) a lawyer's clients are guaranteed
308 independent professional judgment and undivided loyalty, uncompromised by conflicts of

309 interest, and the lawyer's business relationship with the nonlegal professional or nonlegal
310 professional service firm may not diminish those rights; (b) confidences and secrets imparted by
311 a client to a lawyer are subject to legal and ethical protections and may not be disclosed by the
312 lawyer as part of a referral to a nonlegal professional or nonlegal professional service firm
313 without the separate written consent of the client; (c) the protections afforded to a client by the
314 legal and ethical principles of confidentiality may not carry over to dealings between the client
315 and a nonlegal professional or nonlegal professional service firm, and under some circumstances
316 the nonlegal professional or nonlegal professional service firm may be required by law to
317 disclose otherwise protected information; and (d) even where a lawyer refers a client to a
318 nonlegal professional or nonlegal professional service firm for assistance in financial matters, the
319 lawyer's obligation to preserve and safeguard client funds in his or her possession continues.

320
321 [8] To assure that only appropriate professional services are involved, a contractual relationship
322 for the provision of services is permitted under Rule 5.8 only if the nonlegal party thereto is a
323 professional or professional service firm meeting appropriate standards as regards ethics,
324 education, training, and licensing. The [high court of the state] maintains a public list of eligible
325 professions. A member of a nonlegal profession may apply for the inclusion of a particular
326 profession on the list, or professions may be added to the list by the [high court of the state] sua
327 sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and
328 continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter,
329 is not governed by Rule 5.8 when so dealing with the nonlawyer. Thus, a lawyer advising a
330 client in connection with a discharge of chemical wastes may engage the services of and consult
331 with an environmental engineer on that matter without the need to comply with Rule 5.8.
332 Likewise, the requirements of Rule 5.8 need not be met when a lawyer retains an expert witness
333 in a particular litigation.

334
335 [9] Depending upon the extent and nature of the relationship between the lawyer or law firm, on
336 the one hand, and the nonlegal professional or nonlegal professional service firm, on the other
337 hand it may be appropriate to treat the parties to a contractual relationship permitted by Rule 5.8
338 as a single law firm for purposes of these Rules of Professional Conduct, as would be the case if
339 the nonlegal professional or nonlegal professional service firm were in an "of counsel"
340 relationship with the lawyer or law firm. If the parties to the relationship are treated as a single
341 law firm, the principal effects relationship would be that conflicts of interest are imputed as
342 between them pursuant to Rule 1.10. To the extent that the rules of ethics of the nonlegal
343 profession conflict with these Rules, the rules of the legal profession will still govern the conduct
344 of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also
345 be subject to legal obligations arising from a relationship with nonlawyer professionals who are
346 themselves subject to regulation.

347
348 FURTHER RESOLVED, that Rule 7.2(c) of the Model Rules be amended to preserve the core
349 values of the legal profession, as follows:

350
351 (c) A lawyer shall not give anything of value to a person for recommending the lawyer's
352 services except that

353
354 (1) a lawyer may

- 355 (i) ~~(1)~~ pay the reasonable costs of advertisements or communications
356 permitted by this Rule;
357 (ii) ~~(2)~~ pay the usual charges of a not-for-profit lawyer referral service
358 or legal service organization; and
359 (iii) ~~(3)~~ pay for a law practice in accordance with Rule 1.17.
360 (2) a lawyer or law firm may refer clients to a nonlegal professional or
361 nonlegal professional service firm pursuant to an agreement or other contractual
362 relationship with such nonlegal professional or nonlegal professional service firm to
363 provide legal and other professional services on a systematic and continuing basis as
364 permitted by Rule 5.8.
365

366 FURTHER RESOLVED, that Comment paragraph [2] to Rule 7.2 of the Model Rules of
367 Professional Conduct be amended to preserve the core values of the legal profession, as follows:
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369 [2] This Rule permits public dissemination of information concerning a lawyer’s name
370 or firm name, address and telephone number; the kinds of services the lawyer will
371 undertake; the basis on which the lawyer’s fees are determined, including prices for
372 specific services and payment and credit arrangements; a lawyer’s foreign language
373 ability; names of references and, with their consent, names of clients regularly
374 represented; the nature or extent of any nonlegal services provided by the lawyer or by
375 an entity owned and controlled by the lawyer; the existence of contractual relationships
376 between the lawyer or law firm and a nonlegal professional or nonlegal professional
377 service firm, to the extent permitted by Rule 5.8, and the nature and extent of services
378 available through those contractual relationships; and other information that might invite
379 the attention of those seeking legal assistance.
380

381 FURTHER RESOLVED, that a new Comment paragraph [7] be added to Rule 7.2 of the Model
382 Rules of Professional Conduct to preserve the core values of the legal profession, as follows:
383

384 [7] Reciprocal referrals of clients by and between a lawyer or law firm and a nonlegal
385 professional or nonlegal professional service firm pursuant to an interprofessional
386 contractual arrangement permitted by Rule 5.8 are excluded from the scope of Rule
387 7.2(c).
388

389 FURTHER RESOLVED, that Comment paragraph [1] to Rule 7.5 of the Model Rules of
390 Professional Conduct be amended to preserve the core values of the legal profession, as follows:
391

392 [1] A firm may be designated by the names of all or some of its members, by the names
393 of deceased members where there has been a continuing succession in the firm’s identity
394 or by a trade name such as the “ABC Legal Clinic.” Although the United States
395 Supreme Court has held that legislation may prohibit the use of trade names in
396 professional practice, use of such names in law practice is acceptable so long as it is not
397 misleading. If a private firm uses a trade name that includes a geographical name such
398 as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency
399 may be required to avoid a misleading implication. It may be observed that any firm
400 name including the name of a deceased partner is, strictly speaking, a trade name. The

401 use of such names to designate law firms has proven a useful means of identification.
402 However, it is misleading to use the name of a lawyer not associated with the firm or a
403 predecessor of the firm or of a nonlawyer.

REPORT

In July 2000, the House of Delegates responded to the report of the Commission on Multidisciplinary Practice by adopting Resolution 10F. That Resolution contained a statement of principles, paragraph 1 of which provided:

It is in the public interest to preserve the core values of the legal profession, among which are: (a) the lawyer's duty of undivided loyalty to the client; (b) the lawyer's duty competently to exercise independent legal judgment for the benefit of the client; (c) the lawyer's duty to hold client confidences inviolate; (d) the lawyer's duty to avoid conflicts of interest with the client; (e) the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice; and (f) the lawyer's duty to promote access to justice.

The House declared, among other things, that:

- “All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.”
- “The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.”
- “State bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.”
- “The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.”
- “The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.”

Underlying the House of Delegates action regarding multidisciplinary practice was the April 2000 Report of the New York State Bar Association's Special Committee on the Law Governing Law Firm Structure and Operations entitled, Preserving the Core Values of the American Legal Profession — The Place of Multidisciplinary Practice in the Law Governing Lawyers (“NYSBA report”).

Responsibilities Regarding Nonlegal Services (Amended Rule 5.7) — In order to effectuate the principles enunciated in Resolution 10F, the House recommended, as had the NYSBA report,

that in jurisdictions that permit lawyers and law firms, in accordance with Rule 5.7, to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

The NYSBA report pointed out that Rule 5.7 contains no admonition regarding the not insubstantial risk that nonlawyer constituents of a nonlegal business may exercise undue influence and control over the way in which the legal practice is conducted. Not addressed by Rule 5.7 (in the absence of such an admonition) is the risk that a nonlawyer generating a substantial amount of revenue for a law firm through nonlegal business activities may attempt to manage or control the overall venture, to dictate the way in which the legal practice is conducted, and to direct the lawyer's professional judgment in rendering legal services.

Thus, it is recommended that Rule 5.7(b) be amended to make clear that the lawyer should not allow nonlawyer colleagues to intrude upon the ability of the lawyer to exercise independent professional judgment on behalf of clients. In addition, focusing on clients rather than on lawyers, the proposed New York version of Rule 5.7 eliminates the reference in the Rule to "law-related services" and substitutes "nonlegal services," defined for purposes of the Rule as "services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer."

The thrust of the amended Rule is to require clarity with respect to the nature of the services being provided, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that accompany an attorney-client relationship.

Safeguards Relating to Contractual Relationships with Nonlegal Services Providers (Proposed Rule 5.8) — Further to effectuate the principles enunciated in Resolution 10F, the House expressly recognized, as had the NYSBA report, the need for "safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional services providers consistent with the statement of principles".

The NYSBA report noted that for at least 40 years, lawyers had entered into cooperative arrangements with other professionals in strategic alliances and other contractual relationships. They involve reciprocal undertakings by firms, often those with related or synergistic products, to steer clients to each other's doorstep, thereby increasing the client base of both firms, and to cooperate in serving the interests and needs of those mutual clients.

There is, however, a dearth of ethical guidance relating to the collateral ethical implications of systematic and continuous interprofessional strategic alliances and other formalized client-related contractual relationships. Combining operations through contractual structures resembling interprofessional strategic alliances can in reality be something dramatically different from the original concept of combining forces to provide cross-referrals and integration of professional services.

To address the absence of ethical guidance in this area, the House of Delegates, as had the NYSBA report, expressly recognized the need for safeguards in the Model Rules relating to strategic alliances and other contractual relationships with nonlegal service providers. Proposed Rule 5.8 sets limits on the existing capability of lawyers to form relationships with nonlawyers to

provide legal and nonlegal services to clients on a systematic and continuing basis, provided that the nonlawyers do not own, control, supervise or manage, directly or indirectly, the whole or in part, the practice of law by the lawyer or law firm.

The existence of the contractual relationship must be disclosed to any client for whom a referral is made and the client must give informed written consent.

Lawyers are not permitted to enter into such contractual relationships unless the nonlegal professional satisfies certain minimum educational and ethical criteria. Lawyers must exercise their professional judgment when making referrals to nonlawyers and in accepting referrals, they have no conflicts of interest or other impediments that would preclude them.

It is the essence of the underlying policy that any such multidisciplinary practice be limited to situations in which lawyers retain complete control over the practice of law.

Advertising (Amended Rule 7.2) and Nonlawyers in Firm Names (Amended Rule 7.5) — The NYSBA report expressly recognized that to effectuate the principles enunciated in Resolution 10F regarding nonlegal services (Rule 5.7) and contractual relationships with nonlegal professional service providers (Proposed Rule 5.8) amendments should be made to Rules 7.2 and 7.5 to avoid misleading representations to prospective clients and to ensure clients' informed consent to any such arrangements. The proposed amendments to Rule 7.2 and to Rule 7.5 further this objective.

Action of the New York Court – On November 4, 2000, the New York State Bar Association (“NYSBA”) submitted to the New York courts a comprehensive set of proposed amendments to the ethical rules governing lawyers in the State based upon the April 2000 NYSBA report. On July 24, 2001, the Presiding Justices of the Appellate Division of the Supreme Court (the court with the statutory power to regulate the conduct of New York attorneys) issued a joint order amending the New York Lawyers' Code of Professional Responsibility substantially along the lines proposed by the NYSBA. The amendments, which went into effect on November 1, 2001, provide a clear ethical framework for lawyers or law firms owning and operating nonlegal businesses and for lawyers or law firms wishing to form contractual relationships with nonlegal professionals or nonlegal professional service firms.

The NYSBA prepared the proposed amendments to the Model Rules of Professional Conduct set forth in these Recommendation patterned on the amendments in 2001 to the New York Code. The NYSBA respectfully urges the House of Delegates to adopt them.

Respectfully submitted,
New York State Bar Association

Steven C. Krane, President

November 5, 2001

GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association
Submitted By: Steven C. Krane, President

1. Summary of Recommendations.

Rule 5.7 and associated commentary in the Model Rules of Professional Conduct should be amended, consistent with the statement of principles set forth in Resolution 10F, adopted by the House of Delegates in July 2000, to make explicit that no nonlawyer or nonlegal entity involved in nonlegal businesses owned and operated by lawyers and law firms should be permitted to direct or regulate professional judgment of the lawyers or law firm in rendering legal services to any person. Similarly, a new Rule 5.8 and associated commentary should be added to the Model Rules to assure that there are safeguards in the Rules relating to contractual relationships between lawyers and nonlawyers professionals to establish unambiguous limits on permissible conduct in multidisciplinary relationships, and otherwise to establish a clear ethical framework for lawyers seeking to enter into such relationships. Relatedly, Rule 7.2 and Rule 7.5, and the commentary thereto should be amended to ensure clients' informed consent to any such arrangements and to avoid misleading representations to prospective clients.

2. Approval by Submitting Entity.

The Executive Committee of the NYSBA approved the Report and Recommendations at a November 2, 2001 meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In May 2000, former ABA president, Robert MacCrate submitted Report 100 for consideration at the Annual Meeting of the House Delegates in July 2000. Report 100 was based on a NYSBA report entitled, Preserving the Core Values of the American Legal Profession – The Place of Multidisciplinary Practice in the Law Governing Lawyers. The appendices to Report 100 set forth recommendations relating to the Model Rules that were substantially similar to the resolutions presented in the present Report and Recommendations.

4. What existing Association Policies are relevant to these recommendations and how would they be affected by its adoption?

Resolution 10F, adopted by the House of Delegates in July 2000, is relevant to these recommendations and would be effectuated thereby.

5. What urgency exists which requires action at this meeting of the House?

The Standing Committee on Ethics and Professional Responsibility prepared Report No. 113 on the calendar for the August 2001 meeting of the House that purported to address a part of the same subject matter. Report No. 113 was withdrawn at the request of the NYSBA subject to the

understanding that the NYSBA would be submitting its own report to the House at the February 2002 meeting.

6. Status of Legislation. (If applicable)

No applicable.

7. Costs to the Association. (Bother direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable)

None. The members of the NYSBA are already subject to the proposed rules set forth in these recommendations.

9. Referrals.

None to date.

10. Contact Person. (Prior to the Meeting.)

Steven C. Krane, President, New York State Bar Association, at Proskauer Rose LLP, 1585 Broadway, New York, New York 10036, 212-969-3435, skrane@proskauer.com.

11. Contact Person. (Who will present the report to the House.)

Steven C. Krane, President, New York State Bar Association, at Proskauer Rose LLP, 1585 Broadway, New York, New York 10036, 212-969-3435, skrane@proskauer.com and Robert MacCrate, Chair, New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, at Sullivan & Cromwell, at 125 Broad Street, New York, New York 10004, 212-558-3614, maccrater@sullcrom.com.