The practice of law is a profession, not a business. One practical application of this tenet is that the New York Rules of Professional Conduct (the “Rules”) require lawyers to maintain professional independence and to keep legal practice separate from nonlegal services. However, the Rules afford lawyers certain specific limited opportunities to engage with nonlawyers to provide legal and nonlegal services to clients and nonclients.

Prohibited Business Models

Regarding legal services, the guiding ethical principle is that the lawyer must exercise independent professional judgment on behalf of a client not directed or controlled by a nonlawyer. The Rules also generally require a strict separation between legal services rendered by lawyers and nonlegal services offered by nonlawyers. These rules in combination prohibit certain joint lawyer-nonlawyer business models.

- **Partnerships**

  May a tax lawyer and an accountant form a partnership to advise clients? No. Rule 5.4(b) flatly bans lawyers from forming partnerships with nonlawyers (i.e., share profits and losses) if any of the activities of the partnership consist of the practice of law. See NYCLA Op. 687 (1991) (lawyer may employ an accountant to advise clients on tax planning, but the accountant may not have an ownership stake in the law firm).

- **For-Profit Practice**

  May a nonlawyer be a partner in a law partnership? No. Rule 5.4(d) bars nonlawyers from having any ownership interest in the profits generated by a lawyer or law firm, acting as member, director or officer or a position of similar responsibility in the firm, or having the right to direct or control a lawyer’s professional judgment, unless specifically exempted.

- **Sharing Legal Fees**

  May a lawyer pay a nonlawyer providing services to the lawyer a fraction of legal fees? No. A lawyer is prohibited from sharing legal fees with a nonlawyer under Rule 5.4(a). So, if a nonlawyer’s compensation depends on the lawyer’s receipt of legal fees
in specific cases, Rule 5.4(a) is violated. See N.Y.S. Bar Op. 733 (2000) (lawyer may not compensate a nonlawyer with a percentage of fees from a matter referred to the lawyer’s firm); N.Y.S. Bar Op. 885 (2011) (lawyer may not reduce fees as part of an arrangement to accept referrals from a nonlawyer by refunding the balance owed to nonlawyer back to clients); N.Y.S. Bar Op. 565 (1984) (paying marketing companies a commission or percentage of fees for introducing clients to a lawyer is improper). However, N.Y.S. Bar Op. 917 (2012) observed that a law firm may pay a bonus to a nonlawyer marketer based on the number of clients obtained through advertising if the amount paid is not calculated with respect to fees paid by clients. Rule 5.4(a) also forbids giving a nonlawyer a stake in the outcome of a particular case or cases.

Of course, all law firm employees are ultimately paid from fees received by the law firm, and this is not proscribed. The prohibition is against paying the nonlawyers an amount dependent on the amount of fees collected. Thus, paying a paralegal a bonus of 15% of all fees on cases she refers to the firm would violate Rule 5.4(a). See N.Y.S. Bar Op. 927 (2012) (where a client pays a single fee directly to a nonlawyer, a portion of which is then paid to the lawyer is improper because the nonlawyer is essentially acting as a referral agent for fees and the lawyer is sharing legal fees with a nonlawyer).

- **Unauthorized Practice**

May a lawyer hire a nonlawyer to practice law on behalf of the lawyer? No. Under Rule 5.5(b), a lawyer is barred from assisting a nonlawyer in the unlicensed practice of law. While lawyers can hire nonlawyers to assist them, a lawyer must adequately supervise nonlawyer employees. See Rule 5.3.

**Permissible Business Models**

Despite the traditional prohibitions, the Rules allow some leeway for arrangements where lawyers may provide legal and nonlegal services together with nonlawyers.

- **Approved “Systematic and Continuing” Joint Business Models**

One permissible model for lawyer-nonlawyer arrangements is a “strategic alliance” or contractual relationship with a nonlegal professional or professional service firm under Rule 5.8(a). Such a contractual relationship allows sharing out-of-pocket expenses and costs but not profits or legal fees pro rata. To illustrate, a law firm and an architectural firm may enter into an office sharing arrangement to rent office space that is divided equally between the two firms, with each firm contributing half the total rent. If the law firm’s rent payment exceeds its share of costs and expenses, the law firm may be deemed to be improperly sharing legal fees and profits with a nonlawyer.

The Appellate Divisions maintain a list, pursuant to Section 1205.3 of the Joint Appellate Division Rules, of nonlegal professions with which lawyers and law firms may enter into “strategic alliances,” “contractual relationships” or “cooperative business
arrangements” on a “systematic and continuing” basis. Under Rule 5.8, the professions that can be placed on the list must satisfy rigorous standards on ethics, education, training and licensing. The professions currently approved are: Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying and Certified Social Work.

So, a lawyer or law firm may enter into a systematic and continuing relationship with an accounting firm to provide legal/nonlegal professional services to clients, sharing premises, general overhead or administrative costs and services on an arms-length basis. They may also engage in joint advertising and promotion. Comment [2] to Rule 5.8.

Nevertheless, Rule 5.8 still prohibits such nonlawyer professionals from (i) having any ownership or investment interest in the law firm, (ii) exercising managerial or supervisory rights or powers relating to the practice of law, (iii) sharing fees with lawyers or (iv) receiving or giving any monetary or other tangible benefit in exchange for referrals. Nonlawyer professionals are also barred from making decisions regarding accepting or terminating client engagements, compensating and advancing lawyers and legal staff, the manner of hiring or training lawyers, and financial and budgetary concerns for the law firm.

In addition, Rule 5.8 requires the law firm to disclose the contractual relationship to a prospective client before accepting any client referred by the nonlegal professional, and to an existing client before referring the client to the nonlegal professional. The law firm must also obtain the client’s informed written consent to the referral, and give the client a copy of the “Statement of Client’s Rights In Cooperative Business Arrangements” pursuant to Section 1205.4 of the Joint Appellate Divisions Rules. In some cases, clients of the nonlegal professionals may be considered clients of the law firm for purposes of the imputed conflicts rule (Rule 1.10(a)) and the law firm may need to comply with the conflicts checking requirements of Rule 1.10(e).

• **Other Permitted Arrangements With Nonlegal Services Providers**

Lawyers or law firms may enter nonexclusive reciprocal referral arrangements with nonlegal professionals whose profession is **not** included in the Appellate Division list, such as bankers, insurance agents, securities brokers, real estate brokers and doctors. This may not entail sharing of premises and expenses or joint advertising and promotion. See Rule 5.8(c). See N.Y.S. Bar Op. 930 (2011) (lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer it’s customers both legal and nonlegal services, even if the agency and lawyer are separately paid and do not share in each other’s fees); N.Y.S. Opinion 765 (2003) (lawyers may enter into nonexclusive reciprocal referral relationships with securities brokers or insurance agents).

So, for example, a lawyer or law firm may enter into a referral agreement with an insurance agent provided it is nonexclusive: the arrangement should not be a promise to refer every client to the insurance agent or accept every referral from it, and they may not share premises or engage in joint marketing activities.

• **Nonlegal Services Provided By Law Firms**
Rule 5.7(c) defines “nonlegal services” as “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.” Under Rule 5.7, lawyers and law firms may provide nonlegal services to clients or to the public in different ways: either (1) directly, e.g., by hiring salaried nonlawyer employees who may or may not be professionals (e.g., researchers or financial planners) to provide nonlegal services or employing lawyers who are, for example, also accountants, or (2) indirectly, e.g., through legally separate entities – such as engineering firms or accounting firms – that the lawyer or law firm owns, controls or is affiliated with.

Directly Provided Nonlegal Services: If the legal and nonlegal services are “not distinct,” i.e., so closely intertwined that they cannot be distinguished, Rule 5.7(a)(1) requires that a law firm rendering nonlegal services comply with the Rules with respect to the nonlegal services. So, if an accountant hired by a law firm gives tax advice to the firm’s client in the same matter where a firm lawyer provides legal advice, the lawyer and the accountant are bound by the Rules, and the firm is required to ensure that the accountant adheres to the Rules governing confidentiality, conflicts, competence, compensation, attorney advertising and solicitation.

Even where the legal and nonlegal services are “distinct,” i.e., the nonlegal services are unrelated to legal services, Rule 5.7(a)(2) requires that a lawyer providing nonlegal services adhere to the Rules unless the client does not believe and could not reasonably believe that the nonlegal services are the subject of a client-lawyer relationship. So, if a law firm engages a real estate brokering service to broker real estate deals, the client must be advised in writing that the brokering services are not part of the legal services provided to the client and not protected by the privileges afforded by an attorney-client relationship.

Note, as a general matter, the lawyer must abide by the Rules of Professional Conduct even when providing the nonlegal services. This is required because, when lawyers or law firms directly provide nonlegal services to clients or render both legal and nonlegal services with respect to the same matter, there is a risk that clients may misunderstand the lawyer’s role and assume that the legal and ethical protections that normally accompany a client-lawyer relationship – the duty of confidentiality, avoiding conflicts and exercising independent professional judgment – are present.

Indirectly Provided Nonlegal Services: Some law firms have nonlegal “ancillary businesses” that they own or operate as separate entities to provide nonlegal services (e.g., investment advice, environmental services or trust services). See N.Y.S. Bar Op. 755 (2002), applying the predecessor to the Rules (lawyers may refer clients to their nonlegal businesses if they provide clients the disclaimer under Rule 5.7(a)(4), without complying with Rule 1.8(a) governing business transactions with clients, so long as the client is fully informed of the lawyer’s interest in the nonlegal entity pursuant to Rule 1.7(a) and of available alternatives). The opinion added that there is no bar on the lawyer
or the ancillary business from advertising the availability of the dual roles or referring existing clients to the other but warned that no referral fee may be paid for such referral.

Where a lawyer or law firm provides nonlegal services indirectly, i.e., through such a separate entity, Rule 5.7(a)(3) requires the lawyer or firm to comply with the Rules with respect to the nonlegal services, unless the client understands that the nonlegal services are not the subject of a client-lawyer relationship and could not reasonably believe that they are.

**Disclaimer Requirement**: In those instances noted above where the Rules do not apply (if the client does not believe and could not reasonably believe them to apply to the nonlegal services being provided), the Rules are still presumed to apply unless the client is given a written disclaimer under Rule 5.7(a)(4). The disclaimer must state that the services are not legal services and that the protection of a client-lawyer relationship will not exist with regard to the nonlegal services. Comment [3] to Rule 5.7 says that the disclaimer should be provided before entering an agreement to provide nonlegal services and in a manner sufficient to ensure the client understands the distinction between “legal” and “nonlegal” services. In addition, where legal and nonlegal services are provided to clients in the same transaction, the lawyer should specifically counsel the client about the possible effect of the services on the availability of the attorney-client privilege. The disclaimer is excused if the lawyer or firm has only a *de minimis* interest (undefined by the Rules) in the nonlegal entity.

**Limited Fee-Sharing**: While nonlawyers may not share legal fees, Rule 5.4(a)(3) permits a lawyer or law firm to compensate a nonlawyer employee based in whole or in part on a profit-sharing arrangement. Comment [1B] to Rule 5.4 states, “[S]uch sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.” So, the firm may not have profit sharing plans or bonuses based on fees from a single, identifiable or selected group of cases. As long as the firm has discretion in awarding a bonus to the nonlawyer, no partnership is created. Note, this limited fee sharing is *only* permitted with nonlawyer “employees,” not independent contractors (e.g., consultants or vendors).

**Potential Conflicts**: If a client requests both legal and nonlegal services from a law firm or affiliated nonlegal entity in the same or substantially related matters, such as litigation and consulting services relating to electronic discovery, the law firm may have a financial interest in the nonlegal services that could create a personal interest conflict under Rule 1.7(a)(2). For example, legal representation may involve exercising judgment regarding which provider of nonlegal services to recommend or whether to recommend nonlegal services at all. To resolve such conflicts, the lawyer may need to satisfy the conditions in Rule 1.7(b) requiring client consent and to comply with Rule 1.8(a) governing business transactions with clients. See N.Y.S. Bar Opinion 933 (2012) (permissible for lawyer to conduct law practice and real estate brokerage business in the same office provided the lawyer does not serve as both lawyer and broker in the same matter as this would create a nonconsentable conflict of interest under Rule 1.7).
Playing By The Rules

Overall, a strict division is maintained in the Rules between lawyers and nonlawyers, and between legal and nonlegal services. But the Rules do permit various lawyer/nonlawyer business models. With careful attention to the Rules regulating such arrangements, lawyers can deliver a wide range of services to their clients, providing always that the traditional independence of professionals admitted to the practice of law is maintained.

Devika Kewalramani is a partner at Moses & Singer LLP, co-chair of its Legal Ethics & Law Firm Practice, and chair of the Committee on Professional Discipline of the New York City Bar Association. David Rabinowitz, a partner and co-chair of the firm’s Litigation Department, contributed editorial assistance, and John Baranello, an associate in the firm’s Litigation Department, assisted with the preparation of the article.

Endnotes

References to examples and commentary in the article are attributed to Roy D. Simon, Simon’s New York Rules of Professional Conduct Annotated (West 2013 Ed.).

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