

## **Editorial: Amend Judiciary Laws § 491 and Rule 5.4(a)(3).**

In adopting the language of DR 3-102(A)(3) without essential change, Rule 5.4(a)(3) of the Rules of Professional Conduct has perpetuated the anomaly created by the co-existence of Judiciary Law § 491 and the Rule itself. Judiciary Law § 491 prohibits fee-sharing between a lawyer and an employee, while the Rule recognizes the right of an employee to share in the lawyer's profits.

COSAC recognized and understood this anomaly, but was powerless to do anything about it except recommend a change to section 491:

COSAC notes that the sharing of fees as contemplated by this provision (Rule 5.4(a)) would appear to violate section 491 of the Judiciary Law, and, therefore, would not be permitted under the 'except' clause. COSAC nevertheless urges the adoption of this provision [Rule 5.4(a)(3)] and recommends an appropriate amendment of the Judiciary Law, which would permit the limited fee sharing described here [to] be considered.

Because COSAC'S recommendation has never been adopted and § 491 remains unchanged, the anomaly continues. (Roy Simon called it an ambiguity.) NY SBA's Opinion 733 also recognized the potential for inconsistent decisions by the lower courts.

The problem is intensified by New York's failure to adopt the approach of the ABA in Model Rule 5.4(a)(3), which confirms that the profit-sharing arrangement must cover all non-lawyer employees and not "a" non-lawyer employee. We have recommended that the legislature amend Judiciary Law § 491 and that the Appellate Divisions amend Rule 5.4(a)(3) to make them consistent with each other and to separate the provisions relating to retirement from those relating to compensation. We renew our recommendation here. This is a problem that should not have happened and should not be allowed to continue.

The changes we would recommend are:

### **Judiciary Law § 491. Sharing of compensation by with attorneys prohibited**

1. It shall be unlawful for any lawyer, or any person employed by the lawyer, ~~partnership, corporation, or association to divide with or~~ receive from, or to agree, or to enter into an arrangement or agreement, to share to or divide a fee or other compensation earned by or paid to the lawyer by any client of the lawyer, or as the result of any one matter or group of matters in which the lawyer participates or renders any services. ~~With or receive from, any attorney at law or group of attorneys at law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney at law or any valuable consideration or reward, as~~

~~an inducement for placing, or in consideration of having placed, in the hands of such attorney at law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof.~~ But this section does not apply: (a) to a written profit-sharing plan in which all employees of the lawyer participate and which provides for bonuses or other compensation based on the employees' merit and/or a percentage of the profits of a lawyer from all matters and clients in a prescribed period of time; or (b) to an agreement between attorneys and counselors-at-law to divide between themselves the compensation to be received from one matter or a group of matters.

2. Any lawyer or other person violating any of the provisions of this section is guilty of a misdemeanor.

### **Rule 5.4(a)(3)**

A lawyer or law firm may: ~~compensate a nonlawyer employee or~~

- (i) Include a nonlawyer employees in a retirement plan based in whole or in part on a profit-sharing arrangement.
- (ii) Adopt a written profit-sharing plan in which all employees of the lawyer participate and which provides for bonuses or other compensation based on merit and/or a percentage of the profits of a lawyer from all matters and clients in a prescribed period of time, but not on an agreement between the lawyer and any employee to share in or divide a fee or other compensation earned by or paid to the lawyer by any client of the lawyer, or as the result of any one matter or group of matters in which the lawyer participates or renders any services.