



The State Bar *of California*

OPEN SESSION AGENDA ITEM 701 JULY 2019

DATE: **July 11, 2019**

TO: **Members, Board of Trustees**

FROM: **Justice Lee Edmon, Chair, Task Force on Access Through Innovation of Legal Services**

Randall Difuntorum, Program Manager, Office of Professional Competence

SUBJECT: **State Bar Task Force on Access Through Innovation of Legal Services Report:
Request to Circulate Tentative Recommendations for Public Comment**

EXECUTIVE SUMMARY

The Board of Trustees (Board) authorized the formation of a Task Force on Access Through Innovation of Legal Services (ATILS) to identify possible regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. ATILS has prepared tentative recommendations presented as options under consideration by the Task Force. ATILS' further evaluation and refinement of these recommendations would benefit from public input. This item requests that the Board authorize a 60-day public comment period and a public hearing on the tentative recommendations under consideration by ATILS.

BACKGROUND

The ATILS project executes a specific item in the State Bar's strategic plan.¹ Goal 4, Objective d, of the strategic plan provides that:

¹ At its July 20, 2018, meeting, the Board of Trustees (Board) received a consultant's [Legal Market Landscape Report](#) and the consideration of this report led to the Board's decision to form a special Task Force. Professor William Henderson prepared the report that, in part, observed that: "ethics rules...and the unauthorized practice of law... are the primary determinants of how the current legal market is structured...."

Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

The following ATILS Task Force charter was prepared by staff and approved by the Board at its meeting on September 14, 2018:

The Task Force on Access Through Innovation of Legal Services (“ATILS”) is charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. A Task Force report setting forth recommendations will be submitted to the Board of Trustees no later than December 31, 2019. Each Task Force recommendation should include an explanatory rationale that reflects a balance of the dual goals of public protection and increased access to justice.

In carrying out this assignment, the Task Force should do the following:

1. Review the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;
2. Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with nonlawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need; and
3. With a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.

ATILS is comprised of twenty-three members: eleven public members; ten lawyers; and two judges. Collectively, the expertise on ATILS includes but is not limited to knowledge and

experience in: legal services programs; artificial intelligence and “big data;” attorney professional responsibility and UPL; lawyer referral services; information technology and data security/privacy; online provision of legal information, document preparation and law-related services; paralegal and law office legal support services; and online dispute resolution. Two members of the Task Force are appointees nominated by the Legislature. Additionally, a liaison from the staff of the Supreme Court of California attends the ATILS meetings. State Bar assistance is provided by staff from the Office of Access & Inclusion, the Office of the Chief Trial Counsel, the Office of General Counsel, and the Office of Professional Competence.

Consistent with the charter’s three enumerated assignments, ATILS formed three subcommittees: an Unauthorized Practice of Law-Artificial Intelligence subcommittee (UPL/AI subcommittee); a Rules and Ethics Opinions subcommittee (Rules subcommittee); and, an Alternative Business Structures-Multidisciplinary Practice subcommittee (ABS/MDP subcommittee). ATILS has met five times and on each of these meeting dates both the entire Task Force and each subcommittee were scheduled to meet. In addition, in between these meetings, each subcommittee has held at least one additional meeting.

As part of its study, ATILS has received presentations² from persons knowledgeable in legal technology and access to justice (see table below).³

| SPEAKER | BRIEF BIOGRAPHICAL INFORMATION | MEETING DATE ⁴ |
|----------------------|--|---------------------------|
| IV Ashton | Founder and president of Houston AI | 12/5/2018 |
| William D. Henderson | Professor of law, editor of Legal Evolution, author of the Legal Market Landscape Report presented to the Board on July 20, 2018 | 12/5/2018 |
| Kevin E. Mohr | Professor of law, former COPRAC Chair, former Rules Revision Commission consultant, member of ATILS | 12/5/2018 |

² For the next ATILS meeting on August 9, 2019 in San Francisco, the following speakers are scheduled to make presentations: Colleen Cotter, Legal Aid Society of Cleveland, LSC grant recipient for technology in legal aid; Gillian Hadfield, Professor of Law and Professor of Strategic Management, University of Toronto; and Margaret Hagan, Director of the Legal Design Lab and a lecturer at Stanford University Institute of Design.

³ Written comments also were received from: Crispin Passmore (email dated February 26, 2019), a consultant with experience in the regulation of legal services in the United Kingdom; Cathy Sargent, (email dated March 26, 2019), Lawyers’ Mutual; Alex Guirguis (letter dated April 8, 2019), Off The Record, Inc.; Rilind Elezaj (email dated May 7, 2019), a search engine optimization specialist at Day Translations, Inc.; Jennifer McGlone (letter dated May 9, 2019), Director of Legal Affairs and Strategic Partnerships for Court Buddy, an online business offering unbundled legal services; and Genie Doi (email dated June 20, 2019), an immigration law practitioner. Copies of these comments are provided as Attachment B.

⁴ The ATILS meetings were webcast, including presentations of speakers, and the archived streams are available at [the State Bar website](#).

| SPEAKER | BRIEF BIOGRAPHICAL INFORMATION | MEETING DATE ⁴ |
|--------------------|---|---------------------------|
| Rebecca L.Sandefur | Faculty fellow and founder of the Access to Justice Initiative at the American Bar Foundation | 4/8/2019 |
| Alison Paul | Executive Director, Montana Legal Services Association | 5/13/2019 |
| Angie Wagenhals | Director of Pro Bono, Montana Legal Services Association | 5/13/2019 |

At the ATILS meeting on June 28, 2019, the Task Force voted to submit its tentative recommendations to the Board with a request that public comment and a public hearing be authorized.⁵

DISCUSSION

TENTATIVE NATURE OF THE RECOMMENDATIONS

The ATILS tentative recommendations are intended to achieve the dual goals of public protection and increased access to justice. The recommendations are primarily concept or policy positions proposed for certain key regulatory issues. As concept recommendations, some of the proposals for changes in the law or regulatory structures will require details to be considered by a subsequent implementation body.⁶ Other recommendations, such as changes to the Rules of Professional Conduct, might not require consideration by an implementation body.

The tentative recommendations fall into three categories: general recommendations; recommendations for specific exceptions to the current restrictions on UPL; and Rules of Professional Conduct recommendations. The recommendations represent concepts and proposals that are under consideration by ATILS as a menu of options. This means that there are some recommendations that represent competing or alternate approaches to certain issues or policies (for example there are two inconsistent proposals for amending rule 5.4 (“Financial and Similar Arrangements with Nonlawyers”) of the Rules of Professional Conduct.

⁵ The complete list of tentative recommendations of the Task Force on Access Through Innovation of Legal Services are provided as Attachment A.

⁶ The method used for conducting an implementation study is itself a topic for consideration that should be pursued after any policy recommendations are determined. As one example of possible methods, see “Independent Regulator of Legal Services Policy Outline,” by Gillian Hadfield and Lucy Ricca, presented at IAALS Making History: Unlocking Legal Regulation Workshop, April 2019, posted online at: <https://worldjusticeproject.org/sites/default/files/documents/Independent%20Regulator%20of%20Legal%20Services%20Policy%20Outline.pdf> (last accessed: July 2, 2019). See also, Utah Supreme Court notice dated March 4, 2019 regarding a “regulatory sandbox” to test innovative legal service models and delivery systems, posted online at: <https://www.utahbar.org/wp-content/uploads/2019/03/A-Move-Toward-Equal-Access-3.pdf> (last accessed: July 2, 2019).

Having deliberated on the pros and cons of each recommendation, ATILS determined that each recommendation has sufficient merit for seeking public comment. Upon consideration of the public comment, ATILS will further consider and refine these recommendations. In the anticipated final report and recommendations, some of the tentative recommendations may be eliminated or consolidated; however, alternate proposals for certain issues or policies might remain included where, for example, a choice between those recommendations requires more information that can only be accomplished by a subsequent implementation study or regulatory design process.

REQUEST FOR PUBLIC COMMENT:

Although public comment circulation is not required because a change in the law is not presently requested, ATILS requests authorization to circulate the recommendation for a 60-day public comment period. ATILS believes that input from consumers, legal service providers, technology experts and lawyers is important for evaluating the tentative recommendations. The planned outreach efforts by ATILS include: contacting legal services providers; consumers groups; and using networks and social media.⁷ In addition to written public comment, ATILS requests authorization to hold a public hearing to receive oral testimony on the tentative recommendations. Preliminary plans have been made to facilitate the holding of a hearing on August 10, 2019 in San Francisco. This year the ABA Annual Meeting is being held in San Francisco from August 8 – 13 and attendees from across the country (including regulators and other stakeholders) would have a convenient opportunity to provide input on the ATILS recommendations by testifying at the hearing.

FORMAT OF THE RECOMMENDATIONS

Each of the ATILS recommendations include a statement of the recommendation itself, a brief statement of what the recommendation is intended to accomplish, and a summary of the pros and cons considered by ATILS. Depending on the specific recommendation, there may be introductory background or supporting documents that provide observations or analysis by the members of the Task Force or staff. For example, the recommendation concerning the issue of defining the “practice of law” in California is supported by a summary of relevant California laws.

LIST OF TENTATIVE RECOMMENDATIONS

General Recommendations

- 1.0** - The Task Force does not recommend defining the practice of law.
- 1.1** - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

⁷ For example, representatives of: the Access to Justice Lab programs at Harvard Law School, the Future of Lawyering Committee of the Association of Professional Responsibility Lawyers (APRL), and the California Lawyers Association have agreed to review the tentative recommendations during the public comment period.

- 1.2** - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.
- 1.3** - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Recommendations for Specific Exceptions to the Current Restrictions on the UPL

- 2.0** - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.
- 2.1** - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.
- 2.2** - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.
- 2.3** - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of "artificial intelligence." Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.
- 2.4** - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.
- 2.5** - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality.
- 2.6** - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Rules of Professional Conduct Recommendations

- 3.0** - Adoption of a new Comment [1] to rule 1.1 "Competence" stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1

amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

- 3.2** - Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee sharing arrangement with a nonlawyer.
- 3.3** - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.
- 3.4** - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.

GENERAL RECOMMENDATIONS – EXPLANATIONS AND PROS AND CONS:

1.0 - The Task Force does not recommend defining the practice of law.

Background: California Business and Professions Code section 6125 prohibits the UPL in California. The statutory scheme, however, does not define what constitutes the "practice of law." The common definition of the term can be originally found in *People v. Merchants Protective Corp.* (1922) 189 Cal. 531 as "the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure" and has been understood in practice to include legal advice and transactional legal services as well. *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128. This definition has been applied in an individualized fact specific manner, giving it sufficient agility to address the numerous, and oftentimes ever changing, factual circumstances where attempts to bypass the UPL rules have resulted in actual harm, or the substantial potential for harm, to members of the California public.

The Task Force, in reviewing the above, agrees that the current approach is sound and in the public interest. Thus, the Task Force's recommendations do not involve a change to existing rules or statutes as to the definition of UPL.

What will this recommendation do? – In connection with other recommendations that propose new exceptions to UPL permitting certain activities to constitute a safe harbor from UPL violations to promote innovation and new delivery systems, this recommendation clarifies that the existing definition of the practice of law will remain subject to Supreme Court interpretation notwithstanding anticipated regulatory changes to the rules and statutes that are the basis of current UPL violations.

Pros: This approach seeks to continue the current common law approach evidenced through a large body of case law going back almost a century, which demonstrate that protection of the public requires an agile definition to address numerous ways for actual and potential harm from UPL practitioners. Other attempts to codify the definition of the practice of law have not been successful. Attempting to codify the definition of the practice of law is not necessary to accomplish the Task Force's goals.

The safe harbor recommendation provides certainty for those meeting the criteria of the safe harbor.

Cons: The lack of a precise definition of either the practice of law or the unauthorized practice of law creates uncertainty for the public and potential providers.

Selected Resources: Attachment C – January 17, 2019 ATILS Task Force memorandum on UPL and the rules and statutes governing the practice of law; and a table of state case law for those states that have acknowledged the difficulty involved in attempting to define the practice of law.

1.1 - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

What will this recommendation do? – This policy will seek changes in the laws governing UPL to create a new exception permitting both for profit and not for profit entities to engage in specified activities in order to increase innovation and availability of legal services.

Pros: As found in Professor Henderson's [Legal Market Landscape Report](#), existing rules and regulations are a disincentive for nonlegal entrepreneurs to enter the legal market. (Legal Market Landscape Report, at page 21.) One likely disincentive is the existing California statutory law and case law which is the basis for the prohibition against a corporation (that is not a registered law corporation) operating a business in California to profit from the practice of law. Abrogating this restriction also would likely ameliorate the existing law disincentive. Notwithstanding this long-standing UPL prohibition, there is some limited precedence in regulating for-profit activities by entities. The rules governing professional law corporations

regulate for profit activities. Similarly, the rules governing certified lawyer referral services regulate for profit activities. To a lesser extent, in the multijurisdictional practice context, a for profit corporation may choose to hire an out-of-state corporate counsel who is not a full-fledged State Bar licensee. In addition, the Task Force believes that individuals in the middle class have access to justice concerns that could be addressed by the activities of a new form of for-profit provider. The success of online businesses, such as LegalZoom, provides anecdotal support for this proposition. Furthermore, to the extent for profit entities may already be engaging in these types of practices, providing regulatory parameters will improve public protection and the administration of justice.

Cons: This recommendation would mark a fundamental change in the ability of corporations to practice law in contrast to certain nonprofits that are currently authorized to practice law in California.

Nonprofit corporations may seek registration under the State Bar's law corporation rules and other nonprofit activities are permitted under Supreme Court precedents but for profit business activity generally is limited to law corporations and limited liability partnerships registered with the State Bar. The ultimate strategic objective of the State Bar in conducting a study of regulatory reforms is to use technology to create access to justice for persons who presently cannot afford legal services under the current delivery systems (i.e., the traditional law firm model). Absent a thoughtful or directed regulatory framework, it is not clear that legal technology innovations developed in the for-profit sector would have a significant benefit to those impacted most by the justice gap.

Selected Resources: Attachment D – February 25, 2019 ATILS Task Force memorandum regarding expanding access to legal representation to consumers in civil matters involving critical human needs. Attachment E – Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access and Professionalism* (2016) Volume 29:1, The Georgetown Journal of Legal Ethics.

1.2 - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.

What will this recommendation do? – For those lawyers or law firms that might choose not to participate in reforms permitting fee sharing with nonlawyers or new UPL exceptions for regulated entities or individuals, this recommendation nevertheless encourages the use of technology to innovate and reduce costs in traditional law firm contexts that continue to offer consumers the option of obtaining legal and law-related services governed by the core principals of confidentiality, the attorney-client privilege, loyalty, competence, and independence of professional judgement.

Pros: The primacy of the judicial branch's regulation over the practice of law and the administration of justice militate in favor of retaining the current regulatory paradigm of a lawyer as client representative and advocate, as an officer of the legal system and as a person having special responsibilities for the quality of justice. Lawyers, both as individuals and as members of law firms (defined in rule 1.0.1(c) to include an association authorized to practice law) are obligated to increase public access to legal services through innovation and technology (see Persky, *Home Grown* (June 2019) ABA Journal) in the same manner that lawyers and law firms are encouraged to increase access to justice, directly and in association with nonlawyers, through voluntary pro bono public services (see rule 1.0, Comment [5]), through projects for the appointment of legal counsel to represent low-income persons in identified areas of critical need (See Government Code § 68651) and through nonprofit public benefit and advocacy corporations (See Corporations Code § 13406(b) and *Frye v. Tenderloin Housing Clinic Inc.* (2006) 38 Cal.4th 23). This recommendation is intended to promote lawyers working in association with nonlawyers in the provision of cost-efficient legal and non-legal services either under a modified rule patterned after ABA Model Rule 5.7 or another regulatory model that fosters investment and development in technology-driven delivery systems, including but not limited to on-line legal services, Alternative Legal Service Providers (ALSPs) and an expanded role for paraprofessionals and nonlawyer specialists. (See rule 5.3.) This recommendation complements consideration of any potential reforms that might involve new regulatory models, such as an entity regulation model where a corporation or other organization, rather than an individual, is authorized to practice law under adequate public protection requirements, with the goal to increase access to justice.

Cons: Traditional lawyer regulation has not proven to foster innovation in the delivery of legal services, especially the types of innovative delivery models that might flow from enhanced competition. The slow evolution of the rules governing lawyers, including, but not limited to, lawyer advertising and solicitation, fee sharing/fee splitting, and UPL, are examples of regulatory reforms failing to keep pace with changes in the legal services market, including changes in the market driven by evolving innovation and technology and related consumer behavior and preferences.

Selected Resources: Attachment F – January 7, 2019 ATILS Task Force memorandum in part addressing the issue of “Why Lawyers are Regulated Under the Judicial Branch.”

1.3 - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Background: A framework for measuring the impact of the Task Force's work is important and should be identified and articulated before implementation. The framework should allow benchmarks to be captured prior to making any changes to the system. See, for example, the

Drake Equation work that has been done at the Florida Justice Technology Center posted at: <https://floridajusticetechnologycenter.org/project/the-drake-equation/>.

What will this recommendation do? – In connection with the goal of the Task Force recommendations to increase access to justice, this recommendation will require a deliberate effort to identify and evaluate metrics that can assess the actual impact of any of the recommended reforms on access to legal services, including but not limited to the justice gap.

Pros: Absent a plan and methodology for capturing data and applying measures to evaluate the impact of regulatory changes, there would be no reliable way of knowing whether regulatory changes are having any positive effect on the access to justice crisis. Particularly where the providers to be regulated are developing technology-driven delivery systems, the regulator's plan and methodology for capturing data and applying quantitative and qualitative metrics should be considered by the providers at the time that the technology itself is being developed. In addition, the details of the regulatory changes should be thoughtfully considered to determine whether rules should require certain data collection and reporting, as long as such requirements do not unduly burden user privacy or data security.

Cons: Development of strategic data collection and metrics likely will involve the cost of retaining expert consultants and vendors who possess the resources and skills to design reasonable and realistic benchmarks. Similar costs should be anticipated for the ongoing periodic analysis of the data. Lastly, a culture of evaluation and improvement assumes that changes will be made based on what is learned and this can be very challenging in a regulatory environment.

RECOMMENDATIONS FOR SPECIFIC EXCEPTIONS TO THE CURRENT RESTRICTIONS ON UPL – EXPLANATIONS AND PROS AND CONS

These recommendations would add exceptions to the existing restrictions on UPL to permit provision of specified services by regulated persons or entities. Recommendations 2.0 and 2.1 are not limited to activities by an entity or by technology-driven delivery systems.

Recommendations 2.2–2.6 are limited to activities by an entity using a technology-driven delivery system. The Task Force is considering all of these options for regulatory reform with the goal of public protection and increasing access to legal services through innovation.

2.0 - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

Background: Unlike the entity regulation model contemplated by Recommendations 2.2–2.6, this recommendation describes a policy that would permit regulated nonlawyers to provide specified legal advice and services without a requirement that the delivery system be

technology-driven. For example, it would encompass nonlawyers practicing as limited licensed legal technicians⁸ similar to the nonlawyer provider program implemented in [Washington State](#).

Task Force Discussion Points on Options for Regulation: The Task Force engaged in an in-depth discussion about the ways in which individual nonlawyers who offer certain types of legal services might be regulated in order to ensure public protection. According to the research Professor Rebecca Sandefur presented to ATILS, members of society are faced with a growing number of legal problems, some with severe adverse legal consequences to their livelihood and well-being without even knowing they have a legal problem or that they may have legal recourse in the civil justice system. Her report shows that statistically middle income persons often turn to family members or to nonlawyers in their network of acquaintances for advice. They seldom involve lawyers or they do nothing and accept the consequences as bad luck or part of life. Lawyers are believed to be out of reach to many mainly because of cost. See:

http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf

In light of this, the Task Force reached a general consensus that allowing qualified nonlawyers to advise consumers on the existence of solutions for resolving legal problems in areas of critical need (e.g., housing, health and social services, domestic relations, domestic violence) could be justified as a limited exception to UPL. In light of this, the Task Force considered the following structural options for permitting nonlawyers to provide legal advice and services to consumers:

Option 1: Entity Regulation only

Under this option, if the Task Force (and ultimately the Court) were to implement an entity regulation model for the provision of legal services, quality control over nonlawyer individuals serving as employees of the regulated entities would be handled through the entity itself. The entity would be responsible for ensuring that its employees were complying with established standards for the provision of legal advice and services, and there would not be a parallel individual licensing scheme for nonlawyers. Under this option, nonlawyer individuals who seek to deliver limited legal services would have to establish an entity for this purpose.

⁸ Recommendation 2.0 is consistent with the conclusion reached in the Report of the State Bar of California Commission on Legal Technicians (July 1990) that, in part, states:

Issues of whether there is any role for those who are not attorneys to play in providing legal services directly to the public and, if so, the limits of that role, are obviously complex and susceptible to a variety of viewpoints. Public protection is, of course, paramount. At the same time, one may question whether the public is currently protected sufficiently under a system which results in some members seeking "unauthorized" assistance and encourages, or at least facilitates, unauthorized providers who operate outside the law.

Ultimately the Commission concluded that limited licensure of non-lawyers is a reasonable and worthwhile approach.

(Report of the State Bar of California Commission on Legal Technicians (July 1990), at p. 53. Copy is on file with the Office of Professional Competence.)

Option 2: Hybrid Entity/Individual Regulation

Under this option, a separate licensing scheme for nonlawyer individuals would be established, and nonlawyer individuals delivering the limited legal services under the regulatory scheme would be individually licensed under a separate licensing category from attorneys (like the nurse practitioner model). This could be administered by the State Bar, or another separate Board could be created to regulate these individuals. To the extent these new licensees also work for regulated entities, both the entity and the licensees would be separately regulated.

Option 3: Certification of Paraprofessionals/Exemption from UPL

Under this option, individuals who wish to serve as paraprofessionals could be certified upon a showing that they have met standards for training and qualification in the particular field. Once certified, these individuals would be permitted to provide limited legal advice and assistance as an exemption from the UPL statutes.

What will this recommendation do? – This recommendation recognizes that authorizing nonlawyers (such as limited license legal technicians) to provide specified legal advice and services is a category of UPL reform that merits exploration and should be considered as means for increasing access even if other recommendations would provide UPL exceptions for regulated entities or would allow fee sharing among lawyers and nonlawyers.

Pros: Expanding the number of individuals who may deliver certain legal services may increase access to those services by increasing supply, and also decreasing the price of those services. This recommendation would also balance that increased access with public protection by establishing a mechanism for regulating these nonlawyers that would ensure they are minimally competent to provide the services, and are accountable to consumers if they fall below established standards. Finally, clarifying the role nonlawyers may permissibly play will enable entities to more efficiently and with greater certainty deliver legal services to consumers.

Cons: This type of regulation requires a very delicate balance. Defining the permissible scope of practice for legal services delivered by nonlawyers may be challenging and could also lead to overregulation. Entities may be discouraged from employing nonlawyers to perform these tasks, or individuals may be hesitant to seek permission to deliver the limited services, if it is perceived that the qualifications are too onerous. On the other hand, if regulations are too lax, critical aspects of public protection, including the maintenance of client confidentiality and the avoidance of conflicts may be compromised.

2.1 - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

What will this recommendation do? – This policy will clarify the wide variety of regulated entities that would be permitted to provide specified legal, or law-related, advice and services, without a technology requirement (similar to Recommendation 2.0 that contemplates regulated individuals being permitted to render specified services), and that the particular regulations imposed would be tailored to the type of entity structure (e.g., lawyer and nonlawyer entity or 100 percent nonlawyer entity).⁹

Pros: In the legal industry, there is no existing definitive structure that has demonstrated an ability to spark technology-based innovation in delivering legal services to consumers. Experimentation with all options seems important for a thorough assessment, and regulatory reform methods, such as regulatory pilot programs, “sandbox” (<http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf>) or another controlled environment, may be considered. Different strategies for balancing public protection and innovation should be tailored to different structures. While a technology entity comprised of a majority of lawyer owners might be conducive to modest reforms that are similar to the regulation of a registered professional law corporation, that specific regulatory approach should not be considered as a “one-size fits all” paradigm for all possible structures and combinations.

Cons: A multiplicity of structures for different new providers that each have their own rules and regulations may result in consumer confusion and stifle consumer adoption of any one of those new market participants. Significant resources will be necessary to provide robust education and outreach to help consumers, as well as lawyers, understand the new regulatory structures and the public protection consequences of a consumer using, or a lawyer participating in, one or more of the new legal services providers. Multiplicity of practice structures may also challenge the regulator and the participants in determining which regulations apply to their practice structure. Even with the consumer interest being paramount, lawyers and judges should have a unique role in the delivery of legal services.

Selected Resources: Attachment G – June 18, 2019 Task Force memorandum of points discussed concerning various options for regulating entities or individuals permitted to render legal specified legal services.

⁹ By virtue of including this recommendation, ATILS is interpreting its charter as inclusive of recommendations for reform authorizing practice of law activities that do not inherently involve lawyer ownership or control. The charter’s inclusion of “ABS” and “MDP” structures led some ATILS members to wonder whether the charter implicitly limited the possible reforms to lawyer owned/controlled structures.

2.2 - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

What will this recommendation do? – This policy will change the laws governing UPL to create a new exception permitting specified legal advice and services to be provided by nonlawyer regulated entities that use technology to innovate and expand the delivery of legal services.

Pros: There are several pros to this approach: (1) members of the public have a way to identify providers that have been vetted by the regulating entity, removing their uncertainty in provider selection; (2) providing an exception to the UPL statute or rules will provide commercial certainty, thereby incentivizing innovation to increase and improve services to clients who fall within the access to justice gap; and (3) as proposed, this program will be self-funded and voluntary – thus, those who do not wish to participate and are comfortable operating under the existing definition of UPL without the safe harbor can continue to do so.

Cons: As with all technology, a new regulatory scheme will require development of new skill sets by the regulating entity that it may not currently possess, which will take time and money. The program will also require an initial set of seed funding in order to get the program up and running, so that the regulating entity is ready to go when the first wave of applicants submit their products. The regulatory scheme may stifle innovation.

2.3 - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of “artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

What will this recommendation do? – In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy provides that regulation will not be based on a definition of the term “artificial intelligence” because a definition is not needed and would likely be problematic given the evolving concept of artificial intelligence.

Pros: Artificial Intelligence “AI” is a rapidly evolving field without a specific definition or delineation. The term “AI” is often used as an umbrella/placeholder term in common usage further blurring its meaning. AI-driven systems may also incorporate human input or judgement. Defining AI for the recommendations could lead to unclear applicability as new technologies emerge and evolve. There is no logical reason to exclude technology solutions that may not be “AI driven.”

Cons: The limitation based on “legal technology” is vague, both in scope and in terms of the degree of technology/data required for qualification.

2.4 - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

What will this recommendation do? – In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require those entities and their technology to abide by specified standards intended to balance public protection, for example, by requiring standards similar to the legal profession’s core values of confidentiality, loyalty, and independence of professional judgment.

Pros: This recommendation protects the public by requiring equivalent protections across all legal services, whether delivered by technology or human effort. These ethical standards should enable exploration of technologies in all areas of law, with case-by-case review by an expert panel. The Regulator will be required to provide information and guidance to technology providers. Ethical uniformity of the standards will also avoid favoritism of one type of provider over another.

Cons: Establishing ethical standards may limit technology architectures and design patterns available to technology providers. (For example, a service could receive data from two parties in a matter who are adverse to each other and merge that data to create a mediation settlement. However, that utility would likely be precluded by the duty of loyalty owed to each party.) Additionally, these standards may also impose significant regulatory costs. Overregulation may stifle innovation. While the public protection functions remain paramount, due care should be given for reasonably applying these ethical duties to technology providers.

Selected Resources: Attachment H – Task force discussion draft overview of “Standards and Certification Process for Legal Technology Providers;” and Task Force’s discussion draft of “Possible Rules for Technology Providers.”

2.5 - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.

What will this recommendation do? - In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require changes in the law to ensure that those entities and their technology preserve the client’s information through confidentiality and an

evidentiary privilege notwithstanding the fact that communications might be exclusively with nonlawyers.¹⁰

Pros: Imposing privilege will promote candor in legal communications with these programs thereby increasing the competency of the legal service provided. Creating privilege encourages the use of the technology. By building in these protections, the end-user cannot waive the privilege, except as specified by law, thereby protecting the user.

Cons: Extending protections like privilege to communications with technology providers engaging in practice of law activities may impose additional costs or restrict available technology architectures. Expanding protections like attorney-client privilege and a lawyer's ethical duty of confidentiality to technology providers may frustrate the administration of justice by shielding information from legal proceedings. It is also unclear if the extension of privilege protections to technology providers engaging in the practice of law activities will be respected at the federal level or outside of California. This may present significant risk and uncertainty to clients as to whether other jurisdictions can compel disclosure of their sensitive legal communications. Addressing and litigating these issues may create additional costs to technology providers. Lastly, the recommendation may be overly restrictive, depending upon the particular legal services delivery system, and whether there is or should be an expectation of confidentiality or privilege.

2.6 - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

What will this recommendation do? - In connection with the proposed new exception to UPL permitting certain entities to provide specified legal advice or services through the use of technology-driven innovation, this policy will require those entities to pay a registration or certification fee to fund the regulatory agency tasked with oversight, including the concept of fee scaling.

Pros: This approach would eliminate or reduce cost barriers for provision of low- or no-cost services to the public, and allow funding of the regulatory process on an equitable basis. Allowing scaled fees based upon how much the product addresses the access to justice gap incentivizes innovation that specifically addresses the need, and provides a potential alternative avenue for large revenue/profit companies that may balk at the scaled fee structure.

Cons: Disparity in the fee structure may seem unfair to those on the higher end of the fee spectrum. Such a fee structure may involve subjective judgment. Close qualitative distinctions on fee thresholds may be difficult to administer.

¹⁰ See the statutory privilege that protects a client's communications with a certified lawyer referral service, Evidence Code sections 965 – 968.

Each of the following recommendations involves changes to the rules. In some instances, rule language is provided. Any provided language is for illustration and discussion purposes only. The Task Force's goal for these recommendations is to obtain input on the concept of the rule amendments and the policy changes underlying each proposal. The drafting of actual rule amendment language should follow the consideration of these policy issues.

RULES OF PROFESSIONAL CONDUCT RECOMMENDATIONS - EXPLANATIONS AND PROS AND CONS

3.0 - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

What will this recommendation do? – To help lawyers be mindful of how technology can enhance the delivery of legal services, this amendment to existing rule 1.1 (Competence) would add a Comment to the rule stating that attorneys have a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

Pros:

1. Including a Comment to the competence rule, rule 1.1, that recognizes a lawyer's duty to be familiar with and be competent in using relevant technology will alert lawyers to that duty and provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions can have a beneficial effect on a practice's efficiency, which can in turn lead to reduced costs that can be passed on to clients.
2. Although there are State Bar ethics opinions that have already embraced the substance of the proposed Comment, (see, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179), such opinions are merely persuasive. Further, those opinions, for the most part, rely on reasoning that depends on the interaction of various rules that can create confusion. A direct statement of the lawyer's duty is preferable in providing the aforementioned incentives for lawyers to familiarize themselves with, and adopt available legal technology.
3. A Comment is preferable to black letter text. There are many different kinds of knowledge and skills that serve as the foundation for a lawyer's competent delivery of legal services. For example, the [ABA MacCrate Report on Law Schools and the Profession \(1992\)](#) identified 10 separate skills and four values that every lawyer should possess. A black letter rule on competence should be more generally written, for example, it should identify the general components of competence, with comments included to flesh out the more generally-stated components. That is precisely what rule 1.1 does by defining “competence” in providing any legal service to mean that a lawyer applies “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Familiarity with the benefits and risks of using technology in providing legal

services is just one aspect of the knowledge and skills a lawyer must bring to bear in providing services to a client. The proposed Comment clarifies that.

4. Using a Comment to clarify the scope of a rule is preferable to the ABA Model Rule approach.¹¹ First, the Comment to ABA Model Rule 1.1 uses the word “should,” which is merely aspirational in nature. Such non-mandatory language is not appropriate in a disciplinary rule. Second, including a Comment similar to the Discussion section to former rule 3-110 is preferable to the Model Rule approach because such language could not be interpreted as adding to a lawyer’s duties, which is not a permitted use of a comment. Instead, using the syntax and general style of the former rule Discussion should be viewed as merely elucidating what the black letter of the rule encompasses. Explaining the scope of a rule’s application is an appropriate use of a comment. Moreover, that competence includes a familiarity with and appreciation of relevant technology is supported by several State Bar ethics opinions on this topic.
5. Importantly, a lawyer’s familiarity not only with the benefits of technology, but also its risks, (e.g., the risk of confidential client information being disclosed when using electronic means of communication) should also enhance client protection.
6. The addition of the Comment would bring California in line with a substantial majority of jurisdictions that have incorporated the ABA Model Rule Comment into their rules.

Cons:

1. Referring to the benefits and risks of technology use in the black letter text will more effectively educate lawyers on their duties when employing technology to provide legal services. Many lawyers will focus only on the black letter text and ignore the Comments.
2. It is possible that the Comment could have the opposite effect on lawyers and discourage them from adopting useful technology for fear of being held in breach of a duty if the technology is used incorrectly.

Selected Resources: Attachment I - Clean and redline versions of proposed new Comment [1] to rule 1.1 Competence.

¹¹ Model Rule 1.1, Cmt. [8], provides in relevant part: “To maintain the requisite knowledge and skill, a lawyer *should* keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology” (Emphasis added)

The Task Force is proposing two alternate rule recommendation changes to rule 5.4, Recommendations 3.1 and 3.2. The Task Force proposes that both versions of the rule 5.4 revisions be circulated for public comment in an effort to gauge public input on the narrow approach of Alternative 1 (Rec. 3.1) and the broader approach of Alternative 2 (Rec. 3.2). The Task Force is open to both approaches and welcomes input on both versions to help inform further consideration and preparation of a final ATILS report and recommendations.

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may share legal fees with a nonlawyer and may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

What will this recommendation do? – With the objective of removing some of the financial barriers to the collaboration of lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this amendment to rule 5.4 will expand the exception for fee sharing with a nonprofit organization and will permit a lawyer to practice in a firm in which a nonlawyer holds a financial interest so long as certain requirements are met.

Background: The proposed revisions to rule 5.4 Alternative 1 are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the Task Force efforts is the understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The Task Force reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant practice efficiency enhancements will increase access to legal services.

There are four proposed amendments. First, the Task Force recommends that current paragraph (b)(5), which permits a lawyer or law firm to share with or give court-awarded

fees to a nonprofit organization¹² be expanded to permit such sharing or giving of legal fees to a nonprofit organization regardless of whether the fees have been awarded by a tribunal. Second, the Task Force recommends the addition of a sixth exception to paragraph (a)'s fee sharing prohibition, new subparagraph (a)(6), which would permit fee sharing in a law firm in which nonlawyers hold a financial interest so long as the lawyer or law firm has complied with each of the requirements of paragraph (b). Paragraph (b), which replaces paragraph (b) of current rule 5.4, prohibits fee sharing in a law firm in which nonlawyers hold a financial interest unless each of the requirements set forth in subparagraphs (b)(1) through (b)(6) have been satisfied. Third, paragraph (d) is substantially revised to conform it to the changes made to paragraph (b). Fourth, new Comment [4] has been added, and current Comments [4] and [5] renumbered [5] and [6], respectively.

It is important to note that paragraph (b) is substantially more limiting than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to “assist” the firm’s lawyers in the firm’s sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature, e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.

Selected Resources: Attachment J – Clean and redline versions of proposed rule 5.4 [Alternative 1] and June 18, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 1] pros and cons.

3.2 - Adoption of an amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.

What will this recommendation do? – To promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this expansive revision of rule 5.4 would permit fee sharing with a nonlawyer, including compensation paid to a nonlawyer for client referrals, so long as the client provides informed written consent.

¹² The Task Force welcomes public comment on the issue of whether “nonprofit organization” ought to be limited to a 501(c)(3) corporation.

Background: The proposed revisions to rule 5.4 Alternative 2 are meant to create a major shift in rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in access to justice to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in access to justice. In fact, a recent survey has suggested that the access to justice gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing access to justice crisis.

The Task Force's charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is nonlawyer ownership or investment - a specific area the current rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the Task Force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to "ensure that the recommendations of the Task Force are focused on protecting the interest of the public." Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of access to justice needs go unmet. The statistics evidencing the failure to meet the access to justice needs are immense and well documented.

The Alternative 2 proposed rule revision invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. In establishing ATILS, the State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for access to justice.

Pros:

1. The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.
2. The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
3. The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
4. The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.

5. The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
6. The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

Cons:

1. There is no mechanism for regulating nonlawyers under this proposal because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.
2. Little or no concrete evidence that this proposal would increase access to justice.

Selected Resources: Attachment K – Clean and redline versions of proposed rule 5.4 [Alternative 2] and June 14, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 2] pros and cons.

3.3 - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

What will this recommendation do? – If a new rule is ultimately adopted, this recommendation could enhance access to justice in California by promoting the delivery of law related services by lawyers and law firms because the applicability of attorney professional responsibility standards to such services would be clarified by the new rule.

Background: The Task Force is not making a specific recommendation as to whether the Board should adopt a rule patterned on Model Rule 5.7. Rather, given that the State Bar's recent comprehensive rule revision project considered Model Rule 5.7 but did it include a version of that rule in the rules adopted by the Board and submitted to the Supreme Court, the Task Force is interested in public comment on the specific issue of a possible variation of Model Rule 5.7 that could promote innovation, particularly in the area of lawyer and nonlawyer delivery of law-related services.

Pros: A version of Model Rule 5.7 has the potential to promote innovation because the rule would likely include a definition of "law-related" services and clarify the duties of lawyers when such services are provided separately from any provision of "legal" services. The rule could prevent client confusion regarding the protections a client can expect when a lawyer—whether through the lawyer's law firm or a separate entity—provides ancillary law-related services. Such a rule could also require the lawyer to inform the client as to whether such law-related services would have any of the protections ordinarily present when legal services are being rendered, thus enhancing client protection.

Cons: California case law and advisory ethics opinions specifically address the duties of lawyers when providing law-related services and carefully account for differences in the facts and circumstances of particular matters. As a general proposition, this includes the longstanding policy that the authorities that govern attorney conduct in California apply to an attorney acting in a fiduciary relationship, regardless of whether the attorney is acting in his or her capacity as an attorney in a particular matter (see *Worth v. State Bar* (1976) 17 Cal.3d 337, 341). Any development of a new rule based on Model Rule 5.7 might present a challenge in codifying or changing the public protection presently found in California case law. In this area of attorney conduct, a one-size-fits-all rule might not afford adequate public protection.

Selected Resources: Attachment L – July 1, 2019 ATILS Task Force memorandum regarding background information in support of the ATILS recommendation to consider a new rule similar to ABA Model Rule 5.7. Attachment M – June 18, 2019 staff memorandum regarding ethics opinion related to ABA Model Rule 5.7 and currently circulating for public comment.

3.4 - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

What would this recommendation do? – If rule changes are ultimately adopted, this recommendation could improve public awareness and understanding of the legal dimensions of various issues, such as common landlord-tenant problems, because the advertising and solicitation rules would be revised in ways that foster innovative online delivery of legal services and the online marketing of such services.

Background: The Task Force is not making a specific recommendation as to whether the Board should adopt amendments to rules 7.1–7.5 (re advertising and solicitation). Rather, given that the ABA revised the Model Rules on advertising and solicitation after the Rules Revision Commission completed its comprehensive rule revision project and the Supreme Court had approved its recommended revisions to those rules, the Task Force is interested in public comment on the specific issue of whether the latest versions of these Model Rules, and versions recently adopted in other jurisdictions, offer possible changes that would enhance the free flow of accurate information to consumers of legal services. Such a result would be particularly relevant in light of anticipated new and future innovations in the delivery of legal services. The Task Force is also interested in public comment on the versions of the analogous rules proposed in the 2015 and 2016 reports of the Association of Professional Responsibility Lawyers, which were the impetus for the ABA's 2018 revisions to the Model Rules.

Pros: In part, the 2018 ABA revisions to the advertising rules: repeal rule 7.5 and move some of the content concerning firm names and letterhead to the Comments to rule 7.1; repeal rule 7.4

and move some of the content concerning fields of practice and specialization to rule 7.2 and the Comments to rule 7.2; and amend the concept of prohibited direct contact solicitations to focus on the concept of “live person-to-person contact” rather than the concept of “real-time electronic communication,” which had caused numerous application issues with respect to technological advances. Generally, these changes reduce and streamline the regulatory burden imposed on lawyer advertising. In particular, removing the restriction on real-time electronic communication could facilitate development of innovative online delivery systems that primarily utilize electronic communication for both the marketing and delivery of online legal services.

Cons: Considering changes to California’s attorney advertising rules at the present time would be premature. Up until November 1, 2018, the California advertising rules were not based on the ABA Model Rules. Because the change to rules based on the ABA Model Rules is new in California, implementation of further revisions could be disruptive of steps recently taken by lawyers and law firms to comply with the new California rules. Moreover, the California appellate courts and ethics opinion committees have not yet had an opportunity to interpret and apply the new rules. Interpretation of the new versions of the California rules by courts and ethics committees could be very informative of any further revisions.

Selected Resources: Attachment N – July 1, 2019 Task Force memorandum regarding background information in support of the ATILS recommendation to consider revised rules 7.1–7.5 similar to ABA Model Rules 7.1–7.3.

FISCAL/PERSONNEL IMPACT

There is no unbudgeted fiscal or personnel impact for authorizing the requested for public comment period. The cost of a public hearing will be absorbed by the Office of Professional Competence budget.

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 4. Support access to legal services for low-and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: d. Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

RECOMMENDATIONS

It is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees hereby authorizes a 60-day public comment period and a public hearing on the tentative recommendations of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes.

ATTACHMENT(S) LIST

- A. The complete list of tentative recommendations of the Task Force on Access Through Innovation of Legal Services.
- B. Full text of public comments received.
- C. January 17, 2019 ATILS Task Force memorandum on UPL and the rules and statutes governing the practice of law; and a table of state case law for those states that have acknowledged the difficulty involved in attempting to define the practice of law.
- D. February 25, 2019 ATILS Task Force memorandum regarding expanding access to legal representation to consumers in civil matters involving critical human needs.
- E. Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access and Professionalism* (2016) Volume 29:1, The Georgetown Journal of Legal Ethics.
- F. January 7, 2019 ATILS Task Force memorandum in part addressing the issue of "Why Lawyers are Regulated Under the Judicial Branch."

- G.** June 18, 2019 Task Force memorandum of points discussed concerning various options for regulating entities or individuals permitted to render legal specified legal services.
- H.** Task force discussion draft overview of “Standards and Certification Process for Legal Technology Providers;” and Task Force discussion draft of “Possible Rules for Technology Providers.”
- I.** Clean and redline versions of proposed new Comment [1] to rule 1.1 Competence.
- J.** Clean and redline versions of proposed rule 5.4 [Alternative 1] and June 18, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 1] pros and cons.
- K.** Clean and redline versions of proposed rule 5.4 [Alternative 2] and June 14, 2019 ATILS Task Force memorandum regarding proposed rule 5.4 [Alternative 2] pros and cons.
- L.** July 1, 2019 ATILS Task Force memorandum regarding background information in support of the ATILS recommendation to consider a new rule similar to ABA Model Rule 5.7.
- M.** June 18, 2019 staff memorandum regarding ethics opinion related to ABA Model Rule 5.7 and currently circulating for public comment.
- N.** July 1, 2019 Task Force memorandum regarding background information in support of the ATILS recommendation to consider revised rules 7.1–7.5 similar to ABA Model Rules 7.1–7.3.



The State Bar of California

**Task Force on Access Through
Innovation of Legal Services**

To: The Board of Trustees, State Bar of California
From: Task Force on Access Through Innovation of Legal Services
Date: July 2, 2019
Re: The Complete List of Tentative Recommendations

The Task Force on Access Through Innovation of Legal Services requests authorization to circulate for a 60-day public comment period the following tentative recommendations:

General Recommendations

- 1.0** - The task force does not recommend defining the practice of law.
- 1.1** - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.
- 1.2** - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.
- 1.3** - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Recommendations for Specific Exceptions to the Current Restrictions on the Unauthorized Practice of Law

- 2.0** - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.
- 2.1** - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.
- 2.2** - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.
- 2.3** - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of

“artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

- 2.4** - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.
- 2.5** - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.
- 2.6** - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Rules of Professional Conduct Recommendations

- 3.0** - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.
- 3.2** - Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.
- 3.3** - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

ATTACHMENT A

3.4 - Adoption of revised California Rules of Professional Conduct 7.1 - 7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1-7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.



The State Bar *of California*

**Task Force on Access Through
Innovation of Legal Services**

To: Board of Trustees
From: Task Force on Access Through Innovation of Legal Services
Date: July 2, 2019
Re: Public Comments Received by the Task Force

The following are public comments received by the Task Force as of June 27, 2019:

Public Comment Letters Received

- Crispin Passmore, Passmore (February 26, 2019)
- Cathy Sargent, Lawyers' Mutual (March 26, 2019)
- Alex Guirguis, Off The Record, Inc. (April 8, 2019)
- Rilind Eleza, Day Translations, Inc. (May 7, 2019)
- Jennifer McGlone, Court Buddy (May 9, 2019)
- Genie Doi, immigrate.LA (June 20, 2019)

ATTACHMENT B

From: ATILS
Sent: Tuesday, February 26, 2019 2:34 PM
To: McCurdy, Lauren
Subject: ATILS: Email Comment on Model Rule 5.7 and Law Related Services

ATILS Task Force Members:

See email comment below from Crispin Passmore on the topic of Model Rule 5.7 and law related services, received and shared by Bridget Gramme.

--

Lauren McCurdy | Program Supervisor
Office of Professional Competence
[The State Bar of California](#) | 180 Howard St. | San Francisco, CA 94105
415.538.2107 | lauren.mccurdy@calbar.ca.gov

Working to protect the public in support of the mission of the State Bar of California.

Please consider the environment before printing this email.

From: Bridget Gramme [mailto:bgramme@sandiego.edu]
Sent: Tuesday, February 26, 2019 11:39 AM
To: McCurdy, Lauren
Subject: Re: ATIL task force - Model Rule 5.7

"If I were at the meeting as a member of the public and allowed to speak (I like that you do that) the point I'd be making is that the paper is very focused on lawyers. It considers consumer protection only by saying that lawyers must in effect say to clients 'look, this service isn't ethical because I am not acting as a lawyer' but that isn't to my mind a real consideration of the consumer or public interest but one of dressing up protectionism as public interest/consumer protection; or suggesting that lawyers are the only ethical way to get law like service. It is almost designed to persuade clients not to go to a non lawyer service. To me a proper consideration of the consumer interest in this issue takes into account two different key points.

First is that too many individuals and small business don't get access to legal services. There is no point having perfect protection for those that make it if the unintended (or intended!) consequence is to keep the market small and exclude the majority of those that would benefit from advice and assistance. If a new rule encouraged as well as allowed firms to offer wider services then we might see new ways of reaching this currently excluded group. That is crucial to economic growth from small business as well as tackling poverty. There is great research in UK on small business legal need in particular. (see <https://research.legalservicesboard.org.uk/news/latest-research-18/> - The LSB commissioned research on small business legal need in 2013, then repeated in 2015 and 2017. This brings all of that together. The data is actually publicly available too but the reports are pretty comprehensive.)

Second is that it looks at MDPs only from the law firm end. Regulators and professions need to deal with whole market rather than just look at their narrow professional practice. So many businesses are in reality offering law like services in most of the

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world. Accountancy firms, small business advisors and trade unions are just obvious examples: they find a way around the rules in most jurisdictions where there is money at stake. The effect of that is that innovation happens to benefit of big clients with money but is never available to poorer individuals and smallest business. One issue in the rule making is to think about how a non-law firm would be allowed to have solicitors added to their services - rather than just how are law like services added to regulated law firms."

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Public Comment - Email Received from Cathy Sargent

From: Cathy Sargent [<mailto:sargentc@lawyersmutual.com>]

Sent: Tuesday, March 26, 2019 11:18 AM

To: Joanna Mendoza

Subject: Technology, the law, and access to justice

Dear Joanna,

I hope all is well with you and I wanted to pass along some information I gleaned while attending an Access to Justice Conference hosted primarily by incubators and access to justice professionals.

The 5th Annual Access to Justice Conference (AC2J2019) held in Utah this year, accentuated the *necessity of technology* and highlighted the many ways it can be used to make a practice more efficient, thus cost effective and available to the public who need low cost services. During the opening plenary session, **Supreme Court Justice Himonas** announced that Utah will be the first state to have “licensed” paralegals in 3 areas-family law, unlawful detainer and small claims—they have training at law schools, testing and licensing requirements. They are also first court to adopt “Pajama Court” as it has been affectionately named where it will be mandatory for small claims to be handled online 24/7 at anytime and anywhere. The parties are given 48 hours to resolve it and if not, an online facilitator is appointed to resolve it within 21 days. This project is in a 1- year trial and 43 other states are watching the outcome. If it is positive, they may adopt and are also looking to develop an interstate data base to share experience and knowledge with this program. *As far as technological innovation, they are borrowing from the FINTECH model and have a vision of asking tech companies to come to the Utah Bar/ Supreme Court, so they can evaluate and set parameters to protect the public and avoid the unauthorized practice of law (much like the current CA committee studying the same issues). The Utah Report on what this would look like is due June 2019.* Finally, they will have “Form Reform,” changing and simplifying all court forms to an 8th grade English standard level and putting them online for public use and access. A second Utah Supreme Court Justice Melissa Hart opened with “lawyers hate change” and believes that Incubators are the space that has and will continue to disrupt the practice of law in positive way. She believes that incubator law firms (who almost exclusively use technology) will be how future law firms operate. Her vision of disruption includes eliminating the billable hour, the Bar collecting hours of pro bono hours from lawyers at registration, and pricing transparency and predictability in the form of subscription fees.

Just and FYI as I know these issues are important to you and Utah may have some great ideas and thus eliminate the need to reinvent the wheel when it comes to how California may want to approach it.



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Joanna Mendoza and Task Force Members
Task Force on Access Through Innovation of Legal Services
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Ms. Mendoza and Task Force Members,

Thank you for giving us the opportunity to share our thoughts on the current rules and, further, for lending an ear to what we believe would be valuable changes to those rules. While I am not a lawyer, having worked in the industry for the last five years, I believe the proposed changes to the California Rules of Professional Conduct described below would benefit all parties involved - lawyers would benefit from increased demand for their services; consumers would benefit through increased transparency, greater choices and more competitive pricing; and innovators would benefit by being confident the technology they are building will not be held back by outdated rules.

Off The Record (OTR) is a service that connects consumers looking to fight a traffic ticket with a local, qualified lawyer. Currently, less than 5% of the yearly 41 million tickets are contested. My co-founders and I started OTR back in 2015 after receiving unfair traffic tickets in Oregon. We did not initially set out to build such a service, but it soon became obvious that fighting these tickets was almost impossible. We searched for lawyers the traditional way, but the majority didn't bother returning our calls. Those who did, quoted us upwards of \$1,000 to fight a simple, common speeding ticket. It dawned on us that something was broken.

Here we are, four years later, and we've helped tens of thousands of drivers successfully fight their traffic tickets in 30 states. We have a 97% success rate across the country and we've earned a stellar reputation, as our [Google](#) and [Facebook](#) reviews make obvious (4.5+ out of 5 stars with 1000+ reviews). In fact, we have earned more and better reviews than our largest law firm competitors and solo practitioners alike, despite some of them having been around decades. Beyond that, our entry into a market actually drives down the cost to contest a ticket. This is something we are particularly proud of as it puts legal services within the reach of more consumers. It also provides more business for the participating attorneys. We see these as very promising signs.

Growth for OTR starts with the consumer. With two of our founders coming from the world's most customer-centric company, Amazon, we've worked extremely hard to create a quality consumer experience that earns and keeps consumer trust. And yet, our business would not exist without attorneys. Consequently, we've worked hard to ensure that lawyers feel comfortable participating on the platform. Despite our best efforts with lawyers and the legal

sector, one of the main impediments to our continued growth is the rules governing how lawyers can interact with non-lawyers.

Rethinking the RPCs

We write today to provide some suggested changes to the California Rules of Professional Conduct that would simplify our interactions with lawyers, allow us to grow the number of lawyers we work with, and, ultimately, help more people get access to the legal services they need.

As technology builders and innovators first, and RPCs experts only by necessity, we're most focused on the rules that pose the greatest immediate impediments to growing our business. Therefore, beyond the specific changes we propose below, we acknowledge that (a) there are other rules that either must be changed to make them consistent with the changes we propose here, and (b) there are probably rules that impact less integral parts of our business which we haven't yet realized need to be changed. As a result, we've included links to some articles that we believe reflect additional changes that you should explore but for which we haven't had the need or resources to draft specific proposed changes.

New Proposed Model Rule 5.4

Add new definition:

Definition of LMS (included in rule 5.4 if not included elsewhere in the rules): A Legal Matching Service or LMS is a lawyer matching service, a lawyer referral service, or other similar organization that refers, connects, or matches consumers to lawyers or facilitates the creation of attorney-client relationships between consumers and lawyers. An LMS may or may not be owned by lawyers or non-lawyers in whole or in part and does not engage in the practice of law.

New Proposed Rule:

- (a) A lawyer or law firm may share fees with an LMS provided:
 - (1) A lawyer or law firm enters into a written** agreement with LMS to share the legal fees and prior to the consumer engaging with the LMS the consumer has consented in writing** to the fact that a division of fees will be made.
 - (3) The total fee charged to the consumer is not increased solely by reason of the agreement between the lawyer and the LMS to divide fees.
 - (4) The lawyer does not permit the LMS to influence the lawyer's professional judgment in the delivery of legal services to the consumer.

**Such agreement may be executed by any generally accepted commercial means, including electronically.

Lawyer Referral Service Rules

Given that the proposed changes above explicitly incorporate the notion of a lawyer referral service, we further recommend that the lawyer referral rules be stricken entirely. As [this post](#) describes in detail, one main reason for the emergence of lawyer referral services was a way for bar associations to get around the legal profession's pre-*Bates* prohibition on advertising. Today, thanks to *Bates*, lawyers can advertise. And, thanks to the internet, consumers can tap conventional wisdom, the wisdom of crowds, and/or sophisticated AI-driven algorithms to recommend lawyers.

Eliminating the lawyer referral service rules would also allow consumers of legal services to leverage the same transparency they enjoy in other sectors. Whether in transportation (via driver ratings on Uber or Lyft), hospitality (via hotel and host ratings on Expedia or AirBnB), restaurants (via Yelp), or any other service provider and product (via Google and/or Amazon), it's not just that consumers aren't deceived (risk of deception in the referral being another reason that lawyer referral services emerged) they find these services incredibly valuable.

Ethics Opinions

We also recommend that the California Bar rethink the practice of issuing ethics opinions. More often than not, these opinions act as a chill on innovation and, frankly, lawyer commercial speech. Time and time again lawyers have quoted these opinions or offered their varying interpretations of these opinions to us as an excuse for not trying new marketing methods or engaging with new innovative services. Note further that many of these opinions, which emerge from different states and yet interpret the same issues, result in entirely different conclusions. This creates a confusing and contradictory landscape for lawyers in states where the issue hasn't been formally addressed or for lawyers in a multijurisdictional practice situation (an increasingly common situation these days), services like ours that work across borders, or jurisdictions that are late to addressing the question and want to see consistency in what's been done. Finally, because of concerns that lawyers will rely upon these opinions ethics committees almost always adopt the most conservative interpretation in drafting and issuing ethics opinions. Expanding access will require that lawyers take some risks. The regular drumbeat of "no" from conservative ethics opinions chills those efforts.

Other Rule Changes

As we stated earlier, there are likely other rules that need reconsideration. Here are a few links to some articles that provide suggestions about rules and regulation that we support at least in spirit:

- [3 Ways to Tweak the Lawyer Regulatory Rules Now](#)
 - Rule 1.15 and Rule 5.4
- [5 Wishes for Attorney Regulation Reform](#)
- [On "Lawyer Referral Services"](#)
 - On lawyer referral service rules
- [The Awful No Good, Rule 7.2](#)
 - Rule 7.2
- [What Should Attorney Advertising Regulation Look Like?](#)

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- Rules 7.1, 7.2, 7.4, and 7.5.

We at OTR are just one of hundreds of such startups attempting to bridge the gap between the demand for legal services and lawyers willing to help. As such, we want to thank the Task Force again for this opportunity to share our thoughts about the evolution of legal regulation. With technology rapidly changing the face of the world we know, and the California Bar stepping into a brave new era with its recent changes, now is the time to reexamine how technology and regulation can go hand in hand to help lawyers build strong businesses, protect consumers, and expand access to the legal system. We at OTR are excited by these times and by the efforts of this Task Force. We stand at the ready to answer any questions about this letter or assist in any way that we can.

Thank You,

Alex Guirguis

Alex Guirguis
Chief Executive Officer
Off The Record, Inc.

Public Comment - Email Received from Rilind Eleza

From: Rilind Elezaj [<mailto:relezaj@daytranslations.com>]

Sent: Tuesday, May 7, 2019 8:04 AM

To: Mccurdy, Lauren

Subject: How Technology will Transform Legal Services

Dear Lauren,

Technology has touched every facet of life and work, from businesses and industries to services, such as legal services, healthcare, communication, education and more.

Lawyers and attorneys are able to serve their clients better and faster because they can optimize the processes and workflows at every stage of delivery or service. Digital transformation helps them to be more flexible and offer more value to their clients, improving their business impact and revenue.

I noticed your page on [how technology affects legal services](#) and I wanted to suggest the following article of ours: <https://www.daytranslations.com/blog/2019/04/future-legal-services-technology-transforms-industry-13794/>

I think your readers would like to understand our key points and how technology will transform legal services.

Let me know if you could share this with your readers.

Best,
Rilind Elezaj

*Rilind Elezaj
Human Powered Translations
Day Translations, Inc.
New York | Houston | Washington D.C. | Dubai*



May 9, 2019

VIA EMAIL

Lori Gonzalez and Task Force Members
Task Force on Access Through Innovation of Legal Services
The State Bar of California
180 Howard Street
San Francisco, CA 94105
lori@raynacorp.com

Re: Court Buddy's Attorney And Client Insights For Task Force

Dear Lori,

Thank you for your time promoting the important work that the Task Force on Access Through Innovation of Legal Services (the “Task Force”) is doing to address the access to justice gap that affects all Californians. We appreciate that the Task Force is considering what pilot programs might be adopted, and whether and how changes in the Rules of Professional Conduct and related guidelines, regulations, or opinions might foster innovation in, and expansion of, the delivery of legal services, especially to the vast majority of middle-class Californians who have legal needs that go unmet.

I. Court Buddy: Leveraging Technology To Effectively Address The Access To Justice Gap.

Court Buddy is a private, venture capital-backed company founded by attorneys for attorneys with the express intent of leveraging technology to address access to justice issues. We consider attorneys the “gold standard” and are on a mission to help as many people as possible find an attorney when they need one, regardless of their financial situation.

We understand that there are exponentially more California residents in need of legal services than there are California attorneys available to meet their legal needs, but we start by providing an automated online matching service for potential clients looking

for legal services. We have found that the automated matching of potential clients with attorneys practicing in their area of need is an invaluable first step.

Then, we utilize our platform, apps and tech features to help the attorneys and clients work together in a way that alleviates some of the biggest pain points for middle-class consumers of legal services. Our market research reveals that consumers are most concerned with: (1) finding attorneys available to help them, (2) overall cost and steep retainers, (3) the need for transparency and predictability when purchasing legal services, and (4) the need for targeted advice or services.

We also address many of the issues solo practitioners, small firm attorneys, and law school graduates in their first few years of practice face when they are looking to grow their practices. Year-over-year, solo practitioners and small firm attorneys identify their biggest issues as: (1) finding qualified, paying clients, (2) minimizing time spent on business development and administrative tasks such as fee-collecting, and (3) the need to free up more time to focus solely on the practice of law.

We launched Court Buddy in 2015 to build on the reforms being adopted as more and more state bars across the country recognized the importance of allowing their attorneys to unbundle legal services to better serve the needs of the chronically underserved middle-class. California's current Rules 1.2(b) and 1.5(e) of the Rules of Professional Conduct embody these reform efforts. Our attorney-members offer unbundled legal services at flat rates. For example, an attorney makes a single appearance in court on behalf of a party to a divorce or custody proceeding, drafts a motion or pleading to be filed in court, or writes a letter to challenge the withholding of a social security benefit for an agreed-upon, upfront flat fee.

Since our launch in 2015, we have helped tens of thousands of middle-class consumers and thousands of small firm and solo attorneys find each other and work together. The growth on our platform has been explosive, and we think that the Task Force understands why: the statistics show that there is a huge unmet need for legal services. To even begin to close the gap, attorneys must be allowed to leverage their time (which is a scarce resource) to reach as many everyday families, individuals, and small business owners as possible.

We're proud that our work in the access to justice space has been recognized. Court Buddy is the proud recipient of the ABA's 2017 Louis M. Brown Select Award for Legal Access. Court Buddy was also cited as a valuable legal technology tool available to consumers in Professor Rebecca L. Sandefur's Study which she presented to the Task Force at its April 8, 2019 meeting. (See "Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies," Rebecca L. Sandefur et al., 2019, Appendix B, at #43). We have been recognized by Above the Law as a "Top 3 Legal Tech Company in

America." We have also won a Webby Award in the category of law, and an Envolve Award for entrepreneurship, which is sponsored by former President Barack Obama. Court Buddy has been cited in many articles and college textbooks and is frequently invited to guest lecture at colleges, universities, and law schools across the country on access to justice issues, diversity and entrepreneurship.

II. A Legal Technology Company's Perspective On Bridging The Access To Justice Gap.

We've been asked what sets Court Buddy apart. We firmly believe that the major thing that differentiates us is that we listen to our customers and build our platform, apps and tech features around their needs. We meet both attorneys' and middle-class consumers' needs by investing unlimited amounts of time understanding them. We respect, and therefore do not interfere with, our attorney-members' independent professional judgment and we let them determine whether they will work with any particular client, whether a limited scope representation is reasonable, and if so, what work needs to be done, and how to break the work down into discrete tasks for the clients to understand and agree to fund. In tech parlance, we have adopted a user-centric model.

We've also taken great care to build a business model that takes the ABA's Model Rules of Professional Conduct and the corresponding state Rules of Professional Responsibility and ethics opinions into account. Additionally, Court Buddy actively works with the ABA, state and local bar associations to ensure that Court Buddy remains aware of any updates to applicable ethics rules. Court Buddy is proud to have been asked to partner with certain state and local bar associations because we provide more services to our attorney-members than the bar associations have the resources to provide through their call-in, next-in-line "referral hotlines."

Court Buddy's goal is to leverage the power of technology and innovation to achieve a greater social good. Court Buddy's platform can reach all 170,044 active, licensed attorneys in California and all of the 29.87 million adult Californians who have access to either a smartphone or computer. While Court Buddy cannot single-handedly solve the access to justice problem in California, Court Buddy is certainly doing all that it can to address the problem.

III. Understanding The Access To Justice Gap In California.

A. Population Demographics Indicate That California Has One Of The Worst Access To Justice Problems In The Nation.

Statistically, one would expect California's access to justice gap to be one of the worst in the nation. This is because California is the most populous state in the nation,

with 40.02 million residents, 29.87 million adults, and only 170,044 attorneys. (Appendix A). The population data shows that there is only one licensed, active California attorney for every 175 adult residents. (*Id.*).

Nationwide studies show that between 67%-80% of adults have a legal problem every 12 to 18 months. (“Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study,” Rebecca L. Sandefur, 2014, Executive Summary). Most everyday Americans do not formally consult with attorneys about those problems, either because they do not understand that they have a legal right, or because the barriers to finding and working with an attorney are too high. Time and again, middle-class Americans self-help. Currently, less than 15% of those with a legal problem even consult an attorney, let alone take their problem to court, with or without legal representation. (*Id.*)

Applying these nationwide statistics to our state would mean that every active, licensed California attorney has approximately 140 unserved, potential adult clients every 12-18 months. (Appendix A). If 67-80% of the 29.87 million adult California residents have a legal problem every 12-18 months, if only about 15% of those people take their issue to court, and if a smaller fraction of those litigants find an attorney, then that means that at least 17-20.3 million Californians will have an unmet legal need this year. To put that number into perspective, that number is greater than the entire population of New York, the fourth most populous state. (*Id.*).

California has the largest access to justice gap in the nation in terms of the size of its unserved client population (i.e., its unmet need). (Appendix A). In terms of the ratio of available attorneys to potential adult clients, it ranks eleventh out of all of the states. (Appendix B). As will be discussed further below, Court Buddy considers California’s access to justice problem to be among the most severe in the nation and tracks and treats it accordingly. Indeed, we moved our corporate headquarters to California in 2017 in part to be on the ground here.

As we’re certain the Task Force is aware, the California State Bar has commissioned a Justice Gap Study for the end of 2019. But there is little doubt that the problem is real and dire. The California Judicial Council for Public Affairs tracks and publishes the following statistics:

- More than 4.3 million Californians per year come to civil court unrepresented;
- 90% of family law cases have at least one party without an attorney;
- 90% of tenants in eviction cases represent themselves;
- More than 75% of civil cases have at least one party without an attorney; and

- More than 1.2 million Californians visit civil court self-help centers a year.

This has led the California Judiciary to conclude that “[f]or millions of Californians, self-help centers aren’t the last resort to get legal help—they’re the only resort.” (California Courts, Judicial Council for Public Affairs, “Court Users Flock to Self-Help Centers,” April 19, 2017). Court Buddy improves the situation by matching middle-class California residents with licensed California attorneys, so that fewer people in need are left to self-help.

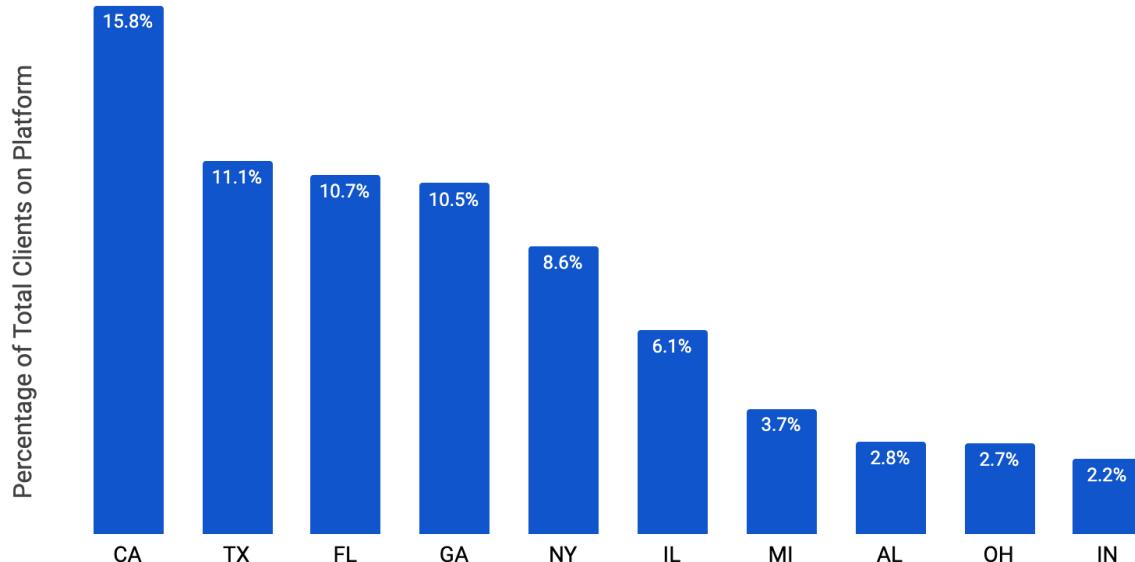
B. Court Buddy’s Data Substantiates The Severity Of The Problem And Its Impact On Middle-Class Families And Individuals.

Court Buddy’s internal data substantiates that there is a severe access to justice problem in California. California is one of our busiest states in terms of active potential clients on our platform, underscoring the magnitude of the middle-class demand for legal services in our state. Appendices C-D demonstrate the outsized demand for legal services from California residents. The following graph also shows the relative need of California residents to residents of other states with the largest access to justice gaps. The need of California residents clearly dwarfs that of residents of even the other most populous states.

Our daily experience with assisting tens of thousands of people puts a real human face on the problem that cannot be reduced to mere percentages: every single day, middle-class Californians turn to Court Buddy to look for attorneys for help for themselves, for their families, and for their businesses.

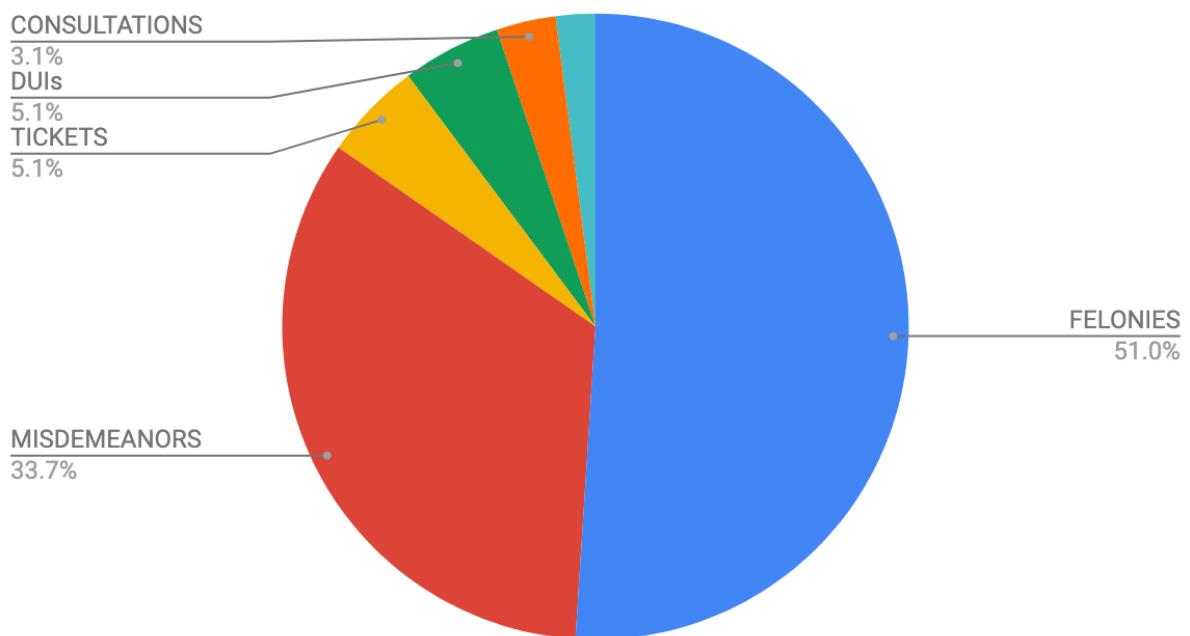
Top Ten States With the Most Clients Seeking Attorneys

Court Buddy’s Platform

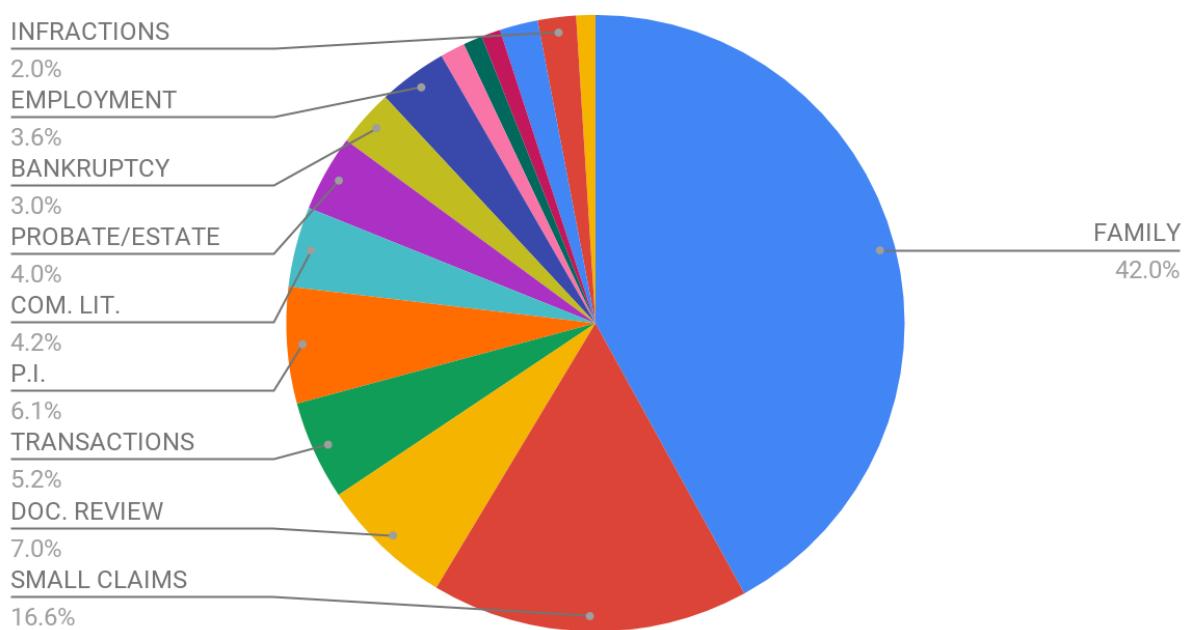


We are often asked about the types of legal services requested by potential clients. Currently, Californians use Court Buddy to request the following services:

Criminal Law Services Requested



Civil Law Services Requested



Attorneys who offer unbundled legal services in these areas make a real, measurable impact helping everyday Californians while growing their practices. There is a win-win value proposition here, where more California attorneys can find paying clients in the chronically underserved middle-class market and “do well by doing good.”

IV. The Data Shows That There Are Attorneys Looking To Grow Their Practices Who Are Available To Serve The Middle-Class Market.

While on paper, California’s 170,044 active, licensed attorneys should have more clients than they can handle from amongst their 40.02 million fellow Californians, in actuality, there are segments of the profession that are underemployed. Indeed, Court Buddy is often used by solo practitioners, small firm attorneys, and law school graduates in their first few years of practice who are looking to grow their practices and who have the most rate flexibility.

There is an underemployment problem among young lawyers nationwide. The ABA’s Section on Legal Education commissioned a post-Great Recession study and reported that, for respondents who graduated from law school during and after the time period between 2009 and 2017, only 44% indicated that they had a “good job” waiting for them when they graduated. Of the post-Great Recession law school graduates, 26% said that it took them more than one year to find a “good job.” (ABA Journal, “Less than Half of Recent Law Grads. Had Good Jobs after Graduation, Report Says,” Stephanie Francis Ward, Jan 16, 2018). According to the Summary Report prepared by the ABA, around 86% of recent law graduates were employed 10 months after graduation, but only 62% of U.S. law school graduates were employed in full-time, long-term positions that required a law degree. (*Id.*)

U.S. News & World Reports estimates that about half of California’s law school graduates overall secure full-time, long-term legal jobs 10 months after graduation. Those numbers fall well below the national average of 62%, and the two-thirds of graduates from law schools in New York and Pennsylvania who find law jobs according to the data. This can be partially explained by the fact that, despite California being the most populous state, it doesn’t have the same concentration of big law firms that are found in New York and Washington, D.C.

Court Buddy was founded by attorneys for attorneys. We are well aware of the challenges that attorneys face when they are just starting out and when they are at a point in their careers when they must focus on building their practices. We value our attorney-members and strive to serve their needs as well as those of the middle-class consumers. We are well aware that solo practitioners and small firm attorneys identify the same issues as their biggest challenges year-over-year: (1) acquiring new clients, (2) the amount of time spent on business development and administrative tasks such as

fee collecting, and (3) limited time to practice law. (2019 State of U.S. Small Law Firms Report, Thomson Reuters). More than 73% of the attorneys surveyed identified their biggest challenge as “acquiring new clients.” (*Id.*) Their persistent lament is that they spend only about half of their days (less than 60%) practicing law. (*Id.*) We are changing that.

Court Buddy offers solo and small firm attorneys, which may also consist of younger lawyers, the opportunity to create a profile identifying their areas of practice and to then, through Court Buddy’s automated matching algorithms, be matched with potential clients who can pay for those services. It affords the attorneys access to potential clients they wouldn’t otherwise have access to, which frees them up to spend more time doing what they most want to do: practice law.

V. What Can The Task Force Do To Help?

Our relatively unique perspective as an innovative, venture capital-backed technology company with an emphasis on tackling access to justice issues has given us insights into the size of the problem, how technology can be leveraged to help, and how certain ethics rules --- or at times, the perception of the rules by attorneys who do not realize the rules have been reformed --- can inhibit growth, investment, and innovation in the space. We respectfully submit these observations to the Task Force.

We speak to hundreds of attorneys every day, and our experience reveals that the ethics rules --- and even, attorneys’ perceptions of the rules --- can serve as an unnecessary barrier to entry. Attorneys remain concerned about whether they are even allowed to unbundle their services to meet the needs of middle-class consumers, or whether they are even allowed to use a wholly-automated online platform to be matched with potential clients. Our Attorney Success team fields daily inquiries from attorneys who want to grow their practices and sign up, but who are entirely unaware of the changes to the rules to allow reasonable, limited scope representations, or to allow the payment of reasonable advertising fees for truthful advertising. Although we are actively educating and informing our attorneys about how to best navigate the various ethics rules, the Task Force’s assistance would be welcomed.

The rules do matter: relaxing the regulatory environment and giving legal professionals more flexibility in how they deliver legal services absolutely increases their ability to work with middle-class consumers in a way that better serves the needs of those clients. Court Buddy would respectfully ask the Task Force to keep the following in mind when it undertakes its important work of considering revisions to the current ethics rules and related regulations: (1) strict regulations can inhibit growth, investment and innovation, and (2) good rules are not necessarily strict rules, rather, good rules are

rules that serve underlying policy objectives without undue unintended consequences for the consumer.

We appreciate the great care the California State Bar took in revising and adopting the Rules of Professional Responsibility that went into effect November 1, 2018; however, there is room for further positive change. Specifically, we ask the Task Force to consider whether: (1) it can promote attorney awareness of those rules that have already been reformed to afford attorneys greater flexibility in delivering legal services, and (2) whether certain of the remaining rules are even necessary and/or should be further revised or clarified.

From our perspective, the following reforms have been crucial to improving the situation on the ground and are already showing positive results; our wish is that California attorneys were better aware of them:

- **Unbundling:** Cal. Rules of Prof. Conduct, Rule 1.2(b) allows attorneys to “limit the scope of the representation if the limitation is reasonable under the circumstances” and provided the client “gives informed consent.” This reform to the rules is extremely important for facilitating the delivery of legal services to middle-class consumers, though in our experience attorneys remain unfamiliar with it. Promotion of the reform would be helpful.
- **Flat Fees for Legal Services:** Cal. Rules of Prof. Conduct, Rule 1.5(e) expressly allows attorneys to “make an agreement for, charge, or collect a flat fee for specified legal services,” which may be paid “in advance of the lawyer providing those services.” In our experience, this rule is extremely important because it encourages attorneys to work with middle-class consumers for flat rates while providing attorneys with a mechanism to ensure they will be paid for their efforts, and it should also be promoted.
- **Attorney Advertising and Solicitation Rules:** Cal. Rules of Professional Conduct, Rules 7.1-7.5 have been reformed to expressly permit attorneys to “advertise through any written, recorded or electronic means of communication, including public media,” and to “pay the reasonable costs of advertisements or communications permitted by this rule.” (Rule 7.2(a)-(b)(1)). Of course attorneys must take care that all communications about themselves, their firms and the legal services they offer are not false or misleading, but the rules clearly allow them to create truthful profiles, post them online and in “public media.” Our wish is that these rules were better understood, because electronic advertising is a primary way to reach middle-class consumers.

From our perspective, the following rules could be clarified, reformed or outright removed as indicated, to promote further innovation in the access to justice space:

- **Confidentiality:** Cal. Rules of Prof. Conduct, Rule 1.6 imposes the duty to protect client confidences, which the entire profession agrees serves crucial consumer protection objectives by encouraging clients to seek legal help and be forthcoming with their attorneys; however, Court Buddy would ask the Task Force to consider whether a formal Comment that attorneys' duties of confidentiality are not breached (and applicable privileges and protections are not waived) when they communicate with clients via the various secure, electronic methods so common today (i.e. email, secured online messaging platforms, or text messaging) would promote better attorney-client communication.
- **Safekeeping of Client Funds:** Cal. Rules of Prof. Conduct, Rule 1.15 provides that attorneys must safekeep client funds received by them either in their IOLTA accounts ("trust accounts") or operating accounts, as appropriate. Flat fees paid in advance may be deposited directly into attorneys' operating accounts, subject to certain conditions. Rule 1.15(b)(1)-(2). At Court Buddy, we provide an extra level of consumer protection by securely holding client funds until they agree to fund the tasks posted by their attorneys and authorize payment. The secured funds are then released by the consumer and placed directly into the attorney's account of choice, with the attorney receiving their entire legal fee. Even with these consumer protections in place, we find that attorneys are still hesitant to agree to unbundle their services and take upfront, flat fees. Clarification on this point or further promotion of the rules would be helpful.
- **Financial Arrangements with Non-Lawyers and UPL Concerns:** Cal. Rules of Prof. Conduct, Rule 5.4 prohibits an attorney from "shar[ing] legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law" pursuant to certain exceptions, including that attorneys may "pay a prescribed registration, referral or other fee to a lawyer referral service." While Court Buddy takes pains to make clear to all consumers that we do not provide legal services, are not a lawyer referral service, and do not fee-share with our attorney-members (as we are funded by membership fees and client-side administrative fees), we are left wondering, what purpose is served by the Rule, is it necessary, and is it reasonably tailored? Or, does attempting to regulate "lawyer referral services" unduly discourage attorneys from utilizing any service other than their nonprofit state bar "referral hotlines," which are chronically underfunded, and do not have the resources or capacities of for-profit wholly-automated matching platforms such as Court Buddy? As we understand it, the purpose of Rule 5.4 is the same as Rule 5.5 prohibiting the unauthorized

practice of law, but any innovation in the access to justice space will necessarily involve opening up the channels of delivering legal services to consumers. Especially when the attorneys themselves are the ones performing the legal services, these concerns seem misplaced and the rules an undue hindrance.

We would respectfully request that the Task Force consider whether the consumer protection purposes of the foregoing rules are being well-served, or rather, whether they are unduly inhibiting attorneys' ability to find and assist middle-class clients and therefore unwittingly and unintentionally contributing to the access to justice problem. Our position on the foregoing unauthorized practice of law rules is the latter.

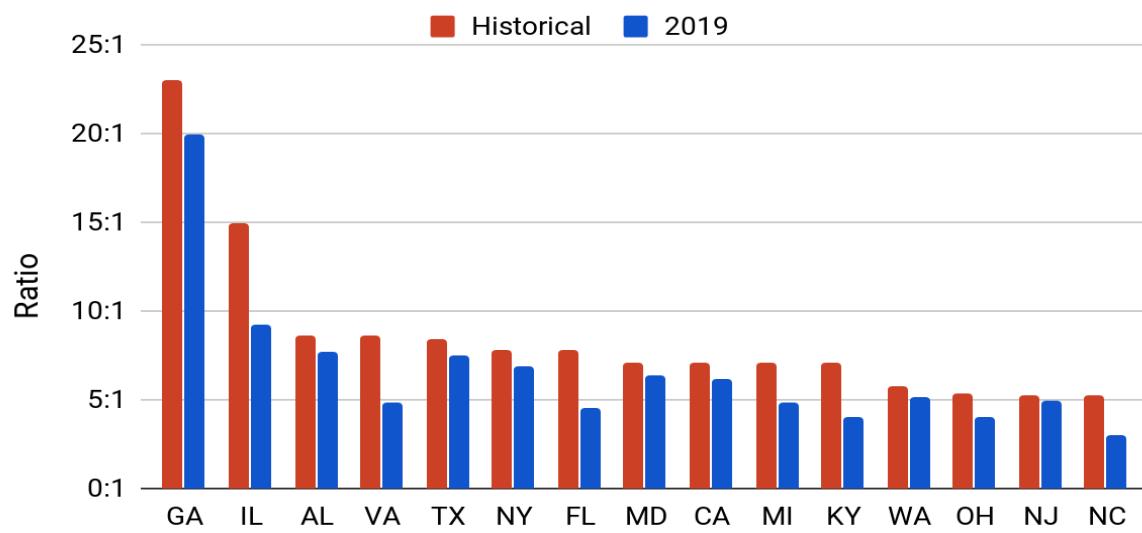
VI. Making An Impact: Improvement Within The Court Buddy Platform.

Court Buddy leverages our venture-capital backing, our team's time, energy, and expertise, and technology's ability to scale in an effort to consistently innovate and make a real impact. The encouraging thing that we can report to the Task Force is that our efforts are paying off. We are proud that the world with Court Buddy looks better than the world without Court Buddy.

The following graph shows the improvement in the ratio of new potential clients to available attorneys within the Court Buddy platform for the states with the biggest access to justice issues. (See Appendices E-F). A "lower" ratio is better, and the ratios are clearly trending that way within the Court Buddy platform over time. By way of example, while California still has the largest unmet client need in absolute terms, our efforts are improving the number of licensed California attorneys available to meet that need within the platform. The historic ratio was 7.1:1, or 7.1 potential clients for every available attorney. Currently (for the first quarter of 2019) it is 6.2:1., or 6.2 potential clients per attorney. There is across-the-board improvement:

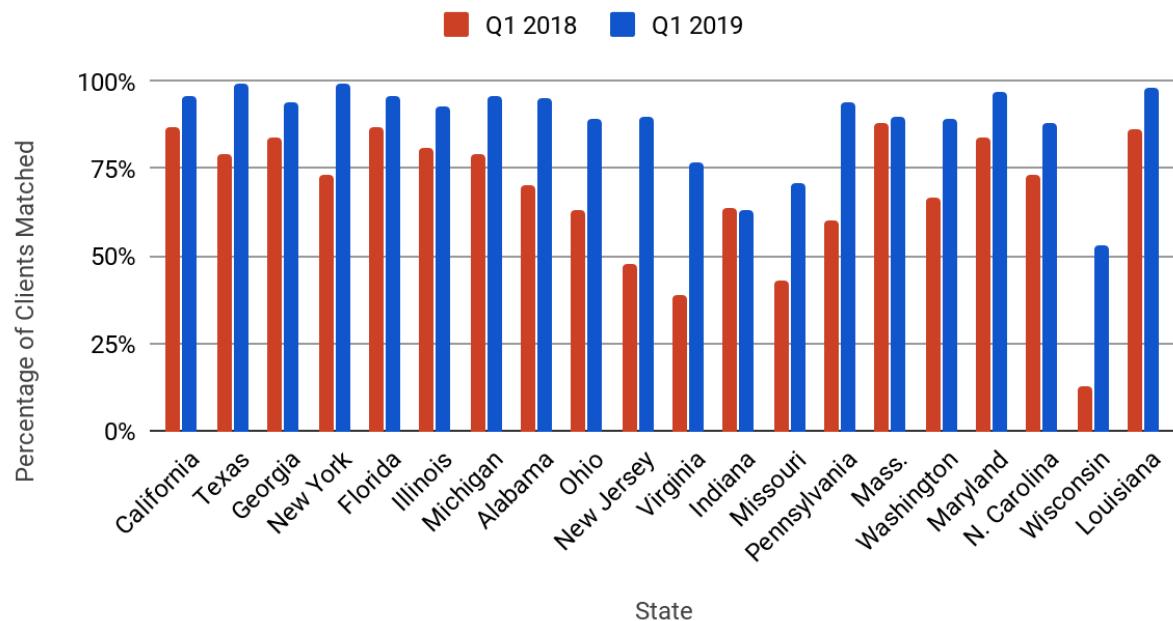
Ratio of Clients to Available Attorneys

Court Buddy's Platform



Similarly, the number of matches being made through the Court Buddy platform is improving over time. The following graph shows the improvement in the match rate for potential clients within the Court Buddy platform for the most problematic access to justice states. (See Appendices G-H). By way of example, California's match rate is currently at 96%, and has improved more than 10% from the first quarter of 2018 to the first quarter of 2019. (Appendix G). As the Task Force can see, there is across-the-board improvement in the number of matches being made between potential clients seeking help and available attorneys:

Improving Match Rates, Q1 2018 - Q1 2019

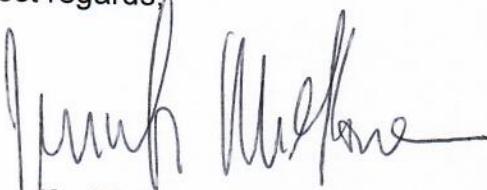


We are happy to report that the situation on the ground is improving nationwide. We have a long way to go, but investment and initiative, coupled with the ability to bring our value proposition to the various state bars and their attorney-members, has helped. We're encouraged, in California and elsewhere.

ATTACHMENT B

Again, Court Buddy thanks the Task Force's attention to these important matters. If we can be of any further help or a resource for the Task Force --- given our robust database and our on the ground perspective tackling access to justice issues in California and across the country --- please do not hesitate to let us know.

Best regards,

A handwritten signature in black ink, appearing to read "Jennifer McGlone".

Jennifer McGlone, Esq.
Director of Legal Affairs and Strategic Partnerships, Court Buddy

Cc: Jojo Roque, Head of Business Marketing, Court Buddy (via email)

APPENDIX A

**States with Anticipated Severe Access to Justice Gaps,
Ranked from Most Populous State to Less Populous State**

| Rank | State | Population (2019) | Adults (2019) | Attorneys (2018 ABA report) | Ratio of Attorneys to Population | Ratio of Attorneys to Adults | Ratio of Attorneys to Potential Clients, Per Year |
|------|-------------|-------------------|---------------|-----------------------------|----------------------------------|------------------------------|---|
| 1 | California | 40.02 M | 29.87 M | 170,044 | 1:235 | 1:175 | 1:140 |
| 2 | Texas | 29.1 M | 20.2 M | 90,485 | 1:321 | 1:223 | 1:178 |
| 3 | Florida | 21.64 M | 16.17 M | 78,244 | 1:276 | 1:206 | 1:164 |
| 4 | New York | 19.54 M | 15.6 M | 177,035 | 1:110 | 1:88 | 1:70 |
| 5 | Penn. | 12.84 M | 10.1 M | 50,112 | 1:256 | 1:201 | 1:160 |
| 6 | Illinois | 12.73 M | 9.9 M | 63,422 | 1:200 | 1:156 | 1:124 |
| 7 | Ohio | 11.73 M | 8.98 M | 37,873 | 1:309 | 1:237 | 1:189 |
| 8 | Georgia | 10.66 M | 7.7 M | 32,802 | 1:325 | 1:234 | 1:187 |
| 9 | N. Carolina | 10.5 M | 7.76 M | 24,087 | 1:435 | 1:322 | 1:257 |
| 10 | Michigan | 10.02 M | 7.72 M | 36,362 | 1:275 | 1:212 | 1:169 |
| 11 | New Jersey | 9.03 M | 6.96 M | 41,021 | 1:220 | 1:169 | 1:135 |
| 12 | Virginia | 8.58 M | 6.5 M | 24,208 | 1:354 | 1:268 | 1:214 |
| 13 | Wash. | 7.65 M | 5.55 M | 26,057 | 1:293 | 1:212 | 1:170 |
| 14 | Arizona | 7.23 M | 5.19 M | 18,500 | 1:390 | 1:280 | 1:224 |
| 15 | Mass. | 6.93 M | 5.4 M | 42,925 | 1:161 | 1:125 | 1:100 |

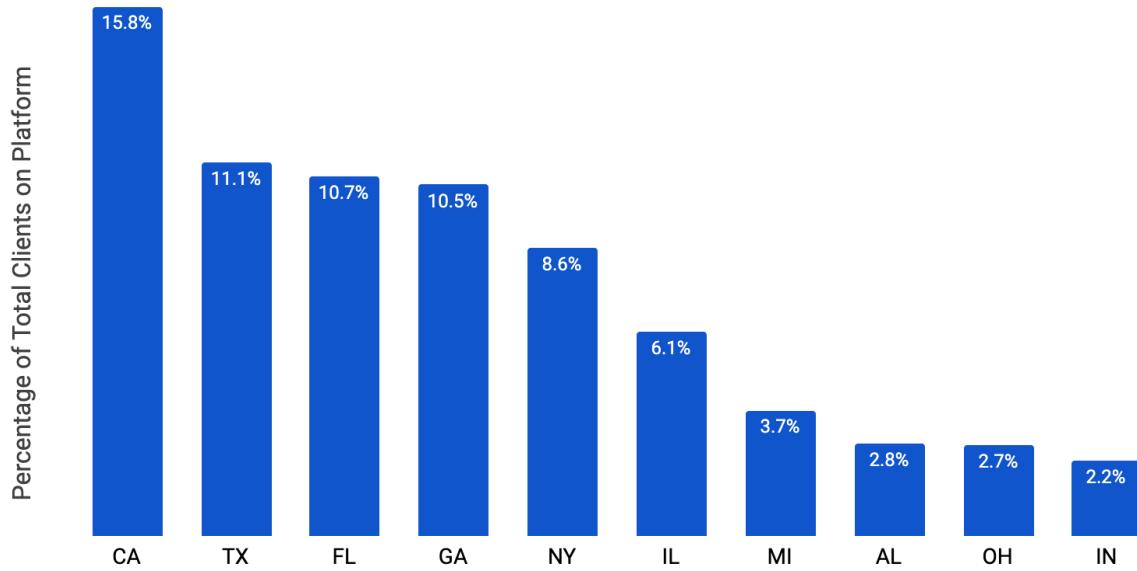
APPENDIX B

**States With Anticipated Severe Access to Justice Gaps,
Ranked by Ratio of Attorneys to Potential Adult Clients in Population**

| Rank | State | Adult Population | Number of Attorneys | Ratio of Attorneys to Adults | Ratio of Attorneys to Potential Clients, Per Year |
|-----------|-------------------|----------------------|---------------------|------------------------------|---|
| 1 | N. Carolina | 7.76 Million | 24,087 | 1:322 | 1:257 |
| 2 | Arizona | 5.19 Million | 18,500 | 1:280 | 1:224 |
| 3 | Virginia | 6.5 Million | 24,208 | 1:268 | 1:214 |
| 4 | Ohio | 8.98 Million | 37,873 | 1:237 | 1:189 |
| 5 | Georgia | 7.7 Million | 32,802 | 1:234 | 1:187 |
| 6 | Texas | 20.2 Million | 90,485 | 1:223 | 1:178 |
| 7 | Washington | 5.55 Million | 26,057 | 1:212 | 1:170 |
| 8 | Michigan | 7.72 Million | 36,362 | 1:212 | 1:169 |
| 9 | Florida | 16.17 Million | 78,244 | 1:206 | 1:164 |
| 10 | Pennsylvania | 10.1 Million | 50,112 | 1:201 | 1:160 |
| 11 | California | 29.87 Million | 170,044 | 1:175 | 1:140 |
| 12 | New Jersey | 6.96 Million | 41,021 | 1:169 | 1:135 |
| 13 | Illinois | 9.9 Million | 63,422 | 1:156 | 1:124 |
| 14 | Mass. | 5.4 Million | 42,925 | 1:125 | 1:100 |
| 15 | New York | 15.6 Million | 177,035 | 1:88 | 1:70 |

APPENDIX C**States with Demonstrated, Severe Access to Justice Gaps,
Measured by Number of Active Clients with Legal Needs in Court Buddy Platform**

| Rank | State | % of Active Clients in Court Buddy Platform |
|------|-------------------|---|
| 1 | California | 16.7% |
| 2 | Texas | 12% |
| 3 | Florida | 11.5% |
| 4 | Georgia | 11% |
| 5 | New York | 8.33% |
| 6 | Illinois | 6.6 % |
| 7 | Michigan | 3.7% |
| 8 | Alabama | 2.55% |
| 9 | Ohio | 2.5% |
| 10 | Massachusetts | 2.2% |
| 11 | New Jersey | 1.9% |
| 12 | Virginia | 1.8% |
| 13 | Maryland | 1.7% |
| 14 | Indiana | 1.7% |
| 15 | Pennsylvania | 1.6% |
| 16 | Washington | 1.5% |
| 17 | Louisiana | 1.45% |
| 18 | North Carolina | 1.4% |
| 19 | Missouri | 1.15% |
| 20 | Kentucky | 1% |

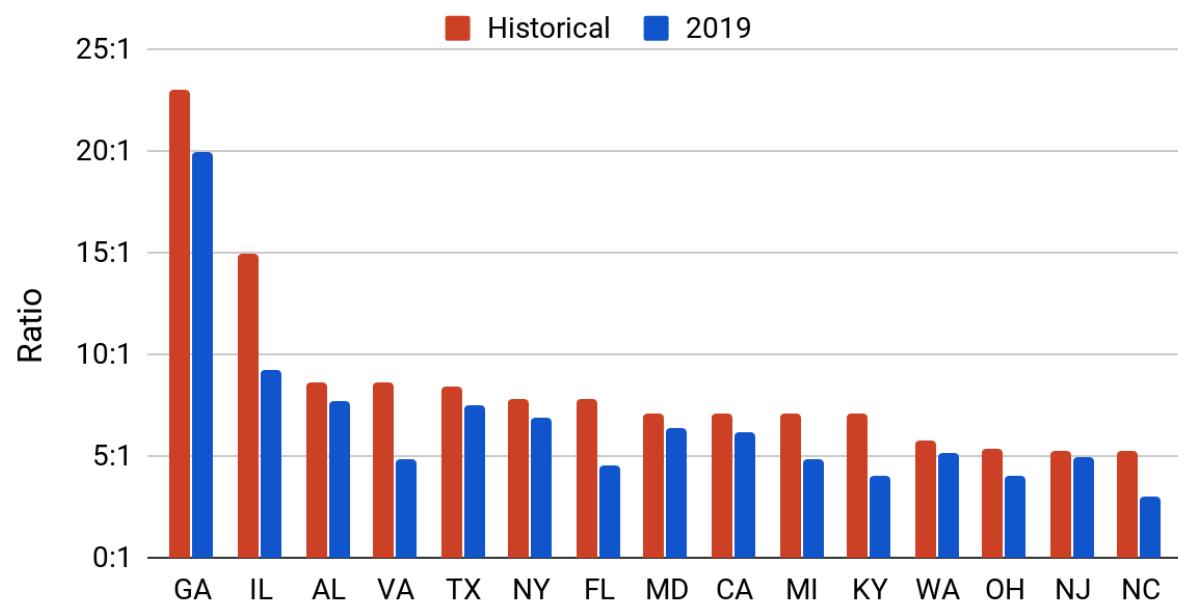
APPENDIX D**Confronting the Most Severe Access to Justice Gaps,
Measured by Number of Active Clients with Legal Needs in Court Buddy Platform****Top Ten States With the Most Clients Seeking Attorneys
Court Buddy's Platform**

APPENDIX E**Confronting the Most Severe Access to Justice Gaps,
By Ratio of Available Attorneys to New Clients in Court Buddy Platform**

| Rank | State | Ratio of Attorneys to Clients, Historically | Ratio of Attorneys to New Clients (Q1, 2019) |
|----------|-------------------|---|--|
| 1 | Georgia | 1:23 | 1:20 |
| 2 | Illinois | 1:15 | 1:9.2 |
| 3 | Alabama | 1:8.6 | 1:7.7 |
| 4 | Virginia | 1:8.6 | 1:4.8 |
| 5 | Texas | 1:8.4 | 1:7.5 |
| 6 | New York | 1:7.8 | 1:6.9 |
| 7 | Florida | 1:7.8 | 1:4.5 |
| 8 | Maryland | 1:7.1 | 1:6.4 |
| 9 | California | 1:7.1 | 1:6.2 |
| 10 | Michigan | 1:7.1 | 1:4.8 |
| 11 | Kentucky | 1:7.1 | 1:4 |
| 12 | Washington | 1:5.8 | 1:5.2 |
| 13 | Ohio | 1:5.4 | 1:4 |
| 14 | New Jersey | 1:5.3 | 1:5 |
| 15 | North Carolina | 1:5.3 | 1:3 |

APPENDIX F**Addressing the Most Severe Access to Justice Gaps Within the Court Buddy Platform,
Improving the Ratio of New Clients to Available Attorneys Over Time****Ratio of Clients to Available Attorneys**

Court Buddy's Platform



APPENDIX G

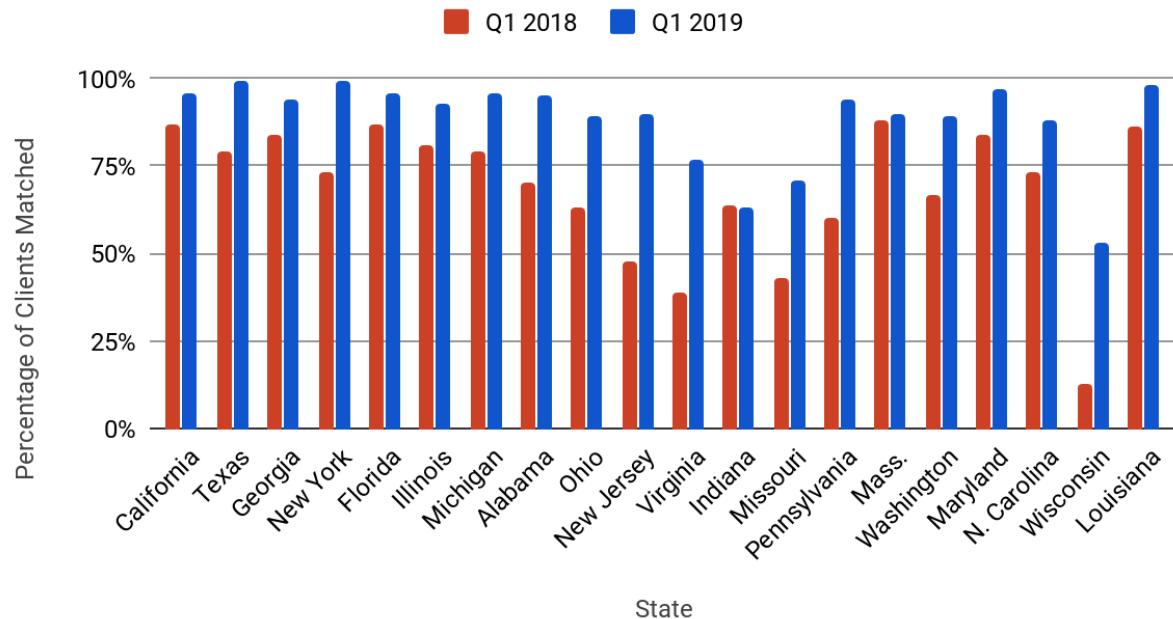
**Improving the Match Rate for Clients Within the Court Buddy Platform Over Time,
Ranked by States with the Largest Number of Active Clients with Legal Needs (See
Appendix C)**

| Rank | State | % of Successful Attorney-Client Matches On Court Buddy Platform: Q1, 2018 | % of Successful Attorney-Client Matches On Court Buddy Platform: Q1, 2019 | Improvement of Attorney-Client Match Rate, Q1 2018 to Q1 2019 |
|------|--------------|---|---|---|
| 1 | California | 87% | 96% | 10% |
| 2 | Texas | 79% | 99% | 24% |
| 3 | Florida | 87% | 96% | 11% |
| 4 | Georgia | 84% | 94% | 12% |
| 5 | New York | 73% | 99% | 37% |
| 6 | Illinois | 81% | 93% | 15% |
| 7 | Michigan | 79% | 96% | 21% |
| 8 | Alabama | 70% | 95% | 35% |
| 9 | Ohio | 63% | 89% | 42% |
| 10 | Mass. | 88% | 90% | 2% |
| 11 | New Jersey | 48% | 90% | 89% |
| 12 | Virginia | 39% | 77% | 96% |
| 13 | Maryland | 84% | 97% | 15% |
| 14 | Indiana | 64% | 63% | 0% |
| 15 | Pennsylvania | 60% | 94% | 57% |
| 16 | Washington | 67% | 89% | 33% |
| 17 | Louisiana | 86% | 98% | 13% |
| 18 | N. Carolina | 73% | 88% | 21% |
| 19 | Missouri | 43% | 71% | 63% |
| 20 | Kentucky | 38% | 83% | 122% |

APPENDIX H

**Improving the Match Rate for Clients Within the Court Buddy Platform Over Time,
Considering States with the Largest Number of Active Clients with Legal Needs**

Improving Match Rates, Q1 2018 - Q1 2019



Public Comment Letter From Ms. Doi

From: Genie Doi [<mailto:genie@immigrate.la>]

Sent: Thursday, June 20, 2019 10:04 AM

To: ATILS

Subject: Public Comment

Hello,

I would like to comment on the ATILS Rec. B. 2. - "Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/ approved entities to use technology-driven delivery systems to engage in authorized practice of law activities."

Disclaimer: I was unable to read the committee's reasoning for this recommendation because there is a problem with the PDF (see attached screenshot).

I love technology and leverage it where possible in my legal practice to create efficiency, lower costs, and thereby increase access to legal representation in my community. However, speaking on behalf of the immigration bar, allowing for-profit non-lawyers to provide immigration services would absolutely result in predatory consumer practices and life-altering outcomes for foreign nationals seeking to immigrate to the United States legally.

1. Tech entrepreneurs are by nature risk takers. They will encourage clients to take risks with the promise of high reward and low cost. Lawyers, by contrast, are trained to mitigate risk and will advise accordingly. In today's political environment, filing risky immigration applications can lead to life-altering consequences like deportation.
2. Tech entrepreneurs are primarily motivated by revenue generation. As non-lawyers, they owe no legal duty to the client. Lawyers, by contrast, are bound by law to act in the best interest of their client.
3. Legaltech startups may be here today, gone tomorrow—immigration applications sometimes take years to conclude. Lawyers, by contrast, are legally required to see a client through the end of each matter.
4. Immigrants are already a vulnerable community that is being preyed upon by bad actors engaged in the unauthorized practice of law.

Case in point: <https://www.passright.com/>

- for-profit non-lawyer engaged in lots of marketing and advertising that incorporates legal advice
- the business apparently partners with lawyers, but the marketing of this service violates attorney advertising rules
- not only that, the advertising makes dubious claims about obtaining green cards in 3 weeks
- consumers are clearly confused as to whether the founder is a lawyer or not

I used to consult for this company and had to end my ties due to their refusal to abide by ethical standards.

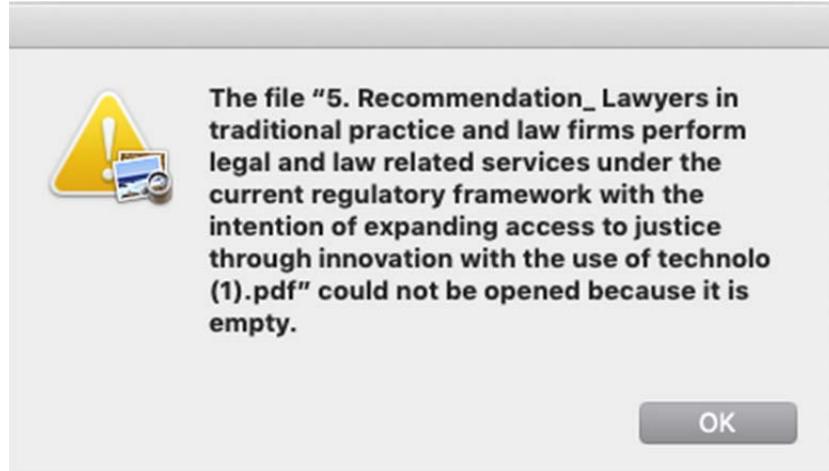
Thank you for your consideration.

ATTACHMENT B

Genie Doi
Attorney at Law
424.254.7972



[twitter](#) | [linkedin](#) | [facebook](#) | [instagram](#)





The State Bar of California

Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Artificial Intelligence and
Unauthorized Practice of Law

To: Subcommittee on Artificial Intelligence and Unauthorized Practice of Law
From: Judge Wendy Chang
Date: January 7, 2019
Re: Unauthorized Practice of Law

1. What constitutes the practice of law in California?

Section 6125 of the State Bar Act states:

No person shall practice law in California unless the person is an active member of the State Bar.

(Business & Professions Code §6125); Cal. Rule Prof. Conduct Rule 5.5(b). State Bar members are also prohibited from aiding or abetting any person or entity in the unauthorized practice of law. Cal. Rule Prof. Conduct Rule 5.5(b); *Geibel v. State Bar* (1938) 11 Cal.2d 412, 419-423.

The State Bar Act, however, does not define “practice of law.” In *Birbrower, Montalbano, Condon & Frank v. Sup. Crt.* (1998) 17 Cal.4th 119, the California Supreme Court reaffirmed the long standing definition of the practice of law as ““the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.”” *Id.* at 128 (quoting *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535). The *Birbrower* court went on to note that the *Merchants* definition included “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation,” *Id.*, and then cited with approval *People v. Ring* (1937) 26 Cal. App. 2d Supp. 768, 771-772 (noting that the fact that the State Bar Act was adopted by the Legislature in 1927 using the term “practice of law” without defining it evidenced the “obvious and inescapable” conclusion that “in doing so, it accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court that it had a sufficiently definite meaning to need no further definition. The definition above quoted from *People v. Merchants Protective Corp.* has been approved and accepted in the subsequent California decisions [citations], and must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term ‘practice of law’”.

2a. What conduct is prohibited in California as the unauthorized practice of law?

The performance of the following acts by a person who was not an active member of the State Bar of California would be unauthorized practice of law in California:

- 1) Appear in a court of justice
 - a. Physical appearances in court
 - b. Appearances on pleadings filed in court
 - c. Signing of pleadings filed in court
 - d. Depositions taken in pending litigation

- 2) Giving legal advice
- 3) Drafting legal instruments
- 4) Holding oneself out as an attorney
- 5) Negotiating and settling claims on behalf of another
- 6) Serving as a private arbitrator, mediator or other dispute resolution neutral

Merchants, supra, 189 Cal. At 535; Vapnek, Tuft, Peck and Wiener, *California Practice Guide, Professional Responsibility* (The Rutter Guide 2017) at 1:181 et seq. and citations contained therein.

Due to the language of §6125 being drafted in terms of a “person”, California law only permits a non-attorney natural person to represent themselves before a Court. *Roddis v. Strong* (1967) 250 Cal. App. 2d 304, 311. An entity, on the other hand, must be represented by a lawyer and may not represent itself (either directly or through a non-lawyer agent) in litigation, as such an act would be the unauthorized practice of law. *See e.g. Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101 (corporation); *Albion River Watershed Protection Ass'n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37 (unincorporated association); *Aulisio v. Bancroft* (2014) 230 Cal. App. 4th 1518, 1519-20 (trustee for trust).

Out of state law firms must register with the State Bar of California to be eligible to practice law in California. Business and Professions Code sections 6174 and 6174.5 (limited liability partnerships); Business and Professions Code sections 6160 (law corporations).

2b. In addition, what are the penalties or consequences for unlawful practice in California?

For the UPL perpetrator, potential consequences for engaging in UPL can include:

- 1) Criminal penalties. Business & Professions Code §6126 (misdemeanor that could result in jail time).
- 2) Monetary awards connected with criminal prosecutions. Business & Professions Code §6126.6.
- 3) Contempt of Court. Business & Professions Code §6127.
- 4) Civil lawsuits. UPL can also result in civil lawsuits for equitable relief under the unfair competition law of Business & Professions Code §17200 and civil damages under tort theories, *Olson v. Cohen* (2003) 106 Cal. App. 4th 1209, including potential punitive damages.
- 5) The inability to recover fees. *Birbrower, supra*, 17 Cal.4th at 140.
- 6) Imposition of sanctions. *Albion River Watershed Protection Ass'n v. Department of Forestry & Fire Protection* (1993) 20 Cal. App. 4th 34, 37

For those affected by UPL, potential consequences can include:

- 1) Nullification of civil judgments obtained against a party represented by an unlicensed person. *Russell v. Dopp* (1995) 36 Cal. App. 4th 765, 775.

- 2) The overturning of criminal conviction of defendant represented by unlicensed person, as a deprivation of the defendant's constitutional right to counsel. *In re Johnson* (1992) 1Cal.4th 689, 700-701.
3. What practice of law conduct is permitted for persons who are not State Bar licensees?
 - a. Exceptions to §6125:

Notwithstanding the broad language of Business & Professions Code §6125, California law recognizes limited exceptions to §6125's prohibition, allowing unlicensed persons to practice law in California under "narrowly drawn"¹ circumstances:

- 1) By Consent of the Trial Judge. *In re McCue* (1930) 211 Cal. 57, 67.
- 2) Pro Hac Vice. Cal. Rules of Court, rule 9.40.
- 3) Appearance by military counsel. Cal. Rules of Court, rule 9.41.
- 4) Certified law students. Cal. Rules of Court, rule 9.42.
- 5) Out-of-State Attorney Arbitration counsel. Cal. Rules of Court, rule 9.43.
- 6) Registered Foreign Legal Consultant. Cal. Rules of Court, rule 9.44.
- 7) Registered Legal Services Attorneys. Cal. Rules of Court, rule 9.45.
- 8) Registered In-House Counsel. Cal. Rules of Court, rule 9.46.
- 9) Attorneys Practicing Temporarily in California as part of litigation. Cal. Rules of Court, rule 9.47.
- 10) Non-litigating attorneys temporarily in California to provide legal services. Cal. Rules of Court Rule. 9.48.

See also Comment to Cal. Rules Prof. Conduct Rule 5.5.

- b. Actions Not Considered the "Practice of Law" Under California Law

Certain other acts have been legally deemed to not constitute the "practice of law" in California:

- 1) "How to" books – so long as they are instructional and addressed to the public in general, as opposed to addressing any specific legal problem of a specific person. *People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1606.
- 2) Legal forms. *Id.* at 1605-06.
- 3) Filling in forms at the direction of clients. *Id.*; *Matter of Valinoti* (Rev. Dept. 2002) 4 Cal. State Bar Crt. Rptr. 498, 519.
 - a. Non-lawyer filling in form without direction of clients is UPL. *Brockey v. Moore* (2003) 107 Cal. App. 4th 86, 97. But compare:

¹ *Birbrower, supra*, 17 Cal.4th at 130.

b. Non-lawyer selection form to be used by client for client may be UPL. *People v. Sipper* (1943) 61 Cal. App. 2d Supp. 844, 847 (disapproved on other grounds in *Murgia v. Mun. Ct.* (1975) 15 Cal.3d 286, 301).

- 4) Acting as mere scrivener. *Id.*
- 5) Acting as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator, or in any similar capacity for a court or any other governmental agency, so long as the individual does not give legal advice, examine the law or hold themselves out as being entitled to practice law. State Bar Rule 2.30(B), (C).
- 6) Non-lawyer operating a collection agency collecting a debt on its own behalf. *Le Doux v. Credit Research Corp.* (1975) 52 Cal. App. 3d 451, 454-55. (*disbarred or suspended attorneys excluded. Business & Professions Code §6130).
- 7) Preparation of simple tax returns. *Agran v. Shapiro* (1954) 127 Cal. App. 2d Supp. 807, 813.
- 8) Qualifying legal document assistants and unlawful detainer assistants registered under Business & Professions Code §6401.5 (*disbarred or suspended attorneys excluded. Business & Professions Code §6402).
- 9) Qualifying paralegals under the supervision of a State Bar member or an attorney practicing law in federal courts located in California by the attorney to him or her. Business & Professions Code §6450 et seq.)
- 10) Insurance company employing captive law firm(s) is not engaging in UPL. *Gafcon Inc. v Ponsor & Assoc.* (2002) 98 Cal. App. 4th 1388, 1405.
- 11) Immigration services. 8 CFR §§1.1, 292.1; Business & Professions Code §22440 et seq.; Government Code §8223.
- 12) Bankruptcy petition preparers who merely type bankruptcy forms. 11 USC §110(a); *In re Reynoso* (9th Cir. 2007) 477 F.3d 1117, 1123.

See Vapnek, Tuft, Peck and Wiener, California Practice Guide, Professional Responsibility (The Rutter Guide 2017) at 1:215 et seq. and citations contained therein.

4. What are the relevant California rules and laws restricting practice of law conduct?

Please see discussion above.

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

| State | Case | Summary | Comments |
|-------|---|---|---|
| AR | Arkansas Bar Ass'n v. Block, 230 Ark 430; 323 SW2d 912 (1959) | <p>Research of authorities by able counsel and by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts.—The practice of law is difficult to define. Perhaps it does not admit *435 of exact definition. <u>Rhode Island Bar Association v. Automobile Service Association, 1935, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226.</u></p> | <p>Notes on why practice of law is not appropriate for A.I. “The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. A dual trust is imposed on attorneys at law. They must act with fidelity both to the courts and to their clients. They are bound by canons of ethics which are enforced by the courts. The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.”</p> <p>State Bar Association of Connecticut v. Connecticut Bank & Trust Company, 145 Conn. 222, 140 A.2d 863, 870</p> |

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

| State | Case | Summary | Comments |
|-------|--|---|----------|
| CA | Birbrower, Montalbano, Condon & Frank v. Superior Court, (1998) 17 Cal.4th 119 | <p>“Although the Act did not define the term “practice law,” case law explained it as “ ‘the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.’ ” (<i>People ex rel. Lawyers’ Institute of San Diego v. Merchants’ Protective Corp.</i> (1922) 189 Cal. 531, 535, 209 P. 363 (<i>Merchants</i>)) <i>Merchants</i> included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. (<i>Ibid.</i>; see <i>People v. Ring</i> (1937) 70 P.2d 281, 26 Cal.App.2d Supp. 768, 772–773 (<i>Ring</i>) [holding that single incident of practicing law in state without a license violates § 6125]; see also <i>Mickel v. Murphy</i> (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993 [giving of legal advice on matter not pending before state court violates § 6125], disapproved on other grounds in <i>Biakanja v. Irving</i> (1958) 49 Cal.2d 647, 651, 320 P.2d 16.) <i>Ring</i> later determined that the Legislature “accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in <i>Merchants</i>] that it had a sufficiently definite meaning to need no further definition. The definition ... must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term ‘practice law.’ ” (<i>Ring, supra</i>, 70 P.2d 281, 26 Cal.App.2d Supp. at p. 772.)</p> <p>In addition to not defining the term “practice law,” the Act also did not define the meaning of “in California.” In today’s legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act’s application ***309 to those out-of-state attorneys who are physically present in the state.”</p> <p>“Section 6125 has generated numerous opinions on the meaning of “practice law” but none on the meaning of “in California.” In our</p> | |

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

| State | Case | Summary | Comments |
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| | | <p>view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations."</p> | |
| FL | <p>Florida v Sperry, 140 So 2d 587 (Fla, 1962)</p> <p>Judgment vacated and case remanded.</p> | <p>"Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case... We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law."</p> | <p>This case was remanded.</p> <p>Additional excerpt. Sperry v Florida 373 U.S. 379. "The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by non-lawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions,⁴ or which impose upon the performance of activity sanctioned by federal license additional</p> |

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

| State | Case | Summary | Comments |
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| | | | conditions not contemplated by Congress. ⁵ ‘No State law can hinder or obstruct the free use of a license granted under an act of Congress.’ <i>Pennsylvania v. Wheeling & Belmont Bridge Co.</i> , 13 How. 518, 566, 14 L.Ed. 249.” |
| HI | <i>Fought & Co, Inc v Steel Engineering and Erection, Inc</i> , 87 Hawaii 37; 951 P2d 487 (1998) | <p>“First enacted in 1955, <u>HRS §§ 605–14</u> and <u>605–17</u> were intended to protect the public “against incompetence or improper activity.” See Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661; Hse. Stand. Comm. Rep. No. 612, in 1955 House Journal, at 782. In drafting the statutes, the legislature expressly declined to adopt a formal definition of the term “practice of law,” noting that “[a]ttempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems.” Sen. Stand. Comm. Rep. No. 700, in 1955 Senate Journal, at 661; Hse. Stand. Comm. Rep. No. 612, in 1955 House Journal at 783. The legislature recognized that the practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party <i>affecting the legal rights ... of such party</i>, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy. ... Similarly, while it has explored the concept’s dimensions, this court has never formally defined the term “practice of law.” ... Our holdings in <i>Lau</i> and the other cases cited above are not incompatible with the proposition that the “practice of law” entails far more than merely appearing in court proceedings.”</p> | |

TABLE OF STATE CASES THAT INCLUDES EXCERPTS WITH REASONS FOR NOT DEFINING UPL

| State | Case | Summary | Comments |
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| IA | Iowa Supreme Court Comm on Unauthorized Practice of Law v Sturgeon, 635 NW2d 679 (Iowa, 2001) | <p>“Iowa Court Rule 118A.1 authorizes injunctions against the unauthorized practice of law. The commission notes that this court has the inherent authority to define and regulate the practice of law, citing <i>Baker</i>. In <i>Baker</i> we approved the nonexclusive definition of the practice of law found in Ethical Consideration 3-5:</p> <p>It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. However, the practice of law includes, but is not limited to, *682 representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional judgment is required.</p> <p>Iowa Code of Prof'l Responsibility EC 3-5; see also Baker, 492 N.W.2d at 701 (approving a similar version of this definition).”</p> | |

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| ME | Bd of Overseers of the Bar v Mangan, 2001 ME 7; 763 A2d 1189 (Me. 2001) | <p>“The Maine Bar Rules do not explicitly state what constitutes the “practice of law,” nor have we ever defined what constitutes the “practice of law.”... The term “practice of law” is a “ ‘term of art connoting much more than merely working with legally-related matters.’ ” <i>Attorney Grievance Commission of Maryland v. Shaw</i>, 354 Md. 636, 732 A.2d 876, 882 (1999) (quoting <i>In re Application of Mark W.</i>, 303 Md. 1, 491 A.2d 576, 585 (1985)). “The focus of the inquiry is, in fact, ‘whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.’ ” <i>Id.</i> (quoting <i>In re Discipio</i>, 163 Ill.2d 515, 206 Ill.Dec. 654, 645 N.E.2d 906, 910 (1994)). Even where “ ‘trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law.’ ” <i>Shaw</i>, 732 A.2d at 883 (quoting <i>Lukas v. Bar Ass'n of Montgomery County</i>, 35 Md.App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977)).”</p> | |
| MN | Cardinal v Merrill Lynch Realty Burnet, Inc, 433 NW2d 864 (Minn, 1988) | <p>“We have quoted extensively from these earlier decisions to illustrate this court's abiding concern for the public interest in determining whether certain conduct constitutes the unauthorized practice of law and also the difficulty in defining with any precision that conduct which is unauthorized. The overriding consideration in the case before us, in keeping with our tradition in these matters, is the public welfare rather than the advantage that might accrue to lawyer or nonlawyer. We recognize today, as we did long ago, that the “interest of the public is not protected by the narrow specialization of an individual who lacks the perspective and the orientation which comes only from a thorough knowledge and understanding of basic legal concepts, of legal processes, and of the interrelation of law in all its branches.” <i>Id. at 480-81, 48 N.W.2d at 796.</i>”</p> | |

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| State | Case | Summary | Comments |
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| NE | State of Nebraska v Childe, 147 Neb 527; 23 NW2d 720 (1946) | <p>“The power to define what constitutes the practice of law is lodged with this court. The sole power to punish any person assuming to practice law within this state without having been licensed to do so also rests with this court. It is the character of the act and not the place where the act is performed that constitutes the controlling factor. An all inclusive definition of what constitutes the practice of law is too difficult for simple statement. We shall not attempt it here, but will follow the practice established by the previous decisions of this court and examine the facts and circumstances of each case and determine whether the defendant purported to exercise the legal training, experience and skill of an attorney at law without a license to do so. Our former decisions supporting these views are collected and discussed in State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381.”</p> | |
| NH | Appeal of Campaign for Ratepayer's Rights, 137 NH 720; 634 A2d 1345 (1993) | <p>“It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. “[T]here is [no] single factor to determine whether someone is engaged in the unauthorized practice of law and, consequently, may be prohibited from undertaking the legal representation of another. That determination must be made on a case-by-case basis.” Bilodeau v. Antal, 123 N.H. at 45, 455 A.2d at 1041. CRR's position that it ought to be permitted to intervene without restriction in the adjudicatory aspects of a commission proceeding is, however, untenable. See <i>Selected Opinions of the Attorney General of New Hampshire 1987</i>, No. 87-46, at 144-45 (Equity 1989). There is no dispute that public participation can add considerable value to commission proceedings, and the commission should ensure that such participation is maximized. Where, however, the conduct under scrutiny is congruent with well accepted, exclusively lawyer functions, that conduct cannot lawfully be performed *716 by a non-lawyer, albeit with good character, who appears commonly.”</p> | |

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| State | Case | Summary | Comments |
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| ND | State of North Dakota v Niska, 380 NW2d 646 (ND, 1986) | <p>“Although what constitutes the practice of law does not lend itself to an inclusive definition, it clearly includes Niska's drafting of legal instruments and pleadings and providing legal advice. <i>Cain v. Merchants Nat. Bank & Trust Co. of Fargo</i>, 66 N.D. 746, 268 N.W. 719 (1936); see also <i>Bluestein v. State Bar of California</i>, 13 Cal.3d 162, 118 Cal.Rptr. 175, 529 P.2d 599 (1974); <i>Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n</i>, 91 Wash.2d 48, 586 P.2d 870 (1978).”</p> | <p>Notes on why UPL for advertising does not violate right of freedom of speech.</p> <p>“The State's interest in regulating the practice of law is unrelated to the expression of ideas. Section 27-11-01 is not targeted at ideas which the state seeks to suppress. Compare, <i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i>, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (statute banning advertising price of prescription drugs); <i>Police Dept. of City of Chicago v. Mosley</i>, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (ordinance describing permissible picketing in terms of its subject matter). Instead, § 27-11-01 is aimed at preventing the harm caused by unqualified persons performing legal services for others. Because providing legal services requires communication, any regulation of that activity necessarily limits speech. However, any resulting limitation on speech is merely incidental and is not directed at suppressing the expression of ideas. See <i>Clark v. Community for Creative Nonviolence</i>, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); <i>Grayned v. City of Rockford</i>, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); <i>Cox v. New Hampshire</i>, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (reasonable time, place and manner</p> |

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| State | Case | Summary | Comments |
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| | | | <p>restrictions valid even though they limit expression)." "There are numerous modes of communication not encompassing the practice of law available for Niska to express his views. We therefore conclude that § 27-11-01 as applied to Niska does not violate his right of free speech guaranteed by the North Dakota Constitution and the First and Fourteenth Amendments to the United States Constitution."</p> |
| RI | Rhode Island Bar Association v. Automobile Service Association, 1935, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226 | <p>"Whether or not it [practice of law] can be reduced to definition is not important to the decision of the matter before us at this time. "Definition, simple, positive, hard and fast as it is, never tells the whole truth about a conception," said the American philosopher, Josiah Royce, and we adopt that view in refraining from any attempt at definition here. That the practice of the law is a special field reserved to lawyers duly licensed by the court, no one denies."</p> | |



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
From: Mark Tuft
Date: February 25, 2019
Re: Expanding Access to Legal Representation to Consumers in Civil Matters
Involving Critical Human Needs

As we pursue our charge of identifying possible regulatory changes to enhance access to legal services through the use of technology, including artificial intelligence and online legal services, our study should include nonprofit public benefit and advocacy organizations made up of lawyers and non-lawyers as a near-term model for enhancing the delivery of legal services to consumers in matters of critical need.

The law recognizes the right of a broad range of public interest and nonprofit advocacy organizations to provide legal services to individuals and groups in order to advance various social and political objectives (e.g., the ACLU, Natural Resources Defense Council; the Center for Biological Diversity, Disability Rights Advocates, Equal Rights Advocates). Members of these organizations and the governing boards are not limited to those licensed to practice law by the State Bar. Nor are they all required to be registered with the State Bar under the Nonprofit Public Benefit Corporation Law (Corporation Code §5110 et. seq.; §13406(b)). *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 28, 40. The constitutional limitations on the power of a state to exclude organizations that represent individuals and groups in litigation that involve matters of common interest or constitute a form of political expression is well established. *NAACP v. Button* (1963) 371 U.S. 415; *United Mine Workers of America v. Illinois State Bar* (1967) 389 U.S. 217, 222; ABA Formal Op. 93-374 (1993). These practice settings are not hampered by issues of the unauthorized practice of law or non-lawyer involvement in the provision of legal services. The State Bar responded to the Supreme Court's directive in *Frye* to study whether additional regulation of this form of practice was necessary. To date, further regulation has not been considered necessary for purposes of public protection.

In 2016, the Legislature established a pilot program aimed at expanding access to legal representation for low-income parties in specified civil matters "involving critical issues affecting basic human needs." Government Code §68651 (e.g., housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships; elder abuse; child custody proceedings). The pilot program is statutorily limited to "qualified legal projects" as defined under Business and Professions Code §6214 and is subject to funding restrictions which have rendered the program practically moribund. However, this legal services model could provide a framework for expanding the delivery of legal services in areas of critical need through artificial intelligence and on-line delivery systems that allow for greater efficiencies at an affordable cost to consumers. If viable, it could one of a series of recommendations that we provide to the Court.

ATTACHMENT D

Links:

- [State Bar of California Report re Nonprofit Entity Legal Practice \(*Frye Report*\) \(2008\)](#)
- [Corporation Code § 5110 et seq.](#)
- [Corporation Code § 13406\(b\)](#)

ARTICLES

When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism

NICK ROBINSON*

ABSTRACT

As legal aid budgets have stagnated or declined, deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. One proposed deregulatory strategy, non-lawyer ownership of legal services, has become both particularly prominent and contested. Competition advocates claim that allowing non-lawyers to own legal services will bring in needed capital and expertise that will make legal services more affordable and reliable, while many members of the bar contend these outsiders will undercut professionalism. The existing academic literature has been almost entirely speculative and largely favored non-lawyer ownership on theoretical grounds.

Non-lawyer ownership though is not an abstraction. Two major jurisdictions, the United Kingdom and Australia, have adopted such ownership in recent years, and there are parallels to it within the United States in online legal services and social security disability representation. This Article draws on case studies and quantitative data from these three countries to argue for a more context-driven understanding of the impact of non-lawyer ownership. It finds that, for reasons under-explored in the literature, the access benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies. This Article also identifies challenges to professionalism that non-lawyer ownership can create, including new types of conflicts of interest and the potential for regulatory capture by new actors who can profit from legal services.

* Research fellow at the Program on the Legal Profession, Harvard Law School. I would like to thank David Wilkins, Amy Chua, Jed Rubenfeld, Robert A. Kagan, Vic Khanna, Mark Wu, Carole Silver, Marc Galanter, Scott Cummings, Robert Gordon, Cass Sunstein, John Flood, David Grewal, Drew Days III, Dennis Curtis, Ian Ayres, Dave Trubek, Laurel Terry, Vince Morabito, Stephen Mark, Tahlia Gordon, Henry Hansmann, Richard Abel, John Morley, Susan Rose-Ackerman, Avrom Sherr, John Fabian Witt, Issa Kohler-Hausmann, William Alford, Intisar Rabb, Daniel Nagin, and James Greiner for their discussions about and valuable feedback on this Article. The Article also benefited from feedback at presentations at Harvard Law School, Yale Law School, UC Davis, and the Law and Society Annual Conference in Minneapolis. © 2016, Nick Robinson.

Despite its questionable access benefits, given current trends towards deregulation, non-lawyer ownership is likely to continue to spread. To address the potential dangers it can create, as well as maximize any access benefits it can bring, this Article recommends a process-based solution. Namely, that a diverse set of stakeholders, drawing on available empirical data, develop a tailored approach for when to allow for non-lawyer ownership and in what form.

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INTRODUCTION

In the face of stagnant or declining legal aid budgets¹ and perceived limitations of pro bono assistance,² deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. These include proposals to liberalize restrictions around the unauthorized practice of law,³ as

1. Funding to the Legal Services Corporation, which helps fund civil legal aid programs in U.S. states, has declined by almost half in real terms between 1994 and 2013 to \$340 million. *Funding History*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/congress/funding/funding-history> [<http://perma.cc/E4CU-M27P>] (last visited Aug. 29, 2015); DEBORAH L. RHODE, *ACCESS TO JUSTICE* 186 (2004) (noting that most programs to assist the poor in both “civil and criminal matters are starved for resources”).

2. For an overview of some of these constraints, see Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 115–144 (2004) (detailing the history of the institutionalization of pro bono in the United States and noting the limitations of having free legal services provided by lawyers beholden to private commercial interests).

3. See, e.g., RHODE, *supra* note 1, at 87–91 (advocating for allowing other professionals, like accountants, to practice law in some areas and licensing and certifying others to perform other legal activities); Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STANFORD L. REV. 1689, 1709–11 (2008) (arguing that non-lawyer providers could

well as to create new categories of legal providers, like licensed paralegals, that require fewer qualifications.⁴ Perhaps the most prominent and controversial deregulatory approach is to allow for non-lawyer ownership of legal services. Liberalization advocates contend that the outside capital and expertise non-lawyers would bring would increase access to justice by making legal services more affordable and reliable. This argument has been taken up by civil society,⁵ numerous legal academics,⁶ and is a key claim in a legal challenge to restrictions on non-lawyer ownership brought by the law firm of Jacoby & Meyers in a New York federal court.⁷ On the other hand, opponents of non-lawyer ownership, including the American Bar Association (ABA), assert that opening up the profession to outside owners will undercut lawyers' independence and professionalism with adverse consequences to all clients, including those in under-served populations.⁸

adequately provide many legal services); CLIFFORD WINSTON, ROBERT W. GRANDALL, & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 83 (2011) (arguing for a certification regime instead of a licensing regime for most legal services in the United States).

4. Notably, in 2012 Washington State introduced licensed "legal technicians" in an effort to increase access to civil legal services. For an overview of this policy and the history leading up to it, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 Miss. L.J. 75, 77 (2013); *see also* RHODE, *supra* note 1, at 15 (noting that "almost all of the scholarly experts and commissions" that have studied the issue have recommended a larger role for non-lawyer specialists).

5. TESTIMONY TO THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL AID SERVICES ON ALLOWING INNOVATION TO MEET UNMET LEGAL NEEDS, RESPONSIVE L. (Sept. 27, 2013), http://responsivelaw.org/files/Responsive_Law_-_NY_Task_Force_2013.pdf [<http://perma.cc/8LBP-G5V2>] (arguing that non-lawyer ownership would increase access to legal services).

6. For an early example of the argument that non-lawyer ownership will increase access, albeit by two Canadians, see Robert G. Evans and Alan D. Wolfson, *Cui Bono-Who Benefits from Improved Access to Legal Services*, in LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES 3, 24–26 (Robert G. Evans & Michael J. Trebilcock eds., 1982). In the run-up to the consideration of multi-disciplinary practice by the American Bar Association several prominent academics wrote in support of non-lawyer ownership, although mostly on efficiency, not access grounds. *See, e.g.*, Larry Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 Va. L. Rev. 1707, 1721–25 (1998); Edward Adams & John Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998). More recently, a number of articles have appeared arguing for non-lawyer ownership on access grounds. *See, e.g.*, Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L. J. 1 (2012) (arguing for non-lawyer ownership on first amendment and access grounds); Gillian Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2013) (arguing that abandoning restrictions on the corporate practice of law in the U.S. can significantly increase access to justice); Cassandra Burke Robertson, *Private Ordering in the Market for Legal Services*, 94 BOSTON UNIV. L. REV. 179–180 (2014) (arguing that restrictions on non-lawyer ownership reduce access and should be struck down as unconstitutional).

7. *See infra* note 203.

8. *See infra* II.C.; The New York State Bar Association (NYSBA) has considered and rejected non-lawyer ownership twice. *See* N.Y. ST. BAR. ASS'N SPECIAL COMM. ON THE L. GOVERNING FIRM STRUCTURE OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, Ch. 12, § 5 (2000) (describing how outside investment could undercut lawyers' independence); N.Y. ST. BAR ASS'N, REPORT OF THE TASKFORCE ON NONLAWYER OWNERSHIP 73–76 (2012) [hereinafter NYSBA REPORT] (citing amongst other concerns that non-lawyer ownership might undercut professionalism).

Although the debate between these two competing sides has often been fierce, it has also been almost entirely theoretical with the New York State Bar Association Taskforce on Non-Lawyer Ownership recently noting, “there simply is a lack of meaningful empirical data about non-lawyer ownership . . .” (partly because of this dearth of data, the Taskforce recommended not allowing outside owners).⁹ Non-lawyer ownership though is not an abstraction. It has been allowed in most Australian states since the early 2000s¹⁰ and in England and Wales in the United Kingdom since 2011.¹¹ Since making these regulatory changes, these two countries have seen new types of actors provide legal services, including law firms that are listed on stock exchanges,¹² law firms owned by major insurance companies,¹³ and legal services offered by brands better known for their grocery stores.¹⁴ Under pressure from Australian and British law firms, Singapore recently allowed for minority non-lawyer ownership¹⁵ and the United Kingdom’s membership in the European Union may eventually force other European countries to also open up their legal markets.¹⁶

9. *Id.* at 17. The report continued, “ . . . we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force’s ability to study the issue as it was difficult to assess past experience.” *Id.* at 72.

10. Starting with New South Wales different states in Australia allowed for non-lawyer ownership beginning in 2001. See Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, U. MELBOURNE LEGAL STUD. RES. PAPER No. 339, at 5-6 (2008).

11. *Alternative Business Structures*, L. Soc’Y (Jul. 22, 2013), <http://www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures/> [<http://perma.cc/FN2C-G8JG>] (noting that alternative business structures, or “ABSs,” began to be approved in 2011) [hereinafter *Alternative Business Structures*].

12. In 2007, the Australian law firm Slater & Gordon made headlines by becoming the first publicly traded law firm in history. Peter Lattman, *Slater & Gordon: The World’s First Publicly Traded Law Firm*, WALL STREET J. L. BLOG (May 22, 2007), <http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/> [<http://perma.cc/3Q2L-X8CR>].

13. See *infra* II.A.1.

14. See *infra* II.A.2. for a description of Co-operative Legal Services, which is part of the Co-operative Group that runs a popular grocery store chain in the UK.

15. John Hyde, *Singapore Embraces ABSs to ‘Keep Pace’ With Rivals*, L. Soc’Y GAZETTE (Jan. 28, 2014), http://www.lawgazette.co.uk/5039611.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ280114 [<http://perma.cc/D52M-YMVQ>]; COMMITTEE TO REVIEW THE REGULATORY FRAMEWORK OF THE SINGAPORE LEGAL SERVICES SECTOR, FINAL REPORT 6, 38 (2014), <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20Report%20of%20the%20Committee%20to%20Review%20the%20Reg%20Framework%20of%20the%20Spore%20Legal%20Sector.pdf> [<https://perma.cc/3DWM-GDK8>] (finding that the new ABS models in Australia and the UK had caused ‘pressure’ on Singapore’s regulatory structure, with firms from those jurisdictions seeking to register in a similar form to their head offices).

16. Jacob Weberstaedt, *English Alternative Business Structures and the European Single Market*, 21 INT’L J. LEGAL PROF. 103, 109 (2014) (arguing that UK membership in the European Union will lead the entire union to adopt similar rules relating to non-lawyer ownership); Spain, Italy, and Denmark already allow for minority non-lawyer ownership. PANTEIA, EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS: FINAL REPORT 205-06 (2012), http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf [<http://perma.cc/23MY-4TQH>] (listing European countries that allow for partial non-lawyer ownership).

Meanwhile, regulatory bodies not just in the United States,¹⁷ but also Canada¹⁸ and Hong Kong¹⁹ are actively considering whether to allow for non-lawyer ownership in legal services.

This Article helps fill the current knowledge gap facing regulators by undertaking the most extensive empirical investigation of the impact of non-lawyer ownership to date. It focuses in particular on non-lawyer ownership's effect on civil legal services for poor and moderate-income populations. To do this, it draws on qualitative case studies and other available empirical data from the United Kingdom and Australia, as well as the United States, where non-lawyer ownership is generally barred, but close parallels are present in online legal services and social security disability representation.

Part I begins by briefly describing how non-lawyer ownership functions in the United Kingdom and Australia. It then lays out the most common justifications of those who claim non-lawyer ownership of legal services will either increase access or undercut professionalism. It then argues that those on both sides of this debate have mischaracterized its probable impact in at least three ways. First, their claims are frequently overly abstract. Not only do they not ground their claims empirically, but they generally ignore how the impact of non-lawyer ownership will likely be affected by contextual factors, specifically the type of non-lawyer owners, the legal sector at issue, and regulatory and economic variations between jurisdictions. Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these innovations will significantly increase access in most legal sectors for reasons that are underexplored in the literature. Finally, while non-lawyer ownership probably will not lead to the nightmare scenarios that some suggest,²⁰ in some contexts it can create new conflicts of interest and undermine lawyers' public

17. NYSBA REPORT, *supra* note 8, at 2 (recommending that New York not adopt non-lawyer ownership absent compelling need, pressure to change, or empirical data); James Podgers, *ABA Ethics Opinion Sparks Renewed Debate Over Nonlawyer Ownership of Law firms*, ABA JOURNAL (Dec. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/aba_ethics_opinion_sparks_renewed_debate_over_nonlawyer_ownership_of_law_fi/ [http://perma.cc/4ZFN-WZEB] (describing debate created when the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that would permit a law firm to split fees with a law firm from another jurisdiction that is non-lawyer owned); Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011 8:22 AM), <http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/> [http://perma.cc/3REW-3Y6J] (describing legislation introduced in North Carolina that would have allowed non-lawyers to buy up to forty-nine percent of a law firm).

18. CBA LEGAL FUTURES INITIATIVE, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA 68 (2014), [cba futures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf](http://www.cba.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf) [http://perma.cc/4M4R-WBX9] (recommending the Canadian Bar Association allow for Alternative Business Structures).

19. Kathleen Hall, *Hong Kong Ponders ABS Model*, L. SOC'Y GAZETTE (Sept. 13, 2013), <http://www.lawgazette.co.uk/practice/hong-kong-ponders-abs-model/5037620.article> [http://perma.cc/J5PU-RR5W].

20. The idea of non-lawyer ownership has inspired actual nightmares for some.

Along the way to this presentation I also had nightmares. It was five years from now, the ABA was in steep decline . . . after an exhaustive search [of the ABA meeting] no programs on pro bono were to be

spiritedness and professional standards, often in ways even critics have failed to appreciate.

Part II illustrates these arguments through available data and case studies of non-lawyer ownership in the United Kingdom, Australia, and the United States. Part III uses these country studies to support and expand the arguments about non-lawyer ownership's likely impact laid out in Part I. Part IV ends by exploring some of the access and regulatory implications of the Article. Given the questionable impact of non-lawyer ownership on access, it argues that deregulatory approaches like non-lawyer ownership can become a distraction and that other strategies to increase access should instead be prioritized, particularly strengthening and broadening legal aid. Even though non-lawyer ownership may not bring significant access benefits, given current liberalization trends, such ownership is likely to continue to spread. To address concerns about professionalism non-lawyer ownership can create as well as to maximize any access benefits it can bring, the Article recommends a multi-stake holder process to tailor when and how to allow non-lawyer ownership, weighing its costs and benefits in different contexts.

While the regulation of the legal profession has often benefited lawyers more than the public,²¹ there is a danger that a new regulatory regime that embraces an ideology of deregulation or competition too strongly will gloss over new hazards or unduly dismiss old values worth supporting. Reforms like non-lawyer ownership raise the possibility for new conflicts between the interests of clients and the potentially diverse and distinct interests of non-lawyer owned commercial enterprises. With new groups profiting from legal services, regulation may become less susceptible to capture by interests inside the legal profession, but more susceptible to capture by actors outside of it. More generally, by becoming more like other services in the market the profession risks losing the public spiritedness that draws socially committed individuals into its ranks and supports its ability to promote public-spirited ideals within the legal system and more broadly.²² These concerns should not lead to a dismissal of non-lawyer

found, the crisis in death penalty representation went unnoticed . . . and no one was worrying about the independence of the judiciary . . .

LAWRENCE FOX, WRITTEN REMARKS OF LAWRENCE J. FOX TO THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE (Feb. 1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html [<http://perma.cc/6M4L-ECUJ>].

21. For perhaps the most extensive critique of lawyer self-regulation in the United States, see RICHARD ABEL, *AM. LAW* (1991).

22. See Robert Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1, 9, 32 (1988) (arguing that many are attracted to the profession for its independent, collegial, and intellectually stimulating environment or its publicly minded goals); David Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1273–77 (2007) (detailing the “paradox of professional distinctiveness,” which is that as law firms attempt to model themselves more on other types of businesses to increase efficiency that they lose their professional uniqueness which both justified the profession’s self-regulation and attracted talented practitioners to firms in the first place).

ownership out of hand, but instead a continuing analysis of available evidence to assess arguments over the merits of different types of non-lawyer ownership in different contexts.

I. NON-LAWYER OWNERSHIP OF LEGAL SERVICES

A. UNBUNDLING OWNERSHIP OF LEGAL SERVICES

Like any enterprise, the ownership of a legal services entity can be viewed as a bundle of rights and duties. These rights and duties may be unbundled and apportioned to different owners. For example, one party may claim profits produced by a business enterprise, while the right to manage that enterprise may be claimed by another. In practice, if one has significant profit rights in a business one will generally desire a stake in how it is controlled, but the two types of rights can be unbundled, such as in the case of non-voting stock in a public company.²³

A commercial enterprise delivering legal services has an added element of complexity surrounding its ownership. Only lawyers are allowed to practice law, so an enterprise offering legal services must do so through lawyers. Lawyers, though, do not have an unlimited right in the legal services they sell.²⁴ Instead, like other licensed occupations, they have a conditional use right given by the state, usually through one or more regulators. These regulators not only determine the conditions required to become a lawyer, but also can withdraw a lawyer's right to practice if they violate certain professional rules, such as lying to a court or misappropriating a client's funds.²⁵

Significantly, regulators of legal services have traditionally limited the ability of lawyers to be part of a commercial enterprise in which non-lawyers share profits in or manage the business entity.²⁶ These restrictions have largely been justified on the premise that non-lawyers may inappropriately influence how legal services are offered either to increase profits or out of a lack of appreciation of the duties imposed on one offering legal services.²⁷

The recent reforms in the United Kingdom²⁸ and Australia²⁹ have relaxed or ended these restrictions on lawyers' commercial relationships with non-lawyers and so open up new potential ownership structures for legal services. For

23. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 12 (2000) (noting that if those with control rights have no rights to residual earnings they will have little incentive to make a profit).

24. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT (2009) [hereinafter MODEL RULES] (listing rules that lawyers must follow in order not to be disciplined or disbarred).

25. *See, e.g.*, MODEL RULES R. 8.5 (2009) (empowering disciplinary authorities to sanction lawyers).

26. *See, e.g.*, MODEL RULES R. 5.4 (2009) (declaring that a lawyer shall not share legal fees with a non-lawyer or practice law in an organization where a non-lawyer owns or is the director of or can control the professional judgment of a lawyer).

27. *See infra*, I.B.

28. *See* Legal Services Act 2007, c. 29 (U.K.); *Alternative Business Structures*, *supra* note 11.

29. *See* Parker, *supra* note 10.

example, in both countries non-lawyers can now join law firms as partners, law firms may become publicly owned, or legal services may be offered alongside other non-legal services or products offered by a larger commercial enterprise.³⁰ While lawyers could previously only sell their law firm to other lawyers, who would then themselves have to become part of the firm, lawyers in this more liberalized environment can sell their firm, or part of it, to lawyers or non-lawyers whether they are active managers or passive investors.³¹

TABLE 1:
POTENTIAL RIGHTS AND DUTIES OF DIFFERENT TYPES OF OWNERS AND EMPLOYEES IN AN ENTITY SELLING LEGAL SERVICES.

| | Sharing Profits | Control of Business | Transfer Rights | General Liability | Control of Legal Services | Professional Liability |
|-------------------|-----------------|---------------------|-----------------|-------------------|---------------------------|------------------------|
| Lawyer Owners | X | X | X | X | X | X |
| Non-Lawyer Owners | X | X | X | X | | |
| Lawyer Employees | | | | | X | X |

Governments and regulators in jurisdictions where they have allowed non-lawyer ownership have been clear that control over the right to actually practice law has to remain with licensed legal professionals, even if the profit rights of the business can be shared more broadly. To accomplish this, jurisdictions adopting non-lawyer ownership have required that a lawyer be responsible for ensuring professional rules of conduct are abided by in legal service enterprises owned by non-lawyers. England and Wales have mandated compliance officers for legal practice,³² while in jurisdictions like New South Wales in Australia a legal practitioner director performs a similar role.³³ If the business enterprise, or those in it, violate rules of professional conduct these compliance lawyers have a duty to correct the misbehavior, and the business entity may be disciplined or barred from offering legal services in the future if it is not corrected.³⁴ In Queensland,

30. *See infra* II.A–B.

31. *Id.*

32. SOLICITORS REGULATION AUTHORITY, SRA AUTHORISATION RULES FOR LEGAL SERVICES BODIES AND LICENSABLE BODIES 2011, Rule 8.5 [hereinafter SRA AUTHORISATION RULES].

33. Legal Services Commission, OBLIGATIONS OF LPDs (Nov. 2013), <http://www.lsc.qld.gov.au/compliance/incorporated-legal-practices/obligations-of-legal-practitioner-directors> [perma.cc/G87J-FBX5].

34. *See* SRA AUTHORISATION RULES, *supra* note 32, at R. 8.5 (finding compliance officers must take all reasonable steps to ensure compliance and report any failures); *Legal Profession Act 2004* (NSW) s 141(2)

the legal practitioner director also manages the entity's legal services,³⁵ while in England and Wales one of the managers of the enterprise offering legal services must be a lawyer.³⁶ Further, all lawyers working in any entity must abide by professional rules of conduct and may be open to professional discipline if they do not.³⁷ Whether it is through mandated compliance officers, lawyers' involvement in the management of legal services, or continued individual professional liability, it is licensed legal professionals that bare primary responsibility for ensuring that legal service enterprises that may be owned by non-lawyers are not in violation of professional rules.³⁸

While non-lawyer ownership allows lawyers and non-lawyers to share profit rights, debates over whether or not to adopt such ownership have frequently been polarizing. Advocates have claimed non-lawyer ownership will transform legal services, increasing access to justice in the process, as opponents have maintained that this transformation will undercut professionalism. The next two sections briefly detail the most common arguments of those who advocate each of these positions.

B. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR ACCESS

Access to legal services is a long-standing challenge in Australia, the United Kingdom, and the United States. Studies done in each of these countries indicate that there are likely a significant number of people who could benefit from the help of a lawyer, but do not hire one because they either cannot afford a lawyer or are unaware of how one could assist them.³⁹ One 2009 Legal Services

(Austl.) (stating that a legal practitioner director must take all reasonable action to correct the misbehavior of a legal practitioner employed by the practice); *id.* § 153 (listing conduct of legal practitioner director as grounds the Supreme Court can disqualify an Incorporated Legal Practice).

35. *Legal Profession Act 2004* (NSW) s 140 (Austl.).

36. *Alternative Business Structures*, *supra* note 11, § 5.1 (noting that all ABS's must have one manager who is a recognized legal professional in England and Wales or in Europe).

37. *Legal Profession Act 2004* (NSW) s 143(1)(a) (Austl.).

38. As John Flood has noted reforms like the Legal Services Act 2007 in the United Kingdom may outwardly seem to liberalize the profession, but they also re-regulate it, furthering the interests of some actors, like large law firms, within the legal profession. John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 CURRENT SOC. 507 (2011); *see also* Legal Services Act 2007, c. 29 (U.K.).

39. BDRC CONT'L, *LEGAL SERVICES BENCHMARKING REPORT 15* (2012), <https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf> [perma.cc/H79R-ESVF] (finding in the UK that the working class and the unemployed were more likely to take no action when faced with a legal problem) [hereinafter BDRC CONT'L]; CHRISTINE COUMARELOS ET AL., *LEGAL AUSTRALIA-WIDE SURVEY LEGAL NEED IN AUSTRALIA* 142 (2012), [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf) [perma.cc/AKA7-NFT4] (finding that in Australia 30 percent of those who began to address a legal problem ended up not pursuing it further, perhaps because of lack of money); *see also* AM. BAR ASS'N, *LEGAL NEEDS AND CIVIL JUST.: A SURVEY OF AMERICANS MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 28* (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf> [perma.cc/H9EJ-DHSY] [hereinafter ABA LEGAL NEEDS] (noting that

Corporation survey in the United States found that for every client their funded programs served for a civil legal problem another potential client was turned away due to insufficient resources.⁴⁰

Prominent legal scholars like Gillian Hadfield in the United States and regulators in countries like the United Kingdom contend that non-lawyer ownership will help overcome this problem by increasing access to legal services.⁴¹ They support this claim primarily by arguing that outside capital will create new economies of scale, spur innovation, and generate new economies of scope and brands that will all benefit those in need of legal services.

Law firms that provide legal services for individuals have generally been small, consisting of solo practitioners or partnerships of a few lawyers.⁴² Critics claim this form of service delivery is inefficient, as each lawyer or small legal practice invests independently in office space, administrative systems, advertising, and finding solutions to routine legal problems.⁴³ They argue outside capital allows legal services enterprises to achieve larger economies of scale allowing them to invest more in technology, administrative systems, and research into more efficient ways to deliver legal services.⁴⁴ This larger size also allows lawyers within the firm to specialize more in different areas of law.⁴⁵

Non-lawyer ownership is seen as a way not only to address perceived under-capitalization in law firms, but also to recruit and retain high-value employees. Law schools generally do not train lawyers in management, technology, marketing, or other fields that are critical for running many legal

“fear of the cost” was one of the principal reasons given by low income respondents for not using the civil justice system). For an overview of twenty-six large-scale legal needs surveys undertaken across two decades in 15 separate countries, see PASCOE PLEASANCE & NIGEL J. BALMER, HOW PEOPLE RESOLVE ‘LEGAL’ PROBLEMS 4 (2014) (amongst other findings, cost is a primary barrier to accessing lawyers).

40. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS 1 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [http://perma.cc/WC94-KGFG] (last visited Oct. 31, 2015).

41. Gillian Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 1, 83 (2014) (finding that perhaps the largest barrier to access in the U.S. is an overly restrictive approach to regulating legal markets, including barring non-lawyer ownership); MKT. INTELLIGENCE UNIT DEPT. OF CONSTITUTIONAL AFFAIRS, GOVERNMENT CONCLUSIONS: COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET, Jul. 2003, at ¶ 47 (UK), <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/general/oftreptconc.htm#part5> [http://perma.cc/7MX5-T74D] [hereinafter MARKET INTELLIGENCE UNIT] (advocating for non-lawyer ownership on competition and efficiency grounds in the UK).

42. For a classic description of the two hemispheres of the bar in America—those who service large organizations, like corporations, and those who service the majority of individual consumers, see JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

43. Hadfield, *supra* note 6, at 49–50.

44. *See id.*; SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 115, 139 (2004) [hereinafter CLEMENTI REPORT].

45. Hadfield, *supra* note 6, at 52; Traditional law firms can, and do, expand through bank loans or saved profits. However, loans frequently come with high interest rates that must be repaid by the firm and many partners may not want to forgo profit disbursements in order to expand.

service enterprises. Non-lawyer ownership allows firms to provide equity (instead of just salaried compensation) to non-lawyers with skills not as readily available in the legal profession, potentially leading to more innovative or efficient legal services.⁴⁶ Investor ownership may also improve leadership transitions in some situations, as removing poorly performing management will generally be easier if management is also not significant co-owners of the firm as are managing partners in most law firms.

An enterprise offering multiple types of services, including legal services, may also create new efficiencies.⁴⁷ For example, it might be more convenient for a customer to be able to access banking and legal services through one company and a company offering these multiple services may be able to save on shared overhead costs.

Finally, outside investment may allow legal service providers to scale and their brands to become better recognized so that consumers can more efficiently navigate the legal services market. If an already well-known brand offering other services begins to offer legal services a consumer can use their perception of the quality of the larger brand as a proxy for the quality of the legal services they provide.⁴⁸ Concerns about protecting the reputation of their larger brand may also create an added incentive for legal service enterprises to provide a quality product.

C. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR PROFESSIONALISM

Criticism of non-lawyer ownership is perhaps most developed in the United States where such ownership has been considered and repeatedly rejected by regulators.⁴⁹ Prominent critics have included decision makers at the American Bar Association, the New York Bar Association's Taskforce on Non-lawyer

46. See Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 531 (2009) (noting that a publicly listed firm can be more efficiently organized and that employees remuneration can be better linked to the success of the firm); Ribstein, *supra* note 6, at 1723 (commenting that law firms may use the tournament of lawyers model because of the lack of options to reward employees with anything else, but the promise of management and financial rights combined with tenure); Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L. J. 953, 1010 (2012) (arguing non-lawyer ownership will allow these firms to attract other talented professionals).

47. See Interview 10, in Cambridge, Mass. (Feb. 4, 2014) [hereinafter Interview 10]. This interview, as well as the other interviews cited in this Article, was conducted with the understanding of confidentiality, and therefore no names are included. Instead the interviews are coded by number. Each number corresponds with an individual interview subject. Journal staff reviewed the notes from each interview to ensure the accuracy of the representations. The notes from the interviews are on file with the author. Interview 10 (Feb. 4, 2014).

48. Hadfield, *supra* note 6, at 49–50. For example, if Walmart started offering legal services, consumers could use their experience with the Walmart brand as a proxy for the quality of legal services they might receive.

49. See *infra* III.C.

Ownership, and vocal members of the profession such as Lawrence Fox.⁵⁰ Notably, few academics have publicly opposed non-lawyer ownership outright, although some have expressed notes of caution.⁵¹ Critics of non-lawyer ownership claim that its access benefits are unproven⁵² and that it will undermine professionalism,⁵³ imposing unreasonably high costs on clients, including low-income ones, as well as society as a whole. Non-lawyer ownership is seen to undercut professionalism by promoting commoditization, creating more conflicts of interest, and by increasing the likelihood that non-lawyers will be in a position to undercut professional standards.

Opponents of non-lawyer ownership argue that lawyers, and their firms, are acculturated towards a different set of goals than those owned by non-lawyers. Like Anthony Kronman's "Lawyer Statesman," legal professionals in this vision work to earn a living from their trade, but also to promote ideals that encourage public-spirited devotion to the law.⁵⁴ These critics contend that non-lawyer owners, in particular investor-owners, seek only to maximize the return on their investment because, unlike lawyers working in a firm, they are not personally invested in the labor of the enterprise.⁵⁵ Investor owned firms might focus exclusively on enhancing profits with little regard for the public good, which not only could harm the community, but also undercut one of the historical sources for the profession's legitimacy.⁵⁶ Non-lawyer owners may also be less likely to act as an independent check on state or corporate power.⁵⁷ While these critics generally acknowledge that law has become more like a business in recent years, with lawyers themselves more and more motivated by profit alone, they want to protect what remains of the profession's value system from further decline.⁵⁸

Non-lawyer ownership brings the potential for lawyers to be caught in a conflict between their duties to investors and their duties to their clients or the

50. See generally NYSBA REPORT, *supra* note 8, at 3; ABA COMMISSION ON MULTI-DISCIPLINARY PRACTICE, REP., ABA (1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdi_report.html [hereinafter ABA COMMISSION]; Fox, *supra* note 20.

51. Robertson, *supra* note 6, at 180–81 (claiming that "few onlookers have attempted to defend the corporate practice doctrine" and citing to a handful of partial defenses. Although such a broad claim is likely too strong, as there have been many members of the bar who have argued against non-lawyer ownership, it is accurate to portray the academic literature as overwhelmingly supportive of non-lawyer ownership.).

52. See NYSBA REPORT, *supra* note 8, at 72 (noting lack of empirical data on the impact of non-lawyer ownership).

53. See *id.* at 73–74 (expressing concerning that non-lawyer ownership will undermine professionalism).

54. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1995).

55. See Benedict Sheehy, *From Law Firm to Stock Exchange Listed Law Practice: An Examination of Institutional and Regulatory Reform*, 20 INT'L J. LEGAL PROF., 3, 7 (2013).

56. See *id.* (noting that the one of the major concerns of non-lawyer ownership was that these businesses would "focus excessively on enhancing members' economic benefit without regard for the public good").

57. See Fox, *supra* note 20 (noting that lawyers working for non-lawyer owned companies would be less likely to work on death penalty or other high profile and controversial pro bono matters).

58. See Adams & Matheson, *supra* note 6, at 23.

justice system.⁵⁹ For example, Shine Lawyers, a publicly owned law firm in Australia, makes clear in its prospectus to potential investors that their first duty is to the courts, then clients, and then shareholders.⁶⁰ These duties, in this order, are also laid out in Australian law.⁶¹ This example signals there is a potential regulatory solution to this conflict, but it also suggests that non-lawyer ownership creates conflicts different than those previously faced by the profession. Before non-lawyer ownership, it may have been in lawyers' self-interest to take actions that would further the financial interests of the firm, but a sense of professional duty or the firm's culture may have tempered such actions if they conflicted with a client's interests. In a world of non-lawyer ownership, investors may try to create new demands on a firm, and the lawyers within it, to prioritize commercial interests.

While many criticisms of non-lawyer ownership are directed at non-lawyer owners, others are directed more specifically at the dangers of having multiple kinds of employees, often offering multiple services, in the same firm. Some argue that non-lawyer managers and other employees may be more likely to violate legal ethics, not because lawyers have superior morality, but because lawyers are trained and duty-bound to look for conflicts, prize confidentiality, and uphold other professional rules.⁶² As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to engage in the unauthorized practice of law or share confidential client information across different departments of the company.⁶³

D. TOWARDS A NEW UNDERSTANDING OF NON-LAWYER OWNERSHIP

Participants in the debate over non-lawyer ownership have argued for two dueling, if not necessarily conflicting, claims: (1) that non-lawyer ownership will significantly increase access to legal services; and (2) that such ownership will negatively impact professionalism. While both sides to the debate bring insight, the actual effect of non-lawyer ownership is likely to be quite different than either

59. Arthur J. Ciampi, *Non-Lawyer Investment in Law Firms: Evolution or Revolution?* 247 N.Y. L. J. 3 (2012) (arguing that non-lawyer ownership places lawyers in a conflict between the best interests of their clients and having to answer to their non-lawyer partners).

60. SHINE LAWYERS, PROSPECTUS 40 (2013), https://www.shine.com.au/wp-content/uploads/2013/10/shine_corporate_limited_prospectus.pdf [https://perma.cc/XWG8-YX8K] ("Shine has a paramount duty to the court, first, and then to its clients. Those duties prevail over Shine's duty to Shareholders.") [hereinafter SHINE PROSPECTUS].

61. *Legal Profession Act 2004* (NSW) ss 161–163 (Austl.) (noting that the legislation is given precedence over the company's Constitution and allows the regulations associated with the Legal Profession Acts to displace the operation of the Corporations Act).

62. ABA COMMISSION, *supra* note 50 ("The Commission is particularly mindful that the principal arguments . . . for retaining such prohibitions relate to concerns about the profession's core values, specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest.").

63. Adams & Matheson, *supra* note 6, at 21.

of these traditional accounts suggest in at least three ways that are briefly laid out in this section, before being returned to again in more detail in Part III where they are supported by the country studies presented in Part II.

First, arguments over non-lawyer ownership tend to be too abstract. Non-lawyer ownership should not be thought of as having the same impact in every context—it matters who the non-lawyer owners are and what legal sector or jurisdiction is at issue. A legal services firm owned by consumer owners or worker owners is likely to respond to a different set of incentives and have a different set of potential conflicts of interest than a firm owned by outside investors or owners that also offer other services in the market. Some sectors of legal services may attract more non-lawyer investors than other sectors because they are perceived to be more lucrative or easier to standardize or scale. Countries with larger capital and legal services' markets could see greater amounts and types of non-lawyer ownership. Meanwhile, non-lawyer ownership may be more or less likely depending on the specifics of the regulation allowing it, while a jurisdiction's other professional rules may also influence whether and how it develops. Accounting for these variables can help predict the effect non-lawyer ownership will have in different situations. For example, non-lawyer ownership may have little impact in the immigration sector in a relatively small jurisdiction where such ownership is highly regulated, but it may have a transformative impact that requires regulatory attention in the personal injury sector in a large jurisdiction where major commercial conglomerates enter the market.

Second, even though non-lawyer ownership may lead to more innovation in legal services, greater competition, and larger economies of scale there is reason to doubt that these changes will lead to significantly more access to legal services for poor and moderate income populations. Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that are relatively easy to commoditize and where expected returns are high. However, these lucrative sectors are less likely to have an access need because of long-standing practices like conditional or contingency fees. More generally, many areas of legal work may be difficult to scale or commoditize, such as aspects of family or immigration law that require significant tailoring to the specific situation of the client, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits. Even where commoditization is possible, persons with civil legal needs frequently have few resources and complicated legal problems. In this context, non-lawyer ownership is unlikely to provide these persons with significant new legal options, as they will still be unable to afford legal services. Finally, cultural or psychological barriers may cause some persons to resist purchasing some types of legal services. In other words, there may not be as much price elasticity in the market for some legal services as advocates of deregulation suggest.

Finally, those who oppose non-lawyer ownership on the grounds that it will undercut professionalism tend to make arguments that are both too wide and too

narrow. Many non-lawyer owned firms are likely to operate in ways quite similar to lawyer owned firms or at least in ways unlikely to create any serious new professionalism concerns. This though does not mean that no new professionalism concerns arise with non-lawyer ownership. The interests of clients and non-lawyer owners are likely to sometimes conflict, placing new pressures on lawyers. These conflicts seem most likely where non-lawyer owners have other well-defined commercial interests, such as in the case of a large corporation that offers multiple other services in the market.⁶⁴ In some situations, non-lawyer ownership may also undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit. Lastly, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and in some instances pressure by investors could undercut standards in the profession.

II. COUNTRY STUDIES

To illustrate the arguments laid out at the end of Part I, the three country studies in this Part explore the impact of non-lawyer ownership on access and professionalism for civil legal services for poor and moderate-income populations.⁶⁵ While non-lawyer ownership may have access benefits for other groups as well, it is poor and moderate-income individuals that are often excluded from legal services altogether and have justifiably been the primary focus of access advocates.⁶⁶

In the three countries studied, the available quantitative data on legal services is limited. None of the jurisdictions has reliable or systematic data on the price of civil legal services, although England and Wales are beginning to collect some of this information.⁶⁷ Given these restrictions, in each country examined this Article first attempts to determine where there has been significant investment in legal services by non-lawyers. If there is no significant non-lawyer ownership in a sector it is unlikely that such ownership is having a large impact on access or professionalism. In sectors where there has been significant non-lawyer ownership it undertakes qualitative case studies of particularly prominent instances of non-lawyer ownership in enterprises that provide services that are aimed, at least

64. Perhaps the most obvious example of such a conflict, albeit in the criminal context, would be a company that offers criminal defense services and also runs prisons. *See, e.g.*, MODEL RULES R. 1.8(a) (“A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . .”).

65. This Article examines how non-lawyer ownership may increase access for this population by increasing awareness of relevant legal options, reducing their price, or increasing their quality at the same or a lower price.

66. *See, e.g.*, RHODE, *supra* note 1, at 187 (for an overview of efforts to increase access to civil legal services in the United States and a proposed agenda).

67. Pricing data has been collected for conveyancing, divorce, and probate services in the United Kingdom for 2012. *See* BDRC CONTINENTAL, *supra* note 39.

in part, at low or moderate income populations. These case studies focus on examining new models of delivering legal services seemingly spurred by non-lawyer ownership, as it posits this type of innovation is most likely to lead to significant gains in access or to raise new professionalism concerns.⁶⁸ Data was collected from public sources, including through special requests to regulators and government agencies, as well as through institutional review board (IRB) approved interviews with key participants.⁶⁹

Given the limitations of the available data, and the complexity of the functioning of legal markets, this study should be treated as an initial attempt to demonstrate non-lawyer ownership's impact on access and professionalism, to be supplemented with further research. Nevertheless, drawing from available evidence does allow one to make, plausible arguments about non-lawyer ownership's most likely influence. Focusing on concrete examples also forces all sides in the debate to more carefully develop, and limit, their claims, while reexamining their normative commitments in the light of potentially contradictory evidence.⁷⁰

A. UNITED KINGDOM

Some background is helpful to appreciate the momentous regulatory changes in the legal services market in the United Kingdom, and specifically England and Wales, over the last several years. While in some jurisdictions there is only one type of legal professional—i.e. lawyers—in England and Wales there are eight types of licensed legal professionals: barristers, solicitors, notaries, conveyancers, legal executives (a type of para-legal), patent attorneys, trademark attorneys, and costs lawyers (who can settle the legal costs of a court case).⁷¹ While the division between barristers, solicitors, and notaries is old, the other types of licensed legal professionals are of more recent origin and were created in part to provide more affordable services by allowing individuals to specialize in areas of

68. See CLAYTON M. CHRISTENSON, THE INNOVATOR'S DILEMMA (2011) (describing how disruptive technology can lead to large new efficiency gains, undercutting earlier models of doing business).

69. To capture a more complete view—which included minority and contradictory perspectives—the author interviewed executives at non-lawyer owned legal service providers, competitors, regulators, representatives of the bar, academics, and those in non-profit organizations offering services to under-served populations. The author chose initial interview subjects through publicly available information on non-lawyer ownership and then followed a snowball interview method of selection.

70. Case studies in particular can be used to present us “with unfamiliar situations that inspire tentative moral judgments, which may destabilize the web of normative conviction we bring to them when we examine the connections among its elements.” David Thacher, *The Normative Case Study*, 111 AM. J. SOC. 1631, 1669 (2006).

71. See Approved Regulators, LEGAL SERV. BD., http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [<https://perma.cc/NF5M-MGUP>] (last visited Oct. 31, 2015) (these eight types of licensed legal professionals each have their own regulator. Two accountant associations are also authorized to license accountants for special probate activities, but currently do not do so).

legal practice without as much training as a solicitor or barrister.⁷²

Since at least Margaret Thatcher's government there has been a strong deregulatory push in legal services in the UK.⁷³ In 2004, a report by Sir David Clementi, which built on a previous study by the UK's competition agency,⁷⁴ recommended a series of regulatory changes to the legal profession.⁷⁵ These proposals culminated in Parliament passing the Legal Services Act (the Act) in 2007.

The Act implemented two primary changes. The first concerned regulatory agencies. The Act separated the advocacy and disciplining functions of the bar by creating an independent Legal Ombudsman to address consumer grievances.⁷⁶ It also separated the advocacy and regulatory functions of the bar by, for example, creating the Solicitor Regulatory Authority (SRA) as the independent regulatory arm of the Law Society.⁷⁷ To oversee the eight independent frontline regulators of each type of legal professional in England and Wales the Act created the Legal Services Board (LSB), which acts as a "meta-regulator."⁷⁸ Second, the Legal Services Act allowed for Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs).⁷⁹ LDPs, the first of which were licensed in 2009, permit different types of legal professionals to own and manage law firms together (for example, solicitors and barristers can practice together in a LDP, while previously they had to practice in separate firms).⁸⁰ ABSs began to be licensed in 2011 and can be fully owned by non-lawyers as well as offer non-legal services alongside legal services.⁸¹

These reforms were brought about to increase competition, make the market more consumer friendly, and increase access to legal services for those without

72. Some of these other professions also formalized the role non-licensed individuals were already performing. For a short history of the origins of these licensed legal professionals, see *LEGAL SERV. INST., THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE* (Aug. 2010), <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf> [https://perma.cc/D5AB-YZE2?type=source].

73. For an excellent history of the reforms that were instituted in the English legal profession in the 1980s and 1990s, see RICHARD ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003).

74. In a 2001 report the Office of Fair Trading pointed to uncompetitive practices in the legal profession that it argued needed to be reformed. See *OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS* (2001), http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf [https://perma.cc/F33B-3DTL].

75. See CLEMENTI REPORT, *supra* note 44.

76. See Legal Services Act 2007, c. 29, § 115 (UK).

77. See *How We Work*, SOLIC. REG. AUTHORITY, <http://www.sra.org.uk/sra/how-we-work.page> [https://perma.cc/7KDS-GWZ2] (last visited Oct. 31, 2015).

78. See Approved Regulators, *LEGAL SERV. Bd.*, http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [https://perma.cc/NF5M-MGUP] (last visited Oct. 31, 2015).

79. See Legal Services Act 2007, c. 29, § 5 (UK) (setting out the legal basis for ABSs); see also *Legal Disciplinary Practice*, L. Soc'Y (Apr. 6, 2011), <http://www.lawsociety.org.uk/advice/practice-notes/legal-disciplinary-practice/#ldp2> [perma.cc/GV65-8LHG] (describing the legal basis for LDPs) [hereinafter *Legal Disciplinary Practice*].

80. See *Legal Disciplinary Practice*, *supra* note 79.

81. See generally *Alternative Business Structures*, *supra* note 11 (describing how ABSs operate).

them.⁸² Although most ABSs licensed so far are traditional law firms simply adopting a new form, many are new actors in the legal services with new business models.⁸³ The reforms have also caught the attention of foreign investors. The publicly listed Australian law firm, Slater & Gordon, became an ABS in 2012 and subsequently bought several personal injury and general service law firms across the country to become a major market player.⁸⁴ LegalZoom, a U.S. online legal service provider, has also received an ABS license and announced a partnership with a major UK law firm network.⁸⁵

Deciphering the impact of non-lawyer ownership of legal services in England and Wales can be challenging. Not only did ABSs begin to be licensed only in late 2011,⁸⁶ but shortly after the Legal Services Act was passed the 2008 financial crisis undercut the demand for legal services, especially in certain sectors such as real estate.⁸⁷ Due to increased pressure on the budget and longstanding belt-tightening trends, the government implemented major cuts to the legal aid system in April 2013 (the UK has traditionally spent more per capita on legal aid than most other countries).⁸⁸ These cuts reduced fees paid to lawyers for legal aid and eliminated legal aid for many family law, housing, employment, welfare, debt, and immigration matters, as well as created a residency test and a more stringent means cutoff for beneficiaries.⁸⁹ Since legal aid has traditionally been through government contracting with private lawyers these cuts have created downward pressure on salaries in the overall legal services market.⁹⁰

82. See MARKET INTELLIGENCE UNIT, *supra* note 41; see also CLEMENTI REPORT, *supra* note 44, at 105.

83. As of 2014, about a third of licensed ABS firms were new entrants, while the others were law firms that had already been in existence and converted to ABSs. SOLIC. REG. AUTHORITY, RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES: FINDINGS WITH SURVEYS OF ABSs AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 10 (2014) [hereinafter SOLICITORS REGULATORY AUTHORITY].

84. As of 2014, Slater & Gordon had more than 1200 staff in eighteen offices. See Neil Rose, *Slater & Gordon Completes Pannone Acquisition and Hints at Yet More to Come*, LEGALFUTURES (Feb. 17, 2014), <http://www.legalfutures.co.uk/latest-news/slater-gordon-completes-pannone-acquisition-hints-yet-come> [https://perma.cc/8JFN-QZP2] [hereinafter Rose, *Slater & Gordon Completes Pannone Acquisition*].

85. See John Hyde, *LegalZoom Enters Market with ABS License*, L. SOC'Y GAZETTE (Jan. 7, 2015), <http://www.lawgazette.co.uk/practice/legalzoom-enters-market-with-abs-licence/5045879.fullarticle> [https://perma.cc/8WQC-3RDS].

86. Neil Rose, *Future of Law: Big Brands and Alternative Business Structures*, GUARDIAN (Oct. 12, 2012), <http://www.theguardian.com/law/2012/oct/12/brands-alternative-business-structures> [http://perma.cc/MF38-3G3] [hereinafter Rose, *Future of Law*].

87. See PASCOE PLEASENCE, NIGEL J. BALMER & RICHARD MOORHEAD, A TIME OF CHANGE: SOLICITORS' FIRMS IN ENGLAND AND WALES 2–3 (2011), <https://research.legalservicesboard.org.uk/wp-content/media/time-of-change-report.pdf> [https://perma.cc/K2KZ-WLV3] (detailing a general fall in the demand for legal services after the financial crisis, particularly around real estate transactions and probate).

88. See John Flood & Avis Whyte, *What's Wrong with Legal Aid? Lessons from Outside the UK*, 25 CIV. JUST. Q. 80, 84 (2006). On cuts to the legal aid system, see Owen Bowcott, *Labour Peer Condemns Legal Aid Cuts*, GUARDIAN (May 2, 2012), <http://www.theguardian.com/law/2012/may/02/labour-peer-legal-aid-cuts> [https://perma.cc/9YLB-5SXU] [hereinafter *Labour Peer*].

89. See *Labour Peer*, *supra* note 88.

90. For the first time in their history barristers in the country went on strike in January of 2014 to protest these changes, indicating both the perceived severity of the cuts to the legal system and the profession. Owen Bowcott,

Despite this turmoil, the available data does allow us to see where Alternative Business Structures have and have not entered the market. As of August 2014, there were over 360 ABSs, most of which had been licensed by the Solicitor Regulatory Authority (SRA).⁹¹ The ABS firms licensed by the SRA are

TABLE 2:
ABS MARKET PRESENCE IN DIFFERENT LEGAL SECTORS REGULATED BY
SOLICITOR REGULATORY AUTHORITY BETWEEN OCTOBER 2012 AND
SEPTEMBER 2013.⁹³

| | ABS market share (%) of Sector | Number of ABSs in Sector | Number of ABSs > 50% of Business in Sector |
|------------------------------------|--------------------------------|--------------------------|--|
| Children | 3.47% | 33 | 0 |
| Consumer | 19.77% | 6 | 0 |
| Criminal | 2.87% | 34 | 7 |
| Debt Collection | 3.73% | 46 | 3 |
| Employment | 6.07% | 94 | 5 |
| Family/Matrimonial | 5.27% | 76 | 5 |
| Intellectual Property | 2.46% | 16 | 1 |
| Landlord/Tenant | 3.45% | 57 | 2 |
| Litigation (Other) | 4.26% | 112 | 18 |
| Mental Health | 23.49% | 6 | 1 |
| Non Litigation Other ⁹² | 16.80% | 64 | 5 |
| Personal Injury | 33.53% | 102 | 53 |
| Probate Estate Administration | 4.78% | 67 | 0 |
| Property Commercial | 3.19% | 73 | 0 |
| Property Residential | 3.03% | 78 | 2 |
| Social Welfare | 11.96% | 5 | 0 |
| Wills Trusts Tax Planning | 3.35% | 89 | 7 |

Barristers and Solicitors Walk out Over Cuts to Legal Aid Fees, GUARDIAN (Jan. 5, 2014), <http://www.theguardian.com/law/2014/jan/05/barristers-solicitors-walkout-legal-aid-cuts> [<http://perma.cc/Q7V6-CRST>].

91. Nick Hilborne, *SRA Now Licensing More Than 300 ABSs*, LEGALFUTURES (Aug. 6, 2014), <http://www.legalfutures.co.uk/latest-news/sra-now-licensing-more-than-300-abs> [<http://perma.cc/GSR7-8F3R>].

92. “Non Litigation Other” is a catchall category that includes work that does not fit neatly into other categories when they self-report. It is unclear what types of work firms might be including in this category. Email from CBT to author (June 13, 2014) (on file with author).

93. SOLICITORS REGULATORY AUTHORITY, *supra* note 83, at 12, supplemented with data provided in email correspondence with SRA (June 13, 2014).

disproportionately concentrated in certain sectors, particularly personal injury, where in 2012–2013 ABS firms accounted for 33.5 percent of the market share.

Following personal injury, ABSs have had the biggest share of revenue in consumer, social welfare, and mental health law, although each of these sectors had a relatively small number of actual ABSs.⁹⁴ Consumer law includes product liability cases, mental health law contains mental health malpractice, and social welfare law includes disability benefits, so these legal services may be being offered by larger personal injury firms.⁹⁵ Corporate law, financial advice, civil liberties and immigration are left out of the above table because in these categories less than two percent of market share were with ABSs.⁹⁶

The next two sub-sections examine in more detail the initial impact of ABSs in the UK in two legal sectors: personal injury and family law. These examples highlight both how ABS firms are transforming these sectors, but also that these transformations do not necessarily bring improvements in access and can raise some professionalism concerns.

1. PERSONAL INJURY AND THE INSURANCE INDUSTRY

The rush of ABS licensed firms into the personal injury market has created new innovations, brought in new types of investors, and generated larger economies of scale.⁹⁷ However, the access benefits so far have been questionable and some of these ABSs have also created the possibility for new types of conflict of interest and helped actors bypass professional regulations.

The rapid growth of non-lawyer ownership in personal injury is not particularly surprising. The personal injury market is both historically large and, at least in recent years, disproportionately profitable, making it a clear target for outside investors.⁹⁸ Personal injury firms also require capital-intensive upfront costs, both to solicit claims through advertising and then to screen those claims.⁹⁹

94. This work constituted over fifty percent of business for only one ABS. *Id.*

95. *Id.*; Nick Hilborne, *ABSs Capture a Third of Personal Injury Market, SRA Research Reveals*, LEGALFUTURES (June 12, 2014), <http://www.legalfutures.co.uk/latest-news/abss-capture-third-personal-injury-market-sra-research-reveals> [http://perma.cc/LP6G-8F6J].

96. Email from SRA to author (June 13, 2014) (on file with author).

97. Quindell, discussed in this section, is an example of a firm with a new business model, outside investors, and a larger economy of scale. *Infra* note 117.

98. Previous research found firms that were more productive were most likely to operate in the injury market segment. LEGAL SERV. BOARD, EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 6 (Oct. 2013), [https://research.legalservicesboard.org.uk/w/on file with author/u 2015\]ls,gler](https://research.legalservicesboard.org.uk/w/on file with author/u 2015]ls,gler) mentions. Is this what the author intended to cite back to?r that it comes from the same sop-content/media/Changes-in-competition-in-market-segments-REPORT.pdf [https://perma.cc/Q56V-37YL] [hereinafter LSB 2013]. The sector accounted for £1.8 billion in 2011 or about 12 percent of all legal turnover for solicitors in the United Kingdom. *Id.* at 4.

99. The need for larger investment in advertisement led to the growth of claims management firms in the United Kingdom before the 2013 ban on referral fees. LONDON ECON., ACCESS TO JUSTICE: LEARNING FROM LONG TERM EXPERIENCES IN THE PERSONAL INJURY LEGAL SERVICES MARKET 17 (2014), <https://research>.

There are regulatory reasons unique to the UK that likely helped spur non-lawyer investment as well. The government banned referral fees in April 2013 after a report recommending their prohibition by Justice Rupert Jackson to the Ministry of Justice.¹⁰⁰ This ban, and its anticipation, arguably sped the entry of ABSs into the personal injury market. Large insurance companies had previously made money off of the referral of their customers to personal injury lawyers after they had been in auto accidents.¹⁰¹ Instead of losing this lucrative source of revenue, insurance companies have instead invested in their own law firms to which they can refer cases without charging a fee, but still benefit from the subsequent profits.¹⁰² Meanwhile, large personal injury law firms, like Slater & Gordon, have bought law firms with well recognized brands and invested in advertising to ensure a steady supply of clients in the wake of the referral fee ban.¹⁰³

Many lawyers have criticized insurance companies for bypassing restrictions on referral fees by setting up their own legal practices. As one prominent UK personal injury lawyer noted,

The referral fee ban was ostensibly at least a principled one, i.e. distaste in selling the right to act for an injured person. It seems a strange solution to that problem, to allow those referrers now to own [a solicitor's practice] rather than simply be paid by a solicitor's practice a referral fee, and to somehow conclude this is better.¹⁰⁴

Indeed, beyond a general “distaste” for referral fees, the Jackson report criticized the referral system for not helping consumers find the best quality lawyer for their claim, but rather guiding them towards the lawyer who would pay the referrer the highest price.¹⁰⁵ Consumers who are directed to an ABS

legalservicesboard.org.uk/wp-content/media/Access-to-Justice-Learning-from-PI.pdf [<http://perma.cc/Q56V-37YL>] [hereinafter LEARNING FROM LONG TERM EXPERIENCES].

100. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 203-206 (Dec. 2009), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> [<https://perma.cc/JE44-6XRQ>]; *Claims Management Company Regulations, Guidance and Legislation*, MINISTRY OF JUSTICE (Jan. 23, 2015), <http://www.justice.gov.uk/claims-regulation/information-for-businesses/referral-fees-ban-in-personal-injury-cases> [<https://perma.cc/A4JP-4UPW>?type=source] (detailing April 2013 ban created by Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) [hereinafter MINISTRY OF JUSTICE].

101. Before the referral fee ban over fifteen percent of personal injury solicitor firms received over fifty percent of their business through referrals. LSB 2013, *supra* note 98, at 53.

102. See Neil Rose, *ABS-Owning Insurers Sign up to Code on Handling Legal Work for Policy Holders*, LEGALFUTURES (Feb. 14, 2014), <http://www.legalfutures.co.uk/latest-news/abs-owning-insurers-sign-code-handling-legal-work-policyholders> [<https://perma.cc/TL5Q-4CEL>?type=source] [hereinafter Rose, *ABS-Owning Insurers*].

103. See Interview 1, in London, Eng. (Jan. 9, 2014) [hereinafter Interview 1].

104. Email 21 (Apr. 7, 2014) (on file with the author and with Geo. J. Legal Ethics).

105. JACKSON, *supra* note 100, at 203–206. Importantly, the report also criticized referral fees for increasing the price of the overall personal injury litigation process by adding more players and costs. *Id.*

because their insurance company owns it similarly seem to be referred simply because of the monetary benefit to the insurance company and not because the referral is necessarily in the consumer's best interest.

One ABS, Quindell, which is listed on the Alternative Investment Market (AIM) on the London Stock Exchange, has bypassed the referral ban even though it is not owned by an insurance company.¹⁰⁶ Instead, Quindell sells claims management services.¹⁰⁷ Its agents staff telephone hotlines that are the first point of contact for customers when they call insurance companies after an auto accident.¹⁰⁸ The agent then alerts the insurance company to the claim, but also offers a package of other services to the customer including roadside assistance, vehicle repair, car rental, rehabilitation medical support, and legal services.¹⁰⁹ Since Quindell agents are the first point of contact with customers, recommending them to their legal services arm is not technically a banned referral.¹¹⁰ This strategy has been profitable, increasing Quindell's reported revenue from £163 million (with £52 million in profit) in 2012 to £380 million (and £137 million in profit) in 2013.¹¹¹ Some though have questioned whether the company is subverting the referral fee ban¹¹² or whether having medical evidence for a personal injury client provided by the same company that provides legal representation for the client creates a conflict of interest.¹¹³ One particularly critical report of Quindell's business strategy (written by a firm short selling its stock) led Quindell's shares to lose almost half their value, or about £1 billion, in one day in April 2014.¹¹⁴

106. Rory Gallivan, *Quindell Mulls U.S. Listing After Move to London Premium List Blocked*, WALL STREET J. (June 11, 2014), <http://online.wsj.com/articles/quindell-mulls-u-s-listing-after-move-to-london-premium-list-blocked-1402498223> [http://perma.cc/5UJ3-QY2G].

107. QUINDELL, QUINDELL PORTFOLIO PLC INVESTOR TEACH-IN & TRADING UPDATE 21 (2013) (describing how Quindell pays to be first notice of loss contact point). Quindell also receives a significant portion of its clients through direct customer outreach and other intermediaries.

108. *Id.*

109. *Id.*

110. *Id.*; see also Neil Rose, *Quindell Targets Huge Staff Growth and Higher Value Cases*, LEGALFUTURES (June 19, 2014), <http://www.legalfutures.co.uk/latest-news/quindell-targets-huge-staff-growth-higher-value-cases> [https://perma.cc/Y2GN-SQ3S?type=source] [hereinafter Rose, *Quindell Targets Huge Staff Growth*].

111. Stephen Joseph, *Investor Relations*, QUINDELL (Sept. 14, 2015), <http://www.quindell.com/investors/> [https://perma.cc/5NRP-BYLL].

112. Richard Moorhead, Lawyer Watch, *After Referral Fees—Ethical Personal Injury Practice?* LAWYER-WATCH (Mar. 21, 2014), <http://lawyerwatch.wordpress.com/2014/03/21/after-referral-fees-ethical-personal-injury-practice/> [https://perma.cc/BJD8-QKMN?type=source] (noting how First Notification of Loss Services (like Quindell) have the effect of bypassing the referral fee ban).

113. Interview 18, in London, Eng. (July 7, 2014).

114. Although this report seems to have been produced by an American trading firm shorting Quindell's stock, the market's reaction may indicate a larger unease about their business model. Neil Rose, *Quindell Launches Legal Action Over 'Shorting Attack'*, LEGALFUTURES (April 25, 2014), <http://www.legalfutures.co.uk/latest-news/quindell-launches-legal-action-shorting-attack> [https://perma.cc/8J6U-GYND?type=source] [hereinafter Rose, *Quindell Launches Legal Action*].

While it is in the short-term interest of insurance companies, or companies they contract with like Quindell, to have those they insure succeed in claims against third party insurance companies, it is in the interest of the insurance industry overall to keep the cost of claims down. This raises questions about whether there is an inherent conflict in having personal injury firms owned by insurers even if they do not bring cases against the insurers that own them.¹¹⁵ Before the ban on referral fees, some personal injury firms had bulk contracts with insurance companies to provide the firm with cases and this perhaps meant these law firms were careful not to be too aggressive against the insurance industry.¹¹⁶ However, such an arrangement still created some distance between insurance companies and personal injury law firms.

In February 2014, many of the major insurance companies with ABSs signed a voluntary code of conduct.¹¹⁷ Amongst other provisions, in the code they agreed that they and any party they might refer customers to would whenever possible settle their customers' claims through a government and stakeholder sanctioned claims portal and in a manner that does not unreasonably increase legal costs for the at-fault insurer.¹¹⁸ Such codes of conduct raise concerns that the insurance industry is actively trying to shape its ABSs' legal practice to keep insurance companies costs as low as possible, which may, or may not be, in the best interests of those who have been injured.

More generally, insurance companies have traditionally lobbied for regulation to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulation that would allow for greater compensation.¹¹⁹ Having insurance companies capture a large part of the

115. There is no outright prohibition on an insurance company owned ABS bringing an injury case against the insurance company that owns them. However, the Solicitors Regulation Authority Handbook provides a set of principles that all solicitors must follow. Principle 3 states, “[y]ou must not allow your independence to be compromised,” and Principle 4 states, “[y]ou must act in the best interests of each client.” Both of these principles would seem to bar solicitors from acting against the company that owns their firm on behalf of their client. SOLIC. REG. AUTH., *SRA Principles 2011* (2011), <http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page> [<http://perma.cc/66J7-VREV>].

116. Interview 17, in London, Eng. (July 3, 2014).

117. ASS'N OF BRITISH INSURERS, SUPPORT FOR CUSTOMERS WITH ROAD TRAFFIC INJURIES: THE ABI CODE (July 1, 2015), <https://www.abi.org.uk/media/Files/Documents/Publications/Public/2014/personal%20injury/Customers%20with%20Road%20Traffic%20Injuries%20The%20ABI%20Code.ashx> [<https://perma.cc/B7P7-YYCQ>]; Rose, *ABS-Owning Insurers*, *supra* note 102.

118. ASS'N OF BRITISH INSURERS, *supra* note 117, at § 22(i); Rose, *ABS-Owning Insurers*, *supra* note 102. In the code of conduct signatories also agreed to alert customers they were referring of their relationship with their ABS and also not to pressure customers into making claims or refer clients to third parties who might. ASS'N OF BRITISH INSURERS, *supra*, note 117, at §§ 15–16.

119. The Association of Personal Injury Lawyers undertakes multiple lobbying efforts on behalf of UK personal injury lawyers. *See Parliamentary Room*, ASS'N OF PERS. INJ. L., <http://www.apil.org.uk/parliamentary-room> [<http://perma.cc/P5QT-D82Y>] (last visited Oct. 9, 2015). The Association of British Insurers undertakes lobbying efforts for the UK insurance industry. *See About Us*, ASS'N OF BRITISH INSURERS, <https://www.abi.org.uk/About> [<http://perma.cc/9MWW-DQ6H>] (last visited Oct. 31, 2015).

personal injury sector upsets this political balance and could lead to regulation more favourable to insurance companies in the future.

While ABSs owned by insurance companies raise a number of potentially serious conflicts of interest, the access benefits of ABSs in the personal injury market have yet to be demonstrated.¹²⁰ In fact, there has been a decline in personal injury claims made in the United Kingdom from 2011–2012 to 2014–2015.¹²¹ This recent drop has been led by motor claims, which account for about three-quarters of all personal injury claims and reduced about 8 percent from 828,489 claims in 2011–2012 to 761,878 claims in 2014–2015.¹²² It is important to note that between 2011–2012 and 2014–2015 there has been a 35 percent jump in clinical negligence claims (which numbered 18,258 in 2014–2015) and an 18 percent jump in claims against employers (which numbered 103,401 in 2014–2015).¹²³ While this data indicates that the entry of ABSs into the market have failed to halt a decline in the overall number of injury claims, and motor accident claims in particular, without further information it is not possible to speculate about ABSs impact. The decline in motor vehicle claims and the recent rise of claims in clinical negligence and against employers could be caused by the emergence of ABSs, but also the recent referral fee ban, broader reforms in the personal injury sector, a change in the number of motor accidents,¹²⁴ a recent rise in hearing loss claims in the country,¹²⁵ or other factors.

Yet, there are other reasons to believe that ABSs may not be having a significant direct impact on access in personal injury matters. In 2010–2011, before ABSs were licensed, ninety-seven percent of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid,

120. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 38 (“It is clear that ABSs have already had a big impact on the personal injury market. However, it is not yet possible to assess whether this had led to an increase in access to justice.”).

121. All parties in the UK who receive a claim against them for a personal injury matter must register with the government’s Compensation Recovery Unit, which recovers social security and National Health Service costs in certain compensation and personal injury cases. *Collection, COMP. RECOVERY UNIT*, <https://www.gov.uk/government/collections/cru> [<https://perma.cc/E2QU-UPCE>] (last updated June 8, 2015) [hereinafter COMP. RECOVERY UNIT DATA]; data on the number of personal injury claims taken from excel file available at the Compensation Recovery Unit’s website.

122. *Id.*

123. *Id.* For a fuller discussion of what might be causing the trends in different categories of personal injury, see LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 25–28.

124. Road injuries and deaths have been steadily declining in the United Kingdom in recent years (on average down 4.7 percent each year since 2006, including 2012 and 2013). See *Reported Accidents, Vehicles & Casualties*, DEPT. FOR TRANSPORT, <https://www.gov.uk/government/statistical-data-sets/ras40-reported-accidents-vehicles-and-casualties> [<https://perma.cc/YY6G-YFRZ>] (last updated Sept. 24, 2015) (click on link for Table RAS40001).

125. Mark Sands, *25% of UK Workforce at Risk of Noise Induced Hearing Loss*, Post, May 27, 2014 (noting a forty percent increase in hearing loss claims since the introduction of the Jackson Committee reforms in 2013).

a trade union, or some other source.¹²⁶ Given the nature of this market, it would seem that large shifts in the number of people who can make personal injury claims are more likely to be driven by changes in the structure of conditional fee arrangements or calculations within the insurance industry on when they should fund claims, rather than by the emergence of ABSs.

2. FAMILY LAW AND CO-OPERATIVE LEGAL SERVICES

Co-operative Legal Services is part of the Co-operative Group, which was founded in 1863, is owned by its almost eight million members, and has 3,500 retail outlets throughout the country.¹²⁷ The Co-operative is known in particular for its grocery stores, pharmacies, banks, and services in funeral care and farming. In 2006 the Co-operative began offering legal services to its members and in 2012 they were granted an ABS license to provide these services to the general public.¹²⁸ Co-operative Legal Services is one of the most prominent examples of an ABS offering a broad range of civil legal services to a diverse customer base. Many observers, including those inside the Co-operative,¹²⁹ see Co-operative Legal Services as a way to increase access through economies of scale and scope. However, it is unclear how much the Co-operative has been able to actually increase access and its larger business model is still unproven.

In 2014, Co-operative Legal Services had a staff of 342 and a £23 million annual turnover.¹³⁰ Its major areas of work were probate, personal injury, and family law.¹³¹ Co-operative's funeral, financial, and other arms are able to refer clients to its legal services, and Co-operative Legal Services advertises heavily in the Co-operative Group's chain of grocery stores.¹³² Co-operative Legal Services primary offices are in London, Manchester, and Bristol, but they service many of their customers via phone.¹³³ They claim that by investing in infrastructure and quality control systems they can provide a better service at a more affordable price.¹³⁴

The Co-operative is unique in being member owned and committed to a larger social mission. The Co-operative claims it does not aim to make a profit from its

126. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 31–32.

127. *About Us*, THE CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/> [http://perma.cc/72KU-AT6D] (last visited Oct. 9, 2015); *Who We Are*, THE CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/an-introduction/> [http://perma.cc/Z3S8-J2YL] (last visited Oct. 9, 2015).

128. See *Supermarket Sweep: The cold wind of competition sweeps the legal services market*, ECONOMIST, Apr. 27, 2013, at 54.

129. See Interview 10, *supra* note 47.

130. *Id.*; THE CO-OPERATIVE. GRP., ANNUAL REPORT 19 (2014), <http://www.co-operative.coop/Corporate/PDFs/Annual-Report/2014/Co-operative-Group-Annual-Report-2014.pdf> [http://perma.cc/NGZ9-5NHH] [hereinafter THE CO-OPERATIVE GRP.].

131. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

132. Interview 10, *supra* note 47; THE CO-OPERATIVE. GRP., *supra* note 130, at 16–17.

133. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

134. Interview 10, *supra* note 47.

legal services as they are interested in offering a “social good” both to their members and the community at large.¹³⁵ Several of the senior lawyers who helped build Co-operative Legal Services joined from the social welfare sector of the legal profession when steep cuts in legal aid were announced in the early 2010s.¹³⁶ They came in part because they saw the Co-operative as a viable platform to provide low cost legal services through a trusted brand to not only the middle class, but also to low income populations who no longer had access to legal aid.¹³⁷

This sense of social mission is particularly true in regard to family law. While legal aid had previously been available to those who were income eligible in most private family law matters, including divorce and custody battles, after the cuts in April 2013 legal aid was only available in private family law disputes involving domestic abuse, forced marriage, or child abduction.¹³⁸ Within this reduced ambit, Co-operative Legal Services was the largest provider of family legal aid in the UK in 2014, having won seventy-eight government contracts across the country.¹³⁹ They serviced these contracts with peripatetic teams of lawyers that share office space in twenty-three of the Co-operative’s bank branches.¹⁴⁰ They also have one of three national telephone contracts for family legal aid.¹⁴¹ Beyond these government contracts, the Co-operative provides family legal services to the public at fixed rates. Some have expressed hope that the Co-operative will be able to provide these services at low enough prices so as to meaningfully mitigate access needs created by legal aid cuts.¹⁴²

However, although the Co-operative is one of the largest providers of family law services, it has not been able to halt a massive increase in the number of unrepresented litigants in UK family courts as a result of legal aid cuts that took effect in 2013. Between 2011 and the first half of 2014 the percent of private family law disputes where neither party was represented by a lawyer more than doubled, and the percent of cases where both parties were represented by a lawyer dropped from forty-nine percent to 25.8 percent.

135. *Id.*; *Co-Operative Group Values and Principles*, CO-OPERATIVE. GRP., <http://www.co-operative.coop/corporate/aboutus/The-Co-operative-Group-Values-and-Principles/> [http://perma.cc/J3LJ-PRNF] (last visited Oct. 9, 2015) (noting “social responsibility” and “concern for the community” as core values and principles).

136. *See Interview 10, supra* note 47.

137. *Id.*

138. *Q&A: Legal Aid Changes*, BBC News (March 20, 2013), <http://www.bbc.com/news/uk-21668005> [http://perma.cc/4JQ2-77AP].

139. *Interview 10, supra* note 47.

140. *Id.*

141. *Co-operative Launches ‘Massive Expansion’ of Family Legal Aid Service*, SOLIC. J., (April 23, 2013), <http://www.solicitorsjournal.com/news/management/business-development/co-op-launches-%E2%80%98massive-expansion%E2%80%99-family-legal-aid-service> [http://perma.cc/RPS3-5RWZ].

142. *Interview 10, supra* note 47.

TABLE 3:
PERCENT OF PARTIES WITH LEGAL REPRESENTATION IN PRIVATE FAMILY LAW
DISPUTES IN THE UK.¹⁴³

| | Both Parties | Applicant Only | Respondent Only | Neither Party |
|-----------------------------|-------------------------|---------------------------|----------------------------|--------------------------|
| 2011 | 49.0 | 29.9 | 10.0 | 11.1 |
| 2012 | 46.1 | 31.4 | 10.3 | 12.2 |
| 2013 | 35.0 | 37.4 | 9.3 | 18.3 |
| 2014 (1 st half) | 25.8 | 37.4 | 9.7 | 27.1 |

Just because new ABSs like Co-operative Legal Services have not been able to fill the gap created by reductions in legal aid, does not mean they have not helped mitigate the impact of these cuts or that they will not play a larger role in the future.¹⁴⁴ However, in recent years, by far the predominant driver of changes in access to representation in family law disputes in the United Kingdom is not the rise of ABSs like Co-operative Legal Services, but cuts in legal aid. Much like in personal injury, the emergence of ABSs in family law representation seems at best a sideshow with unclear effects in the larger access story.

B. AUSTRALIA

Like in the United Kingdom, Australia's competition authority (which enforces anti-competition law in the country) played a key role in advocating for the adoption of non-lawyer ownership in the country.¹⁴⁵ Under this pressure, and with little input from regulators or the bar, in the early 2000's the New South

143. This data is taken from U.K. MINISTRY JUST. COURT STATISTICS (QUARTERLY): APRIL TO JUNE MAIN TABLES, tbl 2.4 (2014), <https://www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014> [<https://perma.cc/3KMD-S8W5>]. The number of private law family disputes also began to decline in 2014 (down fourteen percent from 2013), perhaps indicating that a lack of representation is deterring people from still seeking remedies in court. *Id.*

144. The number of respondents who reported that the family law services they received in the past two years represented value for money increased from fifty-seven percent to sixty-three percent between 2011 and 2014. There was also an increase of fixed fees in the family legal services market from twelve percent to forty-five percent. LEGAL SERVICES CONSUMER PANEL, TRACKER SURVEY 3 (2014) (U.K.), http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2014%20Tracker%20Briefing%201_Changing_market.pdf [<https://perma.cc/TE6H-GU7C>].

The entry of ABSs into the market may have helped spur these changes. However, these changes may have also been caused by an increasingly competitive market in the run up to legal aid cuts. ABSs, including Co-operative, are reported to have only about five percent of the family legal services market so, while it is possible that they have spurred some of these changes, it seems unlikely that they are solely responsible. *Supra* tbl. 2.

145. See Georgina Cowdroy & Steven Mark, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 673–75 (2004).

Wales government adopted a set of reforms that allowed for Incorporated Legal Practices (ILPs) and Multi-Disciplinary Partnerships (MDPs).¹⁴⁶ ILPs and MDPs are corporations and partnerships respectively that can offer legal services, along with almost any other non-legal service,¹⁴⁷ and are allowed unlimited non-lawyer investment.¹⁴⁸ Other Australian states undertook similar reforms around the same time.¹⁴⁹

Each ILP or MDP has a designated legal practitioner director or partner, who manages the firm's legal services and ensures compliance with professional obligations.¹⁵⁰ The firms must also create and implement their own "appropriate management systems" to ensure compliance with professional rules.¹⁵¹ However, unlike ABSs in England and Wales, ILPs and MDPs in Australia do not have to be licensed by a legal regulator.¹⁵² The Supreme Court may disqualify them though for violating certain conduct rules.¹⁵³ In other words, it is a registration, not a licensing, process.

While the United Kingdom has seen significant outside investment since allowing for non-lawyer ownership, the impact of similar reforms on the relatively small Australian legal services market has been more subdued. ILPs, and to a lesser extent MDPs, have become quite common in the Australian legal scene, but actual outside ownership outside a small handful of prominent examples is still rare. Instead these forms are largely adopted because of perceived tax and succession benefits.¹⁵⁴ Indeed, the large majority of ILPs are solo practitioners and most other ILPs are organized along the lines of traditional law firms.¹⁵⁵

146. *Id.*; *Legal Profession Amendment Act 2000* (NSW) (Austl.); *id.* at pt. 2.6. For a short history of when states allowed for incorporation of legal practices, see Parker, *supra* note 10, at 5–6.

147. *Legal Profession Act 2004* (NSW) s 135(1) (Austl.). An ILP may not conduct a managed investment scheme. *Id.* at s 135(2).

148. *Practice Structures*, THE LAW SOCIETY OF NEW SOUTH WALES, <http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/practicestructures/index.htm> [<http://perma.cc/84PM-D84B?type=live>] (last visited Oct. 7, 2015) (stating that any corporation may become an ILP, including therefore those owned by non-lawyers).

149. Only the state of South Australia still bars non-lawyer ownership in legal services. *Alternative Business Structures: Lessons From Other Jurisdictions*, GAZETTE 5 (Fall 2012), <http://lawsocietygazette.ca/wp-content/uploads/2013/01/gazette-2012-03-fall.pdf> [<https://perma.cc/6Q2Q-XF87?type=source>].

150. *Legal Profession Act 2004* (NSW) ss 140, 169 (Austl.).

151. *Id.* at § 140; Sheehy, *supra* note 55, at 16–18.

152. Sheehy, *supra* note 55, at 16.

153. *Legal Profession Act 2004* (NSW) s 153 (Austl.).

154. Parker, *supra* note 10, at 12 (ILPs are taxed at the corporate tax rate and it is arguably easier to transfer shares of an ILP to younger colleagues than in a traditional partnership).

155. See, e.g., VICTORIA LEGAL SERV. BOARD & COMMISSIONER ANN. REP. 58 (2013), http://lsbc.vic.gov.au/documents/Report-Legal_Services_Board_and_Commissioner_annual_report-2013.pdf [<https://perma.cc/YK96-A8UL?type=source>] (In the state of Victoria there were 921 ILPs in 2013 of which 715 were solo practitioners). In New South Wales, as of 2014, there were just eighty-five ILPs with ten or more lawyers. Email 20 (Mar. 25, 2014) (on file with the author). From the websites of these firms none were offering fundamentally

1. PERSONAL INJURY AND CLASS ACTION: THE STORY OF THREE LAW FIRMS

Although there has not been a rush of non-lawyer owners into the legal services market in Australia, three law firms, including two personal injury firms, have now listed on the Australian Securities Exchange.¹⁵⁶ The two listed personal injury firms—Slater & Gordon and Shine Lawyers—are two of the three largest personal injury law firms in the country.¹⁵⁷ The other large personal injury law firm, Maurice Blackburn, has not gone public and continues to be lawyer owned. A comparison of these three personal injury law firms suggests that while publicly listing in the Australian context may not create readily apparent new conflicts of interest, it could more subtly undermine the public-spirited ideals of these firms. Such a comparison also casts doubt on whether outside ownership is necessary to achieve large economies of scale or whether such size in the end improves access to legal services.

In 2013, the personal injury market in Australia was estimated at somewhere between \$550 and \$700 million (AUD).¹⁵⁸ Contingency fees are not allowed in Australia,¹⁵⁹ but states have varied types of conditional fee arrangements. For example, Victoria and Queensland allow for a twenty-five percent increase to a winning solicitor's hourly fees, but New South Wales does not allow for a similar “uplift” upon winning.¹⁶⁰ Firms with deep pockets are better placed to offer conditional no win no fee arrangements, while tort reform in the early 2000s that included restrictions on the type of advertising allowed in personal injury has tended to favor established brands.¹⁶¹ This environment has helped lead to consolidation in the personal injury market, and as of 2013 the three largest players were Slater & Gordon (with twenty to twenty-five percent of the market), Maurice Blackburn (with just over ten percent), and Shine Lawyers (with almost

different services than traditional law firms although two, Slater & Gordon and Shine Lawyers, were publicly owned companies.

156. Slater & Gordon Limited (SGH) (listed May 21, 2007), ASX, <http://www.asx.com.au/asx/research/company.do#!/SGH> [perma.cc/Q73K-GDNK] (last visited Dec. 23, 2015); ILH Group Limited (ILH) (listed Aug. 17, 2007), ASX, <http://www.asx.com.au/asx/research/company.do#!/ILH> [perma.cc/FH83-FQKZ] (last visited Dec. 23, 2015); Shine Corporate Ltd (SHJ) (listed May 15, 2013), ASX, <http://www.asx.com.au/asx/research/company.do#!/SHJ> [perma.cc/PVS8-QFJQ] (last visited Dec. 23, 2015).

157. SLATER & GORDON ANNUAL REPORT 2014, SLATER & GORDON 9 (2014), <https://media.slatergordon.com.au/annual-report-2014.pdf> [https://perma.cc/WP3J-R37T] [hereinafter SLATER ANNUAL REPORT].

158. *Id.*

159. MAURICE BLACKBURN LAWYERS, RESPONSE TO THE ACCESS TO JUST. ARRANGEMENTS ISSUE PAPER 3, 4 (Aug. 7, 2013), http://www.pc.gov.au/__data/assets/pdf_file/0007/129337/sub059-access-justice.pdf [http://perma.cc/NE8F-GZZ4].

160. *Id.* at 4. The lack of allowed “uplift” has led firms to complain that in New South Wales they cannot offer legal services for cases they would be able to represent in other states.

161. SHINE PROSPECTUS, *supra* note 60, at 10 (“Tort reform also presents opportunities, particularly in the acquisition of smaller practices which do not have the systems in place to deal with complex regulatory changes.”).

ten percent).¹⁶²

Slater & Gordon, founded in Melbourne in 1935, was already a well-known personal injury law firm when it was the first law firm to list on a stock exchange in Australia in 2007.¹⁶³ At that time it had 400 staff in fifteen offices,¹⁶⁴ revenues of \$55 million a year,¹⁶⁵ and an estimated ten percent of the personal injury market.¹⁶⁶ However, partly through a series of acquisitions,¹⁶⁷ by 2014 it had expanded to have revenue of \$234 million in Australia and employed 1,200 people in seventy locations across the country, in addition to having extensive operations in the UK.¹⁶⁸ It spends heavily on advertising and in 2014 had about seventy-five percent brand awareness across Australia.¹⁶⁹ Slater & Gordon is now also the largest provider of family law services, with plans to expand to become a general all-purpose consumer law firm.¹⁷⁰

While Slater & Gordon has been able to grow rapidly since it went public, it was already expanding before it listed.¹⁷¹ Similarly, Shine Lawyers already had offices across the country and had grown markedly before it went public in 2013.¹⁷² Maurice Blackburn, the second largest personal injury firm in the country, is not publicly owned. From 2005 to 2013 it expanded at a similar rate to Slater to twenty-seven offices and 800 staff.¹⁷³ However, most of this growth was internal and it may be that publicly owned firms are at an advantage in acquiring other law firms since they can often offer generous equity packages to incoming partners.

162. SHINE PROSPECTUS, *supra* note 60, at 10 (estimating Shine had no more than 10 percent of the personal injury market); SLATER ANNUAL REPORT, *supra* note 157, at 9 (estimating Slater had twenty-five percent of the personal injury market); Telephone Interview 16 (June 11, 2014) (noting Maurice Blackburn has a slightly larger share of the personal injury market than Shine) [hereinafter Interview 16].

163. SLATER & GORDON, PROSPECTUS 10 (2007), <https://media.slatergordon.com.au/prospectus.pdf> [http://perma.cc/B7JE-4HR5] [hereinafter SLATER PROSPECTUS].

164. *Id.*

165. *Id.*, at 10. According to its management team, Slater pursued a public listing rather than private equity because it provided more money, was easier for mergers, and allowed for better management systems. Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 536–537 (2009).

166. SLATER PROSPECTUS, *supra* note 163, at 23.

167. For an overview of these acquisitions, see Our History, Slater & Gordon, [perma.cc/E4JR-LQC6] (last visited Dec. 19, 2015).

168. SLATER & GORDON, ANNUAL REPORT 2 (2014).

169. *Id.* at 11. In 2004 (before Slater went public) a survey found that the firm had sixty percent national brand awareness. SLATER PROSPECTUS, *supra* note 163, at 24.

170. Chris Merit, *Slater & Gordon's Three-Part Plan Comes Together*, THE AUSTRALIAN (Nov. 1, 2013), <http://www.theaustralian.com.au/business/legal-affairs/slater-gordons-three-part-plan-comes-together/story-e6frg97x-1226750779555?nk=cfce80ad96b8b743ccae5984fd1d6c42> [http://perma.cc/E35K-T8WN].

171. SLATER PROSPECTUS, *supra* note 163, at 10.

172. Interview 16, *supra* note 162; SHINE PROSPECTUS, *supra* note 60, at 8–9, 14–15.

173. MAURICE BLACKBURN LAWYERS, RESPONSE TO ACCESS TO JUSTICE ARRANGEMENTS ISSUES PAPER 1 (Nov. 2013), <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub059-access-justice.pdf> [http://perma.cc/V7LG-L6R4] [hereinafter MAURICE BLACKBURN RESPONSE].

Some scholars have claimed that access to investor capital allows firms like Slater & Gordon to achieve a large enough size so that it can engage in more pro bono work and fund riskier class actions that may further the public interest.¹⁷⁴ It is unclear though whether investor capital is necessary for either of these aims and it may even undermine them. Both Shine Lawyers, which only listed recently, and Maurice Blackburn, which is not publicly listed, are better known for their pro bono work than Slater & Gordon.¹⁷⁵ Meanwhile, Maurice Blackburn and Slater & Gordon are by far the two largest law firms for plaintiff class action work in the country with Maurice Blackburn claiming to be the largest.¹⁷⁶ Third party litigation funders (who are able to charge contingency fees in Australia, unlike solicitors) finance a large percent of the class actions of both these firms.¹⁷⁷ These third party litigation funders favor securities class actions and are less likely to fund consumer and product liability class actions, which must instead be funded directly by the law firms themselves.¹⁷⁸ Slater & Gordon may actually be less likely than Maurice Blackburn to directly take on the costs of these class actions because it must answer to the market, instead of the firm's partners.¹⁷⁹ For example, when Slater & Gordon lost a major consumer drug class action in 2012, it led to a 10.5 percent profit loss for the firm that year.¹⁸⁰ This very public defeat led its chairman to reassure the market that most of the rest of its class action portfolio was funded by third-party litigation funders.¹⁸¹

174. Sheehy, *supra* note 55, at 24 (“With its increased financial power supplemented by the litigation funders, Slater has been able to prosecute actions against large MNCs more effectively.”).

175. Interview 15, in Cambridge, Mass. (Apr. 18, 2014); Interview 16, *supra* note 162 (Independent observers of the Australian market both noting that Maurice Blackburn and Shine Lawyers had stronger reputations for pro bono work than Slater & Gordon).

176. MAURICE BLACKBURN RESPONSE, *supra* note 173, at 17; VINCE MORABITO, AN EMPIRICAL STUDY OF AUST.’S CLASS ACTION REGIMES FIRST REP. 28 (2009), http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf [<http://perma.cc/D3BR-TPMG>] (finding that Slater & Gordon (forty-nine proceedings) and Maurice Blackburn (thirty-three proceedings) were involved in the most class action proceedings between 1993 and 2009).

177. For an overview of the reasons behind the development of litigation funders in Australia, see generally Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014).

178. Interview 16, *supra* note 162 (academic expert on class actions noting that third party litigation funders are more likely to fund corporate class actions); *see also* Samuel Issacharoff & Thad Eagles, *The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U.N.S.W. L. J. 179, 180 (“The system of third party funders is simply ill-suited to consumer class actions, given the vast number of people who have been harmed and with whom funders would need to contract, and to bringing meritorious claims with thinner profit margins than third party funders find acceptable.”).

179. Interview 16, *supra* note 162 (arguing that since Slater is a public company it is less likely to take on riskier cases).

180. Stephanie Quine, *Failed Vioxx Action Hits Slatters’ Profit*, LAW. WKLY (Aug. 28, 2012), <http://www.lawyersweekly.com.au/news/failed-vioxx-action-hits-slater-profit> [<http://perma.cc/8GCQ-LNCH>].

181. *Id.* (Slater & Gordon’s managing director Andrew Grech reportedly stated that though it was “very disappointing, I think the important thing to emphasize is it’s very much a once-off situation and certainly not indicative of what’s in the portfolio of cases we have in the future, most of which, in the class action area, are funded by third party litigation funders now.”).

Indeed, critics of non-lawyer ownership in Australia argue that publicly listing orients the culture of a firm towards investors' expectations. The chairman of Maurice Blackburn has announced his firm's intention to stay privately owned, claiming that it does not "... want to compromise the quality of [its] work If you are a publicly listed company, then you will have to grow according to market forecast[s]."¹⁸² To meet these projections, some maintain that publicly listed firms do not take on riskier cases (such as large consumer class actions), shun pro bono (particularly controversial cases), and may even pressure their lawyers to settle cases to meet fiscal targets (although such claims have not been proven).¹⁸³

Even though the listing of law firms in Australia has not created the same types of clear conflicts of interest as other types of non-lawyer ownership in the UK, such as insurance companies owning personal injury firms,¹⁸⁴ the Australian experience does suggest that listing publicly could undermine some of the public-spiritedness of these firms. This could reduce access for certain groups that would benefit from pro bono or certain kinds of class actions. The rapid growth of Maurice Blackburn and Shine Lawyers (before it went public) should also lead one to question whether non-lawyer ownership is necessary to achieve large economies of scale, even if it may give these firms a competitive advantage in acquiring other firms. Finally, some have expressed concern that non-lawyer ownership has led to an unhealthy consolidation of the Australian personal injury market leading to a decrease in choice for consumers without necessarily improving the quality of services or making them less expensive.¹⁸⁵

C. UNITED STATES

Non-lawyer ownership of legal services is banned in all fifty U.S. states, although Washington D.C. allows for minority non-lawyer ownership, mostly to accommodate law firms with partners who are non-lawyer lobbyists.¹⁸⁶ In the face of perceived competition from accounting firms, the American Bar Association (ABA) seriously considered allowing for multi-disciplinary practice, which included non-lawyer ownership, in the late 1990s, but this was rejected amidst deep resistance from the bar whose suspicions about its dangers were

182. Jessica Seah, *Slater & Gordon Goes Global*, ASIAN LAW. (May 27, 2013), <http://practicesource.com/asian-lawyer-website-publishes-feature-slater-gordon/> [<http://perma.cc/3RD5-DUUC>] (quoting Maurice Blackburn chairman Steve Walsh).

183. Interview 27 (Aug. 17, 2014).

184. See COMP. RECOVERY UNIT DATA, *supra* note 121.

185. Cristin Schmitz, *PI Bar Warns of Fallout if ABS Comes*, THE LAW. WKLY, Aug. 29, 2014 (quoting Charles Gluckstein commenting on how he thinks Australia has become a "monopoly [personal injury] market").

186. Catherine Ho, *Can Someone Who is Not a Lawyer Own Part of a Law Firm? In D.C., Yes*, WASH. POST (Apr. 8, 2012), http://www.washingtonpost.com/business/capitalbusiness/can-someone-who-is-not-a-lawyer-own-part-of-a-law-firm-in-dc-yes/2012/04/06/gIQAnrvd4S_story.html [<http://perma.cc/2SVD-4ZER>].

heightened in the wake of the Enron scandal.¹⁸⁷ In 2012, the ABA's Commission on Ethics declined to develop a proposal that would have allowed for limited non-lawyer ownership¹⁸⁸ and the same year a task force of the New York State Bar considered and rejected recommending non-lawyer ownership.¹⁸⁹

Unlike its counterparts in the United Kingdom and Australia, the U.S.'s competition body, the Federal Trade Commission (FTC), has not been active in pushing for non-lawyer ownership, in part because of barriers created by U.S. federalism.¹⁹⁰ Jacoby & Meyers, a large branded personal injury and consumer law firm,¹⁹¹ has brought litigation in federal court in New York claiming that the ban on non-lawyer ownership is unconstitutional and limits access to the civil legal system.¹⁹² The firm argues that it does not have access to capital like its non-lawyer owned competitors, such as LegalZoom, that are able to invest heavily in technology and advertising.¹⁹³ Jacoby & Meyers asserts that the lawsuit is "to free itself of the shackles that currently encumber its ability to raise outside funding and to ensure American law firms are able to compete on a global

187. The proposal for multi-disciplinary practice in the United States considered in the late 1990s and early 2000s would have allowed for non-lawyer partners, but not passive investment. Laurel S. Terry, *The Work of the ABA Commission on Multi-Disciplinary Practice*, in *MULTI-DISCIPLINARY PRACTICES & PARTNERSHIPS: LAW, CONSULTANTS & CLIENTS* 2-1, 2-19 (Stephen J. McGarry ed., 2002), <http://www.personal.psu.edu/faculty/l/s/lst3/McGarry%20Mutlidisciplinary%20Ch2.PDF> [http://perma.cc/JNU2-VFVC] (describing process and debates surrounding the ABA's consideration of multi-disciplinary practice). For further reading, see generally *Commission on Multi-Disciplinary Practice*, ABA, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html [http://perma.cc/QK2N-XL7N] (providing links to ABA reports, debates, and resolutions on multi-disciplinary practice).

188. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, ABA J. (June 1, 2012), http://www.abajournal.com/magazine/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership/ [http://perma.cc/2QX7-PTW4].

189. NYSBA REPORT, *supra* note 8, at 6, 69-79.

190. The Supreme Court has held that the Sherman Act does not apply to "state action." *Parker v. Brown*, 317 U.S. 341, 350-52 (1943). This theoretically allows private business actors to pressure state actors to restrict competition, i.e. by influencing a state to implement market restraints that the state "clearly articulates and affirmatively expresses" and "actively supervises." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1978) (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (plurality opinion)).

191. Jacoby & Meyers was well known as one of the major "franchise law firms" that some thought would transform the U.S. legal services in the 1980s and 1990s because of their national brand and economies of scale. See, e.g., Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 63, 68 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992); JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* 4-5 (1997).

192. Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers L. Offices vs. Presiding Justices of the First, Second, Third, and Fourth Departments, Appellate Division of the S. Ct. of the State of N.Y., 2, 4 (S.D.N.Y. May 18, 2011), <http://online.wsj.com/public/resources/documents/JacobyMeyerssuit.pdf> [http://perma.cc/44LY-2AEY]. A New York district judge initially dismissed the suit, but a circuit court later reinstated it in district court in 2013. David Glovin & Don Jeffrey, *Jacoby & Meyers Wins Round in Nonlawyer Investor Dispute*, BLOOMBERG (Jan. 9, 2013), <http://www.bloomberg.com/news/2013-01-09/jacoby-meyers-wins-round-in-nonlawyer-investor-dispute.html> [http://perma.cc/2XKQ-2HPT].

193. Interview 11, in Cambridge, Mass. (Feb. 7, 2014).

stage.”¹⁹⁴

While non-lawyer ownership of legal services per se is barred, this section examines two examples of sectors in the U.S. that provide close parallels: online legal services (in particular legal services provided by the company LegalZoom) and social security disability representation (in particular services provided by the company Binder & Binder).

1. ONLINE LEGAL SERVICES AND LEGALZOOM

LegalZoom is an online legal services company that provides an example of a non-lawyer owned company that has innovated in the legal services market, invested heavily in technology and advertising, and achieved large economies of scale.¹⁹⁵ However, it is unclear how much it, and other companies like it, has increased access to legal services for poor and moderate-income populations. It has also been able to achieve its growth in a regulatory environment that bars non-lawyer ownership, while similar online legal service companies have not developed in either the UK or Australia, although LegalZoom could potentially offer a superior service if the ban on non-lawyer ownership was lifted.

LegalZoom was founded in 2001 by a small group of law graduates based in California.¹⁹⁶ In 2011, LegalZoom’s customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using their online legal platform.¹⁹⁷ As of 2014, LegalZoom had over 800 staff, more than \$200 million in revenue, and offered legal plans in forty-two U.S. states.¹⁹⁸ Today its management team is made up mostly of non-lawyers and the company has a number of private equity investors.¹⁹⁹

LegalZoom provides legal services mainly to small businesses and individuals. They offer flat fee rates for self-guided legal documentation services such as registering a company or creating a will. They also provide legal plans for their customers at set rates. For example, in 2014 they charged fifteen dollars a month for an individual to speak with an attorney regarding “estate planning, contracts

194. Glovin & Jeffrey, *supra* note 192.

195. For example, in 2011, LegalZoom had about \$150 million in operating expenses of which sales and marketing was \$42 million and technology development \$8.1 million. LegalZoom.com, Inc. (Form S-1) (May 10, 2012), <http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm> [http://perma.cc/7EVY-QRQJ] [hereinafter LegalZoom SEC filing]. It provides equity-based compensation to its management team as well as key employees in marketing and technology development. *Id.* at 39.

196. Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html> [http://perma.cc/LXY2-56W9].

197. LegalZoom SEC filing, *supra* note 195, at 36.

198. Telephone Interview 14 (Apr. 15, 2014) [hereinafter Interview 14].

199. In 2014 the European based private equity firm Permira invested \$200 million in LegalZoom, giving Permira the ability to appoint a majority of the board. *Permira Funds Complete Acquisition of More than \$200 Million of LegalZoom Equity*, LEGALZOOM (Feb. 14, 2014), <https://www.legalzoom.com/press/press-releases/permira-funds-complete-acquisition-of-more-than-200-million-of-legalzoom-equity> [http://perma.cc/9G6X-DE9X].

and other new legal matters.”²⁰⁰ While LegalZoom has its own lawyers on staff that develop the guided forms that their customers use to create customized legal documents, the company contracts with third party panel law firms to service their legal plan customers.²⁰¹ These panel law firms have dedicated lawyers that work with LegalZoom customers over the phone and online. The lawyers in these firms, not LegalZoom, are liable for their advice and the partner of the contracted firm is responsible for selecting, training, and supervising the attorney that services LegalZoom customers.²⁰² After each customer interaction, LegalZoom surveys customers on their experience with their lawyer.²⁰³ Since customers are not necessarily well positioned to determine the quality of the legal advice they receive, LegalZoom also hires a third party law firm to “secret shop,” or pretend to be customers, by calling LegalZoom affiliated lawyers with mock legal problems.²⁰⁴ Based on input from these sources, LegalZoom then analyzes a lawyer’s work and discusses their performance with contracted law firms.²⁰⁵

LegalZoom has confronted legal challenges to its business model. Litigants have claimed since non-lawyers own equity stakes in the company it is legally barred from offering legal services and so its services amount to the unauthorized practice of law. At the bottom of its homepage LegalZoom has a disclaimer that reads in part:

LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.²⁰⁶

In its terms of use listed elsewhere on the website it makes clear that “claims arising out of or relating to any aspect of the relationship between us” will be resolved through binding arbitration.²⁰⁷ It also details that “Any arbitration under these Terms will take place on an individual basis; class arbitrations and class actions are not permitted.”²⁰⁸

200. *Last Will and Testament Pricing*, LEGAL ZOOM, <http://www.legalzoom.com/legal-wills/wills-pricing.html> [http://perma.cc/8KZH-Q22P] (last visited Oct. 17, 2015).

201. Interview 14, *supra* note 198.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. LEGALZOOM, <http://legalzoom.com> [http://perma.cc/7332-SA3N] (last visited Sept. 11, 2015).

207. *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> [http://perma.cc/8S95-VB25] (last visited Sept. 11, 2015).

208. *Id.*

LegalZoom has so far either won or settled legal challenges that claimed their services amount to the unauthorized practice of law.²⁰⁹ Importantly, relying on recent U.S. Supreme Court jurisprudence, the Arkansas Supreme Court in *LegalZoom.com v. Jonathan McIllwain*²¹⁰ found that LegalZoom's arbitration clause, including its bar on class actions, was enforceable.²¹¹ Without the economic incentives of a class action at the disposal of plaintiffs (and their lawyers), fewer litigants will likely bring claims against LegalZoom in the future and even where they do, if they are successful, their victories will be more limited.²¹² As LegalZoom, and companies like it, continue to expand, and more customers rely on them, it will also become increasingly impractical for a court—or perhaps even a legislature—to bar their business model.

If the ban on non-lawyer ownership were lifted LegalZoom would not only face fewer litigation challenges, but it would not have to rely on partnerships with outside lawyers and could hire lawyers to directly provide services to its customers. This would increase the company's control over the lawyers that service its customers, potentially allowing the company to provide a better service at a lower price.

Still, the impact of LegalZoom and companies like it so far on access to legal services is not well documented. Anecdotally, they have put pressure on prices and so likely increased access.²¹³ Yet, a company like LegalZoom is aimed primarily at small businesses and the upper middle class.²¹⁴ In other words, people with the capacity to know they have a legal problem and the resources and savviness to be able to seek out its answer on the Internet and pay for it.

Will-writing provides an example of both how difficult it is to assess the access impact of companies like LegalZoom and a reason to believe it might be limited. Many people, even with minimal assets, could benefit from having a will (or at

209. Interview 14, *supra* note 198; Terry Carter, *LegalZoom Business Model OK'ed by South Carolina Supreme Court*, ABA JOURNAL (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court [http://perma.cc/9R7Z-FCQX].

210. *LegalZoom.com v. Jonathan McIllwain*, 429 S.W.3d 261, 261 (Ark. 2013).

211. The Arkansas Court relied heavily on the US Supreme Court's decisions in *Buckeye Check Cashing Inc. v. Cardega*, 546 U.S. 440 (2006) and *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). In *Cardega* the U.S. Supreme Court held that under the Federal Arbitration Act (FAA) the legality of an arbitration clause could only be decided by an arbitrator unless the clause itself was challenged (such as if the contract had been entered into through fraud). In *AT&T*, the U.S. Supreme Court found that the FAA preempted state laws that banned contracts that prohibited class-wide arbitration. The Arkansas Supreme Court held that this line of U.S. Supreme Court jurisprudence barred the state's courts from hearing the plaintiff's challenge, but did refer the case to its Committee on the Unauthorized Practice of Law. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court continued this line of precedent further, finding in a five to three decision that under the FAA a court is not permitted to invalidate a contractual waiver of class arbitration on the reasoning that the cost of an individual plaintiff of arbitrating a federal statutory claim exceeds the potential recovery.

212. *But see* Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, ABA JOURNAL (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina [http://perma.cc/T782-N75C] (last visited Oct. 17, 2015) (noting a North Carolina judge extending the life of a case by North Carolina bar claiming LegalZoom's services amount to the unauthorized practice of law).

213. Interview 14, *supra* note 198.

214. *Id.*

least their family or heirs would). One might hypothesize that the proliferation of websites that offer will-writing services like LegalZoom would increase the number of people with wills both through driving down prices and raising awareness of the need for a will through advertising.²¹⁵ However, a periodic Harris Interactive survey has found that the number of Americans with wills has remained relatively unchanged in the past decade.²¹⁶ According to the survey, it was forty-two percent in 2004, forty-five percent in 2007, thirty-five percent in 2009, and forty-three percent in 2011.²¹⁷ Data from probate courts in at least one state seems to back up this conclusion. In 2002 about thirty-two percent of cases filed in Massachusetts' probate court involved deceased who had no will.²¹⁸ Slightly over ten years later in 2011 this rate was essentially unchanged at thirty-one percent.²¹⁹

While the survey and Massachusetts probate court data indicate there has been little movement in the number of people without wills this does not mean that

215. Others prominent online legal service companies that offer will-writing services for the U.S. market include rocketlawyer.com and nolo.com.

216. *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM (Feb. 25, 2010), <http://press-room.lawyers.com/2010-will-survey-press-release.html> [<http://perma.cc/YT67-JUAH>] [hereinafter *Lawyers.com Survey Reveals Drop*] (last visited Oct. 17, 2015); Jenny Greenhough, *57% of Americans Don't Have a Will—Are You One of Them? Estate Planning Results Announced*, EVERYDAY LAW BLOG, (Mar. 31, 2011), <http://blog.rocketlawyer.com/2011-wills-estate-planning-survey-95235> [<http://perma.cc/Q5ZX-BW8K>].

217. *Lawyers.com Survey Reveals Drop*, *supra* note 216.

218. Importantly, while the survey data does not tell us what number of Americans should have a will, the probate court data is more suggestive. Since the deceased's heirs went to probate court these were instances where the deceased did have some property, that they had not undertaken other forms of estate planning (or these were insufficient), and so they may have benefitted from having a will. As the below table shows, in Massachusetts there has been little change in the number of cases filed in probate court where the deceased had no will between June 30, 2002 and June 30, 2011. (Note: data for 2008 and 2010 was not available. After 2011 Massachusetts no longer tracked whether there was a will in a probate filing). Interview 14, *supra* note 198.

TABLE 4:
NUMBER OF PROBATE FILINGS INCLUDING WILLS.

| | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2009 | 2011 |
|----------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|
| No. of Probate Filings | 19552 | 21420 | 22152 | 21979 | 21384 | 21244 | 20322 | 20645 |
| Filings with Will | 13279 | 14488 | 14800 | 14756 | 14264 | 14345 | 13758 | 14226 |
| Filings without Will | 6273 | 6932 | 7352 | 7223 | 7120 | 6899 | 6564 | 6419 |
| % of Filings without Will | 32.1 | 32.4 | 33.2 | 32.9 | 33.3 | 32.5 | 32.3 | 31.1 |

219. *Id.*

companies like LegalZoom have had no positive access benefits. Perhaps without LegalZoom and companies like it the number of people with wills in Massachusetts or elsewhere would have decreased significantly and instead the number has remained relatively steady.²²⁰ However, the presence of such companies has not been able to significantly increase the number of people with wills, nor is the quality of LegalZoom's wills compared to wills drafted by more traditional law firms well documented.²²¹ Overall, it is unclear what impact a company like LegalZoom has on access to legal services, and how dependent their strategy is to jurisdictions adopting non-lawyer ownership in the first place.

2. SOCIAL SECURITY DISABILITY REPRESENTATION AND BINDER & BINDER

In 2014, about 8.4 million Americans received Social Security Disability assistance.²²² When applying for this assistance, claimants can represent themselves or be represented by an attorney or a registered non-attorney representative. Disability representatives, whether they are attorneys or non-attorneys, frequently act on a contingency fee basis and are paid by the Social Security Administration (SSA) twenty-five percent of any back award owed to the claimant, up to \$6,000.²²³ In 2013, the SSA paid out about \$1.2 billion to these disability representatives.²²⁴ Several disability representation services are non-lawyer owned. Non-lawyer owned representation services often rely on non-attorney representatives while law firms often rely on lawyers in representing claimants. Therefore, it is difficult to disentangle whether it is non-lawyer ownership or non-lawyer representation that is driving differences between firms. Still, the experiences of this sector provide another example of how non-lawyer ownership may allow some companies to scale, but not necessarily significantly increase access. Non-lawyer ownership in this sector may also amplify and formalize behavior that may undermine standards of professional practice.

220. For instance, perhaps the rates of lawyers increased during this period and companies like LegalZoom were able to partially fill the resulting access gap. Alternatively, perhaps companies like LegalZoom have only been a replacement good for other affordable will-writing resources already available, like books on how to write your own will.

221. The available data also does not tell us about the quality of the wills LegalZoom helps its customers create. A survey of will-writing in the U.K. found that online self-completion wills were significantly more likely to be judged not to be legally valid or to fail to fulfill the client's wishes. IFF Research, *Understanding the Consumer Experience of Will-Writing Services* 56 (2011), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lslb_will_writing_report_final.pdf [http://perma.cc/5MR3-EXZ2].

222. SOCIAL SECURITY ADMINISTRATION, MONTHLY STATISTICAL SNAPSHOT JUNE 2014 (July 2014), http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ [http://perma.cc/H7WR-KRVE].

223. *GN 03940.003 Fee Agreement Evaluation*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0203940003#a3> [http://perma.cc/5TY9-M5MW] (last visited Sept. 11, 2015).

224. *Statistics to Title II Direct Payments to Claimant Representatives*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/representation/statistics.htm#2013> [http://perma.cc/37KV-UJU3] (last visited Sept. 11, 2015).

Binder & Binder is one of the largest providers of social security disability representation in the United States.²²⁵ Binder started as a law firm in 1975, but incorporated in 2005.²²⁶ It is not public knowledge whether Binder started receiving non-lawyer investment in 2005, but in 2010 the venture capital firm H.I.G. reportedly bought a major stake in the company.²²⁷ Binder's share of SSA payments to representatives increased from about 3.25 percent of the total in 2005 to six percent in 2010 (or approximately eighty-eight million dollars).²²⁸

Binder has been successful at expanding their customer base through investment in advertising and marketing, but the prevalence of contingency fees in disability representation means that most clients with strong claims probably could already find free representation even before Binder's growth. In expanding its volume of customers Binder may arguably reach more individuals with riskier, but valid, claims. On the other hand, Binder may provide lower quality representation, causing more lost claims than otherwise would occur, but because of their high turnover still win enough cases so that their business model is profitable. Indeed, some disability lawyers complain that Binder's streamlined emphasis on the bottom line has led to a deterioration of standards in the field that has "infected law firms" normalizing and nationalizing harmful practices, such as representatives not meeting clients until the day of their hearing.²²⁹ Binder has also been subject to complaints accusing them of ethical violations, such as not sharing damaging evidence against their clients with the SSA as required by law.²³⁰

Despite these allegations, Binder likely engaged in some of its more controversial business practices before they had non-lawyer investors. Further, lawyer owned firms representing disability claimants have also been criticized for their questionable tactics.²³¹ In the end, non-lawyer ownership may have allowed a firm like Binder to more effectively spread their business model, but likely did not create the tactics that some claim have helped undercut professional norms in the sector.

225. Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in Social Security Disability System*, WALL ST. J. (Dec. 22, 2011), <http://online.wsj.com/news/articles/SB10001424052970203518404577096632862007046> [http://perma.cc/HMP7-5V9E].

226. *Binder & Binder—The National Social Security Disability Advocates (NY)*, N.Y. DEP'T OF ST. DIVISION OF INCORPORATIONS (Aug. 2014), https://appext20.dos.ny.gov/corp_public/ [http://perma.cc/FHB4-E67M].

227. Paletta & Searcey, *supra* note 225.

228. *Id.*

229. Telephone Interview 22 (Aug. 8, 2014) (practitioner noting that "Non-lawyers brought a different ethos that infected law firms . . . It used to be unthinkable 20 years ago that you would go to a hearing and have never met the client before, but now it's not just Binder & Binder that does it but many lawyers").

230. *Id.*

231. See Paletta & Searcey, *supra* note 225; U.S. SENATE COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY'S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM (2013), http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36 [http://perma.cc/4J2R-D3GP].

III. TOWARDS A FRESH UNDERSTANDING OF NON-LAWYER OWNERSHIP

Changes in ownership rules do not directly challenge lawyers' monopoly in providing legal services. However, they do help determine what type of commercial ecosystem lawyers are a part of and the degree to which the profession is integrated, or separated, from the rest of the market. Those who advocate for more integration by allowing non-lawyer ownership frequently argue this will lower prices and increase access and quality. Those who oppose greater integration worry it will undercut ethical and professional distinctiveness and create new conflicts. The country and case studies in this Article show that while both sets of claims have some merit, they also miss critical components of non-lawyer ownership's likely impact.

A. CONTEXT MATTERS: A TAXONOMY OF VARIABLES

The actual scale and form non-lawyer ownership takes is affected by variables that are often overlooked, or under-emphasized, in the non-lawyer ownership debate. These variables include the type of non-lawyer owner, the sector of legal services at issue, the regulatory environment surrounding non-lawyer ownership and the broader profession, and the nature of the legal services and capital markets in a jurisdiction. More fully taking into account these variables can help regulators better predict the likely impact of non-lawyer ownership in different contexts so they can better craft appropriate regulation.

1. OWNERSHIP VARIATION

Not all types of non-lawyer owners of legal services are the same. Legal service enterprises may be publicly listed, owned by private outside investors, worker owned, consumer owned, government owned, or owned by a company that also provides other goods or services. Each type of ownership creates different kinds of pressures on an enterprise offering legal services.²³² For example, a publicly listed firm like Slater & Gordon may be more likely to make decisions to satisfy the broader public investor, whether this means focusing on meeting projected targets or avoiding negative publicity.²³³ Consumer owned firms, like the Co-Operative Legal Services in the United Kingdom, or non-profit owned firms may be better able to follow a social mission.²³⁴ A company that also offers other services may be more likely to offer legal services geared towards increasing the bottom line of the core business of that company, potentially

232. HANSMANN, *supra* note 23 (describing why different industries may be more amenable to certain types of owners in different country contexts).

233. *See supra* II.C.1.

234. *See supra* II.A.2; Salvos Legal in Australia is an example of a law firm owned by a non-profit, the Salvation Army, the profits of which then fund a legal aid firm. *See About Us*, SALVOS LEGAL, http://www.salvoslegal.com.au/about_us [http://perma.cc/J3A7-DRNU] (last visited Sept. 11, 2015).

creating more conflicts of interest.²³⁵ Private equity investment may be particularly drawn to companies like LegalZoom that hold out the promise of technological or other innovations in legal services that could lead to large profits in the short to mid-term.²³⁶ Recently in England and Wales municipal governments have started their own law firms to provide legal services to both themselves and other local governments and non-profits for a fee.²³⁷ These new government owned enterprises could further the public interest by generating profits for the government exchequer or being able to better serve public clients, but they also may present the opportunity for new conflicts of interest and the introduction of an unwelcome commercial orientation into government lawyering. Which types of ownership of legal services come to predominate in the future will have an important impact on what types of conflicts of interest may develop, the public-spirited orientation of the profession, and non-lawyer ownership's ultimate impact on access.

2. LEGAL SECTOR VARIATION

Vitally, and under-appreciated in the non-lawyer ownership debate, certain sectors of legal services are more likely to witness much more non-lawyer ownership than others. In particular, non-lawyer investors seem more probable in areas of the law that are amenable to economies of scale and where other non-lawyer costs may be high (such as advertising, administration, or technology). In this way, the impact of non-lawyer ownership should be viewed differently depending on the sector of legal services at issue, with some sectors likely to be transformed—with potential access benefits and professionalism concerns—and others being only marginally affected.

Notably, in the United Kingdom and Australia the personal injury sector has seen a disproportionate amount of non-lawyer investment.²³⁸ This investment may be because personal injury has historically had high advertising costs, large profits, and a relatively routine and high volume of cases that often result in settlement.²³⁹ Meanwhile, areas like criminal law or immigration have seen

235. For example, insurance companies entering the legal services market may be more likely to view legal services as a spin off from its core insurance business whose interests should remain paramount. *See supra* II.A.1 for such a possible instance in the United Kingdom.

236. Online legal service platforms like LegalZoom have witnessed private investment. *See supra* II.C.1; Binder & Binder has also seen private equity investment although it relies less on technology. *See supra* II.C.2.

237. John Hyde, *SRA Approves First Council ABS*, L. SOC. Y GAZETTE (Aug. 6, 2014), <http://www.lawgazette.co.uk/law/sra-approves-first-council-abs/5042566.article> [<http://perma.cc/444P-43R2>] (last visited Oct. 11, 2015).

238. *See supra* II.A.1, II.B.1.

239. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 810 (2011) (describing how in the U.S. settlement mills use a disproportionate number of non-lawyers to settle routine personal injury matters).

much less non-lawyer ownership,²⁴⁰ perhaps because clients seek more individualized attention and the relative skills of a particular lawyer may matter more to the outcome of a case.

3. VARIATION IN THE REGULATION OF THE LEGAL PROFESSION

The broader regulatory environment of legal services in a jurisdiction also shapes how non-lawyer ownership develops. In the UK, a new ban on referral fees, which insurance companies once counted as an important source of revenue, led them to buy their own affiliated personal injury law firms.²⁴¹ A ban on contingency fees in Australia, and conditional fees that vary by state, has arguably favored larger personal injury firms that are better able to navigate this more complex regulatory system and spread their risk across larger portfolios.²⁴²

How non-lawyer ownership itself is regulated also helps determine its prevalence. In Australia, non-lawyer owned legal enterprises simply need to register with the appropriate regulator, while in England and Wales they must be licensed.²⁴³ The more burdensome licensing requirement in England and Wales likely reduces the amount of non-lawyer ownership that might otherwise occur.²⁴⁴ On the other hand, in Australia a lawyer must manage non-lawyer owned enterprises, while in England and Wales a lawyer only has to be part of the management team.²⁴⁵ This more stringent requirement may discourage some non-lawyer investors from entering the legal market.

4. VARIATION IN CAPITAL AND LEGAL SERVICES MARKETS

Finally, the size of a country's capital and legal services markets help determine the amount and type of non-lawyer ownership one can expect in a jurisdiction. Countries like Australia, without as well developed private equity markets and a relatively small legal services market, have seen far less ownership by non-lawyers than in the United Kingdom, where the population is almost three times larger and there is a broader and deeper range of potential investors.²⁴⁶

240. *See supra* II.A.

241. *See supra* II.A.1.

242. *See supra* II.B.2.

243. *See supra* II.B.

244. Compare VICTORIA LEGAL SERVICES BOARD *supra* note 155 (in the state of Victoria there were 921 ILPs in 2013, which allow for non-lawyer ownership even if there was relatively little of this type of ownership), with Hilborne, *supra* note 91 (in August of 2014 there were about 360 ABSs in all of England and Wales).

245. *Legal Profession Act 2004* (NSW)(Austl.), *supra* note 34; *Alternative Business Structures*, *supra* note 11.

246. Interview 14, *supra* note 198. In 2009-2012, according to the World Bank, the market capitalization of listed companies was about \$1.3 trillion in Australia and \$3 trillion in the UK. *Market Capitalization of Listed Companies (Current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/CM.MKT.LCAP.CD> [http://perma.cc/HST4-LGBN] (last visited Oct. 5, 2015). The legal services market in Australia was estimated to have revenues of about \$19.9 billion in 2011. *Research and Markets: Legal Services Industry in Australia Expected*

Despite a regulatory environment that generally bars non-lawyer ownership, the United States has seen greater investment in and the rise of more online legal service companies than either the UK or Australia, likely in part because the U.S. capital markets are more robust and the legal services market is substantially larger, creating a more suitable environment to scale online legal services.²⁴⁷

If more jurisdictions allow for non-lawyer ownership, in full or in part, one would expect to see an increased number of multi-national legal service companies like Slater & Gordon.²⁴⁸ Their presence may reduce some of the inter-country differences that have marked the early days of non-lawyer ownership, as these multi-national companies would have access to both legal service and capital markets in different countries allowing them to scale their services more uniformly across jurisdictions. However, in a field like law, models developed in one jurisdiction often cannot be directly adopted by another jurisdiction given significant national and sub-national differences in law and the regulation of legal services. This means the size of relative markets, and the available capital within them, will likely continue to be meaningful constraints on the scale and diversity of non-lawyer owned enterprises delivering legal services in each jurisdiction.

B. NEW BUSINESS MODELS, BUT QUESTIONABLE ACCESS BENEFITS

The country studies provide support to the argument that non-lawyer ownership can, and in some circumstances does, lead to new innovation in legal services, larger economies of scale and scope, and new compensation structures.²⁴⁹ Yet, perhaps counter-intuitively, there is little evidence indicating that these changes have substantially improved access to civil legal services for poor to moderate-income populations. These findings may be partly the result of limited data, but there are at least four reasons why such ownership will likely not lead to as significant access gains as some proponents suggest.

First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where

to Increase to a Value of \$26.4 Billion by the End Of 2016, BUSINESS WIRE (Dec. 12, 2012), <http://www.businesswire.com/news/home/20121212006378/en/Research-Markets-Legal-Services-Industry-Australia-Expected#.U99twagzgXw> [http://perma.cc/DHR4-FTH4] (dollar amounts converted from pounds, £, to U.S. dollars, \$). The solicitors market (not counting barristers, conveyancers, or other parts of the legal market) in the UK had revenues of about \$31.4 billion in 2012. *Evaluation: Changes in Competition in Different Legal Markets*, LEGAL SERV. Bd. 4 (Oct. 2013), <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf> [https://perma.cc/NTN9-R3FE].

247. U.S. market capitalization averaged \$18.7 trillion from 2009-2012. World Bank, *supra* note 246; The U.S. legal services market contributed about \$225 billion to GDP in 2012. *Value Added by Industry*, BUREAU OF ECON. ANALYSIS (Jan. 23, 2014), http://www.bea.gov/industry/gdpbyind_data.htm [http://perma.cc/9CYK-5FGY].

248. See Rose, *Slater & Gordon Completes Panonne Acquisition*, *supra* note 84.

249. See *supra* II.

non-lawyer ownership is allowed.²⁵⁰ For example, a bankrupt tenant facing an eviction is likely provided few new options by non-lawyer ownership as they simply have no money to pay for legal services. After cuts in legal aid in the UK, both parties had representation in only about twenty-five percent of private family law disputes did both parties have representation.²⁵¹ This indicates that the legal market, even a deregulated one, is unlikely to address the legal needs of poor and middle income persons, who either cannot or will not spend the money to purchase the legal services they require.

Second, several of the legal sectors, like personal injury and social security disability representation, which have seen the greatest investment by non-lawyers, will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies.²⁵² Instead, competition amongst personal injury or social security disability representation providers is more focused on reaching persons with credible claims in the first place.

Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy to standardize or scale. Much legal work is complicated and requires the individualized attention of an experienced practitioner who often charges high rates. Even though many legal problems may have relatively uniform remedies, an experienced practitioner is needed to determine, case by case, the legal problem confronting the client before tailoring an appropriate solution.²⁵³ Non-lawyer ownership may not be able to overcome this challenge in a significantly more efficient way than a traditional worker owned partnership model. Indeed, where the attention of a lawyer is the primary input into a service, and other capital costs are low, a worker owned model could provide advantages over investor ownership.²⁵⁴

250. See PLEASANCE & BALMER, *supra* note 39, at 100–101 (noting that respondents to a legal needs survey in England and Wales were more likely to contact lawyers for severe problems and that there were clear links between social disadvantage and legal capability).

251. See MINISTRY OF JUSTICE, *supra* note 100.

252. For an overview of the regulatory framework for conditional fee arrangements in England and Wales, see, LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 14–16; Australia also largely allows for conditional fee arrangements. See, LAW COUNCIL OF AUSTRALIA, REGULATION OF THIRD PARTY LITIGATION FUNDING IN AUSTRALIA 10 n. 25 (2011), <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf> [PERMA.CC/M8FD-YRTA].

253. In this way legal services may be an example of Baumol's cost disease, or the proposition that salaries in occupations with little or no increase in labor productivity will still rise at corresponding rates to occupations where there has been increases in productivity. This makes goods or services produced by those occupations inflicted with Baumol's cost disease, such as health care or education, relatively more expensive. See William J. Baumol, *Health Care, Education and the Cost Disease: A Looming Crisis for Public Choice*, 77 PUB. CHOICE 17 (1993).

254. For example, Hansmann argues worker owned enterprises may be able to better overcome monitoring challenges than some investor owned enterprises. See Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L. J. 1749, 1761–62 (1989–1990).

Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have the ability to do so, either because they do not believe they need a legal service or because of cultural or psychological barriers.²⁵⁵ For example, even if the price of preparing a will decreases, many persons still may not purchase one because they do not like to contemplate their own death or do not perceive a will as a need.²⁵⁶ In other words, for some civil legal services there may not be as much price elasticity in the market as proponents of deregulation suggest.

C. DISTINCT CHALLENGES TO PROFESSIONALISM

While the claims behind the argument that non-lawyer ownership will significantly increase access are largely unsubstantiated by the available evidence, those who oppose non-lawyer ownership on the grounds it will undercut professionalism often make assertions that are too sweeping. Take concerns about commoditization and public spiritedness. Although certainly non-lawyer ownership can place new pressures to increase profits on legal service enterprises, lawyers at many firms were arguably already predominantly driven by this desire. Further, some forms of non-lawyer ownership, such as consumer owned firms, might actually be more likely to pursue a public-spirited mission than a lawyer owned firm.²⁵⁷ Still, while critics of non-lawyer ownership can over-generalize or over-estimate its impact, non-lawyer ownership in some contexts can change how legal services are offered in a way that is detrimental to consumers, the public, or the legal system more broadly.

1. CONFLICTS OF INTEREST

The interests of traditional law firms do not always align with their clients, but enterprises that offer legal services that also have other commercial interests are more likely to have conflicting and potentially adversarial interests to their

But see, Andrew von Nordenflycht, *Does the Emergence of Publicly Traded Professional Service Firms Undermine the Theory of the Professional Partnership? A Cross-Industry Historical Analysis*, 1 J. PROF. & ORG. 1 (2014) (arguing that the proposed benefits of partnerships versus public ownership are largely illusory).

255. See Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 244 (Trebilcock, Duggan, & Sossin eds. 2012) (noting that while the cost of lawyers is one factor that explains why justice problems are not taken to lawyers, other factors, like what people perceive as a legal problem, are also significant).

256. See *supra* II.C.2. (observing little change in the number of persons with wills in the United States and Massachusetts).

257. See, e.g., Co-Operative Legal Services in the UK, *supra* II.A.1. Similarly, labor unions in the U.K. have begun to invest in their own law firms, although this may mostly be to recapture referral fees lost when the referral fee ban was introduced. *Leeds Firm Breaks New Ground with Trade Union ABS*, LEGALFUTURES (Dec. 23, 2013), <http://www.legalfutures.co.uk/latest-news/leeds-firm-breaks-new-ground-trade-union-abs> [http://perma.cc/H3B8-FRNU].

clients.²⁵⁸ For instance, since insurance companies in the UK have an interest in reducing the amount they compensate claimants, there is a concern that they may have a conflict in acquiring plaintiff personal injury firms.²⁵⁹ These “captured” law firms may act to either shape outcomes of specific cases or the overall regulatory environment in a way that is beneficial to the insurance industry, but not necessarily their clients.

Where the government outsources functions related to the legal system—like prison or probation services—there is a greater possibility for conflicts of interest to arise. These conflicts can cast doubt on the integrity of the legal system, undermining the public’s trust in very real, though sometimes hard to measure, ways. Capita, a large business process outsourcer with multiple contracts with the UK government, has recently entered the legal services market by buying a law firm.²⁶⁰ Before buying this law firm, Capita already helped run the UK’s migrant removal process²⁶¹ and, separately, one of the government’s telephone hotlines to assess litigants’ entitlement to legal aid.²⁶² While perhaps not a direct conflict of interest, those active in legal aid have expressed concern that immigrants who were worried about the legality of their immigration status would not call the legal aid hotline out of fear that Capita might then try to deport them.²⁶³ This conflict existed before Capita had started its ABS, but similar conflicts could arise in the future with its affiliated law firm, particularly if it began providing legal aid.

Employees of companies that deliver outsourced public services often do not have the same duties as government employees to not further their own (or their company’s) financial interests.²⁶⁴ In this context, non-lawyer ownership creates new possibilities for self-dealing. For instance, attorneys contracted to provide legal aid assistance may refer clients to other services offered by their company, whether or not it was in the client’s best interest. Alternatively, a company contracted by a government agency, like the Social Security Administration in the United States, could attempt to use its insider knowledge to benefit those it

258. As Susan Shapiro notes, one of the primary sources of conflicts of interest for a fiduciary is the diversification and growth of their organization. SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE 5 (2002).

259. *See supra* II.A.1.

260. Michael Cross, *Capita Enters Legal Services Market with Optima Acquisition*, L. SOC.’Y GAZETTE (Sept. 16, 2013), <http://www.lawgazette.co.uk/practice/capita-enters-legal-services-market-with-optima-acquisition/5037679.article> [http://perma.cc/X68S-893G].

261. *Capita Gets Contract to Find 174,000 Illegal Immigrants*, BBC NEWS (Sept. 18, 2012), <http://www.bbc.com/news/uk-politics-19637409> [http://perma.cc/9EMZ-3P5R].

262. *Capita Acquires FirstAssist*, CAPITA (Sept. 30, 2010), <http://www.capita.co.uk/news-and-opinion/news/2010/september/capita-acquires-firstassist-services-holdings-ltd.aspx> [http://perma.cc/F2NS-7JCL].

263. Interview 3, in London, Eng. (Jan. 10, 2014).

264. *See generally* Kathleen Clark, *Ethics for an Outsourced Government* (Washington University in St. Louis Legal Studies Research Paper No. 11-05-03, 2011), <http://ssrn.com/abstract=1840629> [http://perma.cc/5U4A-NVEZ] (describing in the U.S. context how outsourced employees do not face the same ethics standards as government employees).

represents before that agency.²⁶⁵

Some potential conflicts that may undercut public trust or potentially have long-term detrimental impact to the legal system can be so nebulous that they are difficult to regulate. Walmart is one of the largest employers in the United States and is frequently criticized for its employment practices.²⁶⁶ If Walmart started offering legal services in the United States, including employment law, some may question if they have a conflict of interest even if lawyers in their stores never directly represented their clients against Walmart. One could argue that Walmart has an interest in shaping employment law in the United States in a direction beneficial to the company and so it is troubling if they start representing a large number of workers for employment claims. At the very least, it may lead some to have less faith in the integrity or fairness of the justice system. However, the amorphous nature of such a potential conflict makes it difficult for a regulator to justify specifically barring Walmart, and not other retailers, from entering the legal services market in employment law.

Finally, non-lawyer ownership not only can create new conflicts of interest, but also can be used to bypass professional regulation, particularly for enterprises offering multiple services. For example, insurance companies in England and Wales, which once referred injured customers to personal injury firms, have bought up these same firms in part to bypass a new ban on referral fees.²⁶⁷ Similarly, non-lawyer ownership could be used to bypass other regulation such as restrictions on advertising or fee arrangements (particularly where non-lawyers can enter contingency fee arrangements, but lawyers can not, like in Australia). If one believes these professional rules serve a purpose, such actions should be of concern to both regulators and the public.

2. UNDERCUTTING PUBLIC SPIRITED IDEALS

Lawyers may not have an identity as altruistic as that of doctors or the clergy, but most lawyers would acknowledge that the pursuit of profit should not be the sole goal of those in the profession nor making money the dominant criteria for

265. For example, the SSA awarded Social Security Disability Consultants, a major social security representation company, a contract in 2006 to study the value of vocational expertise in the disability determination process. *Experts to Study the Value of Vocational Expertise at All Adjudicative Levels of the Disability Determination Process*, FED. BUS. OPPORTUNITIES, <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=7f5130f6fe72ddabc923fad66c1f5eccc> [https://perma.cc/BC9H-NSXV] (last visited Oct. 5, 2015). Maximus, which has undertaken social security representation, also has been a major contractor for the SSA, particularly for its work training and placement program. Charles T. Hall, *Maximus also has conflict*, SOCIAL SECURITY NEWS (Jan. 27, 2006), <http://socsecnews.blogspot.com/search?q=maximus+conflict>. [http://perma.cc/4DX6-HJYU].

266. Dave Jamieson, *Feds Charge Walmart With Breaking Labor Law in Black Friday Strikes*, HUFFINGTON POST (Jan. 15, 2014), http://www.huffingtonpost.com/2014/01/15/walmart-complaint_n_4604069.html [http://perma.cc/GM2R-8KBD] (detailing actions by the federal government against Walmart for alleged labor violations).

267. *See supra* II.A.1.

determining what characterizes a “good lawyer” or a “good law firm.”²⁶⁸ Many lawyers value furthering the rule of law, assisting the needy, acting as a check on government or corporate power, providing competent assistance, and other social values.²⁶⁹ Non-lawyer ownership, especially that by investors seeking profit, can subvert these public-spirited ideals in at least two ways.

First, legal service providers with outside investors are likely to be concerned about the enterprise’s reputation within the investor community. The failure to meet a projected financial target can lead to a drop in stock price or the loss of a needed private equity investor.²⁷⁰ Such concerns about reputation may make these enterprises more likely to focus on meeting investors’ targets, as is alleged of publicly listed firms in Australia,²⁷¹ at the expense of more public-spirited goals, such as pro bono work or taking on riskier class actions that further the public interest. Importantly, lawyer employees, or lawyer co-owners, may change their behavior to be less public spirited not directly on the orders of non-lawyer owners, but rather if they merely believe such a change will help increase their firm’s reputation in the investor community.

Second, companies that also provide other services may be less likely to offer legal services to publicly unpopular clients out of fear of harming the larger brand of their company.²⁷² For example, in the United Kingdom, the management at the Co-operative Group was initially concerned about Co-operative Legal Services having certain kinds of clients, such as men who had abused their wives, whose association might end up tarnishing their larger brand.²⁷³ This potential problem has ended up being more hypothetical, as Co-operative Legal Services markets themselves as offering services to resolve disputes as amicably as possible, thereby attracting fewer of these clients that are likely to be actively vilified by the public.²⁷⁴ The example, though, raises the specter that unpopular clients, who

268. As R.H. Tawney writes, “[Professionals] may, as in the case of the successful doctor, grow rich; but the meaning of their profession, both for themselves and for the public, is not that they make money, but that they make health, or safety, or knowledge, or good government, or good law” R.H. TAWNEY, THE ACQUISITIVE SOCIETY 94 (1920).

269. For example, a RAND study of class actions in the U.S. found “plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both.” DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 401 (1999).

270. *See supra* II.A.1. (Quindell notably lost half its stock value in one day after an unfavorable market report).

271. *See supra* II.C.1. (Slater & Gordon CEO reassuring investors that in the future most class actions will be funded through outside funders).

272. Lawrence Fox has warned that companies offering other services might be less likely to offer legal services that are unpopular either to the public or the company at issue. Fox, *supra* note 20 (“Can we expect Arthur Andersen to take a tolerant attitude toward a death penalty representation? Or Sears to be pleased its lawyer employees are supporting the Legal Services Corporation, the funder of consumer complaints on behalf of the indigent?”).

273. Interview 10, *supra* note 47.

274. *See id.* (another national legal services provider noting that unpopular clients pose a potential challenge to their brand).

already face discrimination from many law firms, might be further marginalized and have fewer alternatives in a market with a smaller number of providers that are highly sensitive to public opinion.

3. STANDARDS OF PROFESSIONAL PRACTICE

Advocates of non-lawyer ownership have claimed that allowing for outside ownership will increase the quality of legal services as these owners will be eager to build well-respected legal brands and have an advantage at implementing quality control systems.²⁷⁵ Non-lawyer ownership may sometimes improve professional standards, but it is not clear that this would always be the case, or even be the case the majority of the time. In other situations, non-lawyer ownership may lead to the systematization of more dubious business practices that undermine the quality of legal services as firms scale, attempt to create efficiencies, and their work culture is less tempered by the professional norms that lawyer ownership may bring.²⁷⁶ For example, Binder & Binder has been accused of nationalizing and normalizing questionable cost cutting practices in social security disability representation.²⁷⁷

Non-lawyer ownership has so far had an ambiguous impact on consumer complaints about legal services. There is some evidence from the UK that ABS firms receive more complaints from clients than non-ABS firms, but ABSs produce about as many formal complaints to the UK's Legal Ombudsman as ordinary solicitor firms.²⁷⁸ The higher number of recorded initial complaints may be because of the newness of some of the ABSs operating or because they do a better job of soliciting and tracking initial complaints. In Australia, at least one study has shown that customers of firms that have become ILPs make fewer complaints to regulators afterwards.²⁷⁹ This though is likely the consequence of ILPs required implementation of their own "appropriate management systems" rather than non-lawyer ownership, which is still relatively rare for ILPs in Australia.²⁸⁰ So far at least, the evidence from both the UK and Australia suggests

275. Hadfield, *supra* note 6, at 49–50.

276. Parker, *supra* note 10, at 4 (arguing that the ethical dangers commentators worry will come from non-lawyer ownership are actually a "formalisation and accentuation of existing ethical pressures on legal practice").

277. *See supra* II.C.2 (noting complaints that Binder spearheaded the normalization of not meeting with clients until the day of a hearing).

278. According to a 2013 LSB report ABSs generated £4.3 million in turnover for every complaint referred to the Legal Ombudsman, which is similar to the £4.5 million for every complaint for ordinary solicitors firms. LSB 2013, *supra* note 98, at 7, 78.

279. Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Service Profession in New South Wales*, 37 J.L. & SOC'Y 466 (2010) (showing a statistically significant reduction in complaints about ILPs after they performed a self-assessment process to create their own appropriate management systems).

280. Others have argued that the potential dangers of outside investment are not adequately regulated against in Australia. Alperhan Babacan, Amalia Di Iorio, & Adrian Meade, *The (In)effective Regulation of Incorporated*

that non-lawyer ownership does not have a large effect on consumer complaints. Given this uncertain impact, those interested in increasing quality of legal services may be better off pressing for other interventions, such as entity-based regulation, requiring malpractice insurance for all legal service providers, or creating an independent ombudsman to hear complaints.

D. NEED FOR MORE DATA AND THE POTENTIAL IMPACT OF TECHNOLOGY

The country studies make clear that there is a need to improve the collection of data regarding legal services so as to assess the impact of non-lawyer ownership.²⁸¹ In particular, regulators should better track the cost of commonly used legal services, the demand for legal services, how these legal services are used, and different pathways for resolving legal issues.²⁸² Sector specific studies should also periodically examine the functioning of markets for specific legal services such as personal injury, immigration, probate, conveyancing, or family law.

While there are still many unanswered questions about the impact of non-lawyer ownership perhaps the greatest involves the increasing role of technology in legal services.²⁸³ Legal professionals in the future may need to rely on technology, and an accompanying organizational structure, that lawyers cannot efficiently provide for themselves either in-house or otherwise. If this proves true, then non-lawyer ownership will provide clear benefits for the delivery of legal services. Still, it is not certain such a future is ordained. Lawyers may find a way to effectively outsource or contract for these technological and organizational needs just as they currently do for legal databases or for online advertising.²⁸⁴ Alternatively, as is the case with LegalZoom, lawyers and their services may become the outsourced product offered by a company. Finally, the most routinized legal services—those that technology may have the greatest benefit in helping deliver efficiently—may, eventually, not be considered the practice of law at all; either lawyers or non-lawyers would be able to perform these services in different organizational and ownership contexts.

Legal Practices: an Australian Case Study, 20 INT'L J. LEGAL PROF. 315 (2013) (arguing that regulation of ILPs in Australia does not sufficiently account for new pressures from non-lawyer owners and managers).

281. *See supra* II. England and Wales are the furthest along in gathering relevant data.

282. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 47 (making similar recommendations in the UK context).

283. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008) (speculating about the transformative role technology may have in legal services); Gillers, *supra* note 46 (arguing the regulation of the profession should be adopted to harness technological changes transforming the delivery of legal services); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014) (describing how technology, particularly machine intelligence, may disrupt the legal services market in the future).

284. For example, law firms will subscribe to legal databases like Westlaw or referral networks like lawyers.com.

IV. NON-LAWYER OWNERSHIP AND A “NEW PROFESSIONALISM”

The rise of non-lawyer ownership of legal services should not be viewed in isolation. It is useful to think of those who perform traditional legal work as being controlled or organized by at least four forces: (1) the demands of the market, (2) the structure and bureaucracy of the organizations in which they work, (3) the legal profession, and (4) the government.²⁸⁵ While lawyers have always had to be responsive to market pressures, it is notable that lawyers are both becoming integrated into firms that are more similar to other types of commercial organizations and that their relationship with the rest of the economy is becoming more like those of other services.²⁸⁶ For example, the lifting of bans on advertising,²⁸⁷ the abolition of mandatory fixed fee schedules for lawyers,²⁸⁸ and increased consumer awareness of their legal options that has been witnessed in some jurisdictions have made lawyers more responsive to conventional market forces. The rise of limited liability enterprises in legal services²⁸⁹ and non-lawyer owned legal service companies in some jurisdictions have embedded lawyers in organizations more similar to those in other fields. The reducing regulatory power of the bar and the rise of new outside regulators of the profession, whether these are independent ombudsmen, specialized regulators, or competition regulators has seen the government increasingly encroach on the self-regulatory power of the profession.²⁹⁰ Other professions, such as doctors, accountants, teachers, and architects, have seen similar shifts—witnessing greater integration of their occupations into the overall economy and into more varied organizational forms, as well as greater outside regulation.²⁹¹ Indeed, such broader trends have led some to conclude we are witnessing the birth of a “new professionalism,”²⁹² that

285. Eliot Freidson, one of the founders of the sociology of professions, argued that consumers control how work is organized in the market, bureaucracies control work in organizations, and other members of an occupation control work in a profession. *See ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC* 12 (2001).

286. *See STEPHEN BRINT, IN THE AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* (1994) (arguing that professions are becoming marketized and commercialized and as a result their rhetorical justifications have shifted from social trusteeship to expertise).

287. For a brief history of the relaxation of restrictions on lawyer advertising in the United States, *see DEBORAH L. RHODE AND DAVID LUBAN, LEGAL ETHICS* 622–25 (1995).

288. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1979), the U.S. Supreme Court ruled that lawyers were engaged in a “trade or commerce” and that bar mandated minimum fee schedules violated anti-trust rules.

289. For a history of the spread of the Limited Liability Partnership form in the United States since the 1990s, *see ALAN R. BROMBERG AND LARRY E. RIBSTEIN, LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT* (2001) 3–15 (2012).

290. For example, in the U.K., regulatory power has shifted away from the bar to independent regulators like the Legal Services Board, the Legal Ombudsman, and the Solicitor Regulatory Authority. *See supra* II.A.

291. *See Julia Evetts, A New Professionalism? Challenges and Opportunities* 59 CURRENT SOC. 406, 412–14 (July 2011) (describing how professions increasingly emphasize quality control, standardization, and other managerial and governance forms of control).

292. *Id.* at 412; *see also* Sigrid Quack & Elke Schubler, *Dynamics of Regulation and the Transformation of Professional Service Firms: National and Transnational Developments*, in *OXFORD HANDBOOK OF PROFESSIONAL SERVICE FIRMS* (forthcoming 2016) (on file with author) (describing how the advance of competition

has led to battles about the “corporatization” of fields such as medicine and education.²⁹³

These shifts do not mean that professions are disappearing or becoming less significant, even if they might be becoming less distinctive. Occupational licensing and the competency and signaling that go with it has only increased in prominence in countries like the United States.²⁹⁴ In today’s “law-thick” world it is hard to imagine that there will not continue to be a vital and extensive role for legal professionals in the foreseeable future.²⁹⁵ Still, these broader trends facing the legal profession, of which non-lawyer ownership is a key component, raise questions about how to understand and manage these changes. While it is not possible here to systematically lay out such an analytical or normative agenda, this Article provides a number of takeaways relevant to the access debate and how to best regulate legal services to cope with non-lawyer ownership amongst broader shifts in the profession.

A. ACCESS IMPLICATIONS

Permitting non-lawyer ownership of legal services is frequently viewed as a relatively inexpensive regulatory intervention to increase access to legal services. Yet, the access benefits of non-lawyer ownership so far seem questionable. At the very least, the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access strategies, like legal aid.

In general, deregulatory strategies have had a mixed track record of increasing access in a substantial manner. As perhaps the most comprehensive review of the literature on the regulation of legal services noted, “The theoretical literature, on the whole, suggests fairly strong recommendations to policymakers regarding self-regulation [towards deregulation]. On the other hand, the limited empirical

policy, the liberalization of company forms, a shift towards more public oversight, and an increasingly transnational entanglement of the state have led countries to regulate professional service firms more like multinational companies).

293. For a recent debate about the corporatization of medicine, see *Sunday Dialogue: Medicine as a Business*, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/09/opinion/sunday/sunday-dialogue-medicine-as-a-business.html> [<http://perma.cc/54SB-LH2C>]; for one perspective about the corporatization of education, see Paul Nevins, *Shall We Corporatize Public Education Too?*, SALON (Oct. 5, 2012), http://open.salon.com/blog/paul_nevins/2012/10/05/shall_we_corporatize_public_education_too [<http://perma.cc/H7JU-ZU8Z>].

294. In fact, the professions are arguably organizing work life more than ever before. In the United States in 2008, twenty-nine percent of the labor force was in an occupation that required a license (compared to less than five percent in the 1950s). Although not all these occupations would be considered “professions” many would. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 331 J. LAB. & ECON. S173, S175–S176 (2013).

295. As Gillian Hadfield observes, “We live in a law-thick world that people are left to navigate largely in the dark.” Hadfield, *supra* note 6, at 43.

evidence does not always support such strong theoretical predictions.²⁹⁶ This does not mean these deregulatory strategies are not worth pursuing, but rather expectations about their impact should be appropriately tempered. For example, several studies have indicated that more advertising leads to lower priced legal services.²⁹⁷ A well known study undertaken by the FTC in the 1980's in the United States found that the five legal services it surveyed were cheaper on average in states with fewer restrictions on lawyer advertising than in states with more restrictions.²⁹⁸ However, the report also found that within the same state law firms that advertised personal injury services actually charged higher contingency fees than those that did not advertise.²⁹⁹ Stewart Macaulay in surveying, and questioning, the results of the FTC report argued that even if lawyer advertising did somewhat decrease the price of legal services that, “[W]e must be concerned that largely symbolic debates about lawyer advertising may divert us from concern with more pressing issues of access and equality.”³⁰⁰

Other regulatory solutions, such as new, and more varied, types of legal professionals, who require less training than traditional lawyers, could potentially increase access more than non-lawyer ownership. For example, in both Australia and the United Kingdom there is limited evidence to suggest that licensed conveyancers transfer property at significantly lower prices than solicitors,³⁰¹ although a more nuanced UK study of particular geographic regions where conveyancers had entered the market versus where they had not produced more ambiguous results.³⁰² Whatever the evidence, creating new categories of legal professionals who can perform a subset of legal activities requires a sufficient market. In the UK during the 2008 economic and housing downturn conveyancers were particularly hard hit, reducing the number of persons who were willing

296. Frank H. Stephen, James H. Love & Neil Rickman, *Regulation of the Legal Profession*, in REGULATION AND ECONOMICS 647, 670 (Roger J. Van Den Bergh & Alessio M. Pacces eds. 2012).

297. *Id.* at 658.

298. JACOBS, WILLIAM W. ET AL., F.T.C., IMPROVING ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 79 (1984) (finding, “[a]ttorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states.”).

299. *See id.* at 125.

300. Stewart Macaulay, *Lawyer Advertising: “Yes, but . . .”*, 75 (Inst. for Legal Studies, Working Papers No. 2, 1986) (on file with the G.J. Legal Ethics).

301. BDRC CONT’L, *supra* note 39, at 86 (noting that conveyancing in the UK is more expensive when done by a solicitor compared to a licensed conveyancer—nearly £1,300 versus £785 on average); NSW GOVERNMENT SUBMISSION, PRODUCTIVITY COMMISSION REVIEW OF NATIONAL COMPETITION POLICY ARRANGEMENTS 10 (2005), http://www.pc.gov.au/_data/assets/pdf_file/0020/47342/sub099.pdf [<http://perma.cc/3YDN-2VDA>] (noting that conveyancing fees in New South Wales fell by seventeen percent between 1994 and 1996 after the removal of the legal profession’s monopoly on conveyancing).

302. Stephen, Love, & Rickman, *supra* note 296, at 656 (noting that the results of a UK study of conveyancers in the early 90s “should caution against the assumption that multiple professional bodies will necessarily be to the benefit of customers”).

to enter conveyancing.³⁰³ While the housing market over the long run may provide a sufficiently large market for a practitioner to invest in the expense of becoming a conveyancer (and not the additional expense of becoming a solicitor) other legal markets may not be robust enough to support their own specialized legal practitioners.

There is a rich theoretical literature that argues unauthorized practice of law (UPL) provisions are too broad, increasing prices and limiting access as a result of their implementation.³⁰⁴ While there has been little empirical research done to support this proposition³⁰⁵ limiting the reach of UPL provisions intuitively has merit as an access strategy. However, it is not always obvious what services should be regulated and which should not. For instance, in the UK will-writing is not a reserved legal activity, an open market position that some advocates for looser UPL restrictions might cheer. The UK Legal Services Board (LSB) though on the basis of a study and consumer feedback is pressing the government, so far unsuccessfully, to regulate will-writing as a legal activity.³⁰⁶ The LSB argues that some will-writing companies use the power and information asymmetry with their customers to sell defective, unnecessary, and costly wills, undercutting the trust of the public in the will-writing market.³⁰⁷ This experience has parallels to criticisms of “trust mills” in the U.S., which sell un-customized documents to create trusts to seniors at exorbitant rates.³⁰⁸

Besides forms of fee shifting and sharing,³⁰⁹ the two primary alternatives to deregulation to increase access to civil legal services are pro bono and legal aid. Pro bono already plays a vital role in delivering legal services, and should be expanded where possible, but it also has clear constraints both in terms of the amount and type.³¹⁰ Pro bono may also come under new pressure in a regulatory

303. Between 2007 and 2011 there was a decline in the number of students studying to become a conveyancer from 1930 to 497. COUNCIL FOR LICENSED CONVEYANCERS, ANNUAL ACCOUNTS 25 (2011), http://www.clc-uk.org/pdf_files/corporate_docs/Annual_Report_2011.pdf [<http://perma.cc/F2NJ-CRXK>].

304. See, e.g., ABEL, *supra* note 21, at 127–141 (1991); RHODE, *supra* note 1, at 87–91.

305. Stephen, Love, & Rickman, *supra* note 296, at 655 (noting “little empirical work has been done by economists to estimate the effects of professional monopoly rights . . .”).

306. LEGAL SERV. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES 14–16 (2013), http://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf [<http://perma.cc/6TCL-MPCK>].

307. The LSB does not propose that will-writing only need to be performed by solicitors, but that it could also potentially be performed by other licensed legal professionals like paralegals. *Id.* at 24.

308. See, e.g., Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59(3) Md. L. REV. 595, 608 (2000) describing how trust mills may victimize unsuspecting seniors into buying trusts that do not accomplish their goals.

309. Class actions and contingency fees are two forms of fee sharing or shifting that can increase the ability of litigants to bring cases, particularly in cases that involve monetary damages against large businesses. For a recent overview of U.S. Supreme Court litigation limiting class actions and supporting binding arbitration on companies terms, see LAURENCE TRIBE AND JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 282–299 (2014).

310. See Cummings, *supra* note 2, at 115–144.

regime that allows for non-lawyer ownership, with investor owners influencing lawyers to engage in either less pro bono or less controversial pro bono in order to increase profits. Given these limits of pro bono, increasing legal aid may be the best option to significantly expand access to legal services.

Indeed, perhaps the most noticeable change in access was not produced by any shift in regulation or by pro bono activity, but instead by cuts in UK legal aid, which created a large increase in pro se litigants in family court.³¹¹ Given recent dramatic cuts in the UK legal aid budget and declining or stagnating legal aid budgets in the United States³¹² and Australia,³¹³ advocating for renewed investment in legal aid may seem like an unrealistic strategy. Yet, the alternative of relying on regulatory changes or a dramatic increase in pro bono assistance to address access needs seems even more far-fetched. Increases in government spending may also become more realistic if regulatory strategies to improve access seem largely exhausted. Recent surveys in the United States, United Kingdom, and Australia showing that in many instances the government actually saves money in the long run by providing legal aid may further incentivize such spending.³¹⁴ Finally, the relatively small amount of money spent on government legal aid for civil legal services makes it more plausible that there could be a marked increase in legal aid budgets.³¹⁵

Importantly, increased public spending on legal assistance does not have to be directed towards “traditional” legal aid where a publicly employed legal aid attorney guides a client through a legal problem from start to finish. Where appropriate, government intervention could also include legal assistance and advice provided by non-lawyers,³¹⁶ “unbundled” legal assistance,³¹⁷ provision of

311. *See supra* II.A.2.

312. *Funding History*, *supra* note 1.

313. In 1997 Prime Minister Howard’s government instituted major cutbacks in the Commonwealth’s funding of legal aid. While Australian states made up for some of these cuts, civil legal aid programs were curtailed by legal aid commissions. PRICE WATERHOUSE COOPERS, *LEGAL AID FUNDING: CURRENT CHALLENGES AND THE OPPORTUNITIES OF COOPERATIVE FEDERALISM* 19, 57 (2009); CMTY LAW AUSTRALIA, *UNAFFORDABLE AND OUT OF REACH: THE PROBLEM OF ACCESS TO THE AUSTRALIAN LEGAL SYSTEM* 9 (2012).

314. For an overview of studies showing the cost savings of legal aid in the United States, the United Kingdom, Australia, and Canada, see GRAHAM COOKSON & FREDA MOLD, *THE BUSINESS CASE FOR SOCIAL WELFARE ADVICE SERVICES* (July/Aug. 2014), <http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf> [<http://perma.cc/P2PF-ZKAF>]; BOSTON BAR ASS’N, *INVESTING IN JUSTICE: A ROADMAP TO COST EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS* 4–5 (2014) (noting findings of independent consulting firms that in certain categories of cases the government will save from \$2 to \$5 for every \$1 spent in civil legal aid).

315. *Funding History*, *supra* note 1; RHODE, *supra* note 1, at 187 (noting that U.S. federal spending on civil legal aid could be tripled for only \$1 billion. A fact that remains true ten years later).

316. Several studies have shown that, at least in some situations, non-lawyers can be just as effective or more so than lawyers. In the U.K., they have long relied on non-lawyers in their legal aid scheme. *See, e.g.*, Richard Moorhead, Alan Paterson, & Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37(4) L. & SOC’Y REV. 765, 794–96 (2003) (finding that non-lawyers perform at a higher standard than lawyers in a study of the UK’s legal aid system, but that non-lawyers took more hours on the same case and so cost more, perhaps because of contractual incentives); HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS*

legal self-help information, and public legal expenses insurance.³¹⁸ Such programs should be targeted at both the poor and middle class.

Where non-lawyer ownership of legal services is adopted it should be adapted to maximize its access benefits. This might be through encouraging consumer ownership, or other types of non-lawyer ownership, that may be more likely to increase access. Some jurisdictions could also choose to tax non-lawyer owned firms to subsidize the government's legal aid budget. Traditionally, one of the justifications of pro bono was that lawyers should provide legal services to those who cannot afford them in exchange for the benefit they receive from having a monopoly on legal services.³¹⁹ Since non-lawyer owners, unlike lawyer owners, cannot provide pro bono legal services they could be expected to contribute monetarily for being able to benefit from this monopoly as well. Finally, a jurisdiction could encourage that non-lawyer owned companies be set up as benefit corporations, explicitly stating that directors must consider not only maximizing profits in the decisions they make, but also increasing access to justice. Given the loose reporting standards of benefit corporations, adopting this form would certainly not guarantee these enterprises would promote access.³²⁰ However, such an organizational form might encourage these companies to pursue more public-spirited missions and would help protect legal service companies that did engage in extensive socially minded work from shareholder suits alleging that the company did not focus on maximizing profits.³²¹

B. REGULATORY IMPLICATIONS

This Article only examined non-lawyer ownership's impact on access and professionalism for civil legal services for poor and moderate-income popula-

OF REPRESENTATION AT TRIBUNALS, REPORT TO THE LORD CHANCELLOR 245–46 (1989) (finding that experience and expertise were reported as being more important than being a lawyer to successfully represent a client in the U.K. tribunal system); HERBERT KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998) (finding that non-lawyer assistance was just as effective as lawyer assistance in three of the four U.S. case studies examined).

317. For an overview of the literature on unbundled legal assistance, see Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENVER U. L. REV. 825 (2012).

318. For one proposal for a publicly sponsored opt-out legal expenses insurance scheme in Canada, see Sujit Choudhry, Michael Trebilcock, & James Wilson, *Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Insurance*, in *MIDDLE INCOME ACCESS TO JUSTICE* (Michael Trebilcock, Anthony Duggan, & Lorne Sossin eds. 2012).

319. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2419 (1999).

320. It could even weaken directors' accountability as they can blame poor performance on trying to serve the multiple goals of the company. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporations Statutes* 2AM. U. BUS. L. REV. 1, 33 (2012).

321. *Id.* at 16 (noting that existing law in the U.S. likely already provides protection from shareholder suits for pursuing social goals, but that benefit corporations do add clarity to such protections).

tions.³²² That said, the case studies and other evidence presented in this Article do suggest that there is a need for careful regulation of non-lawyer ownership. This is truer of some types of non-lawyer owned enterprises than others. For example, non-lawyer ownership *per se* does not necessarily create significant new conflicts of interest. A publicly listed law firm may not have any more conflicts than a lawyer owned firm. Instead, new conflicts of interest seem to be most likely to occur for enterprises that offer legal services, but also have other commercial interests. Even of these enterprises, it is only a subset that is most likely to develop new conflicts.

Given this context, regulators should not treat all types of non-lawyer ownership the same. In situations where the potential for conflict of interest, or perceived conflict of interest is high, jurisdictions adopting non-lawyer ownership should ban such ownership, or at least heavily regulate it. When the potential for conflict is more amorphous or where the public spirited ideals of the profession, professional standards, or other values of the profession may be undermined, regulators should exercise their choice on when and how to intervene, using the available evidence to weigh the costs and benefits of different types of non-lawyer ownership.

Jurisdictions might adopt several approaches to regulate non-lawyer ownership. They could have blunt and restrictive rules, such as that non-lawyers can only own a minority of any legal services firm or only own non-voting shares.³²³ They might allow for non-lawyer ownership only in some legal sectors, or in all, or could bar legal services from being provided by enterprises also engaged in other types of services. They could have more fine-tuned licensing requirements where potential non-lawyer owners had to submit plans about how they would overcome potential conflicts of interest that would be subject to approval. Or they could only require licensing in certain sectors (like criminal law) or for certain types of owners. The point here is to not go through every possible permutation of regulation and weigh its respective merits (some may be sensible, some unwise, and others would require far more regulatory capacity than others). Rather, it is simply to observe that in designing a regulatory regime for non-lawyer ownership that a regulator faces a large number of choices many of which could plausibly be justified.

Given this extensive regulatory menu of options and the still limited empirical basis upon which to make these choices, who the regulators are making these

322. Notably, it did not study how non-lawyer ownership impacts other parts of the legal market (such as the criminal or corporate sector), how it might impact other clients (such as the upper middle class, corporations, or government), or how it might affect volatility in the legal services market, the satisfaction of legal professionals with their jobs, or other relevant considerations. For example, John Morley argues that investor ownership would have made recent law firm collapses less likely. *See* John Morley, *Why Law Firms Collapse: The Fragility of Worker Ownership* (Aug. 2014) (unpublished manuscript) (on file with author).

323. For instance, Singapore recently adopted minority non-lawyer ownership. Hyde, *supra* note 15.

decisions becomes all the more significant. In the past, the academic literature has been preoccupied with lawyers capturing their own regulation to further their own interests.³²⁴ Examples of this type of regulatory capture are arguably seen in the non-lawyer ownership debate. For instance, in rejecting non-lawyer ownership wholesale, the New York Bar's Taskforce on Non-Lawyer Ownership (the Taskforce), comprised exclusively of members of the bar, noted that there was not sufficient empirical evidence to know the impact of non-lawyer ownership and "that it was not worth taking the risk of impacting the core values of our profession by allowing non-lawyers to hold equity interests in law firms."³²⁵ This intense caution expressed by the Taskforce, and blanket refusal to experiment, can be seen as a protectionist decision that ensures that lawyer owners do not have to compete with non-lawyer owners for either profits or prestige.

With the advent of non-lawyer ownership there is a concern that new outside actors, who can now profit from legal services, may also try to capture the profession's regulation. For example, the Clementi report was instrumental in ushering in non-lawyer ownership in the UK.³²⁶ In recommending its largely wholesale adoption to the UK government, David Clementi argued that, "The burden of proof [in the debate over non-lawyer ownership] rests with those who seek to justify the restrictive practice."³²⁷ This was a very different burden of proof than the Taskforce of the New York Bar, which in the face of unclear evidence favored the status quo. Perhaps not surprisingly, Clementi is not a lawyer, but a Harvard Business School graduate who had been prominently involved in the movement to privatize government companies in the UK. He was also the chairman of a major insurance company when he wrote the report.³²⁸ Today, the current head of the Legal Services Board is Richard Moriarty, who is not a lawyer, but came from a competition background and before joining the LSB was the director of regulation at a private water supply company owned by Morgan Stanley.³²⁹

There is little reason to believe the divergent positions on non-lawyer ownership of these regulators, whether members of the bar or competition advocates, are not sincere. However, given these regulators backgrounds they are

324. See, e.g., ABEL, *supra* note 21, at 44–48 (arguing lawyers use professional ideology to gain market control); WINSTON ET AL., *supra* note 3, at 24–56, 82–91 (2011) (claiming that lawyers capture high rents because of licensing).

325. NYSBA REPORT, *supra* note 8, at 73.

326. See also E. Leigh Dance, *The U.K. Legal Services Act: What Impacts Loom for Global Law Firm Competition?*, 34 L. PRAC. 28, 35 (2008).

327. CLEMENTI REPORT, *supra* note 44, at 132.

328. David Clementi was the Chairman of Prudential LLC until 2008. David Clementi, *Executive Profile*, BLOOMBERG, BUSINESS <http://www.bloomberg.com/profiles/people/1538052-david-cecil-clementi> [perma.cc/K33J-TPUU] (last visited December 23, 2015).

329. See Kathleen Hall, *Super-Regulator Appoints New Chief Executive*, L. SOC'Y GAZETTE (Oct. 22, 2014), <http://www.lawgazette.co.uk/practice/super-regulator-appoints-new-chief-executive/5044599.fullarticle> [http://perma.cc/DT56-6MJH].

likely to emphasize different priorities for the organization of a legal market. In a world of non-lawyer ownership, one should expect that large legal service companies, and their owners, will try to influence regulators to approve regulation that benefits them, but may disadvantage the public or smaller, more traditional legal service enterprises.³³⁰ In other words, we should expect that non-lawyer owned companies will pressure regulators just as lawyer owned law firms have historically.

More and better data will likely continue to be collected on jurisdictions' experiences with non-lawyer ownership. This could reduce some of the potential for regulatory capture by interest groups by limiting the discretion of regulators in their choices. However, much of non-lawyer ownership's ultimate effect on both access and professionalism is likely to be subtle and remain difficult to quantify.³³¹ It is unclear how one would accurately measure whether certain types of non-lawyer ownership negatively affected the public's perception of the justice system and the consequences of any such change in attitude. Similarly, in many cases it will likely be challenging to trace whether new innovations in delivering legal services arose because of non-lawyer ownership or other factors. Yet, these are precisely the types of issues that we want regulators to consider. There is a danger that if regulators only make decisions based on what they can measure with specificity that they will deemphasize factors they cannot easily quantify, but may be just as, or more, important.³³² One can attempt to overcome this bias through more qualitative studies, such as not only commissioning a survey on the public's perception of non-lawyer ownership, but also undertaking in-depth interviews with the public or surveying the history of the impact of other similar regulatory changes. These studies though may generate as many questions as answers and could often prove too costly to undertake.

Given the frequently uncertain consequences of non-lawyer ownership, as well as the competing priorities of potential regulators, it is unlikely that in the near

330. JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 20 (2008) (noting that "large corporations often use their political clout to lobby for regulations they know they will easily satisfy, but that small competitors will not be able to manage").

331. Limited liability partnerships provide a parallel example of the difficulties of assessing impact. At the time of their introduction in the 1990s and 2000s, there were warnings that LLPs would reduce the incentive of partners to monitor each other's behavior leading to a decline in professional conduct. See, e.g., N. Scott Murphy, *It's Nothing Personal: The Public Costs of Limited Liability Partnerships*, 71 IND. L. J. 201 (1995) (arguing that LLPs shift the costs of underinsured legal practices from firms to clients). Although nightmare scenarios about the effect of LLPs did not come true, law firms today might, and some commentators claim do, engage in riskier conduct than in earlier decades, helping contribute to law firm collapses like Dewey & LeBoeuf. See Michael Bobelian, *Dewey's Downfall Exposes the Downfall of Partnerships*, FORBES (June 7, 2012), <http://www.forbes.com/sites/michaelbobelian/2012/06/07/deweys-downfall-exposes-the-demise-of-partnerships/> [perma.cc/2KML-AYR5]. However, given the multiple factors that influence firm behavior we might never know the full effect of the widespread adoption of LLPs.

332. The availability bias, judging probability on the basis of evidence that is easily cognitively available, is a well-known problem in people's ability to assess risk. See Cass Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1358 (2011).

future there will be expert consensus on how to regulate such ownership. Instead, such decisions should be made through regulators drawn from a diverse set of stakeholders.³³³ This more deliberative approach should include not only members of the bar or competition advocates, who tend to weigh a narrow, if valid, set of concerns, but also consumer groups, access advocates, academics, and other professional organizations that deal directly with the public's legal challenges (like doctors, educators, and accountants).³³⁴

While reforms like non-lawyer ownership, which make legal services less distinct and more integrated into the market, provide opportunities to better deliver legal services, they do not always solve the problems they were expected to and may generate their own array of challenges.³³⁵ There is a danger that the push to deregulate legal services may come to dominate the access to justice agenda as deregulation and competition become central tenants of a new set of ideals about how to organize the delivery of legal services.³³⁶ Instead, the goal of regulation of legal services should not be deregulation for its own sake, but rather to increase access to legal services that the public can trust delivered by legal service providers who are part of a larger community that sees furthering the public good as a fundamental commitment.

CONCLUSION

The adoption of non-lawyer ownership of legal services may, in some instances, bring access and other benefits. However, the evidence so far does not indicate that these access gains will be as significant for poor and moderate-

333. Such a multi-stakeholder strategy draws on scholarship on deliberative democracy that does not assume consensus, but rather how to manage conflict given different normative stances of participants. See AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 10 (2004).

334. Having a diverse group of regulators may have the added benefit of shielding regulation from future anti-trust scrutiny in the U.S. context. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Anti-Trust Scrutiny*, 162 U. PA. L. REV. 1093, 1155 (2014); Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 431–38 (2008) (arguing that one of the benefits of the move towards non-lawyer ownership may be to trigger an acceptance that the practice of law is a business and a move away from self-regulation and towards regulating legal services as an industry).

335. In most fields—not just the legal profession—a striking feature of the spread of regulation across jurisdictions is that new regulatory frameworks are frequently adopted more on the basis of ideology, or to harmonize with global norms, than on concrete evidence of their merit. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 17 (2000) (explaining that the key processes of the globalization of business regulation are “coercion, systems of reward, modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building.”) Note that evidence-based learning is not amongst the most important mechanisms identified).

336. Edward Shinnick, Fred Bruinsma & Christine Parker, *Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands* 10(3) INT'L J. LEGAL PROF. 237, 246–47 (2003) (noting that there is “. . . a danger that the ongoing impetus for regulatory reform of the legal profession will be the . . . competition agenda alone and that access to justice and consumer critiques of the legal profession will disappear from the debate”).

income populations as some proponents suggest, and if non-lawyer ownership is seen as a substitute for other access strategies, like legal aid, such a deregulatory reform strategy could even have a detrimental impact. At the same time, the evidence also does not indicate that the professionalism concerns raised by non-lawyer ownership justify a blanket ban. Instead, jurisdictions adopting non-lawyer ownership should be aware of the potential dangers that such ownership can raise, including the possibility of new types of conflicts and the capture of regulators by interests that can now profit from legal services. Mitigating against these possibilities of non-lawyer ownership will require robust, independent, and well-informed regulators.³³⁷

337. Flood, *supra* note 38, at 508–09 (arguing liberalization of legal services requires new types of regulation).



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
From: Mark Tuft
Date: January 7, 2019
Re: Why Lawyers are Regulated Under the Judicial Branch and to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar

This memo addresses these issues by briefly examining the role of the Supreme Court, the Legislature, and the State Bar in the regulation of the practice of law.

The Supreme Court

The California Supreme Court has the exclusive power to regulate attorney admission to practice law in California. "In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts" (Article VI §1 of the California Constitution). *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 592. Such power of regulation means that the Court is vested with the inherent authority to control the admission, discipline and disbarment of persons entitled to practice law in this jurisdiction. *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543. Virtually every state recognizes that the power to admit and discipline lawyers rests with the judicial branch of government, mainly because an attorney is viewed as an officer of the court and whether a person is authorized to practice law is considered a judicial and not a legislative matter. *In re Attorney Discipline System*, *supra*, 19 Cal. 4th at 592; and see *Restatement Third The Law Governing Lawyers* (ALI 2000) §1, Comments b and c.1 Hence, the Court's inherent authority to regulate lawyers is considered a judicial function under the constitutional doctrine of separation of powers.

Lawyers have traditionally been distinguished from other professions and commercial purveyors of non-professional services who are not part of the judicial branch of government.

The right to practice law not only presupposes that the person possesses sufficient integrity, learning, and fitness to practice but also that the person acquires a special privilege and obligation to carry out a public trust in protecting the integrity of the legal system and promoting the administration of justice and confidence in the legal profession. Recent amendments to the California Rules of Professional Responsibility include these obligations in stating the purpose of

¹ According to several authorities, the judiciary's authority to regulate and control the practice of law is universally accepted and dates back to the year 1292. *In re Shannon* (AZ 1994) 897 P. 2d 548, 571; and see *Martineau, The Supreme Court and State Regulation of the Legal Profession (1980-1981)* 8 Hastings Const. L.Q. 199.

the rules. California Rule of Professional Conduct 1.0(a). The concept of lawyers as “officers of the court” envisions more than simply providing legal services to a client. “A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the equality of justice.” California Rule of Professional Conduct 1.0, Comment [5]; and see the ABA Model Rules of Professional Conduct, Preamble ¶ 1.

Despite the special role that distinguishes lawyers from other service providers, the Supreme Court has acknowledged on occasion that there are certain realities about modern law practice and economic circumstances that influence the delivery of legal services. The Court recognized in *Howard v. Babcock*², for example, that the traditional view of law firms as stable institutions is no longer the case and that lawyers are increasingly mobile and make career decisions based on the market place rather than duties to the system of justice. The Court held in that case that there is no longer any legal justification for treating partners in a law firm differently when it comes to restrictive covenants in law firm partnership agreements than other businesses and professions.

The Court’s inherent authority to regulate lawyers is not exclusive. Practice in federal court is governed entirely by federal law and federal court rules of admission and professional conduct. Federal courts and many federal agencies regulate the conduct of lawyers appearing before them. At the same time, the power of federal courts and administrative agencies to discipline attorneys appearing before them does not pre-empt California’s disciplinary authority if a member of the State Bar commits acts in federal court or before a federal agency that reflect upon the lawyer’s integrity and fitness to practice in California. Federal courts in California typically incorporate California’s Rules of Professional Conduct and the State Bar Act as standards governing the practice of law before that tribunal. Federal agencies, such as the U.S. Patent and Trademark Office and the Internal Revenue Service, adopt and enforce standards of practice that are patterned after the ABA Model Rules.

The Court’s inherent authority includes defining what constitutes the practice of law in California (*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court (ESQ Business Services, Inc.)* (1998) 17 Cal. 4th 119, 128-129) and deciding who, besides members of the California State Bar, may practice law in California (California Rules of Court 9.40 – 9.48) and in what form. *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 50 - Court is empowered to authorize and impose restrictions on the practice of law by nonprofit “advocacy” corporations.

The Legislature

The Supreme Court has historically recognized the Legislature’s authority to adopt measures regarding the practice of law. “[T]he power of the legislature to impose reasonable regulations upon the practice of law has been recognized in this state almost from the inception of statehood.” *Brydonjack v. State Bar* (1929) 208 Cal 439, 443. For example, the “duties of attorney” currently found in Business and Professions Code §6068(a) – (h), including the duty to

² 6 Cal. 4th 409 (1993)

“maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client” (§6068(e)(1)), have been integral to lawyer regulation since their enactment in 1872. The Supreme Court has long acknowledged this “pragmatic approach” to lawyer regulation and has respected the exercise by the Legislature, under the police power, of “a reasonable degree of regulation and control over the profession and the practice of law... in this state.” *Santa Clara County Attys Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543-544 – “In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation;” *O’Brien v. Jones* (2000) 23 Cal. 4th 40, 48-57 – appointment of State Bar Court judges by the Governor, the Assembly Speaker and Senate Rules Committee did not violate the separation of powers doctrine.³

The Court’s traditional respect for legislative regulation of the practice of law is not viewed as an abdication of the Court’s inherent responsibility and authority over the regulation of lawyers. The Court has on occasion invalidated legislative enactments that materially impair the Court’s inherent power, including provisions that authorize another entity to discipline an attorney. *Hustedt v. Workers’ Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 339-341 – invalidating statute authorizing Workers’ Compensation Appeals Board to remove or suspend attorneys licensed to practice before it; *Merco Const. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727-733 – invalidating law permitting a corporation to appear in an action through a person who is not a lawyer; *In re Lavine* (1935) 2 Cal. 2d 324, 328-331 – invalidating law requiring automatic readmission of attorneys pardoned after disbarment for felony convictions.

The Court has generally respected laws enacted by the Legislature to regulate the practice of law unless the Court determines that the legislation defeats or materially impairs the Court’s inherent authority over attorney admission, discipline, and disbarment. *Santa Clara County Counsel Attys. Assn. v. Woodside*, *supra*, 7 Cal. 4th at 544. Ultimately, the Court has the inherent power to provide higher standards of attorney conduct than the standards prescribed by the Legislature. *Id.*; *Emslie v. State Bar* (1974) 11 Cal. 3d 210, 225.

In addition to regulating lawyers, the Legislature has enacted statutes regulating non-lawyer service providers in providing services that do not constitute the practice of law. See, e.g., Business and Professions Code §6400 et. seq. (legal document assistants and unlawful detainer assistants); § 6450 et. seq. (paralegals); §22440 et. seq. (California immigration consultants).

The State Bar

The California State Bar originally was created by the Legislature in 1927 as a public corporation by statute (Business and Professions Code §6001). Subsequently, in 1960, the State Bar became and remains today a constitutional entity within the judicial article of the California Constitution (Article VI, §9). The State Bar Act did not delegate to the State Bar, the Legislature or the

³ The California State Bar is the only State Bar in the country with independent professional judges dedicated to ruling on attorney discipline cases.

executive branch, or any other entity, the Supreme Court's inherent judicial authority over the regulation of lawyers. *In re Attorney Discipline*, *supra*, 19 Cal. 4th at 601.

In adopting the State Bar Act, the Legislature expressly recognized that the Court retained the same inherent authority it had prior to the Act. Business and Professions Code §6087 – “Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of (the State Bar Act).”⁴ The State Bar Act contains other provisions confirming the Court’s inherent authority over the practice of law. (Business and Professions Code §6075 – the State Bar’s assistance in matters of admission and discipline of attorneys is a method that is alternative and cumulative to the Court’s inherent power; §6076 – requiring the Court’s approval of the State Bar’s formulation and enforcement of rules of professional conduct; §6100 – confirming the Court’s inherent power to discipline attorneys, including summary disbarment.

The law governing lawyers in California is not confined to the Rules of Professional Conduct and the State Bar Act. Lawyers are also bound by other applicable law including opinions of California courts. California Rule of Professional Conduct 1.0(b)(2); *Santa Clara County Atty. Assn. v. Woodside*, *supra*, 7 Cal. 4th at 548 – the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and the rules are not intended to supersede the lawyer’s duty of loyalty recognized in the common law. Statutory provisions regulating lawyer conduct appear in many state and federal codes and regulations as well as in rules of courts and other tribunals.

The State Bar acts as an administrative arm of the Supreme Court in admission and discipline matters. The Supreme Court has delegated to the State Bar the power to act on its behalf in such matters, subject to the Court’s review. The Court retains the power to control any disciplinary proceeding and its judicial authority to disbar or suspend attorneys. *In re Attorney Discipline*, *supra*, 19 Cal. 4th at 599-600.

Protecting the public is the State Bar’s highest priority in exercising its licensing, regulatory and disciplinary functions. Business and Professions Code §6001.1. Every person admitted and licensed to practice law in California is required to be a member of the State Bar. Art. 1 §9 of the California Constitution; Business and Professions Code §6001, 6002. Non-admitted lawyers authorized to practice law in California are, with rare exception, required to comply with California’s rules and law regulating lawyer conduct in practicing law in California.

The question to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar raises structural and policy issues that are yet to be considered. As a starting point, the State Bar currently regulates lawyers with managerial and supervisory authority over non-lawyer assistants in the provision of legal services. California Rule of Professional Conduct 5.3. This may include the lawyer’s duty to supervise paralegals to ensure

⁴ “[S]ection 6087’s express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act.” *In re Attorney Discipline*, *supra*, 19 Cal. 4th at 600; and see *Brydonjack v. State Bar* (1929) 208 Cal. 439, 443.

compliance with the regulatory provisions of Business and Professions Code §6400 – 6456. However, it is not apparent that the State Bar currently has primary enforcement authority over paralegals, legal document and unlawful detainer assistants and immigration consultants. The State Bar might become involved if the unauthorized practice of law is the primary issue.

Although the State Bar has the ability to enforce registration requirements for professional law corporations and other forms of law practice, the State Bar is not currently empowered to discipline law firms or other entities authorized to render legal services. California Rule 1.0.1(c) defines “law firm” to mean a law partnership, a professional law corporation, a lawyer acting as a sole proprietorship, an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

Depending on the structure and nature of non-lawyer participation in the delivery of legal services, and whether from a policy perspective the State Bar or another agency should regulate non-lawyers or entities rendering legal services in California, the Supreme Court will likely have the ultimate say over the matter.



The State Bar of California

Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Alternative Business Structures /
Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
From: Andrew Arruda and Joanna Mendoza
Date: June 18, 2019
Re: Recommendation: Entities can be composed of lawyers, non-lawyers or a combination of the two however, regulation would be required and may differ depending on the structure of the entity.

* * * * *

Points Discussed by the Subcommittee: What exactly will be regulated, including what are the important aspects of that regulation?

Hybrid Individual and Entity Regulatory Model: The subcommittee engaged in an in-depth discussion about the type of legal service providers that would be regulated under the proposal and came to agree on many aspects. Consensus was reached that the subcommittee is recommending a hybrid model that will allow individual licensing/registration/certification as appropriate (e.g., lawyers, LLLTs, paralegals, etc.) but will also allow for entity regulation. Entity regulation would encompass all forms of entities with regulation to be adjusted accordingly depending upon the scope of attorney involvement: a) attorney-only entities that include passive outside investment; b) entities owned/operated by a combination of attorneys and non-attorneys; and c) entities owned/operated by non-attorneys.

Points Discussed by the Subcommittee: Aspects to require under new regulatory scheme

Much of the discussion was focused upon important aspects of regulating the entities and individuals under this regulatory scheme. Under the proposal, attorneys would continue under the existing regulatory scheme with rules changes as necessary to allow for implementation of the proposed structure.

Aspects considered with respect to all regulated entities and non-attorney individuals:

- 1) Create registration/certification structure/rules under the regulatory agency required in order to do business and be an exception to the UPL statute.
- 2) Incentivize specific types of legal services identified as most needed by the California Justice Gap Study. May include different fee structure for regulated entities and individuals, limiting registration/certification to those areas, and/or requiring a certain

percentage of regulatory fees to be earmarked for legal services to help close the justice gap.

- 3) Require specific disclosures to consumers if services are not provided by licensed attorney (ensured informed consent).
- 4) Extend attorney/client confidentiality requirement to entities and other individuals delivering legal services (incl. prohibition against data sharing/selling).
- 5) Require data collection and reporting to regulatory agency (including specific data tracking impact on access to justice).
- 6) Require transparency (incl. providing credentials of service providers and pricing).
- 7) Require attorney sign-off/approval of law applied to service (e.g., ensuring that technology/AI apply law correctly).
- 8) Create a code of conduct and best practices applicable to regulated entities and non-attorney individuals.
- 9) Do not allow representation in court unless by attorney (current exceptions remain).
- 10) Each regulated entity and non-attorney individual would be given a number (like State Bar number) to allow consumers to know about validity of registration/certification.
- 11) Enforcement of regulations would be in form proposed by IAALS white paper.

Aspects considered with respect to regulated entities in particular:

- 1) Outside shareholders/owners allowed (including passive investment) but consumer interest shall remain paramount.
- 2) Attorney owners can be disciplined individually for violations of entity regulations and any applicable rules violations.
- 3) Corporate entities and LLCs must be a California entity or registered foreign entity in CA with annual statement of information identifying officers and directors and registered agent for service of process. Partnerships would need to identify all partners with the regulatory agency and identify a registered agent for service.

Points Discussed by the Subcommittee: What organization(s) will regulate these individuals or entities? Two options were discussed: the State Bar (Option 1); and the State Bar and an Independent 3rd Party Agency (Option 2)

* * * * *

Option 1: State Bar to Regulate

- a) Scope of regulation would broaden to include all entities/individuals providing legal services. This could include a name change for the agency allowing consumers to more easily identify it as a regulatory agency for anything falling under the umbrella of legal services.
- b) Regulation would continue to fall under the Judicial Branch with oversight by the California Supreme Court.
- c) The regulatory Board would have one or more commissions/committees under its oversight (similar to Committee of Bar Examiners and Board of Legal Specialization) which would propose policies and regulation for the different forms of legal services (e.g., entities, LLLTs, paralegals, document preparers, etc.).
- d) The regulatory fees charged for registration/certification of each form of legal service provider would cover the cost of regulation and discipline.

Pros: Existing structure is in place that can be most easily expanded to cover new areas of regulation in the legal services space. This avoids a significant amount of the implementation cost and duplication that would be associated with a parallel regulatory agency set up just for entity regulation. For example, the State Bar already has processes in place for regulating those not licensed under California law to practice law, such as registered in-house counsel, registered legal service providers and registered military spouses. Given the State Bar's history and long expertise handling these registrations, the agency is most qualified to continue and expand upon this regulation to entities or individuals that would be encompassed within the new regulatory scheme.

Furthermore, by keeping regulation of all legal services under one umbrella it will allow the regulation of attorneys, entities and other legal service providers to be overseen by a single board with a singular mission. This will allow for coordination and complementing legal services to better serve the public, improve access to justice as well as improving the administration of justice in California. This will avoid competing or conflicting missions and duplication of efforts.

This will also avoid issues associated with attorneys being owners or operators of a newly regulated entity and yet falling under the regulation of two separate agencies. When an attorney is involved in any way it will come under the State Bar regulation, so this will ensure no different

treatment. The existing enforcement system will help ensure consistent treatment for both attorneys and non-attorneys, as appropriate.

Cons: Expanding the umbrella of the existing State Bar could bring with it challenges associated with changing how regulation is performed. Starting from zero and building a new regulatory agency from the ground up could make it easier to create a risk-based regulatory system rather than trying to change how the State Bar has operated all these years (role based regulatory system).

Could perhaps have more flexibility if not within the current agency structure, as more specifically referenced in the Option 2 discussion.

Unless the name changes, the State Bar is believed by many (attorneys and the public) to be a trade association that exists for the benefit of lawyers rather than the regulatory agency that it is. Creating an entirely new agency would avoid the stigma, preconceived ideas and misunderstanding associated with an organization that sounds like it exists to provide benefits and cover to lawyers.

Option 2: Existing State Bar and an independent 3rd party agency which would regulate individuals and entities.

Points Discussed by the Subcommittee: Regulatory Approach

Before addressing the structure of this particular option, it is important to consider the regulatory approach. Based on the UK's experience with entity regulation, this type of regulation is most successful when the regulator is given a certain degree of flexibility. To this end, an [anticipatory regulation](#) approach that has been successfully adopted in the UK, in which the regulator is given a set of objectives and functions (as set forth below) so that it can utilize these regulatory principles and adjust to the market as it evolves and new risks emerge. Having an overly-prescriptive regulatory approach can stifle the expansion of the market and the regulator's ability to efficiently and effectively do its job.

The focus on risks is crucial – a good regulator should be aiming to make the market work well for everyone – grow the legal market to its maximum size rather than most profitable for lawyers, to encourage innovation and new services, and to ensure that all needs of potential consumers are met wherever possible. The goal is for individuals, the poor, those living in rural communities, and small businesses can benefit from the legal services market in addition to large corporations and individuals who are able to afford high legal fees.

Points Discussed by the Subcommittee: Structure of the Organization

Under this option, the legislature would statutorily create a new regulatory entity, which, for purposes of this memo, we will call the Legal Services Regulatory Board (“LSRB”). The LSRB will regulate individuals as well as entities authorized to deliver “legal services.” The definition and scope of “legal services” would be determined through the public rulemaking process, incorporating public comment.

Composition: The enabling act would set forth the composition of the Legal Services Regulatory Board. Ideally, it would have a public member majority, and its members would be appointed by the Supreme Court, the Governor, and both houses of the Legislature. The legislation could even specify demographics and areas of expertise for certain members of the Board (for example, consumer organizations, economists, etc.) The Chair could also be an appointed position, possibly requiring Senate confirmation. The Board would then be tasked with appointing its own CEO.

Transparency: The Legal Services Regulatory Board would hold all of its meetings in public and be subject to the Bagley-Keene Open Meeting Act and the California Public Records Act.

Points Discussed by the Subcommittee: Regulatory Objectives

The enabling legislation would impose a set of regulatory objectives for the Legal Services Regulatory Board. (See attached article from Laurel Terry describing regulatory objectives from a variety of jurisdictions). These objectives might include:

- Public protection
- Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.
- Advancement of the administration of justice and the rule of law.
- Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections.
- Delivery of affordable and accessible legal services.
- Efficient, competent, and ethical delivery of legal services.
- Protection of privileged and confidential information.
- Independence of professional judgment.
- Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
- Promoting an efficient and competitive market for legal services

In exercising any of its functions the Legal Services Regulatory Board should seek to deliver the regulatory objectives. This is not a standalone set of objectives – so they are not designed to force the regulator to do anything that anyone can think of that might help them, it is a constraint on how it exercises its functions. So when it sets standards for lawyers to enter the market, or when it sets some kind of threshold for a non-lawyer owner of a legal business, it must do so in a way that is compatible with the regulatory objectives. In other words, adhering to these objectives places competition and economic growth at the core rather than protectionism/lawyers interests.

Points Discussed by the Subcommittee: Accountability/Governance

In order to protect the rule of law, it is important that this Board be an independent agency. This could happen in a number of ways:

- One option would be that the Board would exist under the jurisdiction of the Supreme Court, but be separate and apart from the State Bar's regulation of individual attorneys.
- Another option would be to place the Legal Services Regulatory Board under the umbrella of the Department of Consumers Affairs in the Executive Branch, along with all of the other professional regulatory boards such as the Medical Board, Accountancy Board, etc.
- Under either approach, to ensure independence, the Board could be subject to “sunset review,” by the legislature (most likely a joint session of the judiciary committees) on a regular basis, and the legislature would have the opportunity to assess the Board’s performance adhering to the legislatively-set regulatory objectives. The Chair of the Legal Services Regulatory Board and CEO should be required to attend and answer questions on performance against the regulatory objectives etc.
- The legislation might also require the Regulatory Board to publish an annual report containing finance information/accounts, performance on increasing to access to justice, and other reporting that is high level/proportionate/sensible. That should be laid before your elected representatives of the California Senate ahead of the annual hearing.

[Arguments in favor...] An independent body can ensure that consumer needs – and not attorney self-interests—are at the heart of the regulatory scheme. It may also be more innovative and creative in its regulatory approach as opposed to being limited by the existing framework.

[Potential concerns associated...] It might be challenging (and potentially confusing to consumers) to have one entity—the State Bar—regulating individual lawyers, and a wholly separate entity regulating entities.

**California State Bar Task Force on Access Through Innovation of Legal Services
Subcommittee on Artificial Intelligence and Unauthorized Practice of Law**

Standards and Certification Process for Legal Technology Providers

Evaluate competence in two ways:

- metrics that would be accepted by an academic journal, to be confirmed by independent reviewer that has relevant scientific or academic experience
- licensed attorney working with the provider, as well as a licensed attorney as independent reviewer

Confidentiality

At a bare minimum providers should meet PCI DSS, though LCCA standards would be better. Ideally providers would meet many of the ISO27000 series standards, but this carries significant cost and would be an inappropriate barrier.

Providers need limit data leakage to 3rd parties. Alternatively, providers can build end-to-end encrypted systems and perform machine-learning on-device, or use techniques like homomorphic encryption or differential privacy.

Character Review

Just as lawyers submit to a moral character review, if a legal technology provider wants to undertake activities that would traditionally be considered the practice of law, they should be screened to protect the public from similar harms.

Availability & Disaster Recovery

Legal technology providers should have availability and infrastructure suitable for their business and their company's stage.

Review Process

Modeled on the "informal conference" of a moral character determination. List of specific areas of concern attached.

Open Questions

1. Is there authority to determine and assess a fee?
2. Should meetings be open or closed?
3. Information provided to the panel may contain trade secrets or confidential business records. Should some materials be protected from disclosure? If so, by what mechanism? How will materials be archived? Is a similar system to moral character determinations available and appropriate?
4. Should candidates be able to preempt certain people or groups (e.g. people that work for a legal automation company or a contract review company) from sitting as reviewers?

**California State Bar Task Force on Access Through Innovation of Legal Services
Subcommittee on Artificial Intelligence and Unauthorized Practice of Law**

Standards and Certification Process for Legal Technology Providers

Summary

Machines, and the legal technology providers that build them, are not legally authorized to practice law under today's regulatory scheme. However, this possibility is very near and provides both potential benefits by way of enabling Access to Justice, as well as many potential harms to individuals and to society as a whole. It is the job of regulators to weigh these interests as legal technology providers look to deploy machines that arguably practice law according to current definitions.

As the modern legal profession has taken shape over the last few centuries, bar associations have helped to resolve countless ethical and regulatory issues within in the legal profession. This tradition has resulted in explicit rules of professional conduct as well as norms and customs that, at least in their highest ideal, uphold the profession's integrity and protect the public. Broadly, it is in the interest of society to retain many of these norms and customs as machines inevitably begin to automate some legal processes. To explore these issues, we evaluate the interests, uses, and harms from the perspective of the legal profession using the Model Rules of Professional Conduct. We also consider ethical issues unique to human-machine interaction, algorithmic decisions, and automating some aspects of modern legal practice.

Specifically, we seek to answer the following questions:

1. What standards should technology providers meet to have their technology licensed or excluded from UPL claims by the California State Bar? Evaluate metrics for success, ethics, competency, transparency, data security, auditability, quality control, and various insurance products like general liability, errors & omissions, cyber security/data breach.
2. What process should the State Bar follow to vet or certify technology providers?

Proposed Model

The model under discussion by the ATILS AI & UPL subcommittee would not be mandatory for legal technology companies. Rather, interested companies could voluntarily submit themselves to additional regulatory oversight by the State Bar and commit to similar ethical standards, rules, and processes as lawyers, as well as additional insurance, transparency, and accountability requirements. In exchange, these companies could be eligible for a "safe harbor" from prosecution of Unauthorized Practice of Law (UPL) claims within the limited area they are approved to operate, following a review by technical and legal professionals. Similarly, the Bar could exempt its members that use approved technology products in their practice from similar claims of Unauthorized Practice of Law and concerns of Inappropriate Supervision. No changes would be required to civil and criminal fraud, false advertising, etc. statutes, and would continue to apply to tech companies and lawyers alike. Rather, the State Bar could decline to

prosecute these companies for UPL, so long as they are in good standing and have met *all* of the ethical, competence, insurance, transparency, and review requirements proposed here.

Antitrust Concerns

While an extensive legal review of Antitrust issues would necessarily occur if the proposal moves forward, the most recent Antitrust Determination, 2018-003¹ by the State Bar Office of General Counsel provides a useful summary of some dimensions of Antitrust with respect to the State Bar. “An action may raise antitrust concerns when, for example, that action raises prices, reduces output, diminishes quality, limited choices, or creates, maintains, or enhances market power.” Briefly, regarding each of these dimensions:

- Basic economic theory would predict that expanding the practice of law would increase both choice and output (a goal of this task force) and would therefore lower prices.
- The market power of entrenched participants in legal services would likely be reduced by providing more choice and competition.
- Diminishing quality is a very real and valid concern as new technologies are unproven and only infrequently exceed human performance on many tasks. It will therefore be important for the State Bar to ensure any new market participants meet or exceed human performance, perhaps even by lawyers, on relevant metrics.

Evaluating Competence with Statistics (1.1, 1.3)

While AI systems are increasingly beating human benchmarks in limited domains, their general use is still quite limited. Naturally, a primary concern for many lawyers and members of the public is how competent legal advice could even be provided by a machine. However, with sufficient limitations on scope and by limiting externalities, expert systems have arguably provided legal advice for decades through widely used tax filing systems, systems that select and draft legal forms, as well as trademark filing, and many other situations. The companies making many of these products frequently employ many lawyers as experts to inform the creation of the systems.

As machine learning systems have gained popularity in recent years, however, systems are able to learn about increasingly complex situations from previous examples, rather than simply executing an expert’s distilled knowledge where they feel the options are sufficiently limited and appropriate for automation. Accordingly, performance metrics of self-learning systems are of critical importance to questions of competence, especially in relation to human benchmarks.

Machine learning evaluation metrics exist for every conceivable problem that researchers dream up and are applied with varying success. For example, the F_1 score, which combines precision and accuracy, is frequently used to evaluate many machine learning and Natural Language Processing (NLP) systems. However, it is a simple metric, arguably too simple for many advanced NLP problems. Other common NLP evaluation metrics, like the Bi-Lingual

¹ State Bar of California, (2018), http://www.calbar.ca.gov/Portals/0/documents/antitrust/Antitrust_Determination_2018-0003.pdf (last visited Feb 8, 2019).

Evaluation Understudy (BLEU) score are so imperfect they have led to no fewer than 10 new variants in as many years. While the Recall-Oriented Understudy for Gisting Evaluation (ROUGE) metric, commonly used for automatic summarization and translation tasks, provides another 6 variants for some of the same tasks. There is no consensus on which metric to use for any given machine learning task, so no one metric can or should be prescribed. Rather, a sufficient number of scientifically relevant and accepted metrics are needed to evaluate performance.

Recommendation

Legal technology providers should produce whatever scientifically valid metrics for the task that would be accepted by a peer-reviewed academic journal. When possible, metrics should be evaluated against relevant human benchmarks.

Evaluating Competence with a Professional (1.1, 1.3, 5.1-5.3)

As statistics can miss many fine details, professional evaluation and oversight of legal technology systems should be required at two different levels. First, internal oversight by a licensed attorney employed by the provider (or an advisor for early stage companies), should be required, just as junior lawyers are supervised. Second, the review board should include at least one licensed attorney with experience in the same area as the technology under review.

Confidentiality and Information Security (1.6-1.8)

Confidentiality demanded of lawyers by Rule 1.6 would be even more relevant for legal technology companies under the proposed model. The concentration of sensitive data in law firms has already proven an attractive target for malign actors with high profile attacks against large law firms that have dedicated security personnel like *Appleby*², *Cravath, Swaine & Moore*³, *DLA Piper*⁴, and *Weil, Gotshal & Manges*.⁵ Legal technology providers are already gathering huge amounts of some of the most sensitive data from businesses and individuals, much with potentially grave consequences should these companies be breached. Yet, legal technology companies today seem no better prepared than law firms. In a survey of 503 legal technology companies in 2017, we found failing grades on the most basic web security features across 87.5% of legal tech companies, according to the widely used Mozilla Observatory scoring

² The lawyers at the heart of the leak, November 5, 2017, <https://www.bbc.com/news/business-41878881> (last visited Feb 8, 2019).

³ Matthew Goldstein, *Cravath Law Firm Discloses a Data Attack*, The New York Times, December 21, 2017, <https://www.nytimes.com/2016/03/31/business/dealbook/cravath-law-firm-discloses-a-data-attack.html> (last visited Feb 8, 2019).

⁴ Adam Janofsky, *DLA Piper CIO on ‘Petya’ Attack: ‘The Future of the Entire Business Was At Stake,’* Wall Street Journal, December 18, 2017, <https://www.wsj.com/articles/dla-piper-cio-on-petya-attack-the-future-of-the-entire-business-was-at-stake-1513635888> (last visited Feb 8, 2019).

⁵ Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, Wall Street Journal, March 30, 2016, <https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504> (last visited Feb 8, 2019).

methodology.⁶ Along with competence, confidentiality would seem to be the most acute concern in expanding the practice of law.

PCI DSS

At the *absolute minimum*, any legal technology provider that hopes to provide something resembling a legal service should meet widely accepted Payment Card Industry Data Security Standard (PCI DSS), and its compliance should be independently audited. Broadly, PCI DSS has 12 requirements:

1. Use a firewall to scan network traffic.
2. Change default passwords and related vendor defaults.
3. Use appropriate encryption, hashing, and masking to protect sensitive data.
4. Encrypt sensitive data in transit over public networks.
5. Protect against malware, use and regularly update anti-virus software.
6. Build secure systems and patch vulnerabilities immediately.
7. Restrict access to sensitive data to authorized personnel, “need to know” basis.
8. Identify and authenticate system access; every person needs a unique ID.
9. Restrict physical access to sensitive data.
10. Track and monitor all access to sensitive data.
11. Test security systems and processes regularly.
12. Maintain an information security policy for all personnel.

Legal Cloud Computing Association

The Legal Cloud Computing Association (LCCA) has proposed standards (Appendix A) that are not widely adopted, but well thought out and tailored to this industry. LCCA standards go further than PCI DSS by including integrity, redundancy, confidentiality, disaster recovery, and many other areas of critical importance.⁷ The LCCA standards indeed cover more areas, but are vague on some specifics, so they may require more detail for practical use.

ISO 27000 Series

The International Organization for Standardization (ISO) develops and publishes international standards across many industries, including information security. The ISO/IEC 27000 series of standards (Appendix B) for Information Security could form a well-researched and internationally recognized baseline. Notably, there are already standards in this series met by legal technology providers and accepted by courts for areas like redaction (27038), digital evidence (27042), and e-Discovery (27050-1 and 27050-2).

Recommendation

⁶ Mozilla HTTP Observatory. Contribute to mozilla/http-observatory development by creating an account on GitHub, (2019), <https://github.com/mozilla/http-observatory> (last visited Feb 8, 2019).

⁷ Standards | Legal Cloud Computing Association, , <http://www.legalcloudcomputingassociation.org/standards/> (last visited Feb 8, 2019).

At a minimum, regulators should require legal tech providers to meet PCI DSS. It would be far safer for the consumers of legal services if regulators required higher standards, like those set forth by LCCA and the ISO/IEC 27000 series. However, we must recognize doing so imposes a barrier that will disproportionately impact smaller providers. Perhaps a revenue or volume threshold could be applied to allow smaller providers to only meet PCI DSS and require more mature providers to also meet the higher standards.

As information security rapidly changes and standards are updated, the specific requirements should be promulgated in a way that enables and encourages periodic updates by regulators.

Confidentiality and Data Processors (1.4, 1.6)

Many machine learning models that form the basis for some AI systems are extremely compute-intensive and require specialized hardware (e.g. FPGAs, GPUs, and TPUs). The vast majority of this hardware is available from a limited number of companies (Amazon, Microsoft, Google, and a few others) and is usually located in public cloud infrastructure that is physically controlled by the cloud provider. Cloud providers may be located in different or multiple jurisdictions which can impact lawful data access requests, as demonstrated in *Microsoft Corp. v. United States*. While that case was recently mooted by the CLOUD Act, it provides an example of the complexity of moving increasing amounts of data into the physical control of third parties in other jurisdictions. Even more concerning is how the third-party doctrine applies when a person willingly uses a software product hosted on one of these cloud providers and architected in a way that the cloud provider could access client data. Frequently with machine learning APIs, the cloud provider can even use data it receives to improve its own machine learning models with no notice to or ownership by the ultimate client. Adding to the potential erosion of civil liberties, the cloud provider may not be able or willing to resist subpoenas or other data requests like National Security Letters (that come with a gag order) on behalf of their customer's customer.

While less common, it is currently feasible to train and execute machine learning algorithms on a client's device (i.e. phone, tablet, computer, or on-premise server) instead of sending sensitive client data to 3rd party cloud providers. Doing so enables privacy-by-design architectures that use techniques like end-to-end encryption to protect sensitive client data from third parties.

Recommendation

Legal technology providers that wish to provide a legal service should either:

1. Prevent 3rd party data access using end-to-end encryption
2. Obtain positive consent from clients knowledgeable of their rights, and that they are losing an important legal protection

If a legal technology provider uses a service where a cloud provider or other third party may access sensitive client data, they must clearly disclose this (i.e. not buried in terms of service).

End-to-end encryption could mitigate concerns over data leakage and conflicts of interest. If the technology provider has no knowledge or access to client data (this may include metadata as well as content), it seems safe for any number of parties to use the service without conducting a conflict check. Without end-to-end encryption, however, it would seem irresponsible not to conduct a conflict check on every single user, which would quickly become difficult at web scale.

Character Review

Just as lawyers must submit to a moral character review, if a legal technology provider wants to undertake activities that would traditionally be considered the practice of law, they should be screened to protect the public from similar harms. A couple recent examples of legal technology providers that would rightfully raise some concerns:

- The CEO of a legal technology provider in California had “a \$559,330 judgment entered against him to settle a lawsuit charging him with impersonating a lawyer, forging legal documents and fraudulently swindling two clients.”⁸
- The Board Chairman and largest investor in a legal technology startup was recently indicted by a federal grand jury for conspiracy and fraud relating to an alleged \$11B accounting scheme involving his previous company.⁹

There may be valid concerns regarding individuals in key management or ownership positions, as well as the company’s culture and historical regard for ethics and the rule of law. Should a company have a history of flouting regulators or harming the public, if they are on uneasy financial footing, or do not have the necessary technical skill to protect sensitive client data, the review panel should recommend corrective action or deny their application.

Availability & Disaster Recovery (1.9)

All legal technology providers should have availability and infrastructure suitable for their business and their company’s stage. For example a startup in beta need not have a multi-cloud, geographically-redundant deployment. However, a more mature company providing a legal service to thousands or millions of individuals needs to have appropriate disaster recovery and business continuity plans with regular failover and disaster recovery drills. There are many existing auditors and consultants available to service this need at all stages of business.

The review panel should verify existence of disaster recovery plans, with certification from an independent auditor after a suitable size and business maturity.

⁸ CEO of Legal Startup Settles Lawsuit Charging Fraud, Forgery and Impersonating a Lawyer, LawSites (2016), <https://www.lawsitesblog.com/2016/05/ceo-legal-startup-charged-fraud-forgery-impersonating-lawyer.html> (last visited Feb 19, 2019).

⁹ artificiallawyer, ‘Things Will Continue As Normal’ After Luminance’s Lynch Charged With Fraud Artificial Lawyer (2018), <https://www.artificiallawyer.com/2018/11/30/things-will-continue-as-normal-after-luminances-lynch-charged-with-fraud/> (last visited Feb 19, 2019).

Proposed Review Process

Interview/Demo

Pre-interview questionnaire and an in-person or video-conference interview with a handful of professionals covering expertise in relevant technology (i.e. machine learning, expert systems, blockchain, etc.) and at least one CA licensed lawyer. An existing model that may be useful is the “informal conference” preceding a moral character determination. The interview should cover areas and questions like the following:

- Describe business model and pricing
- System architecture overview
- Overview of security and privacy controls
- (after Jan 2020) Compliance with California Consumer Privacy Act
 - Is the system currently or expected to be subject to CCPA? 1) Revenue over \$25M/yr; 2) over 50k consumers, households, or devices; or 3) earns more than $\frac{1}{2}$ revenue from selling data
 - Describe/demo mechanism for obtaining positive consent for data processing
 - Describe/demo mechanism for responding to data access requests
- Is potentially sensitive legal information accessible to anyone but the user? List all analytics providers or vendors that may receive user data (i.e. your GDPR service provider list). Pay special attention to screen-recording analytics tools like HotJar and Inspectlet that can easily compromise user data.
- What decisions are embedded in the software?
- How are the criteria for those decisions determined? For example, a machine learning system may learn over a corpus of legal documents, while the logic in an expert system may be constructed by a professional.
- If the system is reliant on external data, where does it come from? Is it appropriately licensed?
- How is data provenance maintained?
- Is data quality an issue? If so, how is it checked?
- Is there any attempt to explain how decisions, predictions, or results are reached?
- Is there a mechanism for both the user and people impacted by the software (these may be different) to access any decision criteria, source data, and any other materials needed question or challenge a decision?
- Mechanisms to identify and mitigate bias
- Excerpts and lessons learned from interviews with actual users
- Extensive interactive product demonstration for the members

Evaluation Metrics

A limited set of evaluation criteria covering several areas should be agreed upon by the examining authority. For example, the following sections cover areas of primary importance to protecting the public from harm by legal technology providers:

- Functional completeness

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- Legal competence
- Accountability & transparency
- Compliance, security, & privacy
- Societal impacts

Procedures

The interview should not be a full code review, as that would be excessive and unlikely to actually accomplish the goal of protecting the public.

As with any human evaluation, there are potential conflict issues. It would be convenient to use an existing conflict policy from another State Bar board.

In choosing reviewers techniques like random reviewer assignment, pre-interview blinding, and other mechanisms to ensure fairness should be considered.

A standard fee covering the administrative cost of organizing the meeting as well as reasonable compensation to the reviewers should be levied, if authority to do so exists or can reasonably be obtained following a recommendation.

Open Questions

1. There may not be authority to determine and assess a fee. An alternative to direct oversight could be to license a small number of independent reviewers or organizations that make representations to the State Bar.
2. Should meetings be open or closed? Open meetings with publicly known and appointed members provides more accountability and transparency. Open meetings also may avoid some conflict issues since the pool of reviewers is known. However, open meetings could limit interest since they could expose detail rather kept private.
3. The public's business should be done in public. However, information provided to the panel may contain trade secrets or confidential business records. It is in the public interest to encourage full and complete cooperation, so should some materials be protected from disclosure? If so, by what mechanism? How will materials be archived? Is a similar system to moral character determinations available and appropriate?
4. In the course of review, trade secrets may be disclosed to the panel. Should candidates be able to preempt certain people or groups (e.g. people that work for a legal automation company or a contract review company) from sitting as reviewers?

Additional Ethical Principles

The public legal system is an integral part of a well-functioning society.

Legal technology must not interfere with or disrupt the administration of justice, limit the delivery of fair remedies, or contribute to societal imbalance. At times, public or private technology may augment, substitute, or even partially replace a legal process in the same way that arbitration can provide an alternative to a trial. However, as alternatives become available, they must not inhibit or create new barriers to existing parts of the public legal system.

One standard for suitable legal advice, whether delivered by human or machine.

It would be contrary to our concept of equal justice if technology should worsen the imbalance of our current legal system where those with means frequently receive better representation. AI in Law is still an emerging field, so it is easy to imagine technology providing a lower quality legal service through buggy software and poorly performing algorithms but this may reverse in the future. In fact, many e-Discovery systems that use machine learning technology provide far superior results than human review, but only for those who can afford such tools. As technology advances, it will become increasingly important to ensure sufficient access to legal technology, just as competent legal representation is required in criminal matters.

Legal technology must not undermine fundamental human rights or erode legal norms.

The UN Universal Declaration of Human Rights (UDHR) provides a framework for the rights that must be respected, along with the US and State Constitutions, and principles codified in Rules of Professional Conduct. Notably, UDHR Article 7 provides “All are equal before the law and are entitled without any discrimination to equal protection of the law.” Accordingly, accessibility, internationalization, localization, security, and privacy are not optional.

Legal technology must be designed to limit malicious use.

Our human-mediated legal system has inherent limits that can protect society from certain excesses that technology may exacerbate. For example, an app that enables filing of a lawsuit at the click of a button could be deployed maliciously, similar to a Distributed Denial of Service (DDOS) attack in computer security. Deliberate or inadvertent manipulation, domestic abuse, stalking, denial of access to a legal remedy, and many other potential modalities of misuse must be thoughtfully examined and mitigated where possible. Some malicious uses cannot be mitigated, but should be weighed by independent reviewers against the technology’s benefits.

Openness, transparency, and public access are critical to a fair and just legal system.

Free and public access to the laws and regulations that govern us as well as to the courts that interpret them, resolve disputes, and serve justice is necessary. While commercial involvement brings many benefits, a balance between profit and public benefit is imperative.

[Appendix A and Appendix B have been omitted.]

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|-----------------------|---|---|---|
| 1.1 Competence | | | |
| a | A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. | A legal technology provider shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. | |
| b | For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service. | For purposes of this rule, “competence” in any legal service shall mean for a legal technology provider, or their product, to apply the (i) learning and skill, and (ii) technical ability reasonably* necessary for the performance of such service. | |
| c | If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required , or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent. | If a legal technology provider, or their product , does not have sufficient learning and skill when the legal services are undertaken, the legal technology provider nonetheless may provide competent service by (i) associating with or, where appropriate, professionally consulting a lawyer whom the legal technology provider reasonably believes* to be competent, or (ii) referring the matter to a lawyer whom the legal technology provider reasonably believes* to be competent. | Remove part (ii). For machines, performance is near instantaneous, providing little time to acquire and validate sufficient learning and skill. |
| d | In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances. | | Remove emergency exemption |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|--|--|---|---|
| 1.2 Scope of Representation and Allocation of Authority | | | |
| a | <p>Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p> | <p>Subject to rule 1.2.1, a legal technology provider shall abide by a client's decisions concerning the objectives of the legal service and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to <u>Business and Professions Code section 6068, subdivision (e)(1)</u> and rule 1.6, a legal technology provider may take such action on behalf of the client as is impliedly authorized to carry out the legal service. A legal technology provider shall abide by a client's decision whether to settle a matter.</p> | Criminal representation is beyond the scope of legal technology providers |
| b | <p>A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*</p> | <p>A legal technology provider may limit the scope of the legal service if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*</p> | Most legal technology services will be extremely limited scope, but still require informed consent. |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|---|---|---|--|
| 1.2.1 Advising or Assisting the Violation of Law | | | |
| a | A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.* | Neither a legal technology provider, nor their product, shall counsel a client to engage, or assist a client in conduct that the legal technology provider knows* or reasonably should know* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.* | This sets a high bar for products like chatbots and may not be feasible with current technology. But, chatbots should not counsel clients to commit criminal acts. Still, machine reasoning over such complex scenarios may exist soon and should be available for consideration by reviewers. |
| b | Notwithstanding paragraph (a), a lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.* | Notwithstanding paragraph (a), a legal technology provider, through their approved product, may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.* | |
| 1.3 Diligence | | | |
| a | A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. | A legal technology provider shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in providing legal services to a client. | |
| b | For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer. | For purposes of this rule, “reasonable diligence” shall mean that a legal technology provider acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the legal technology provider. | |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|------|--|---|-------|
| | 1.4 Communication with Clients | | |
| a | A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act; (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation; (3) keep the client reasonably* informed about significant developments relating to the representation , including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law. | A legal technology provider , or their product, shall: (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act; (2) reasonably* consult with the client about the means by which to accomplish the client's objectives of the legal service; (3) keep the client reasonably* informed about significant developments relating to the legal service , including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and (4) advise the client about any relevant limitation of the legal technology product , or legal technology provider 's conduct when the legal technology provider knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law. | |
| b | A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation . | A legal technology provider , or their product, shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the legal service . | |
| c | A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others. | A legal technology provider may delay transmission of information to a client if the legal technology provider reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others. | |
| d | A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law. | A legal technology provider's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law. | |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|---|--|---|---|
| 1.4.1 Communication of Settlement Offers | | | |
| a | A lawyer shall promptly communicate to the lawyer's client : (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and (2) all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters. | A legal technology provider shall promptly communicate to their client all amounts, terms, and conditions of any written* offer of settlement made to the client. | Criminal representation is beyond the scope of legal technology providers |
| b | As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class . | As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement. | Both criminal and class representation are beyond the scope of legal technology providers |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|---|---|---|---|
| 1.4.2 Disclosure of Professional Liability Insurance | | | |
| a | A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer , that the lawyer does not have professional liability insurance. | A legal technology provider who knows* or reasonably should know* that the legal technology provider does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the legal technology provider , that the legal technology provider does not have professional liability insurance. | |
| b | If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer , the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client. | If notice under paragraph (a) has not been provided at the time of a client's engagement of the legal technology provider , the legal technology provider shall inform the client in writing* within thirty days of the date the legal technology provider knows* or reasonably should know* that the legal technology provider no longer has professional liability insurance during the provision of legal service to the client. | |
| c | <p>This rule does not apply to:</p> <p>(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);</p> <p>(2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;</p> <p>(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;</p> <p>(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.</p> | <p>This rule does not apply to:</p> <p>(1) a legal technology provider who knows* or reasonably should know* at the time of the client's engagement of the legal technology provider that the legal service for the matter will not exceed four hours or \$500; provided that if the legal service subsequently exceeds four hours or \$500, the legal technology provider must comply with paragraphs (a) and (b);</p> <p>(2) a legal technology provider providing a legal service to a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;</p> <p>(3) a legal technology provider who has previously advised the client in writing* under paragraph (a) or (b) that the legal technology provider does not have professional liability insurance.</p> | Add alternate \$500 limit Remove emergency exemption |

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| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|------------------------------------|--|--|-------|
| 1.5 Fees for Legal Services | | | |
| a | A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee. | A legal technology provider shall not make an agreement for, charge, or collect an unconscionable or illegal fee. | |
| b | Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following: | Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following: | |
| (1) | whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee; | (1) whether the legal technology provider engaged in fraud* or overreaching in negotiating or setting the fee; | |
| (2) | whether the lawyer has failed to disclose material facts; | (2) whether the legal technology provider has failed to disclose material facts; | |
| (3) | the amount of the fee in proportion to the value of the services performed; | (3) the amount of the fee in proportion to the value of the services performed; | |
| (4) | the relative sophistication of the lawyer and the client; | (4) the relative sophistication of the legal technology provider and the client; | |
| (5) | the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; | (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; | |
| (6) | the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer ; | (6) the likelihood, if apparent to the client, that the acceptance of the particular engagement will preclude provision of other legal services or engagements by the legal technology provider ; | |
| (7) | the amount involved and the results obtained; | (7) the amount involved and the results obtained; | |
| (8) | the time limitations imposed by the client or by the circumstances; | (8) the time limitations imposed by the client or by the circumstances; | |
| (9) | the nature and length of the professional relationship with the client; | (9) the nature and length of the professional relationship with the client; | |
| (10) | the experience, reputation, and ability of the lawyer or lawyers performing the services; | (10) the experience, reputation, and ability of the legal technology provider , or its product, in performing the services; | |
| (11) | whether the fee is fixed or contingent; (12) the time and labor required; and | (11) whether the fee is fixed or contingent; (12) the time and labor required; and | |
| (13) | whether the client gave informed consent* to the fee. | (13) whether the client gave informed consent* to the fee. | |

ATTACHMENT H

| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|--|--|---|---|
| 1.5 Fees for Legal Services (continued) | | | |
| c | A lawyer shall not make an agreement for, charge, or collect: | A legal technology provider shall not make an agreement for, charge, or collect | |
| | (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof, or | any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof. | |
| | (2) a contingent fee for representing a defendant in a criminal case. | | Criminal representation is beyond scope |
| d | A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed. | A legal technology provider may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a legal technology provider to ensure the legal service's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed. | As an example, a SaaS subscription provided by a legal technology provider could be a true retainer, but usually SaaS products include service consumption in addition to mere availability since technology products are often highly available. |
| e | A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services. | A legal technology provider may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the legal technology provider providing those services. | |

ATTACHMENT H

| Rule | Current Rules of Professional Conduct | Possible Rules for Technology Providers | Notes |
|--|--|---|-------|
| 1.5.1 Fee Divisions Among Lawyers | | | |
| a | <p>Lawyers who are not in the same law firm* shall not divide a fee for legal services unless:</p> <p>(1) the lawyers enter into a written* agreement to divide the fee;</p> <p>(2) the client has consented in writing,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms* that are parties to the division; and (iii) the terms of the division; and</p> <p>(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.</p> | <p>Legal technology providers shall not divide a fee for legal services with a lawyer or law firm* unless:</p> <p>(1) the legal technology provider and the lawyer or law firm* enter into a written* agreement to divide the fee;</p> <p>(2) the client has consented in writing,* either at the time the legal technology provider and the lawyer or law firm* enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the parties to the division; and (iii) the terms of the division; and</p> <p>(3) the total fee charged by the legal technology provider and the lawyer or law firm* is not increased solely by reason of the agreement to divide fees.</p> | |
| b | This rule does not apply to a division of fees pursuant to court order. | This rule does not apply to a division of fees pursuant to court order. | |

Proposed Rule 1.1 with New Comment [1] – Clean Version**Rule 1.1 Competence**

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the
 - (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by
 - (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

- [1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- [2] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.
- [3] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

ATTACHMENT I

Redline Comparison of Proposed Rule 1.1 with New Comment [1] to Current California Rule 1.1

Rule 1.1 Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the
 - (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by
 - (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[42] This rule addresses only a lawyer’s responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[23] See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

Proposed Rule 5.4 [Alternative 1] – Clean Version

Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

- (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
- (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
- (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, provided the plan does not otherwise violate these rules or the State Bar Act;
- (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services;
- (5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
- (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

- (1) the firm's sole purpose is providing legal services to clients;
- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
- (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
- (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

Proposed Rule 5.4 [Alternative 1] – Clean Version

- (5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;
- (6) compliance with the foregoing conditions is set forth in writing.

(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 independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration.

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal

Proposed Rule 5.4 [Alternative 1] – Clean Version

services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[6] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

- (1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*
- (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
- (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, provided the plan does not otherwise violate these rules or the State Bar Act;
- (4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; ~~or~~
- (5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
- (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).

(b) ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law. A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:~~

- (1) the firm's sole purpose is providing legal services to clients;
- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
- (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
- (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

(6) compliance with the foregoing conditions is set forth in writing.

(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 independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) ~~A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~

(1) ~~a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration~~;~~

(2) ~~a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

(3) ~~a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment~~

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[45] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).



The State Bar of California

Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Rules and Ethics Opinions

To: Rules and Ethics Opinions Subcommittee
 From: Kevin Mohr
 Date: June 18, 2019
 Re: Recommendation: Adoption of Proposed Rule 5.4 [Alternative 1]

* * * * *

I. Overview of the Proposed Revisions to CRPC 5.4

The proposed revisions to CRPC 5.4 described in this memorandum are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the subcommittee efforts is the understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The subcommittee reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant practice efficiency enhancements will further access to legal services.

The proposed amendments are four in number. *First*, the subcommittee recommends that current paragraph (b)(5), which permits a lawyer or law firm to share with or give *court-awarded* fees to a nonprofit organization be expanded to permit such sharing or giving of legal fees to a nonprofit organization regardless of whether the fees have been awarded by a tribunal. *Second*, the subcommittee recommends the addition of a sixth exception to paragraph (a)'s fee sharing prohibition, new subparagraph (a)(6), which would permit fee sharing in a law firm in which nonlawyers hold a financial interest so long as the lawyer or law firm has complied with each of the requirements of paragraph (b). Paragraph (b), which replaces paragraph (b) of current CRPC 5.4, prohibits fee sharing in a law firm in which nonlawyers hold a financial interest unless each of the requirements set forth in subparagraphs (b)(1) through (b)(6) have been satisfied. *Third*, paragraph (d) is substantially revised to conform it with the changes made to paragraph (b). *Fourth*, new comment [4] has been added, and current comments [4] and [5] renumbered [5] and [6], respectively.

It is important to note that paragraph (b) is substantially more limiting than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to “assist” the firm’s lawyers in the firm’s sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature,

e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.

Each of the foregoing changes is discussed in detail in the next section.

II. Recommendation & Explanation of Proposed Changes to CRPC 5.4

A. Paragraph (a)

The introductory paragraph of paragraph (a) provides:

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

The basic prohibition on fee sharing is preserved. The concept is that lawyers should not share fees with nonlawyers. There is a concern that such fee sharing would result in nonlawyer marketing businesses that would direct clients to lawyers who pay the most for the referral, even if the lawyer is not qualified. Similarly, the absence of this provision would permit a business operated by a nonlawyer to employ lawyers to represent clients and permit interference with the lawyers' independent professional judgment or the lawyer-client relationship. However, there are six exceptions to this basic rule (five in current rule, for which one of them the subcommittee has recommended amendments). A new exception, similar to one proposed by the ABA Ethics 20/20 Commission in 2011 (but never adopted), is provided in subparagraph (a)(6).

1. Subparagraphs (a)(1) through (a)(4).

No changes are recommended for subparagraphs (a)(1) through (a)(4).

Subparagraph (a)(1) is a long-standing exception that permits fee sharing with a deceased lawyer's survivors.¹

Subparagraph (a)(2) is another long-standing exception that conforms with the rule that permits sale of a deceased or disabled lawyer's practice to another lawyer (CRPC 1.17).²

Subparagraph (a)(3) recognizes that many businesses provide for employees to share in the businesses' profits. Without this exception, such profit sharing arrangements would not be

¹ It provides an exception to the fee sharing prohibition for "(1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;**"

² It provides an exception to the fee sharing prohibition for "(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;"

permitted in a law firm.³ Comment [1] to the rule clarifies that the amount of bonus or profit share may not be based on a percentage or share of fees in specific cases or legal matters.

Subparagraph (a)(4) is a long-standing exception that conforms the rule's application to the statutes and rules governing lawyer referral services in California.⁴

2. Subparagraph (a)(5) – Sharing legal fees with a nonprofit organization.

The following amendments to current CRPC 5.4(a)(5) are recommended:

(5) a lawyer or law firm* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, or recommended, or facilitated employment of the lawyer or law firm* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or

At its June 3, 2019 meeting, the subcommittee voted to recommend adoption of a modified version of D.C. Rule 5.4(a)(5).⁵ The inclusion of the word “facilitate” is intended to capture the concept of a law practice incubator. See comment [4].

The phrase “including but not limited to” was substituted to expand the kinds of representations that can generate fee sharing beyond litigation.

The rationale for limiting the kinds of nonprofit organizations to those that qualify under Internal Revenue Code § 501(c)(3) is found in D.C. Rule 5.4, cmt. [8], which provides in relevant part:

“Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.”

³ It provides that “(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, provided the plan does not otherwise violate these rules or the State Bar Act;”

⁴ It provides “(4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California’s Minimum Standards for Lawyer Referral Services;”

⁵ D.C. Rule 5.4(a)(5) provides: “(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

Pros:

- (1) By not limiting the (b)(5) exception to court-awarded fees, access to justice might be increased by providing an increased source of revenue to nonprofit legal service providers such as the ACLU.
- (2) Concerns regarding potential abuse by a nonprofit specifically formed to share in legal fees are obviated by the limitation to those organizations that qualify under IR Code § 501(c)(3).

Cons:

- (1) There is no evidence that expanding the exception beyond “court-awarded” fees will increase access to justice.
- (2) The limitation to court-awarded legal fees ensures that “[n]ot only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose.” ABA Formal Ethics Op. 93-374, at page 6.
- (3) Further, limiting the exception to “court-awarded” legal fees “underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.” *Id.*
- (4) The limitation stated in paragraph (a)(5) restricting fee sharing to a non-profit 501(c)(3) may be too limiting by excluding other non-profits. The Task Force welcomes comments on expanding the type of organizations that ought to be permitted for this fee-sharing exception.

3. Subparagraph (b)(6) – Sharing legal fees with nonlawyers in a law firm that satisfies all requirements set forth in paragraph (b).

Subparagraph (a)(6) provides an explicit exception to the general prohibition against sharing fees with nonlawyers so long as the lawyer or law firm complies with each of the conditions set out in paragraph (b). It is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011.

Paragraph (a)(6) carves out the exception. Paragraph (b) sets out the six requirements or contingencies that the firm must satisfy to come within the scope of the exception. As explained in section I, above, the requirements in paragraph (b) make any firm that qualifies substantially more limited than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999.

The subcommittee has added the full statement of what is required so that there is no confusion as to what a law firm must do to qualify. The Ethics 20/20 version simply provided:

- (x) a lawyer or law firm may do so pursuant to paragraph (b).

Although “do so” could be substituted, the subcommittee thought it important that the black letter text clarify that permission to “do so” mandates that “the lawyer or law firm complies with the requirements set forth in paragraph (b),” all of which requirements are mandatory.

The gist of paragraph (a)(6) is that lawyers and nonlawyers are permitted co-own a law firm, which is defined in the rules as follows:

(c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization. CRPC 1.0.1(c).

Because sharing in the profits of such a firm requires that the legal fees, which would be the source of profit in such a firm, be shared, there must be an express exception to the paragraph (a) prohibition. Subparagraph (a)(6) provides an explicit exception that affords that opportunity.

The subcommittee concluded that no further changes need to be made to the definition of “law firm” because (i) the definition focuses on an organization that practices law and (ii) the kind of firm as envisioned in paragraph (a)(6) is one whose “sole purpose” is “providing legal services to clients.” See (b)(1). That would not have been true had the recommendation been to amend CRPC 5.4 to permit an MDP.

Rather than identify pros and cons for the exception in general, the subcommittee has identified pros and cons for each of the requirements in subparagraphs (b)(1) through (b)(6) that must be satisfied for a firm to qualify under the subparagraph (a)(6) exception.

B. Paragraph (b)

As noted, paragraph (b) is based on the amendments to Model Rule 5.4 proposed by the ABA Ethics 20/20 Commission in 2011. The ABA never adopted those proposed changes to the rule.

The introductory paragraph of (b) is substituted for current CRPC 5.4(b), which absolutely prohibits lawyers from forming a partnership or other organization with a nonlawyer if any of the activities of the organization involve practicing law.⁶ The proposed introduction would provide:

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

The preceding paragraph differs from the Ethics 20/20 proposal in two ways. *First*, the clause “each of the following requirements is satisfied” has been added to emphasize that each of the requirements is mandatory. *Second*, the introductory paragraph has been rewritten to be

⁶ Current CRPC 5.4(b) provides: “b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.”

prohibitory ("shall not ... unless") as is standard in the California Rules rather than permissive ("may ... but only if") as in the ABA Ethics 20/20 proposed rule 5.4.

1. *Subparagraph (b)(1).*

Subparagraph (b)(1) is identical to the same paragraph in Model Rule 5.4 as proposed by the Ethics 20/20 Commission. It would provide:

- (1) the firm's sole purpose is providing legal services to clients;

Pros:

(1) Limiting the type of firm to one whose sole purpose is providing legal services enhances public protection because the lawyer partners, subject to codes and statutes imposing specific duties owed clients, will ultimately be responsible for decisions relating to those services.

(2) This limitation on the services provided should avoid the negative implications of a full-fledged MDP, which was soundly rejected by the ABA in 2000. See note **Error! Bookmark not defined..**

(3) This limitation on the services provided should also avoid the concerns stated in Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#), which likely would create pushback by the legal profession. This article suggests that some rules proposals that would open up the ability of lawyers to enter professional and financial relationships with nonlawyers will merely function as stalking horses and enable the Big Four accounting firms to expand their presence in providing legal services without a corresponding increase in access to justice.

(4) Although limited, this proposal should nevertheless provide nonlawyer technologists with a financial incentive to join forces with lawyers to fashion technological solutions to the justice access problem in concert with the lawyers' provision of legal services.

Cons:

(1) There is little or no concrete evidence that even this modest proposal will increase access to justice. The only jurisdiction that has adopted a similar rule is D.C., and that rule appears primarily intended to provide a means for nonlawyer lobbyists to share in a law firm's profits (and enhance the law firm's profits in that environment.)

(2) See Pro #3, above.

(3) The limitation stated in paragraph (b)(1) restricting fee sharing to a law firm, as defined by the rules, may limit the ability of law firms to join with other service providers or disciplines that would offer valuable services to clients but would not be provided by a law firm.

2. Subparagraph (b)(2).

Subparagraph (b)(2) is identical to the same paragraph in Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;

Pros:

(1) By limiting the role of nonlawyers to providing services “that assist” the provision of legal services, this provision addresses to some extent a concern expressed by members of ATILS regarding whether a tech solution can retain the protection of the privilege or work product in providing services. So long as the nonlawyers, whether through their own efforts or through apps they have designed, are assisting lawyers in providing services to the firm’s clients, the protections of privilege and work product should be preserved.

For example, with respect to privilege, see Evid. Code 952, which provides:

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those *who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added)

Cons:

(1) This rule would not address the stated concern as to a nonlawyer’s business that is engaged in providing legal services directly through technology, unless that business is majority owned or at least controlled by a lawyer or lawyers.

Possible Issue: Should nonlawyer ownership be limited to nonlawyers who “assist” the lawyers of the firm in providing legal services?

If not so limited, e.g., the firm is a true MDP (i.e., providing legal, accounting, etc., services independent of one another), which could open the door wider than intended. See Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#).

Compare the rule revision proposal of the ABA MDP Commission in their [Appendix A](#).

3. Subparagraph (b)(3).

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 proposed by Ethics 20/20. Paragraph (b)(5) provided:

(5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

The subcommittee believes that the balance of subparagraph (b)(5) of the Ethics 20/20 version of the rule is confusing and unnecessary. There will likely be many different ways in which nonlawyer ownership of a law firm will be implemented. The key point is that the nonlawyers in the firm must not direct or control the lawyers' independent professional judgment. This provision will allow some flexibility in setting up a firm's management structure, so long as this cardinal principle is not violated.

Pros: (1) A simple declarative statement that nonlawyers in the firm have no power to direct or control the professional judgment of a lawyer should provide sufficient assurance that the lawyers' professional judgment will not be impinged by the nonlawyers in the firm.

(2) The statement should also provide sufficient guidance on how the various ownership and voting interests should be structured in a firm set up under subparagraph (b). For further clarification, a comment could be added. Consider, for example, a variant Comment [8] to Model Rule 5.4, as proposed by Ethics 20/20, which provided:

[8]For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

However, the subcommittee does not believe that such a comment is necessary to further explain subparagraph (b)(5), which explicitly prohibits nonlawyers from controlling or directing the lawyers' decisions.

Cons: (1) This black letter provision lacks specificity as to how the goal of preventing nonlawyer control of lawyers' professional judgment will be attained.

4. *Subparagraph (b)(4).*

Subparagraph (b)(4) is based on paragraph (b)(3) of Model Rule 5.4 as proposed by Ethics 20/20.⁷ It would provide:

(4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

The additional language in subparagraph (b)(4) recognizes that in California, lawyer conduct is regulated not only by the Rules of Professional Conduct. Under subparagraph (b)(3), the nonlawyers must agree to undertake to conform their conduct to that of lawyers under the Rules of Professional Conduct, the State Bar Act, and the other laws that govern lawyer conduct (e.g., Evidence Code, Probate Code, Penal Code, etc.)

Pros:

(1) This provision, when read in conjunction with subparagraph (b)(5), which imposes on the firm's lawyer partners the duty to ensure the firm's nonlawyers' compliance with the Rules, etc., provides assurance that the services provided by the firm will be in compliance with the Rules.

(2) Requiring certification would not increase public protection. The key element in ensuring legal services are being provided in compliance with the Rules, etc., will be the continued monitoring of nonlawyer conduct by the lawyer partners in the firm.

Cons:

(1) The provision does not provide sufficient public protection, even when read in concert with subparagraph (b)(5). The public would be better protected by requiring that each nonlawyer partner be certified by an appropriate authority. See "Issue2," below.

Although the subcommittee concluded that the provision as drafted should provide sufficient protection when read in conjunction with subparagraph (b)(5), it did identify two further issues that the Task Force as a whole might want to address:

Issue1: The provision requires nonlawyers agree to "undertake to conform their conduct." Should the provision provide that the nonlawyers agree "to conform their conduct." In

⁷ Ethics 20/20 proposed rule 5.4(b)(3) provided:

(3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;

other words, we're not asking you to attempt to conform your conduct but telling you that you must agree to do so.

Issue2: In addition to the foregoing issues presented for the May 13-14, 2019 meeting, during the May 14 subcommittee meeting, there was a discussion whether this provision provides sufficient protection or whether each nonlawyer should be certified by some process implemented by the State Bar. The subcommittee concluded that this provision was sufficient. On reflection, perhaps a slightly revised provision that specifies that *each* nonlawyer must agree in a *signed* writing that the nonlawyer will conform his or her conduct would be an acceptable compromise. For example, subparagraph (b)(4) could be revised as follows:

(4) ~~the~~each nonlawyer~~s~~ states in a writing signed by the nonlawyer that ~~they~~have~~the~~nonlawyer has read and understands the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agrees in that writing to undertake to conform ~~their~~his or her conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

See also note 8.

5. Subparagraph (b)(5).

Subparagraph (b)(5) is identical to paragraph (b)(4) of Model Rule 5.4 proposed by Ethics 20/20. It would provide:

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

Pros: (1) Subparagraph (b)(4) clarifies that managerial and supervisory lawyers are still responsible for the nonlawyers, even though they might be co-owners in the firm. There could be circumstances where a particular nonlawyer might have a larger ownership share in the firm. Nevertheless, the lawyer would still ultimately be responsible for that nonlawyer as if the nonlawyer were a nonmanagerial partner/shareholder or a subordinate lawyer.

(2) This provision would fill a gap in the current rules that would arise should the subcommittee's proposed amendments to CRPC 5.4 be adopted. Under current CRPC 5.1, managerial and supervisory lawyers are responsible for subordinate or non-managerial lawyers. Under current rule 5.3, lawyers in a firm are responsible for nonlawyer assistants (or in ABA Model Rule 5.3, nonlawyer "assistance.") This provision clarifies that the lawyers in the firm remain responsible for the nonlawyers even if they are co-owners in the law firm. See also note 8.

Cons:

(1) None identified.

6. Subparagraph (b)(6)⁸

Subparagraph (b)(6) is identical to paragraph (b)(7) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(6) compliance with the foregoing conditions is set forth in writing.

Subparagraph (b)(6) simply requires that the firm keep a written record, including the writings required under subparagraph (b)(4), to demonstrate that it has complied with all the requirements of paragraph (b).

Pros:

(1) This provision should have a similar effect as a lawyer failing to keep adequate trust account records, i.e., failure to keep adequate records is a violation in itself and even if records are kept, but are inadequate, that would also be a violation. Further, the lack of sufficient writings would constitute evidence of the violation.

Cons:

None identified.

C. Paragraphs (c), (e) and (f)

The subcommittee does not recommend any changes to paragraphs (c), (e) or (f) of current CRPC 5.4.

Paragraph (c) prohibits a lawyer from permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct the lawyer's independent professional judgment or interfere in the lawyer-client relationship.

Paragraph (e) requires that the Board of Trustees formulate and adopt Minimum Standards for Lawyer Referral Services, and prohibits lawyers from participating in any such service that is not in compliance with the Minimum Standards.

⁸ In addition to the six subparagraphs proposed by the subcommittee, Ethics 20/20 also proposed a seventh, subparagraph (b)(6), which provided:

(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results;

At its May 14 meeting, the subcommittee concluded that this provision was not necessary in light of subparagraph (b)(5) regarding the lawyers' duty to be responsible for the nonlawyers as if the nonlawyers were lawyers under rule 5.1.

Paragraph (f) prohibits a lawyer from practicing in a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person to interfere with the lawyer's independent professional judgment or the lawyer-client relationship.

D. Paragraph (d)

The subcommittee proposes that current CRPC 5.4(d) be amended as follows:

(d) ~~A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~

~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable* time during administration~~;~~

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

The proposed changes to paragraph (d) parallel those recommended by Ethics 20/20. These changes are necessary because the prohibitions in former paragraphs (b) and (d) have been subsumed in new paragraph (b). Thus, former paragraph (d) is deleted except for current subparagraph (d)(1) regarding the fiduciary of a lawyer's estate, which is not affected by the changes to paragraph (b).

E. Comments

Current CRPC 5.4 includes five comments. The subcommittee does not recommend any changes to these existing comments as they each address a provision in the current rule that the subcommittee does not recommend amending.

1. New Comment [4].

The subcommittee proposes the addition of new Comment [4], which would clarify the application of subparagraph (a)(5) by explaining the addition of the word "facilitate" in that subsection. New Comment [4] would provide:

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

At its 6/3/19 meeting, the Subcommittee voted to include Comment [4] to clarify that subparagraph (a)(5) is intended to also apply to law practice incubators in addition to legal services organizations.

Conclusion

The subcommittee recommends that the Task Force include in its Report a recommendation that the proposed changes to CRPC 5.4 outlined in this memo be adopted by the Board of Trustees and approved by the Supreme Court.

Proposed Rule 5.4 [Alternative 2] – Clean Version**Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 2]**

A lawyer or law firm* shall not share a legal fee with a person* or organization not authorized to practice law unless:

- (a) the lawyer or law firm* enters into a written* agreement to share the fee with the person or organization not authorized to practice law;
- (b) the client has consented in writing,* either at the time of the agreement to share fees or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that the fee will be shared with a person* or organization not authorized to practice law; (ii) the identity of the person* or organization; and (iii) the terms of the fee sharing;
- (c) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

Rule 5.4 Financial ~~and Similar~~ Arrangements with Nonlawyers [Alternative 2]

(a) A lawyer or law firm* shall not share a legal ~~fees directly or indirectly with a nonlawyer or with an~~ fee with a person* or organization ~~that is~~ not authorized to practice law, ~~except that unless:~~

- (1) ~~an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~
- (2) ~~a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;~~
- (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, provided the plan does not otherwise violate these rules or the State Bar Act;~~
- (4) ~~a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or~~
- (5) ~~a lawyer or law firm* may share with or pay a court awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.~~

(b) ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization 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 independent professional judgment or interfere with the lawyer client relationship in rendering legal services.~~

(d) ~~(a) The lawyer shall not practice with or in the form of a professional corporation or other law firm* enters into a written* agreement to share the fee with the person or organization not authorized to practice law for a profit if:~~

(b) the client has consented in writing,* either at the time of the agreement to share fees or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that the fee will be shared with a person* or organization not authorized to practice law; (ii) the identity of the person* or organization; and (iii) the terms of the fee sharing;

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

- (1) ~~a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;~~
- (2) ~~a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~
- (3c) ~~a nonlawyer has the right or authority to direct or control~~there is no interference with the lawyer's independent professional judgment, or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.
- (e) ~~The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.~~
- (f) ~~A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person, * organization or group to practice law in violation of these rules or the State Bar Act.~~

Comment

[1] ~~Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.~~

[2] ~~Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to a lawyer or law firm,* however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.~~

[3] ~~Paragraph (a)(5) permits a lawyer to share with or pay court awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40~~

ATTACHMENT K

Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

~~Cal.Rptr.3d 221]. See also rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.~~

~~[4] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Pensor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].~~



The State Bar of California

**Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Rules and Ethics Opinions**

To: Rules and Ethics Opinions Subcommittee
From: Johann Drolshagen
Date: June 14, 2019
Re: Recommendation: Adoption of Proposed Rule 5.4 [Alternative 2]

* * * * *

The subcommittee is proposing 2 alternate rule recommendation changes to Rule 5.4. The subcommittee proposes both versions of the Rule 5.4 recommended rule changes be submitted to the public for comment in an effort to gauge discussion/concerns and support for both potential recommendations. While either recommendation may not be the ultimate recommendation of the task force in its final report, gauging the public (and legal field's) reaction to both versions of the proposed rule changes could result in useful data and suggested new business models should either version of the proposed rule ultimately be implemented.

Alternative 2 is meant to create a major shift in Rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, -multi-disciplinary participation and funding/investment. Expecting new innovation in A2J to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in A2J. In fact, a recent survey has suggested that A2J gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing A2J crisis.

The #ATILS task force charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is non-lawyer ownership or investment - a specific area the current Rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the task force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to "ensure that the recommendations of the Task Force are focused on protecting the interest of the public." Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of A2J needs go unmet. The statistics evidencing the failure to meet the A2J needs are immense and well documented.

The Alternative 2 proposed rule change allows a rule change that brings about the same change in increasing access to justice by harnessing the power of technology as it did for building a task force to study regulatory changes. It invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. The State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for A2J.

Pros:

- 1) The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.
- 2) The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
- 3) The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
- 4) The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.
- 5) The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
- 6) The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

Cons:

- 1) There is no mechanism for regulating nonlawyers under this proposal because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.
- 2) Little or no concrete evidence that this proposal would increase access to justice.



The State Bar of California

**Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Rules and Ethics Opinions**

To: Randall Difunctorum, ATILS Staff
From: Kevin Mohr, Vice Chair, ATILS Subcommittee on Rules and Ethics Opinions
Date: July 1, 2019
Re: Background Information in Support of the ATILS Recommendation for Public
Comment Consideration of a New Rule Similar to ABA Model Rule 5.7

INTRODUCTION

This memorandum responds to the action taken at the June 28, 2019 meeting of the ATILS Rules and Ethics Opinions Subcommittee (“Subcommittee”) authorizing me to work with you in revising the materials in support of the rule 5.7 recommendation. This memo does not make a specific recommendation as to whether a rule patterned on Model Rule 5.7 should be adopted, nor does it making an explicit finding that such a rule, if adopted in California, would likely enhance access to justice. Rather, the memo is informational in nature and is intended to assist public commenters in understanding the context of the task force’s rule 5.7 recommendation. The memo provides the text and background of ABA Model Rule 5.7 and a brief summary of existing California law. It also provides observations on the benefits and disadvantages of considering either a rule proposal or, in the alternative, a new ethics opinion to address the issue of ancillary law-related services.

ABA MODEL RULE 5.7

Purpose

Model Rule 5.7 addresses the duties of lawyers who provide “law-related” services as opposed to “legal” services. The rule is intended to avoid client confusion regarding the protections a client can expect when a lawyer, whether through the lawyer’s law firm or a separate entity, provides ancillary “law-related” services. The concern is that the client might assume that these services afford the same ethical protections as the client would be entitled to from legal services being delivered by the lawyer. Model Rule 5.7 places the burden on the lawyer to inform the client and clarify that such services do not provide those protections. If the burden is not met, then the Rules of Professional Conduct will apply to the lawyer’s provision of the services, i.e., the lawyer is required to perform the same duties a lawyer owes a client being provided legal services and advice, including the duties of competence, confidentiality, exercise of independent judgment, and loyalty.

Model Rule 5.7 Overview

The text of Model Rule 5.7 provides:

Rule 5.7: Responsibilities Regarding Law-related Services

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
 - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
 - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

In addition to the rule text, the rule includes 11 Comments. For the full text of ABA Model Rule 5.7, see page 9 of this attachment.

The introductory clause of paragraph (a) sets forth the rule's operative language, i.e., that a lawyer who is providing law-related services is still subject to discipline under the rules of professional conduct if the law-related services are provided in the manner described in either subparagraph (a)(1) or (a)(2).

Subparagraph (a)(1) involves a situation where the lawyer is providing law-related services that are "not distinct" from the lawyer's provision of legal services to a client. Such services, when provided by the lawyer or the lawyer's firm to a client who has or had also retained the lawyer for legal services, might include a tax preparation business, e.g., [N.D. Ethics Op. 01-03 \(5/4/2001\)](#) or financial planning services, e.g., [Ind. Ethics Op. 02-01](#), at least when they are provided in a way that the services are "not distinct" from the lawyer's legal services.

Subparagraph (a)(2) involves a situation where the law-related services are provided either directly by the lawyer or lawyer's law firm, or by a separate entity controlled by the lawyer or firm, but the lawyer has not taken "reasonable measures" to assure that the person who is to receive the law-related services knows the services are not legal services and that the protections afforded by a lawyer-client relationship do not attach. The practical effect of subparagraph (a)(2) is to permit a lawyer who provides such ancillary services to opt-out of being regulated under the Rules. So long as the lawyer takes "reasonable measures," e.g., provides the person using the ancillary services with a sufficient explanation that the services do not afford the protections available from the lawyer-client relationship, e.g., duty of confidentiality, then the lawyer will not be subject to the Rules when providing those services. As to what those "reasonable measures" should include, Comment [6] provides some guidance:

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

In one case, it was held that the lawyer advising his former legal clients that he was retired and now offering accounting and "business advice" services did not constitute "reasonable measures" to opt out of the Rules. See, *In re Matter of Rost* (Kan. 2009) 211 P.3d 145.

Concerning paragraph (b), Comment [8] provides guidance on the kinds of activities that might constitute "law-related" services:

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

State Adoptions of Model Rule 5.7

According the ABA, the rule has been adopted in most jurisdictions, with 29 jurisdictions having adopted a rule identical to Model Rule 5.7.¹ Five jurisdictions have adopted a rule that is substantially similar to Model Rule 5.7.² Five jurisdictions have adopted a version of the rule with substantial variations from the organization or substance of the Model Rule.³ Twelve jurisdictions, including California, have not adopted any version of Model Rule 5.7.⁴ [ABA, Variations of the Model Rules of Professional Conduct, Rule 5.7 \(9/29/17\)](#).

California Law Concerning Law-related Services

California is one of the twelve jurisdictions that has not adopted any version of Model Rule 5.7 or any rule that expressly addresses a lawyer's provision of law-related or non-legal services. See section 0, above. The only mention in the California Rules of Professional Conduct of a lawyer being subject to discipline for conduct outside the practice of law is Comment [2] to Rule 1.0, which states: "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity." Although no rule that might be violated when a lawyer is not practicing law or acting in a professional capacity is identified, several provisions of Rule 8.4 ("Misconduct") could be

¹ The 29 jurisdictions are: Alaska, Arkansas, Colorado, Delaware, District of Columbia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming

² The five jurisdictions are: Georgia, Idaho, Massachusetts, North Carolina and Wisconsin.

³ The five jurisdictions are: Arizona, Florida, New York, Ohio and Pennsylvania.

⁴ The twelve jurisdictions are: Alabama, California, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Montana, Nevada, New Jersey, Oregon, Texas.

violated in such situations. For example, Rule 8.4(b) and (c) are not limited to a lawyer's conduct as a lawyer.⁵ See further discussion under section "4. Non-legal services completely unrelated to the practice of law" at page 6 of this attachment.

California Case Law and Other Authority

There is a substantial amount of California case law and other authority that addresses the application of the Rules of Professional Conduct when a lawyer is providing services that would not be considered the unauthorized practice of law if provided by a nonlawyer. The First Rules Revision Commission recommended that no version of Model Rule 5.7 should be adopted "because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection," and that certain terms and standards in the Model Rule "are materially inconsistent with existing California authorities." *Rules and Standards Not Adopted*, p. 30, and the Second Rules Revision Commission reasoned that "[a]ppropriate guidance is currently provided by other California authorities."

"Law-related" or "non-legal" services defined.

Under California law, the concept of a "non-legal service" has been defined as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." [Cal. State Bar Formal Op. 1995-141](#). This differs from the term "law-related services," which as defined by Model Rule 5.7, means "services that might reasonably be performed *in conjunction with and in substance are related to the provision of legal services*, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." (Emphasis added)

Functional approach. The State Bar Committee that drafted Op. 1995-141 subsequently clarified that the appropriate inquiry should be "functional," i.e., "is the lawyer performing a service that is performed as part of the practice of law and would constitute the [unauthorized] practice of law if performed by a non-lawyer?" [Cal. State Bar Formal Op. 1999-154](#), at n. 4 & accompanying text.

Categories of Non-legal Services a Lawyer Might Provide

Applying the aforementioned "functional" approach, there appear to be four categories of non-legal services recognized in the California authorities.

1. *Non-legal services provided in circumstances "Not Distinct" from the provision of legal services.*

There is a line of cases that recognize that when a lawyer provides non-legal services that are "not distinct" from the provision of legal services, the lawyer is subject to the Rules of

⁵ Cal. Rule 8.4(b) and (c) provide it is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

Professional Conduct. See, e.g., *Layton v. State Bar*, 50 Cal.3d 888, 904 (1990) (“Where an attorney occupies a dual capacity, performing for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”)

These cases all appear to track the scope of Model Rule 5.7(a)(1) as involving a lawyer’s provision of non-legal services that are not distinct from the practice of law.

2. Non-legal services related to the practice of law.

Even when a lawyer is offering services that are “distinct from” the lawyer’s practice of law, the lawyer might still be subject to the Rules of Professional Conduct if a recipient or potential recipient of the non-legal services reasonably might be confused as to the nature of services that the recipient is obtaining from the lawyer. See, e.g., [Cal. State Bar Op. 1999-154](#) (Where lawyer is seeking employment as an investment adviser, and uses the title “Esq.” on her stationery and promotional materials, refers to her experience in estate and tax planning law and that she is a “Certified Tax Specialist,” such advertising could lead potential customers to “mis perceive the nature of the services being offered,” and thus subject the lawyer to the requirements of the lawyer advertising rules.) That same ethics opinion, however, suggested that such a result could be avoided if the promotional materials included “an express disclaimer that [the lawyer] is not offering and does not intend to provide legal services or legal advice.” The drafters cautioned, however, that “no disclaimer will be effective if [the lawyer] is in fact performing legal services or offering legal advice. In addition, such a disclaimer may be ineffective where the services offered are clearly law-related and may inevitably and inextricably involve activities that are legal services.”

Situations that fall into this category appear to be analogous to the situations described in Model Rule 5.7(a)(2).

3. Non-legal services requiring the exercise of fiduciary duties.

Aside from the provision of non-legal services “not distinct” from the provision of legal services and non-legal services that are related to the practice of law, California law also applies the Rules of Professional Conduct to a lawyer who provides non-legal professional services that are fiduciary in nature – even in the absence of a lawyer-client relationship. The State Bar summarized the law in a formal opinion:

When [a lawyer’s] relationship with a client in the course of rendering a purely non-legal service creates an expectation that she owes a duty of fidelity or she is exposed to a client’s confidential information in the course of rendering the non-legal professional service, [the lawyer] may be subject to the same duties to avoid the representation of adverse interests under rule 3-310 [now rule 1.7] with respect to that client as she would if there had been a lawyer-client relationship. (See Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232]; *Allen v. Academic Games Leagues of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785.)

The situations in this category do not appear to be fit neatly into either the Model Rule 5.7(a)(1) or (a)(2) category, and appear to be the kind of services that the First Rules Commission concluded required “nuanced guidance.” See section **Error! Reference source not found.**, above.

4. Non-legal services completely unrelated to the practice of law.

There is a final category of non-legal services that a lawyer might provide that bear no relation to the practice of law, for example, a lawyer-owned restaurant, antiques store, body shop, dry cleaner or other business that provides goods or services that are completely unrelated to the practice of law. Even in situations where the customers of such establishments knew that a lawyer was an owner or even if the lawyer actively participated in its operation, it would not be reasonable for the customer to expect or misperceive the kinds of goods or services being provided as being related to the practice of law. As already noted, lawyers could still be subject to discipline under the Rules of Professional Conduct even when not acting as a lawyer or in a professional capacity.⁶

SUMMARY

Although California has not adopted a version of Model Rule 5.7, there is extensive California authority addressing the concerns of the rule. The aforementioned California authority, however, is not necessarily common knowledge to lawyers or the public, nor is it definitive.

The next section of this memorandum discusses whether a rule of professional conduct or an ethics opinion might be more effective in apprising lawyers or the public of the existing law.

The Benefits and Disadvantages of Employing a Rule of Professional Conduct or an Ethics Opinion to Expand the Availability of Law-related Services Provided by Lawyers?

The charge of the ATILS Task Force includes (i) reviewing “the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public,” (ii) evaluating “existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need,” and (iii) “[w]ith a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the

⁶ See discussion at the beginning of section 0. In addition to violations of the cited provisions of Cal. Rule 8.4, lawyers are also subject to discipline for violations of the State Bar Act, including [Bus. & Prof. Code § 6106](#), which provides “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”

extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.”

Adding a new rule of professional conduct that could provide lawyers or lawyers with an ability to provide ancillary services without being subject to the Rules might not appear to be in keeping with the Task Force’s charter and its emphasis on client protection, or its charge to explore means that might increase access to justice through innovation. This section of the memorandum is not intended to decide that issue but rather to simply determine whether, if a clarification of the availability of a lawyer providing non-legal services without being subject to the Rules of Professional Conduct is amenable to the charter, which approach would be best suited to providing that clarification given the current state of California law: a rule of professional conduct or an ethics opinion promulgated by the State Bar.

Rule of Professional Conduct

There are several advantages to a Rule of Professional Conduct patterned after Model Rule 5.7. *First*, the rule would be mandatory in nature as part of a set of disciplinary rules. A lawyer who seeks to engage in providing law-related services would have to comply with the rule to receive any of its benefits and be subject to discipline for non-compliance. Public protection should be enhanced. *Second*, because all lawyers are aware of the Rules of Professional Conduct, knowledge of what the lawyer’s obligations are with respect to the provision of law-related services would be more readily available and compliance with the law enhanced, as well as any benefits to the public more likely ensured. *Third*, related to the second advantage, to the extent the extensive law concerning law-related services can be reduced to a straightforward disciplinary rule, compliance will be enhanced and public protection fostered. *Fourth*, adopting a version of Model Rule 5.7, even if it were to diverge substantially from the substance of the model rule, would nevertheless remove an unnecessary difference between the law governing lawyers in California and the law governing lawyers in the substantial majority of other jurisdictions. *Fifth*, a rule approved by the California Supreme Court would clarify the current law and, to the extent that law might be inconsistent with the objectives of the rule or the goal of increasing access to justice, overrule the inconsistent law.

To be sure, there are disadvantages with a rule approach. *First*, as noted by the First Rules Revision Commission, a rule might not be able to capture the “nuanced guidance” of the case law. *Second*, because such a rule would necessarily be simplistic, “any iteration of the rule likely would be inaccurate and misleading.” *Third*, the California Rules are narrowly tailored to be disciplinary rules; they are generally mandatory and not permissive or aspirational, nor are they intended to provide general guidance on a topic of concern to lawyers. The complexities of California law reduced to a rule might not fit within that paradigm. *Fourth*, California has been without a rule of professional conduct in this area for over a century without there having been a multitude of lawyers who have taken advantage of clients through the delivery of non-legal services; to the extent lawyers have violated the law, there are already rules available to discipline them. There is no compelling need for such a rule.

As noted, it is not certain to what extent, if any, a rule that is patterned on Model Rule 5.7 would promote innovation that would operate to increase access to justice. The adoption of such a rule in California could increase knowledge of and incentives to lawyers to provide law-related services, and thus increase opportunities for lawyers to expand the services they provide either directly or indirectly their clients or the general public, but whether such a rule will contribute to access to justice is not at present established.

Ethics Opinion Promulgated by the State Bar

There are several advantages to addressing by ethics opinion the matters regulated in other jurisdictions through a rule derived from Model Rule 5.7. *First*, an ethics opinion is generally a better vehicle than a disciplinary rule for providing the “nuanced guidance” that the First Commission concluded is necessary to understand and apply the current law in California. *Second*, by providing that “nuanced guidance,” the ethics opinion should enhance compliance with the law and thereby promote public protection. *Third*, an ethics opinion or opinions would be a better medium for identifying the different kinds of law-related services that lawyers could provide, describing the benefits and disadvantages of each, and even focusing on the kinds of services that might provide better access to justice.

The major disadvantage of an ethics opinion is the fact that such opinions are only advisory in nature. They are not mandatory and might not be viewed as carrying the weight of authority of a court opinion or rule of professional conduct. Further, although they are readily available on the State Bar’s web site, there is no assurance that a lawyer would review such an opinion before embarking on providing law-related services. Ethics opinions, although a valuable resource in applying the law and rules as they relate to a lawyer’s duties, are not controlling law, nor would the violation of a conclusion in an ethics opinion necessarily result in a lawyer’s discipline. (See separately provided memorandum from Andrew Tuft updated June 18, 2019 for a discussion of a relevant proposed ethics opinion currently circulating for public comment with a deadline of August 30, 2019.)

CONCLUSION

ABA Model Rule 5.7 has been adopted in a substantial majority of United States jurisdictions with little variation. California is one of twelve jurisdictions that have not adopted a similar rule. Nevertheless, should the Task Force determine in its final report that promoting law-related services might enhance access to justice and decide to further investigate its regulation to protect the public, there are two potential means to do so: by Rule of Professional Conduct or by an ethics opinion.

ABA Model Rule 5.7 Responsibilities Regarding Law-related Services

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

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

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

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

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

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

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

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

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

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).



The State Bar of California

**Task Force on Access Through Innovation
of Legal Services – Subcommittee
on Rules and Ethics Opinions**

To: Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

From: Andrew Tuft

Date: February 25, 2019 (**UPDATED: 6/18/2019**)

Re: Ethics Opinion Addressing Matters Regulated in Other Jurisdictions Through a Rule Derived From ABA Model Rule 5.7

PLEASE NOTE: The Committee on Professional Responsibility and Conduct approved the above referenced opinion for a 90-day public comment circulation with a public comment deadline of August 30, 2019. The version of the opinion currently circulating for public comment is attached to this memo.

In your meeting materials, Kevin Mohr and Andrew Arruda have provided the following item: "Memo Analyzing Rule 5.7 – Consideration of a Rule of Professional Conduct Patterned on ABA Model Rule 5.7 or, in the Alternative, a State Bar Ethics Opinion."

For informational purposes, staff is including a draft opinion currently under consideration by the State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC). This draft opinion analyzes the following:

Under what circumstances is a lawyer's conduct or provision of services in connection with a non-law business potentially subject to regulation under the California Rules of Professional Conduct and, what steps, if any, can a lawyer take to ensure that the provision of non-legal services is not subject to those Rules? How do rules governing partnership with non-lawyers, sharing of legal fees, solicitation, conflicts of interest and lawyer-client business transactions apply to a lawyer's dealings with a non-law business in which the lawyer is involved?

It is important to note this opinion is only a draft opinion at this stage. Before an opinion becomes formally published, it must be circulated for public comment and approved for publication by the State Bar of California Board of Trustees. To that end, this draft opinion has not yet been circulated for public comment, or presented to the Board of Trustees for final approval. Accordingly, the substance of the opinion is subject to change.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 16-0003**

ISSUES: Under what circumstances is a lawyer's conduct or provision of services in connection with a non-law business potentially subject to regulation under the California Rules of Professional Conduct and, what steps, if any, can a lawyer take to ensure that the provision of non-legal services is not subject to those rules? How do rules governing partnership with non-lawyers, sharing of legal fees, solicitation, conflicts of interest and lawyer-client business transactions apply to a lawyer's dealings with a non-law business in which the lawyer is involved?

DIGEST: Although non-legal services are, by definition, not the practice of law, their provision by a lawyer or lawyer-controlled entity is presumptively subject to the Rules of Professional Conduct if they are conducted in a manner that is not distinct from activities constituting the practice of law or if they are sufficiently law-related to give rise to a reasonable risk that the customer may understand that legal services are being provided or that a lawyer-client relationship has been formed. However, where appropriate steps have been taken to distinguish non-legal from legal services and to clarify that no legal services are being provided and that no lawyer-client relationship has been formed, the Rules of Professional Conduct will not apply to the services provided. The rules governing the lawyer's separate practice of law, including rules pertaining to solicitation, conflict of interest, and lawyer-client business transactions will, however, remain applicable to the lawyer's dealings with the non-legal entity in the course of the lawyer's practice. In addition, a lawyer is always subject to professional discipline for acts involving moral turpitude, dishonesty, or corruption, whether or not those acts occur in connection with the practice of law. Accordingly, the fact that a lawyer has made clear that her distinct non-legal business does not involve the practice of law or the formation of an attorney-client relationship is not a bar to such discipline.

**AUTHORITIES
INTERPRETED:** Rules 1.7, 1.8.1, 5.4, 7.2, 7.3 and 8.4 of the Rules of Professional Conduct of the State Bar of California.^{1/}
Business and Professions Code sections 6068(e)(1) and 6106.

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

INTRODUCTION

In today's economic environment, many lawyers and law firms are interested in pursuing business opportunities that do not involve the provision of legal services. Those activities may draw on the lawyer or law firm's own non-legal background and skills or they may involve investing in or partnering with non-lawyers. This opinion addresses the circumstances under which those Rules of Professional Conduct that apply to lawyers in the practice of law may also apply to lawyers' conduct providing non-legal services individually or through a lawyer-controlled business.^{2/} It also addresses ethical issues that may arise for a lawyer in the practice of law arising from her relationship with a separate non-law business.

STATEMENT OF FACTS

A law firm is considering seeking to capitalize on capacities developed over time by marketing those capacities through businesses that do not involve the representation of clients in legal matters. The firm is considering a variety of options.

In Scenario 1, the firm would provide back office services for law firms who wish to contract out for those services. The law firm would like to provide those services to other law firms pursuant to contracts that, while fully compliant with the standards governing non-lawyer entities providing such services, avoid the complexities and compliance costs associated with the Rules of Professional Conduct relating to, among other things, conflicts of interest, lawyer trust accounts, and similar issues. The services would be provided through a separate entity, which would in turn seek investments from non-lawyer sources of funding.

In Scenario 2, the firm would provide services as a professional fiduciary, specializing in the problems of beneficiaries and conservatees whose welfare is threatened by diminished or declining capacity. The services would be provided through a separate entity. Services at the professional fiduciary firm would be provided by lawyers from the firm and by some non-lawyers trained as professional fiduciaries and the entity would be jointly owned by the law firm and the non-lawyer fiduciaries working there. In California, professional fiduciaries are subject to their own regulatory scheme. Business and Professions Code sections 6500-6592, Probate Code sections 2340 and 2341, and California Code of Regulations sections 4400-4622. From the perspective of the new business, an important and attractive feature of that separate scheme is that the applicable confidentiality rules grant a professional fiduciary implied authority to disclose an incompetent beneficiary's confidential information in the beneficiary's interest when necessary to prevent the beneficiary from suffering or inflicting harm. In contrast, the rules of lawyer-client confidentiality do not recognize such authority except in the rare case where the client intends to commit a violent crime. Business and Professions Code section 6068 (e)(1) and rule 1.6.

With respect to each of the proposed options, the firm would like to know first, whether, and under what circumstances, the provision of the services would be subject to the Rules of Professional Conduct. In addition, the firm wants to know: (a) how the rules barring partnerships or fee-splitting with non-lawyers might apply to such arrangements and (b) how the rules regarding solicitation, conflict of

^{2/} This opinion supplements and updates important earlier opinions on this topic, including Cal. State Bar Formal Opn. Nos. 1982-69, 1995-141, and 1999-154.

interest and lawyer-client business transactions might apply to the relations between the law firm and the separate entity that provides non-legal services.

BACKGROUND

1. The Definition of Non-Legal Services

This Committee's prior opinions have defined non-legal services as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." Cal. State Bar Formal Opn. No. 1995-141.^{3/} It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing Charles W. Wolfram, *Modern Legal Ethics* (1986) pp. 897-898). A lawyer or law firm may engage in the provision of non-legal services either directly from the lawyer or the law firm's own offices^{4/} or through a separate entity in which the lawyer or law firm has an ownership interest. Such services may be delivered by lawyers or by non-lawyers.

The fact that a lawyer is providing services that are not part of the practice of law and that could lawfully be provided by a layperson does not mean that professional discipline and professional rules have no role to play.^{5/} Even when a lawyer's sole business is the provision of non-legal services, she is subject to professional discipline for "the commission of any act involving moral turpitude, dishonesty or corruption." Business and Professions Code section 6106 and Cal. State Bar Formal Opn. No. 1995-141 at p. 2. In addition, certain provisions of rule 8.4 clearly apply to conduct outside the practice of law. There are many reported cases of professional discipline being imposed under Business and Professions Code section 6106 for conduct occurring outside of the lawyer-client relationship.^{6/}

^{3/} Consistent with the Committee's longstanding practice, this opinion is not intended to address or opine upon the issue of the unauthorized practice of law. The prohibition against engaging in the unauthorized practice of law is set forth in statute under the California Business and Professions Code sections 6125 to 6127. Regarding what constitutes the practice of law in California, lawyers should consider the following cases: *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 858]; *Farnham v. State Bar* (1976) 17 Cal.3d 605 [131 Cal.Rptr. 661]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; *Crawford v. State Bar* (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; *People v. Merchants Protective Corp.* (1922) 189 Cal. 531; *Estate of Condon* (1998) 65 Cal.App.4th 1138 [76 Cal.Rptr.2d 922]; *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].

^{4/} The former rule forbidding the provision of legal and non-legal services from the same office has long since been disapproved. See Los Angeles County Bar Assn. Opn. Nos. 384 and 413.

^{5/} The question of whether a lawyer's performance of non-legal services is subject to professional discipline or to the Rules of Professional Conduct is related to, but distinct from, the question whether those services are "professional services" for purposes of the application of the malpractice statute of limitations in Code of Civil Procedure section 340.6. See *Lee v. Hanley* (2015) 61 Cal.4th 1226 [191 Cal.Rptr.3d 536]. We express no opinion on that issue of statutory construction here.

^{6/} Examples, several of which are discussed in more detail below, include *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298] (agent's willful misappropriation of funds); *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467] (fraud by lawyer-fiduciary); *Lewis v. State Bar* (1973) 9 Cal.3d

In addition, under certain circumstances lawyer or law firm involvement in a business providing non-legal services can trigger the application of other Rules of Professional Conduct applicable in the practice of law.^{7/} Comments to the rules note that “a violation of a rule can occur... when a lawyer is not practicing law or acting in a professional capacity.” Rule 1.0, Comment [2] and rule 8.4, Comment [1]. But with the exception of rule 8.4, the rules do not themselves specify when they apply to non-legal services, leaving that question to be resolved under other California authorities, including case law and ethics opinions.^{8/}

2. Non-Legal Services Provided in Circumstances Not Distinct from the Practice of Law

One way that services not constituting the practice of law can become subject to the Rules of Professional Conduct is when they are rendered in circumstances that are not sufficiently distinct from the provision of legal services. The authorities all involve situations where a sole practitioner offered to provide both legal and non-legal services in the same matter, from the same office, without any efforts to distinguish the two services. See, for example: *Layton v. State Bar* (1990) 50 Cal.3d 888, 904 [268 Cal.Rptr. 802] (serving as lawyer for the estate and executor in the same matter); Cal. State Bar Formal Opn. No. 1982-69 (serving as lawyer and broker with respect to the same real estate transaction); and *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321] (lawyer and notary). This principle may apply even if the non-legal services are provided through a separate entity devoted primarily to the provision of such services. For example, a lawyer who establishes a separate entity through which she primarily intends to provide investment advice (a non-legal service) is nevertheless subject to the Rules of Professional Conduct if she also provides legal advice to her investment advisees as part of the separate business. Cal. State Bar Formal Opn. No. 1999-154.

3. Non-Legal Services “Related to the Practice of Law”

Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the Rules of Professional Conduct can still apply if the non-legal services are sufficiently related to the practice of law that the lawyer’s involvement in them could “reasonably lead prospective clients to misperceive the nature of the services being offered.” Cal. State Bar Formal Opn. No. 1999-

704, 712-13 [170 Cal.Rptr. 634] (same); *Alkow v. State Bar* (1952) 38 Cal.2d 257 [239 P.2d 871] (misrepresentation and misappropriation); *Jacobs v. State Bar* (1933) 219 Cal. 59, 63-64 [25 P.2d 401] (deception by lawyer escrow holder).

^{7/} Several independent statutory provisions govern lawyer’s provision of certain products and services ancillary to the practice of law. (E.g., Bus. & Prof. Code, §§ 6009.3 (tax preparation), 6009 (lobbyists), 6077.5 (consumer debt collection), 6175 (financial products), and 18895 (athlete agents). All are beyond the scope of this opinion.)

^{8/} Many American jurisdictions have addressed the issue of the application of professional rules to non-legal businesses by adopting a version of American Bar Association Model Rule 5.7. A drafting team of the Commission for the Revision of the Rules of Professional Conduct recommended against adoption of Rule 5.7 in California “because appropriate guidance is currently provided by other California authorities.” Memorandum from Rule 5.7 Drafting Team to Members, Commission for the Revisions of the Rules of Professional Conduct, May 16, 2016 at p. 4-5. The full Commission voted to accept that recommendation.

154. Thus, we have previously opined that an advertisement for an attorney's separate investment advisory business that lists the attorney's professional credentials as a lawyer is a "communication with respect to professional employment" within the meaning of former rule 1-400, because investment advising is an activity related to the practice of law and the use of the lawyer's legal credentials to advertise that service could therefore lead the client to misperceive the nature of the service being provided. *Id.*

At the same time, there are some forms of non-legal services that are so clearly unrelated to the practice of law that there is no risk of customer confusion between the lawyer's legal and non-legal activities. Thus, it is settled that lawyer-owned retail service businesses like a restaurant or dry cleaner that are distinct from the lawyer's practice are so clearly non-related to the practice of law that the Rules of Professional Conduct do not apply to relations with their customers. Cal. State Bar Formal Opn. No. 1995-141.

4. Types of Law Related Services Potentially Subject to the Rules of Professional Conduct

The California authorities do not provide a comprehensive listing of "law-related" non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. See Cal. State Bar Formal Opn. No. 1995-141 (fiduciary) and Cal. State Bar Formal Opn. No. 1999-154 (investment advisor). Beyond that, however, there is little relevant authority. Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct.^{9/} American Bar Association Model Rule 5.7 defines "law-related services" subject to the Rules of Professional Conduct as those "that might reasonably be performed in connection with legal services and in substance are related to the provision of legal services." This definition reflects the same concern as California law: the risk of client confusion concerning the nature of the services being provided.

The Comments to Model Rule 5.7 suggest a further non-exhaustive list of "law-related" activities that are potentially subject to professional rules, including "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." ABA Model Rule 5.7, Comment [8]. Some of these activities overlap with those already recognized under California law as potentially subject to regulation under the Rules of Professional Conduct. To the extent that the list extends beyond those activities, the Committee does not opine here on whether a lawyer's provision of any of the listed services, in circumstances distinct from her practice, would be subject to the Rules of Professional Conduct. Specific circumstances may matter greatly in assessing the risk of client misunderstanding. In addition, the relationship of the non-legal business activity to activities defined as the practice of law is context-dependent and could change over time. The Committee believes, however, that this broader list may provide useful guidance to lawyers seeking to determine whether a non-law business is potentially subject to the Rules of Professional Conduct.

^{9/} See, Rule 1.0, Comment [4]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 642, 655-656 [82 Cal.Rptr.2d 799]; and Cal. State Bar Formal Opn. No. 2010-180 n.7.

5. Affirmative Steps May Avoid the Application of the Rules of Professional Conduct

The question remains whether the application of the Rules of Professional Conduct governing the practice of law to “law-related” non-legal services is automatic and inescapable, or instead can be avoided through appropriate clarifying measures that eliminate the reasons for applying those rules. No California authority directly addresses this question. It is settled, however, that a lawyer providing non-legal services has a duty to clarify whether and to what extent a lawyer-client relationship exists, at least when a lawyer knows or reasonably should know that the customer believes that such a relationship exists. Cal. State Bar Formal Opn. No. 1995-141; compare *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499]; rule 1.13(f) and rule 4.3(a). It is also settled that: (1) a lawyer can avoid the formation of an implied lawyer-client relationship through words or actions making it unreasonable for the putative client to infer that such a relationship exists and (2) the sophistication of the client is relevant in assessing the reasonableness of the client’s belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.* (N.D. Cal. 1993) 150 F.R.D. 648, 651-52 [applying California law]; see also *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] and Cal State Bar Formal Opn. No. 2003-161 n.1. These principles suggest that appropriate efforts to distinguish legal and non-legal services, coupled with appropriate warnings that no attorney-client relationship exists and that no legal services are being provided, can be effective to take law-related non-legal services outside the coverage of the Rules of Professional Conduct.^{10/}

Allowing lawyers and law firms providing non-legal services that take appropriate clarifying measures to avoid the application of the Rules of Professional Conduct also represents sound policy, for multiple reasons. First, the primary rationales for applying the Rules of Professional Conduct to non-legal services are the risk of overlap with legal services and the risk of client confusion concerning whether the protections of the lawyer-client relationship exist. When those risks are not present, the reasons for applying the Professional Rules are also no longer present. Second, allowing such disclaimers to be effective may benefit both customers and service providers. The fact that the Rules of Professional Conduct do not apply does not mean that the relevant conduct will go unregulated. Apart from the residual power to discipline attorneys described above, the non-law business will very often be subject to regulation under an alternative regulatory or licensing scheme, such as those governing investment advisors or professional fiduciaries. There is no reason to think that the Rules of Professional Conduct, designed to regulate the practice of law, provide a superior regulatory framework for such activities. Instead, when the provision of a non-legal service is subject to its own regulatory or contractual scheme, the lawyer provider and the customer may have multiple shared reasons, including clarity, consistency and efficiency, for having the services regulated under that scheme alone. For example, in the professional fiduciary scenario described above, the parties could well conclude that a regime in which a fiduciary has implied authority to disclose confidential information for the beneficiary’s protection is superior to one in which the fiduciary does not have such authority. Third, where California policy

^{10/} The leading California ethics authorities do not consider whether such clarifying measures are available or would be effective. See, e.g., M. Tuft & E. Peck, *California Practice Guide: Professional Responsibility* (The Rutter Group [2018]) §1:324 (a lawyer or law firm that directly or indirectly provides law related services, whether to clients or non-clients, “must comply” with the Rules of Professional Conduct and the State Bar Act in the provision of those non-legal services). The authors do not, however, consider the possibility of effective clarifying measures or the authorities or reasons of policy cited in text that support their recognition.

permits, it is desirable to align California's approach with that taken in other jurisdictions. The approach outlined here, which treats the application of the Rules of Professional Conduct to law-related services as presumptive only, advances national uniformity because it aligns with the approach taken in ABA Model Rule 5.7, which states that professional rules do not apply to law-related services if the lawyer has established that those services are distinct from legal services and that reasonable measures have been taken to ensure that the customer understands both that the services are not legal services and that the protections of the lawyer client relationship do not exist. ABA Model Rule 5.7, Comments [6] - [8]. In an era when many lawyers and law firms practice (and potentially offer non-legal services) in multiple jurisdictions, having a standard that advances national uniformity is a substantial advantage.

The effectiveness of measures taken to distinguish non-legal services from legal services and to clarify the nature of the services provided and the absence of a lawyer-client relationship will depend on the circumstances, including the clarity of the measures taken, the sophistication of the customer, whether the customer is a client or former client of the lawyer,^{11/} whether the services are being provided in the same matter, and whether the customer has engaged separate legal counsel in the matter. We discuss these issues in more detail below. In some situations, particularly those involving the provision of legal and non-legal services in the same matter or to unsophisticated customers, the legal and non-legal services may be "so closely entwined" that even a very clear disclaimer may not be effective. See ABA Model Rule 5.7, Comment [8]. But where non-legal services are clearly distinguished as such, and the lawyer has taken reasonable clarifying measures, there is no reason why the business cannot be conducted under the baseline legal rules governing non-lawyers who engage in it.

DISCUSSION

1. Applicability of the Rules of Professional Conduct

For purposes of discussion, we assume, without deciding, that the businesses contemplated in Scenarios 1 and 2, if conducted by non-lawyers, would not constitute the unauthorized practice of law.^{12/} If conducted by a lawyer or law firm, however, both would be sufficiently law-related to be presumptively subject to the Rules of Professional Conduct. In Scenario 1, back office services for law firms are frequently provided in connection with, and are substantively related to, the practice of law. The same is true of fiduciary services, where the conclusion is also supported by the case law and ethics opinions. See Cal. State Bar Formal Opn. No. 1995-141. In both Scenarios 1 and 2, there is a significant risk that

^{11/} It has been suggested that the Rules of Professional Conduct should always apply to services provided by a separate non-law business to a lawyer or law firm's present or former client. No California authority supports this result, however, and we think it goes too far. While there may be some situations where the present or former client status of a customer, either individually or in combination with other factors, could render clarifying measures ineffective, there may well be others where such measures can still be effective, particularly when the non-legal services are being provided in a separate, unrelated matter and the client or former client is sophisticated and represented by separate counsel. The existence of a present or former client relationship may, of course, also trigger obligations stemming from that relationship, rather than from the nature of the non-legal services being provided. Those obligations are treated further in Section 4 of the Discussion below.

^{12/} See the discussion, *supra*, at note 2.

the customer could misunderstand the nature of the services being provided and construe them as legal services.

Because the proposed activities are law related, they will be subject to the Rules of Professional Conduct unless they are distinct from the firm's provision of legal services and the firm has taken reasonable steps to ensure that the customer for the services understands that the firm's involvement in providing them does not mean that the services involve the practice of law and is not intended to give rise to an attorney-client relationship.

To avoid the application of the Rules of Professional Conduct to law-related services the provision of those services must be distinct from the law firm's practice of law. If a single lawyer is offering both legal and non-legal services in the same matter, from the same office, the activities ordinarily will not be distinct and the Rules of Professional Conduct will apply. Conversely, if the services are being offered in different matters and by separate entities, they will normally be distinct. In between these extremes, the answer will depend on circumstances. For example, there may be circumstances where distinctness may be achieved even if the services are provided through the same entity—for example if the law firm provides legal and non-legal services through separate units of the firm that are organizationally and functionally distinct. See Model Rule 5.7 (suggesting that distinctness may be shown by using different support staff for legal and non-legal services). Similarly, there may also be occasions where even though services are being provided in the same matter, for example, by the law firm and a separate entity controlled by the law firm, the relationship between the two types of services, in terms of organizational structure, designated responsibilities, personnel, compensation and related issues, could still permit a finding that the services are distinct.

2. Effectiveness of Clarifying Measures

Assuming the provision of non-legal services is distinct from the provision of legal services, the question remains whether the law firm can avoid the application of the Rules of Professional Conduct by taking appropriate measures to clarify the nature of the services being provided and the absence of any lawyer-client relationship. With respect to Scenario 1, we think the answer is clearly yes. With respect to Scenario 2, involving the provision of professional fiduciary services, the question is closer, but we conclude that the ultimate answer is also affirmative.

The issue in connection with Scenario 2 arises from statements like those in Cal. State Bar Formal Opn. No. 1995-141, which states that, "when rendering professional services that involve a fiduciary relationship, a member of the State Bar must conform to the professional standards of a lawyer." This language—and, more important, that in the Supreme Court cases on which it relies—could be read as suggesting that a lawyer engaged in a separate non-legal business that involves any assumption of fiduciary duties is always subject to the Rules of Professional Conduct, even if the lawyer has made clear that she is not engaged in the practice of law or entering into a lawyer client relationship, and even if the Rules of Professional Conduct are inconsistent with other regulatory provisions applicable to that non-law business. Given the great range of non-legal settings in which lawyers assume fiduciary duties, the sweep of such a rule would be broad indeed. But we do not think that such a broad reading is warranted, for multiple reasons.

First, in many of the decided cases, the language concerning the fiduciary status of the lawyer was dictum, because other recognized bases for professional discipline were present.^{13/} Second, no case explicitly considers, let alone explicitly rejects, the use of clarifying measures for a distinct non-law business providing fiduciary services. Third, the facts of the decided cases do not implicitly reject that approach; in fact they are fully consistent with it.^{14/} Because the decided cases provide no explicit or implicit support for applying the Rules of Professional Conduct to non-legal work that is distinct from the lawyer's practice and clearly identified as non-legal, we do not think that they alter the conclusion that California law does and should give effect to such clarifying measures for all types of distinct non-legal businesses. Put simply, once appropriate measures have been taken to avoid consumer confusion, there does not appear to be any good reason why a lawyer who has a separate non-legal business as, for example, a professional fiduciary, should be required to comply with rules that are unique to the legal profession, rather than those that govern the conduct of non-lawyers who conduct such businesses.

Accordingly, we believe that in both Scenario 1 and Scenario 2 a lawyer who is providing non-legal services that are distinct from his or her law practice can avoid the application of the Rules of Professional Conduct to those services if she provides the customer with reasonable notice that: (1) no legal advice or services are being provided, (2) no attorney-client relationship has been formed, and (3) the protections associated with the attorney-client relationship, including the attorney-client privilege and the duty of confidentiality, will not be available. Such clarifying measures are more likely to be effective if the notice is in writing and if prospective customers of the law firm are sophisticated or represented by counsel. This will very likely be the case for the customers of an entity providing back office services for law firms, perhaps less so for a firm serving as a professional fiduciary. Where the customer is not sophisticated, it may be relevant whether the customer had, or was advised to retain, separate legal counsel in the matter.

In Scenario 2, the law firm proposes to have one or more of its lawyers take an active role in directing, performing, or delivering the services in question, as opposed to simply being a passive investor in the entity. Lawyers may be fully as capable of providing non-legal services as their non-lawyer counterparts. The direct involvement of lawyers in providing such services may, however, increase the risk that the customer may believe the services entail the formation of an attorney-client relationship. Still, where the non-legal services are clearly distinct from any legal services provided by the lawyer, the relevant disclaimers are clear, and the client is sophisticated, there is no categorical reason why the lawyer's

^{13/} In some cases, there was a lawyer-client relationship, *Priamos v. State Bar* (1987) 3 Cal. State Bar Ct. Rptr. 824; *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Jacobs v. State Bar* (1933) 219 Cal. 59 [25 P.2d 401]. In others, there was conduct involving moral turpitude. See cases cited in note 5 above.

^{14/} The reported cases all involve individual lawyers providing non-legal services that overlapped both physically and functionally with the provision of legal services. See, e.g., *Libarian v. State Bar* (1943) 21 Cal.2d 862 [136 P.2d 321]; *Jacobs v. State Bar*, *supra*; Cal. State Bar Formal Opn. No. 1982-69, or the lawyer's affirmative use of his professional status to invite the injured person's trust and confidence, *Priamos v. State Bar*, *supra*; *Beery v. State Bar*, *supra*; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422 [121 Cal.Rptr. 467]; *Lewis v. State Bar*, *supra*; *Jacobs v. State Bar*, *supra*, or both. Because none of the decided cases involved distinct non-law businesses and appropriate clarifying measures, all would be decided the same way under the approach proposed here.

involvement should give rise to a risk of misunderstanding sufficient to require the application of the Rules of Professional Conduct.

A similar point applies to the degree of lawyer control of the non-legal business. For purposes of determining whether the Rules of Professional Conduct apply, the degree to which the lawyer or law firm controls the business is important principally insofar as it may indicate to customers of the business that the services being provided are legal in nature. Accordingly, if the degree of lawyer control is not apparent to the customer, it is unlikely to support a finding that the professional rules apply. And even if that degree of control is apparent, it is unlikely, standing alone, to lead to a finding that the Rules of Professional Conduct apply if the non-legal business has properly disclaimed the provision of legal services and the formation of a lawyer client relationship.

3. Partnership and Sharing of Income with Non-Lawyer Partners or Investors

In this section and the following section, we assume, unless otherwise stated, that the lawyer or law firm is subject to the Rules of Professional Conduct, but that the non-legal service provider has taken sufficient steps to ensure that it is not.

A lawyer or law firm may well want to share income from a non-legal business with non-lawyer partners, employees, or investors. Under the Rules of Professional Conduct, a lawyer may not form a partnership or other organization with a non-lawyer if any of the activities of that partnership consist of the practice of law, rule 5.4(b), and, except in certain limited circumstances, may not directly or indirectly share legal fees with a non-lawyer. Rule 5.4(a).

A separate entity providing exclusively non-legal services is, by definition, not engaged in the practice of law. Accordingly, rule 5.4(b) does not bar a lawyer from forming a partnership or other organization with non-lawyers to conduct such a business, or from accepting investment in such a business from non-lawyers. Moreover, fees that are derived exclusively from the provision of non-legal services are not legal fees. Thus, rule 5.4(a) does not bar the direct or indirect sharing of non-legal fees with non-lawyers who work or invest in a separate non-law business. See Cal. State Bar Formal Opn. No. 1995-141.

4. Solicitation, Conflict of Interest and Lawyer-Client Business Transactions

A law firm that practices law and a separate lawyer-controlled business that provides non-legal services may each want to pursue business on the other business's behalf or refer potential clients or customers to the other business. The two businesses may also want to make compensation for such referrals part of the relationship between them, whether in the form of referral fees or otherwise. These issues have been largely covered in earlier opinions. We discuss them below under the headings of solicitation, conflict of interest, and lawyer-client business transactions.

Solicitation. The law of solicitation governs oral or written targeted communications by or on behalf of a lawyer that are directed to a specific person and that offer to provide, or can reasonably be understood as offering to provide, legal services. Rule 7.3(e). A lawyer or law firm that solicits non-client third persons for a distinct non-legal business is not covered by this rule because the communication cannot reasonably be understood as offering legal services. See, Cal. State Bar Formal Opn. No. 1995-141 (construing former rule 1-400). For the same reasons, the solicitation rules do not apply when a lawyer-controlled entity that provides solely non-legal services is soliciting on its own behalf.

When the separate entity is engaged in efforts to obtain clients for the law firm, however, the solicitation rules that govern the law firm's conduct will apply to those efforts, because such communications are "on behalf of" the law firm and can be understood as offering to provide legal services. Moreover, any compensation, gift or promise by the lawyer given in consideration of a recommendation by the non-lawyer entity would be prohibited by rule 7.2(b), and would subject a lawyer to discipline. See Cal. State Bar Formal Opn. No. 1995-141.

Conflict of Interest. A lawyer who refers an existing client to a non-legal business in which the lawyer has an economic interest, with the expectation or intention that the client will purchase non-legal services from the entity, may be obliged to comply with rule 1.7, governing conflicts of interest. Rule 1.7(b) requires informed written consent of the affected client and compliance with rule 1.7(d), "if there is a significant risk the lawyer's representation of the client will be materially limited" by the lawyer's own interests. Rule 1.7(b). Whether the lawyer's referral to a business in which she has an interest will trigger rule 1.7(b) will depend on, among other things, the connection of the non-legal services to the representation of the client, the degree to which the choice of provider could affect the outcome or cost of the representation, and the degree to which the lawyer or law firm will benefit economically from the referral. Compare Cal. State Bar Formal Opn No. 1995-140 (construing the requirement of written disclosure of interests under former rule 3-310(B)(4)). Where the non-legal services are connected to the representation and the lawyer receives compensation for his referral, compliance with rule 1.7 is normally required, because of the risk that the lawyer's exercise of judgment in conducting the representation will be adversely affected by her economic interest. Cal. State Bar Formal Opn. No. 1995-140. Conversely, if the referral is for services unrelated to the representation or if the lawyer's economic benefit from the transaction is immaterial, compliance may not be required. Compare Cal. State Bar Formal Opn No. 2002-159, section III (discussing written disclosure requirements under former rule 3-310(B)(4)).

Lawyer-Client Business Transactions. Transactions by an existing client (and in certain circumstances, a former client) of a lawyer or law firm with an entity providing non-legal services may also be subject to rule 1.8.1, governing lawyer-client business transactions.^{15/} That rule applies not only to transactions between client and lawyer directly, but also potentially to transactions between the client and an entity in which the lawyer has a controlling interest. Cal. State Bar Formal Opn No. 1995-141.

^{15/} Rule 1.8.1 provides that:

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client;
- (b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the transaction or acquisition, and to the lawyer's role in it.

The test for determining the applicability of rule 1.8.1 to a transaction between a lawyer's client and a non-legal business in which the lawyer has an interest is "whether the transaction arises out of the lawyer-client relationship or the trust and confidence reposed by the client in the lawyer as a result of the lawyer-client relationship." Cal. State Bar Formal Opn No. 1995-141 (applying former rule 3-300); see also *Hunnicutt v. State Bar* (1988) 44 Cal. 3d 362, 370-71 [243 Cal.Rptr. 699] (Rule 5-101 (predecessor to former rule 3-300) applies if the client placed his trust in his former attorney "because of the representation").^{16/} When a lawyer advises a client to patronize a non-legal business, and receives a referral fee for doing so, the transaction clearly arises out of the lawyer-client relationship and rule 1.8.1 applies. Cal. State Bar Formal Opn No. 1995-140. The same conclusion should follow in any other case where the lawyer's referral to or involvement in the non-legal business is reasonably likely to cause the client to transfer the trust and confidence reposed in the lawyer to the negotiation of the client's relationship with the non-legal business. *Id.*^{17/}

CONCLUSION

A lawyer engaged in a non-law business is always subject to professional discipline for conduct that violates Business and Professions Code section 6106 or rule 8.4. A lawyer's involvement in a non-law business may also trigger the application of other Rules of Professional Conduct if the business is sufficiently "law-related" that the lawyer's involvement might reasonably lead a customer for those services to believe that an attorney-client relationship was being formed, or that legal services were being provided. Even when a non-law business is "law related" in this sense, however, the rules governing the practice of law do not apply if the non-law business is conducted in a manner distinct from the lawyer's practice of law and if reasonable measures have been taken to ensure that the customer understands that no attorney-client relationship is being formed, that no legal services are being provided, and that the protections of the attorney-client relationship will not apply.

^{16/} There is a suggestion in Cal. State Bar Formal Opn No. 1995-141 that the applicability of rule 1.8.1 to a transaction with a non-legal business is determined by whether the non-legal business is offering services that involve the assumption of a fiduciary duty. If so, then the rule applies. If not, it does not. *Id.* at p.3. To the extent that Cal. State Bar Formal Opn No. 1995-141 takes that view we believe it is incorrect. As the Opinion itself acknowledges, the critical question is whether the transaction with the non-legal business arises out of the attorney-client relationship or the trust and confidence engendered there. But that question is largely independent of the type of non-legal service offered—it turns instead on the degree of risk that the trust and confidence arising from the lawyer-client relationship will influence the customer's approach to the transaction with the non-legal business. Where that risk is present, rule 1.8.1 should apply regardless of the type of law-related service being provided. Where it is not, then the rule should not apply, even if the services being provided are fiduciary in nature. See Probate Code section 16004(c) (presumption of undue influence does not apply to the initial agreement relating to the hiring or compensation of a trustee).

^{17/} Sometimes a transaction may involve the potential for exploitation of client trust both because of the lawyer's role in making the referral and the lawyer's role in the negotiation with the separate entity, as when a personal injury lawyer refers a client to a medical facility in which the lawyer practices as a doctor. Los Angeles County Bar Assn. Formal Opn. No. 477.

ATTACHMENT M

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.



The State Bar of California

Task Force on Access Through Innovation
of Legal Services – Subcommittee on
Rules and Ethics Opinions

To: Randall Difunctorum, ATILS Staff
From: Kevin Mohr, Vice Chair, ATILS Subcommittee on Rules and Ethics Opinions
Date: July 1, 2019
Re: Background Information in Support of the ATILS Recommendation for Public
Comment Consideration of Revising Rules 7.1-7.5 Similar to ABA Model Rules
7.1-7.3

The following are background information for Recommendation 3.4 - Adoption of revised California Rules of Professional Conduct 7.1 - 7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1-7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.

Supplemental Materials Included:

- ABA Model Rules 7.1 to 7.3, CLEAN version, as adopted by the ABA on 8/6/2018
- ABA Model Rules 7.1 to 7.3, REDLINE version, comparing ABA Model Rules to California Rules 7.1 to 7.5, TEXT ONLY
- Excerpt from Richard Zitrin & Kevin E. Mohr, *Legal Ethics: Rules, Statutes And Comparisons* (Carolina Acad. Press 2019), describing the differences between the ABA Model Rules 7.1 to 7.3 and the California Rules 7.1 to 7.5

Links to Materials Available Online:

- [2015 Report of the APRL Regulation of Lawyer Advertising Committee](#)
- [2016 Supplemental Report of the APRL Regulation of Lawyer Advertising Committee](#)

ABA Model Rules of Professional Conduct: Chapter 7 (Rules 7.1 – 7.3)**ABA Model Rule 7.1 Communications Concerning a Lawyer's Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm,

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with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

ABA Model Rule 7.2 Communications Concerning a Lawyer’s Services: Specific Rules

- (a) A lawyer may communicate information regarding the lawyer’s services through any media.
- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
 - (3) pay for a law practice in accordance with Rule 1.17;
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the agreement; and
 - (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.
- (c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

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- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the

ABA Model Rules of Professional Conduct: Chapter 7 (Rules 7.1 – 7.3)

lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule

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does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ABA Model Rule 7.3 Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

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(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal

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services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary

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capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

ABA Model Rule 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication statement considered as a whole not materially misleading.

(b) ~~The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.~~

Comment

[1] This ~~rule~~Rule governs all communications ~~of any type whatsoever~~ about ~~the lawyer or the~~ a lawyer's services, including advertising ~~permitted by rule 7.2~~. A communication ~~includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm*~~ directed to any person.*. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] ~~A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule. (See also Bus. & Prof. Code, § 6157.2, subd. (a).)~~

[32] ~~This rule prohibits Misleading~~ truthful statements ~~that are misleading~~prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if ~~it is presented in a manner that creates~~ a substantial* likelihood exists that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. ~~Any communication that states or implies "no fee without recovery"~~A truthful statement is also misleading ~~unless the communication also expressly discloses whether or not the client will be liable for costs~~if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[43] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, ~~or a testimonial about or endorsement of the lawyer~~, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with the services or fees those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison or claim can be substantiated. AnThe inclusion of an appropriate disclaimer or qualifying language often avoids creatingmay preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[5] This rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. (See, e.g., Bus. & Prof. Code, §§ 6150-6159.2, 17000 et. seq.) Other state or federal laws may also apply.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

ABA Model Rule 7.2 Advertising Communications Concerning a Lawyer's Services: Specific Rules

(a) ~~Subject to the requirements of rules 7.1 and 7.3, a~~ A lawyer may advertise communicate information regarding the lawyer's services through any ~~written,* recorded or electronic means of communication, including public~~ media.

(b) A lawyer shall not compensate, ~~promise or~~ give or promise anything of value to a person* for ~~the purpose of~~ recommending ~~or securing the services of the lawyer or~~ the lawyer's ~~law firm,* services~~ except that a lawyer may:

- (1) pay the reasonable* costs of advertisements or communications permitted by this ~~rule~~Rule;
- (2) pay the usual charges of a legal ~~services~~service plan or a not-for-profit or qualified lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;~~
- (3) pay for a law practice in accordance with ~~rule~~Rule 1.17;
- (4) refer clients to another lawyer or a nonlawyer professional pursuant to an ~~arrangement~~agreement not otherwise prohibited under these Rules ~~or the State Bar Act~~ that provides for the other person* to refer clients or customers to the lawyer, if:
 - (i) the reciprocal referral ~~arrangement~~agreement is not exclusive; and
 - (ii) the client is informed of the existence and nature of the ~~arrangement~~agreement; and
- (5) ~~offer or give a gift or gratuity to a person* having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.~~

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

(ed) Any communication made ~~pursuant to~~under this ~~rule shall~~Rule must include the name and ~~address~~contact information of at least one lawyer or law firm* responsible for its content.

Comment

[1] This ~~rule~~Rule permits public dissemination of ~~accurate~~ information concerning a ~~lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information~~lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. ~~This rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.~~

[2] ~~Neither this rule nor rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.~~

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) ~~permits~~allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or ~~client development~~client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers. ~~See rule~~

Redline Comparison of ABA Model Rules 7.1 – 7.3 to Current California Rules 7.1-7.5

~~5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would

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mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[48] Paragraph (b)(4) permits a lawyer to make referrals A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. (See ~~rules~~Rules 2.1 and 5.4(c).) Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements ~~made pursuant to paragraph (b)(4)~~ are governed by rule Rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by rule 1.5.1. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain

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access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ABA Model Rule 7.3 Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(ab) A lawyer shall not ~~by in person, live telephone or real-time electronic contact~~ solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the ~~person*~~ contacted contact is with a:

- (1) ~~is a~~ lawyer; ~~or~~
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer; ~~or law firm; or~~
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(bc) A lawyer shall not solicit professional employment ~~by written,* recorded or electronic communication or by in person, telephone or real-time electronic contact~~ even when not otherwise prohibited by paragraph (ab), if:

- (1) the ~~person* being solicited~~ target of the solicitation has made known* to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation ~~is transmitted in any manner which~~ involves ~~intrusion,~~ coercion, duress or harassment.

(c) ~~Every written,* recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or~~

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~~electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in ~~paragraph (a)~~this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses ~~in person, live telephone or real time electronic~~person-to-person contact to ~~solicit memberships or enroll members or sell~~ subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.

(f) ~~As used in this rule, the terms "solicitation" and "solicit" refer to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.~~

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication ~~does~~is not ~~constitute~~a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries. (See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].)

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment

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and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[3] This rule~~Rule~~ does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a ~~bona fide~~ group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting

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in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with rules 7.1, 7.2, and 7.3(b). (See also rules 5.4 and 8.4(a).)

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

(1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and

(2) the name of the certifying organization is clearly identified in the communication.

(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of rule 7.1.

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Rule 7.5 Firm* Names and Trade Names

- (a) ~~A lawyer shall not use a firm* name, trade name or other professional designation that violates rule 7.1.~~
- (b) ~~A lawyer in private practice shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates rule 7.1.~~
- (c) ~~A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm* or other organization unless that is the fact.~~

Comment

~~The term “other professional designation” includes, but is not limited to, logos, letterheads, URLs, and signature blocks.~~

**DESCRIPTIVE COMPARISON OF ABA MODEL RULES 7.1 TO 7.3 WITH
CALIFORNIA RULES 7.1 TO 7.5**

[Excerpted from Richard Zitrin & Kevin E. Mohr, *LEGAL ETHICS, RULES, STATUTES AND COMPARISONS* (Carolina Acad. Press 2019)]

ABA Model Rules 7.1 – 7.5

Introduction:

In August 2018, the seventh series of the Model Rules addressing advertising and solicitation of legal business (MR 7.1 through 7.5) underwent a major revision that was intended to (i) focus the rules on prohibiting advertisements and solicitations of legal business that are false and misleading; (ii) streamline the rules by merging two rules, MR 7.4 and 7.5, into MR 7.2 and 7.1, respectively; (iii) eliminate some prohibitions that had become anachronistic in the Internet age (e.g., elimination of former MR 7.3(c) regarding notices on envelopes); (iv) permit solicitation of some persons not reasonably likely to be susceptible to a lawyer's overreaching during "live person-to-person contact"; and (v) move permissive provisions in the text of former MR 7.4 and 7.5 to a comment in MR 7.2 and 7.1, respectively.

For each rule, there is a section entitled "2002 Model Rule Text" that describes the 2002 versions of the text of those Model Rules. Within that section appear comparisons with the "2018 California Rules".

A second section, titled "2018 Model Rules Text," describes the changes made to the 2002 Model Rules text in 2018.

A third section is titled "2002 Model Rule Comment." It describes the 2002 comments to the respective model rule. Again, within that section are comparisons with the "1989 California Rules" and the "2018 California Rules" as in the other rule comparisons, comparing the relevant 2002 Model Rule to the 1989 California Rules discussions and 2018 California Rules comments, respectively.

Finally, a fourth section, titled "2018 Model Rules Comment," will describe the changes made to the 2002 Model Rules comments in 2018.

* * * * *

ABA Model Rule 7.1

2002 Model Rule Text:

The 1983 version of MR 7.1, titled "Communications Concerning a Lawyer's Services," contained the general prohibition against a lawyer making a "false or misleading

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

“communication” regarding the lawyer’s services. It also defined a communication that is false or misleading.

In 2002, a revision deleted from the definition of “false or misleading” communications those statements that are likely to create an unjustified expectation about results the lawyer can achieve; state or imply results achieved by means that violate the ethics rules or other law; or compare the lawyer’s services with other lawyers’ services. These provisions were moved into the rule’s Comment as Comments [2], [3], and [4], respectively.

* * * * *

2018 California Rules. Cal. Rule 7.1(a) is identical to MR 7.1 except that it substitutes “communication” for “statement.” Cal. Rule 7.2(b) authorizes the State Bar Board of Trustees to formulate and adopt standards, similar to the 16 standards the former Board of Governors promulgated under former rule 1-400. Compare former rule 1-400(E). However, as those 16 standards have now been eliminated, converted to rule text, or moved into comments to rules 7.1 through 7.5, it is uncertain whether or to what extent the Board will exercise its authority.

* * * * *

2018 Model Rule Text:

2018 MR 7.1 is identical to the 2002 version of the rule.

2002 Model Rule Comment:

The 2002 version of MR 7.1 had four comments, including Comments [2], [3], and [4] added in 2002 that, as noted, converted prohibitions in the 1983 text into comments. In 2012, Comment [3] was amended to substitute “the public” for the phrase “a prospective client.” See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison, above.

* * * * *

2018 California Rules. Cal. Rule 7.1 includes five comments. Comments [1], [3] and [4] are derived from MR 7.1, Cmts. [1], [2] and [3], respectively. Comment [1] also adds a definition of “communication” that is similar to the definition set out in the introductory clause of former rule 1- 400(A). Comment [2] addresses a “guarantee or warranty” and provides a reference to Cal. B&P § 6157.2(a). Compare former rule 1-400, Standard (1). Comment [5] carries forward the substance of former rule 1-400, Standard (15).

2018 Model Rule Comment:

2018 MR 7.1, in addition to the four comments in the 2002 version of MR 7.1, includes four comments derived from either the text or comment of former MR 7.5. Comment [5] is

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

derived from MR 7.5, Cmt. [1]. Comments [6] and [8] are derived from MR 7.5(b) and (c), respectively. Comment [7] is derived from MR 7.5, Cmt. [2]; they are similar in substance to former rule 1-400, Standard (7).

ABA Model Rule 7.2

2002 Model Rule Text:

The 1983 version of MR 7.2, titled “Advertising,” addressed a number of specific issues regarding communications directed to the general public.

MR 7.2(a) was permissive and provided that a lawyer “may” advertise the lawyer’s services through “written, recorded or electronic communication, including public media,” and described specific modes of advertising, e.g., newspaper, radio and television.

MR 7.2(b) required a lawyer to keep a copy or recording of an advertisement for two after its last dissemination.

MR 7.2(c) prohibited a lawyer from giving anything of value to a person not in the lawyer’s firm who recommends the lawyer’s services, subject to four exceptions.

MR 7.2(d) required that any advertisement must include the “name and office address” of a lawyer or law firm responsible for its content.

In 2002, many of the foregoing provisions were revised as part of the Ethics 2000 Commission’s comprehensive revision of the Model Rules. For example, MR 7.2(a) deleted specific references to modes of public media and added “electronic” media as a permissive means of lawyer advertising.

Former MR 7.2(b), requiring a lawyer to keep records of advertisements for a period of two years after distribution or broadcast, was deleted.

Former MR 7.2(c) was designated MR 7.2(b) and its subsections revised. MR 7.2(b)(2) was amended to expand the permitted payments by a lawyer to include the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service “approved by an appropriate regulatory authority.” MR 7.2(b)(4) was added to permit strategic alliances among lawyers, law firms and non-lawyers and their entities. MR 7.2(b)(4) permits non-exclusive reciprocal referring relationships subject to client disclosure.

* * * * *

2018 California Rules. Cal. Rule 7.2 largely tracks the 2002 version of MR 7.2.

Cal. Rule 7.2(a) is nearly identical to MR 7.2(a) but adds the modifier “any” before “written” and the phrase “means of” after “electronic.”

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

Cal. Rule 7.2(b), introductory clause, is similar to the corresponding clause of MR 7.2(b) but substitutes “compensate, promise or give anything of value” for “give anything of value,” and adds “or securing” in addition to “recommending” and “law firm” in addition to “lawyer.”

Cal. Rule 7.2(b)(1) and (3) are identical to the corresponding provisions in MR 7.2.

Cal. Rule 7.2(b)(2) substitutes “services” for “service,” deletes “not-for-profit,” as California law permits for profit lawyer referral services, and conforms the definition of “qualified lawyer referral service” to California law.

Cal. Rule 7.2(b)(4) is nearly identical to MR 7.2(b)(4) but substitutes “arrangement” for “agreement” and adds a reference to the State Bar Act.

Cal. Rule 7.2(b)(5), regarding gratuities, has no counterpart in the 2002 version of MR 7.2. However, see “2018 Model Rule Text,” below. Cal. Rule 7.2(b)(5) carries forward the substance of former rules 1-320(B) and 2-200(B).

Cal. Rule 7.3(c) is identical to MR 7.2(c) except that it refers to “address,” not “office address,” presumably so that the inclusion of an email address would satisfy the rule.

2018 Model Rule Text:

MR 7.2 underwent substantial change in 2018 starting with its title, which is now “Communications Concerning a Lawyer’s Services: Specific Rules,” which better captures the fact that its scope is broader than the regulation of advertising. As revised, it addresses not only communications directed to the general public, i.e., advertisements (MR 7.2(a)), but also a lawyer’s compensation of others for recommending the lawyer’s services (MR 7.2(b)), and limitations on a lawyer asserting that the lawyer is a specialist in a particular field of practice (MR 7.2(c)).

MR 7.2(a) includes several changes. First, the paragraph is no longer “subject to” rules 7.1 and 7.3. Second, the clause “communicate information regarding the lawyer’s services” is substituted for “advertise.” Third, the phrase “any media” is substituted for the laundry list of permitted media in the 2002 version.

MR 7.2(b), introductory clause, now incorporates the Cal. Rule 7.2 phrase, “compensate, promise or give anything of value,” although in a slightly different order. It also eliminates the qualification in the 2002 version that the “person” is “not an employee or lawyer in the same law firm.” Unlike the California rule, however, it does not extend the rule’s scope to the “lawyer’s law firm.”

MR 7.2(b)(2) deletes the definition of “qualified lawyer referral service.” The definition now appears in MR 7.2, Cmt. [6].

MR 7.2(b)(5), regarding gratuities, is new. It is similar in substance to Cal. Rule 7.2(b)(5).

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

MR 7.2(c) did not previously appear in MR 7.2, but rather incorporates former MR 7.4(d) regarding claims of being a “certified” specialist. The corresponding 1989 and 2018 California provisions can be found in former rule 1-400(D)(6) and Cal. Rule 7.4(a), respectively.

MR 7.2(d) substitutes the term “contact information” for “office address” in the 2002 version of MR 7.2(c).

2002 Model Rule Comment:

The 2002 version of MR 7.2 included eight comments. In 2012, a number of amendments were made to the comments to MR 7.2. As noted in the discussion of the definition of “prospective client” under the Model Rule 1.18 comparison, references to “prospective client” were deleted or substituted in Comments [3], [6] and [7], and minor additions were made to Comments [1] through [3]. The most significant changes were made to Comment [5], which elaborates on permitted payments to third persons for generating client leads, including Internet-based client leads, as well as the limitations on such payments.

2018 California Rules. Cal. Rule 7.2 includes four comments. Comments [1], [2], [3] and [4] are derived in part from MR 7.2, Cmts. [2], [4], [5] and [8], respectively.

2018 Model Rule Comment:

2018 MR 7.2 includes 12 comments. Former MR 7.2, Cmts. [1], [3] and [4] have been deleted. Former Comment [5], concerning payment for referrals, has been divided into three separate comments: [2], [3] and [5]. New Comment [4] clarifies the application of new MR 7.2(b)(5). Former Comments [6] to [8] remain largely unchanged. Comments [9] through [11] incorporate the substance of former MR 7.4, Cmts. [1] to [3]. Comment [12] defines “contact information” in revised MR 7.4(d) [former MR 7.4(c)]

ABA Model Rule 7.3

2002 Model Rule Text:

The 2002 version of MR 7.3, titled “Solicitation of Clients,” addressed a lawyer’s communications directed to particular members of the public or a particular class of persons. The title of MR 7.3 had been changed in 2012 from “Direct Contact with Prospective Clients.” See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison.

The 2002 version of MR 7.3(a) prohibited a lawyer from soliciting professional employment “by in-person, live telephone or real-time electronic contact,” the latter prohibition having been added in 2002 to address the advent of certain real-time modes of communication with the Internet, e.g., chat rooms. MR 7.3 provided two exceptions, i.e., if the person contacted (i) was a lawyer or (ii) had a family, close personal, or prior professional relationship with the

lawyer. In 2012, references to “prospective client” in MR 7.3(b)(1) and (c) were replaced by “target of the solicitation” and “anyone,” respectively.

MR 7.3(b) was not limited to real-time communications. In effect it provided that even when the communication was “written, recorded or electronic” (not just in real-time), the lawyer was prohibited from making contact if (i) the solicitation target had “made known” to the lawyer a desire not to be solicited or (ii) the solicitation involved “coercion, duress or harassment.”

MR 7.3(c) imposed certain notice requirements that had to accompany every “written, recorded or electronic” communication.

MR 7.3(d) was permissive and provided that a lawyer “may participate” with a prepaid or group legal service plan under the prescribed conditions.

* * * * *

2018 California Rules. Cal. Rule 7.3 largely tracks the 2002 version of MR 7.3.

Cal. Rule 7.3(a) is identical to former MR 7.3(a) except for the deletion of the phrase “the lawyer’s” as a modifier of “doing so.”

Cal. Rule 7.3(b) is substantially similar to former MR 7.3(b) except: (i) the phrase “person being solicited” is substituted for “target of the solicitation,” and (ii) in subparagraph (b)(2), the phrase “is transmitted in any manner” and the term “intrusion” have been added. These substitutions and additions conform to the language in former rule 1-400(D)(5). See also discussion of MR 7.3(b) under “2018 Model Rule Text,” below.

Cal. Rule 7.3(c) is substantially similar to former MR 7.3(c) except: (i) any “person” (a defined term) is substituted for “anyone”; (ii) the phrase “the word ‘Advertisement’ or word of similar import” is substituted for “Advertising Material”; and (iii) the requirement is qualified by the following clause: “unless it is apparent from the context that the communication is an advertisement.”

Cal. Rule 7.3(d) is substantially similar to former MR 7.3(d) except that the word “live” is added to modify “telephone” and “real-time electronic contact” has been added to parallel the construction of paragraph (a).

Cal. Rule 7.3(e), a definition of “solicitation” and “solicit” has no counterpart in text of former MR 7.3. However, Cal. Rule 7.3(e) largely tracks the language of the definition in former MR 7.3, Cmt. [1].

2018 Model Rule Text:

Similar to MR 7.1 and 7.2, MR 7.3 underwent significant revision in 2018.

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

First, the definition of “solicitation” was moved from the Comment to paragraph (a) of the rule.

Second, MR 7.3(b) (former MR 7.3(a)) substitutes in the introductory clause the phrase “live person-to-person contact” for the former rule’s list of prohibited communication modes (“in-person, live telephone or real-time electronic contact”) and also adds that pecuniary gain can be a significant motive for the soliciting lawyer’s “law firm.” In addition, subparagraph (b)(2) adds as an exception a person who has a “business” relationship with the soliciting lawyer. Further, in addition to a relationship with the soliciting lawyer, subparagraph (b)(2) now excepts from the prohibition persons who have any of the listed relationships with the “law firm” of the soliciting lawyer.

Perhaps the most important change to MR 7.3 is the addition of subparagraph (b)(3), which excludes from the solicitation prohibition a “person who routinely uses for business purposes the type of legal services offered by the lawyer.” If adopted by a jurisdiction, this provision would appear to put lawyers on equal footing with accountants with respect to “cold calling” potential clients. See *Edenfield v. Fane*, 507 U.S. 761 (1993). There is no counterpart to this exception in either former rule 1-400 or Cal. Rule 7.3.

MR 7.3(c) (former MR 7.3(b)) in its introductory paragraph deletes the list of communication modes (“by written, recorded or electronic communication or by in person, telephone or real-time electronic contact”) but otherwise is identical to former MR 7.3(b).

Former MR 7.3(c) regarding the inclusion of a notation of “Advertising Material” has been deleted.

New MR 7.3(d) excepts from the rule’s scope communications authorized by law or the order of a tribunal. There is no counterpart in either former rule 1-400 or Cal. Rule 7.3.

MR 7.3(e) is substantially the same as the 2002 version of MR 7.3(d).

2002 Model Rule Comment:

The 2002 version of MR 7.3 included nine comments. In 2012, a number of changes were made to the MR 7.3 comments. Most significantly, a new Comment [1], providing a definition of “solicitation,” was added and the remaining comments were renumbered. Under that added definition, a “solicitation” was a targeted communication “initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.” Further, the term “prospective client” was replaced throughout the comments. See discussion of the definition of “prospective client” under the Model Rule 1.18 comparison. As noted, this definition has been moved into the text as MR 7.3(a).

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Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

2018 California Rules. Cal. Rule 7.3 includes only four comments. Comment [1] is identical to the second sentence of former MR 7.3, Cmt. [1]. Comment [2] is derived from former MR 7.3, Cmt. [5], and provides examples of solicitations that would not involve pecuniary gain as a significant motive. Comment [3], derived from former MR 7.3, Cmt. [7], clarifies paragraph (d)'s exception for qualifying prepaid or group legal service plans. Comment [4] is derived from the last sentence of former MR 7.3, Cmt. [9].

2018 Model Rule Comment:

2018 MR 7.3 includes nine comments. Comment [1] restates paragraph (b) and carries forward the last sentence of former Comment [1]. Comment [2] elaborates on what is meant by “live person-to-person contact.” Importantly, it clarifies that the term does not include “chat rooms, text messages or other written communications that recipients may easily disregard.”

Comments [3] and [4] are substantially similar to the 2002 versions. Comment [5], which explains the rationale for the exceptions to paragraph (b)'s prohibition on “live person-to-person contact,” has added several examples of the new exception in MR 7.3(b)(3) for a “person who routinely uses for business purposes the type of legal services offered by the lawyer.”

Comment [6] adds examples of persons who might be particularly susceptible to overreaching. Comments [7] and [9] are nearly identical to the 2002 versions. New comment [8], which explains new paragraph (d) concerning orders of a tribunal, replaces former comment [8], which explained deleted former 7.3(c) concerning the “Advertising Material” notice.

ABA Model Rule 7.4**Note re Model Rules 7.4 and 7.5.**

Although the ABA recently deleted MR 7.4 and 7.5 as standalone rules, moving the substance of the rules into MR 7.2 and 7.1, respectively, we include descriptions of the rules here because the 2018 California Rules — and as of this writing, the rules of nearly every other jurisdiction — include standalone rule counterparts to both rules.

2002 Model Rule Text:

The 2002 version of MR 7.4 addressed a lawyer's communication of fields of practice. Former MR 7.4(a) provided a lawyer “may” disavow practicing in certain fields, and paragraphs (b) and (c) permitted lawyers to state they engaged in patent or admiralty practice, respectively. Paragraph (d) regulated communications regarding certifications to practice.

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Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

2018 California Rules. Cal. Rule 7.4(a) is substantially similar to former MR 7.4(d) [now MR 7.2(c)] regarding communications about certifications.

Cal. Rule 7.4(b), first sentence, is substantially similar to former MR 7.4(a). Cal. Rule 7.4(b) adds that lawyers may also state they specialize in, are limited to, or are concentrated in a particular field of law.

2018 Model Rule Text:

As noted, former MR 7.4 has been removed as a standalone rule, its substance being moved to MR 7.2. The following table shows the location of former MR 7.4 provisions in the 2018 Model Rules:

| Comparison of Former Model Rule 7.4 and New Model Rule 7.2 (2018) | |
|---|-----------------------|
| Former Model Rule 7.4 | Model Rule 7.2 (2018) |
| Former MR 7.4(d) | MR 7.2(c) |
| Former MR 7.4, Cmt. [1] | MR 7.2, Cmt. [9] |
| Former MR 7.4, Cmt. [2] | MR 7.2, Cmt. [10] |
| Former MR 7.4, Cmt. [3] | MR 7.2, Cmt. [11] |

2002 Model Rule Comment:

MR 7.4 included three comments, the substance of which have been moved to the comments of MR 7.2. See Table, above.

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2018 California Rules. Similarly, Cal. Rule 7.4 has no comments.

ABA Model Rule 7.5

2002 Model Rule Text:

The 2002 version of MR 7.5 addressed the potentially misleading use of firm names and letterheads. MR 7.5(a) prohibited use of a firm name, letterhead of “other professional designation” that was false or misleading, but stated trade names were permitted if they complied with former MR 7.1. MR 7.5(b) addressed permitted designations of law firms with offices in more than one jurisdiction. MR 7.5(c) placed limits on using in a firm name the

Excerpt from Zitrin Mohr, *Legal Ethics, Rules, Statutes, and Comparisons*

name of a lawyer holding public office, and MR 7.5(d) provided lawyers may claim to practice in a partnership only if true. The substance of former MR 7.5 has been moved to the comment section of MR 7.1.

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2018 California Rules. Cal. Rule 7.5(a) is substantively similar to the first sentence of former MR 7.5(a). Paragraph (b) is substantively similar to the second sentence of former MR 7.5(a), and paragraph (c) is substantively similar to former MR 7.5(d).

2018 Model Rule Text:

As noted, former MR 7.5 has been removed as a standalone rule, its substance having been moved to MR 7.1. The following table shows the location of former MR 7.5 provisions in the 2018 Model Rules:

| Comparison of Former Model Rule 7.5 and New Model Rule 7.1 (2018) | |
|---|-----------------------|
| Former Model Rule 7.4 | Model Rule 7.2 (2018) |
| Former MR 7.5, Cmt. [1] | MR 7.1, Cmt. [5] |
| Former MR 7.5(b) | MR 7.1, Cmt. [6] |
| Former MR 7.5(d) & Cmt. [2] | MR 7.1, Cmt. [7] |
| Former MR 7.5(c) | MR 7.1, Cmt. [8] |

2002 Model Rule Comment:

MR 7.5 included two comments. The substance of comment [1] and [2] have been moved to MR 7.1, Cmts. [5] and [7], respectively.

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2018 California Rules. Cal. Rule 7.5 has a single comment which clarifies that “other professional designation” includes “logos, letterheads, URLs, and signature blocks.”
