



OPEN SESSION
AGENDA ITEM
54-123 JULY 2020
REGULATION AND DISCIPLINE COMMITTEE III.B

DATE: July 13, 2020

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Proposed Amended Rules of Professional Conduct 1.1 and 5.4 – Return from Public Comment and Request for Adoption of Rule 1.1 and Additional Public Comment for Rule 5.4

EXECUTIVE SUMMARY

On March 12, 2020, the Board of Trustees received the final report and recommendations of the Task Force on Access Through Innovation of Legal Services (ATILS). At that meeting, the Board approved ATILS' recommendations for amendments to rules 1.1 and 5.4 of the California Rules of Professional Conduct¹ for a 60-day public comment period. The public comment period concluded on May 18, 2020. The Board directed the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC or "Committee") to receive and review the public comments submitted. COPRAC has reviewed the public comments received and recommends: (1) that the Board adopts rule 1.1 as proposed by ATILS; and (2) issues rule 5.4 for an additional 45-day public comment period as modified.

BACKGROUND

At the meeting of the Board of Trustees on March 12, 2020, the Board received the final report and recommendations submitted by ATILS. The report included a recommendation that the Board issue for public comment an amended rule 1.1 (Competence) and an amended rule 5.4 (Financial and Similar Arrangements with Nonlawyers). The Board approved these recommendations and the public comment period ended on May 18, 2020. Because the terms

¹ Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

of appointment for ATILS' membership expired on March 31, 2020, the Board directed COPRAC to receive and review the public comments submitted concerning these two rules.

DISCUSSION

ATILS Recommendation Regarding Rule 1.1

Following study and in accordance with their charter, ATILS recommended that rule 1.1 be amended by adding a new comment to the rule providing that a lawyer's duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology.

ATILS determined that adding a comment to the competence rule recognizing a lawyer's responsibility to be familiar with—and be competent in using—relevant technology will inform lawyers of that duty and should provide them with an incentive to adopt and incorporate useful technology in their practices. The adoption of relevant technology could have a beneficial effect on a law practice's efficiency, which can in turn lead to savings that can be passed on to clients. 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), these opinions are only persuasive authority, while comments to the rules are Supreme Court approved guidance for "interpreting and practicing in compliance with the rules." (See rule 1.0(c) regarding the purpose of comments.)

Consideration of Public Comments Received

Thirteen comments were received concerning rule 1.1.² Seven of the comments either supported the rule, or supported the rule if modified. Six of the comments opposed the rule as proposed. In general, the comments in opposition raised concerns that: (1) lawyers would be exposed to discipline for failing to keep up with technology, something that is constantly changing, in areas unrelated to their practice of law; and (2) the proposed language should be revised by expressly limiting this duty to the lawyer's obligation to apply the appropriate "learning and skill" necessary for the performance of a particular matter.

The Committee did not make any changes to the rule as proposed. The addition of this Comment to rule 1.1 is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S. jurisdictions and does not change existing law.³ It is also consistent with California ethics opinions (see, e.g., State Bar Formal Op. Nos. 2010-179 and 2012-184). For example, the Comment does not require that the lawyer become personally expert in technologies used in the lawyer's practice, as the provisions of rule 1.1 explicitly permits a lawyer to fulfill the lawyer's duties under the rule by associating with a lawyer or other person

² A public comment synopsis table, including the Committee's response to each comment, along with the full text of the public comments is provided as Attachment B.

³ Robert J. Ambrogi. "Tech Competence." <https://www.lawsitesblog.com/tech-competence>.

who has such expertise. See rule 1.1(c). See also, rule 5.3 (regarding employing or retaining a nonlawyer assistant).

In addition, this new Comment to rule 1.1 would not establish a disciplinary standard independent of the obligations imposed by the rule. Rule 1.1 prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. The Committee believes that there is great value in drawing the attention of practicing lawyers to this aspect of their duty of competence. Further, the Comment does not give rise to any risk that lawyers will be disciplined for failure to keep up with changes in areas unrelated to the practice of law or their specific practice. The text of the rule is the only basis on which discipline can be imposed, and the duty stated there applies only to the lawyer’s performance of legal services. As a result, the Comment would not provide any basis for disciplining a lawyer on the basis of changes, legal or technological, unrelated to the lawyer’s practice.

Following discussion of all the public comments received, COPRAC voted unanimously in favor of the addition of Comment [1] to rule 1.1 as proposed by ATILS. The full text of rule 1.1 as amended is provided in Attachment A.

ATILS Recommendation Regarding Rule 5.4

Following study and in accordance with their charter, ATILS recommended that rule 5.4 be amended by expanding the existing exception for fee sharing arrangements with a nonprofit organization to include the sharing of fees that arise out of a settlement or other resolution of a matter. Currently, rule 5.4 paragraph (a)(5) permits sharing a court awarded fee with a nonprofit organization that employed, retained, or recommended the lawyer’s employment. ATILS’ proposed amended rule would expand the ability of a lawyer to share fees with a nonprofit organization by adding an exception which provides where the legal fee is not court awarded, but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to a nonprofit organization provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code.

ATILS determined that this rule amendment will “directly enhance the ability of a nonprofit legal services organization to expand its activities and funding options through sharing in legal fees that are achieved through a settlement.” ATILS also recommended the rule be revised to include the term “facilitate” to the language of the exception. This addition is intended to address “incubator programs and other similar relationships with lawyers who are working through a nonprofit legal services organization administering an incubator or similar program.”⁴ Finally, ATILS added a new Comment [4] to the rule, which includes a cross-reference to rule 1.4 and a lawyer’s client communication duty with a statement that in some instances, a fee

⁴ Information about incubator programs is provided on the State Bar’s website under the Office of Access & Inclusion section: <https://www.calbar.ca.gov/Access-to-Justice/About-the-Office-of-Access-Inclusion/Our-Projects/Incubator-Projects>.

sharing arrangement with a nonprofit organization might constitute a significant development that must be communicated to the client.

Consideration of Public Comments Received

Fourteen comments were received concerning rule 5.4.⁵ Eight of the comments opposed the rule as proposed, three supported the rule, and three supported the rule if modified. In addition to these written comments, the Committee also received public comment from Toby Rothschild during the committee's meeting on June 5, 2020.⁶

The Committee considered all the public comments suggesting changes to rule 5.4 as recommended by ATILS.⁷ Following consideration of all the comments, the Committee determined to revise rule 5.4 based on the following.

The Committee was persuaded by the California Lawyers Association's (CLA) recommendation that the proposed new exception for the division of legal fees arising from a settlement with a qualified nonprofit was significant enough to merit its own new subsection (a)(6). The ATILS version includes the new exception in the same subsection as the existing exception for sharing court awarded fees.

The Committee also agreed with CLA's comment that such a fee division would in fact be a significant development requiring communication to the client. This concern was also raised by Leigh Ferrin on behalf of the Public Law Center as an important safeguard against abuse.⁸ Toby Rothschild also shared this observation. Other comments expressed concern that limiting the fee sharing exception to organizations that qualify as a 501(c)(3) does not provide enough client protection on its own, absent disclosure to the client of the fee division. The Committee noted that current rule 1.5.1 (Fee Divisions Among Lawyers) allows for the division of fees between lawyers who are not in the same firm, only after specific conditions are met, including a written fee division agreement between the dividing lawyers or law firms, written consent of the client following full written disclosure to the client, and that the total fee charged by the lawyers is not increased by reason of the division.

Fee divisions between lawyers and nonlawyers have thus far been generally prohibited outside the current exceptions contained in rule 5.4(a). The Committee determined that the same safeguards contained in rule 1.5.1 should apply to fee divisions between lawyers and 501(c)(3) nonprofit organizations in the settlement context, where the fee-setting process is not public or subject to the protective supervision of a court. In part, the public policy underlying rule 1.5.1 addresses referral fee concerns and the rule's requirements are intended to ensure that clients are not referred to a lawyer solely based on who might pay the most generous referral fee rather than a lawyer who might serve the client's interests best. Because the same potential for abuse exists in division of fees with 501(c)(3) nonprofit organizations derived from settlements,

⁵ The full text of the public comments submitted for rule 5.4 is provided as Attachment D.

⁶ Mr. Rothschild is the former Co-Vice-Chair of ATILS. He has also served both as the General Counsel to the Legal Aid Foundation of Los Angeles and the Executive Director of the Legal Aid Foundation of Long Beach.

⁷ Proposed rule 5.4 as recommended by ATILS is provided as Attachment E.

⁸ Public comment submitted on May 1, 2020.

the Committee believes similar safeguards should apply. The Committee does not believe that requiring these established safeguards would interfere with the intended purpose of the rule change in increasing access to justice.

In addition, the Committee added a new Comment [4] which states: "A lawyer or law firm who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client's best interest. See rule 1.7 and 2.1."

Following discussion of the public comments received, COPRAC voted unanimously in favor of recommending an additional 45-day public comment period for rule 5.4 as revised. A copy of the revised rule is provided in Attachment C.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

With respect to Rule of Professional Conduct 1.1, if adopted by the Board, this rule amendment would only become binding and operative if approved by the Supreme Court of California (Bus. & Prof. Code § 6076 and 6077.)

With respect to Rule of Professional Conduct 5.4, this agenda item requests authorization for a 45-day public comment period. Board action to adopt this rule would occur only after the public comment process.

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 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 March 31, 2020, 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

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee recommends that the Board of Trustees adopts amendments to Rule of Professional Conduct 1.1 as set forth in Attachment A; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee recommend that the Board of Trustees direct staff to submit the amended rules to the Supreme Court of California with a request that the rules be approved; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby authorizes a 45-day public comment period on proposed amended rule 5.4 of the California Rules of Professional Conduct attached hereto as Attachment C; and it is

FURTHER RESOLVED, that the authorization for release for public comment of the proposed amendments to Rule of Professional Conduct 5.4 is not—and shall not be construed as—a statement or recommendation of approval of the proposed changes.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that upon recommendation of the Regulation and Discipline Committee, the Board of Trustees adopts amendments to Rule of Professional Conduct 1.1 as set forth in Attachment A; and it is

FURTHER RESOLVED, that staff is directed to submit the amended rules to the Supreme Court of California with a request that the rules be approved.

ATTACHMENT(S) LIST

- A. Proposed Rule 1.1 – (Clean and Redline)
- B. Synopsis of Public Comments and Full Text of Public Comments re: Rule 1.1
- C. Proposed Rule 5.4 – (Clean and Redline)
- D. Full Text of Public Comments Received re: Rule 5.4
- E. Revised Rule 5.4 as Proposed by ATILS – (Clean and Redline)

**Rule 1.1 Competence
(Proposed Rule – Clean Version)**

- (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.

Rule 1.1 Competence
(Proposed Rule – Redline Version to Current Rule)

- (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.](#)

~~[4]~~ 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.

~~[2]~~ See rule 1.3 with respect to a lawyer’s duty to act with reasonable* diligence.

TOTAL = 13
 S = 4
 SM = 3
 O = 6
 NP = 0

Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
1	Young, Michael (4-02-20)	N	O	None	No response required.
2	Matthew (04-02-20)	N	S	It is crucial in this day and age to have all practicing attorneys aware of the potential impact, positive or negative, of technologies that are, or can be, involved in their practice of law. It is a disservice to clients when attorneys do not take full advantage of available technology, particularly if due to ignorance of the technology's existence and/or benefits, to aid their practice.	The Committee agrees with the comment in support. The Committee supports the revisions as proposed.
3	Lester, Mark (04-30-20)	N	O	The proposed change to rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution in search of a problem.	The addition of this Comment to rule 1.1 is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S. jurisdictions. (See: https://www.lawsitesblog.com/tech-competence .) It is also consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.)

¹ S = Support SM = Support If Modified O = Oppose NP = No Position

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 SM = 3
 O = 6
 NP = 0

Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
					The addition of this Comment to rule 1.1 does not establish a disciplinary standard independent of the obligations imposed by the rule. Rule 1.1 prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. The Comment clarifies that the duty includes keeping abreast of technology employed in the practice of law. Unless the lawyer’s conduct is intentional, reckless or grossly negligent, a single failure would not constitute grounds for discipline. This is a reasonable minimum public protection standard for a lawyer’s familiarity with technology used in the practice of law.
4	Gorton, James (05-04-20)	N	O	Changes to the Rules as to technological competence are far too vague and open to abusive enforcement. What is needed is specific guidance in each area of technology if this 'reform' is to be adopted. Any rule to be adopted should recognize that technological	The addition of this Comment to rule 1.1 is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S. jurisdictions. (See: https://www.lawsitesblog.com/tech-competence .) It is also consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.)

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 S = 4
 SM = 3
 O = 6
 NP = 0

Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
				competence may be satisfied by having adequate staff or independent contractor fulfillment.	Guidance in the use of technology has been provided in various ethics opinions. The Comment is intended to alert lawyers to the fact that the duty of competence includes keeping abreast of technology utilized in the practice of law and not that a lawyer should be required to become an expert in relevant technology. A lawyer would not necessarily be required to become an expert in a particular area of technology, but instead might be expected to associate with someone else who is, which rules 1.1(c) and 5.3 explicitly recognize.
5	Griep, Galen (05-04-20)	N	O	The proposed change to rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution in search of a problem.	The addition of this Comment to rule 1.1 does not establish a disciplinary standard independent of the obligations imposed by the rule. Rule 1.1 prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. The Comment clarifies that the duty includes keeping abreast of technology employed in the practice of law. Unless the lawyer’s conduct is intentional, reckless or grossly negligent,

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Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
					a single failure would not constitute grounds for discipline. This is a reasonable minimum public protection standard for a lawyer’s familiarity with technology used in the practice of law.
6	Sirkin, Mina (05-05-20)	N	O	This is a slippery slope. Technology is changing on a daily basis. As soon as a lawyer learns one thing, the tech system has changed. I think the rule is too risky for lawyers, especially those above 50 years old. It prejudices good older attorneys and subjects them to unnecessary discipline.	The addition of this Comment to rule 1.1 does not establish a disciplinary standard independent of the obligations imposed by the rule. Rule 1.1 prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. The Comment clarifies that the duty includes keeping abreast of technology employed in the practice of law. Unless the lawyer’s conduct is intentional, reckless or grossly negligent, a single failure would not constitute grounds for discipline. This is a reasonable minimum public protection standard for a lawyer’s familiarity with technology used in the practice of law. The Comment does not, and cannot be read, as requiring that a lawyer become an expert in relevant technology. The Comment alerts lawyers to the fact that

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Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
					they have a duty to provide their clients with competent legal services which, in some instances, would call for the lawyer to employ technology in the representation. The duty highlighted by the Comment, like other duties under rule 1.1, can be satisfied in the ways explicitly permitted by the Rules, including associating with someone who is more expert in the technology, as rules 1.1(c) and 5.3 explicitly recognize.
7	Gonzales, Efrain (05-08-20)	N	O	Attorneys like any other business needs to advertise their service, however is a misleading information when Law firms advertise the amount of money they were able to be awarded in any case. I believe that law firms should not advertise any amount of judgement because people will think that they will received that amount of money.	This comment does not specifically address the proposed revision to rule 1.1. Nonetheless, the Committee observes Rule of Professional Conduct 7.1 prohibits false or misleading communications about the lawyer or the lawyer’s services. Additionally, Comment [4] to rule 7.1 states that 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

**Proposed Rule 1.1, Comment [1] - Competence
Synopsis of Public Comments**

TOTAL = 13 S = 4
SM = 3
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No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
					be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."
8	California Commission on Access to Justice (Kaddoura) (05-12-20)	Y	S	The California Commission on Access to Justice supports the proposed amendment to California Rule of Professional Conduct 1.1), and encourages the State Bar to continue to look for ways to highlight and address the needs of low- and moderate-income people who participate in the justice system including through technology and innovation.	The Committee agrees with the comment in support. The Committee supports the revisions as proposed.
9	Orange County Bar Association (Garner) (05-14-20)	Y	SM	There is a danger that this Comment will lead to lawyers being held responsible for keeping up with changes in areas of the law unrelated to their practice. The proposed Comment should be revised to state: "The duties set forth in this rule include the duty to keep abreast of the <u>relevant</u> changes in the law and its practice, including the benefits and risks associated with relevant	The addition of this Comment does not change the law, but instead highlights for busy practitioners an important aspect of existing law. It is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S. jurisdictions. (See: https://www.lawsitesblog.com/tech-competence .) It is also consistent with California ethics opinions based on existing law. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.)

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Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
				technology, as applicable to the <u>particular lawyer’s practice.</u> ”	The Comment does not give rise to any risk that lawyers will be disciplined for failure to keep up in areas unrelated to their practice, because the text of the Rule is the only basis on which discipline can be imposed, and the duty stated there applies only to the lawyer’s performance of legal services in the lawyer’s practice. Accordingly, the Comment would not provide any basis for disciplining a lawyer on the basis of changes, legal or technical, unrelated to the lawyer’s practice.
10	Legal Aid Association of California (Newman) (05-15-20)	Y	S	We support the proposed amended California Rule of Professional Conduct 1.1.	The Committee agrees with the expressed position in support. The Committee supports the revisions as proposed.
11	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (Kreuger) (05-15-20)	Y	SM	The Los Angeles County Bar Association Professional Responsibility and Ethics Committee opposes proposed Comment [1] to rule 1.1 as unnecessary and as not providing clear guidance to practitioners because of the risk that the lawyer may be held responsible for changes unrelated to the provision of legal services or the	The addition of this Comment does not change the law, but instead highlights for practitioners an important aspect of existing law. The Committee believes that there is clear value in drawing the attention of the practicing bar to this aspect of their duty of competence. The Comment is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S.

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**Proposed Rule 1.1, Comment [1] - Competence
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
				<p>lawyer’s practice. It proposes a revised version as follows:</p> <p>[1] Under paragraph (b), learning and skill necessary for the performance of a legal service includes keeping abreast of changes in the law and the benefits and risks associated with relevant technology applicable to such service.</p>	<p>jurisdictions. (See: https://www.lawsitesblog.com/tech-competence.) It is also consistent with California ethics opinions based on existing law. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.)</p> <p>The Comment does not give rise to any risk that lawyers will be disciplined for failure to keep up with changes in areas unrelated to the practice of law or their specific practice, because the text of the Rule is the only basis on which discipline can be imposed, and the duty stated there applies only to the lawyer’s performance of legal services. Accordingly, the Comment would not provide any basis for disciplining a lawyer on the basis of changes, legal or technical, unrelated to the lawyer’s practice.</p>
12	California Lawyers Association Ethics Committee (Majchrzak) (05-18-20)	Y	SM	The Committee recommends considering whether an amendment is necessary to add understanding and, if it is, to consider whether to use language more closely mirroring from ABA Model Rule 1.1, Comment	We note that the CLA comment indicates that no member of the CLA Committee opposed the inclusion of this concept in the comments.

TOTAL = 13	S = 4
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**Proposed Rule 1.1, Comment [1] - Competence
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
				<p>[8], rather than the proposed language, such as “To maintain or acquire the requisite learning and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”</p> <p>Among the reasons given for considering such a change are that the proposed Comment might be read as expanding the rule and that it might be read as negating the Rule’s permission to achieve competency by associating or consulting with another competent lawyer or by relying on persons expert in the relevant technology.</p>	<p>The reasons suggested for altering the Comment are not persuasive. The Comment does not expand rule 1.1— instead it highlights for practitioners an important aspect of existing law. It is consistent with the Comments to the ABA Model Rule as adopted by a majority of U.S. jurisdictions. (See: https://www.lawsitesblog.com/tech-competence.) It is also consistent with California ethics opinions based on existing law. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.)</p> <p>The Comment also cannot and does not affect or repeal other portions of rule 1.1. Rule 1.1 prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. Unless the lawyer’s failure was intentional, reckless or grossly negligent, a single failure would not constitute grounds for discipline. In addition, the Comment does not require that the lawyer become personally expert in technologies used in the lawyer’s</p>

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Proposed Rule 1.1, Comment [1] - Competence Synopsis of Public Comments					
No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	COPRAC Response
					practice; the provisions of the Rules explicitly permitting a lawyer to fulfil the lawyer’s duties under the Rule by associating a lawyer or other person who has such expertise are unaffected. See Rules 1.1(c) and 5.3.
13	San Diego County Bar Association (Berenson) (05-18-20)	Y	S	<p>The San Diego County Bar Association believes that further elaboration on lawyers' duty to keep up with relevant technology is appropriate. We recommend adding a second sentence to Comment [1] as follows:</p> <p>The duties set forth in this rule include the duty to keep abreast of relevant changes in the law and its practice, including the benefits and risks associated with relevant technology, before performance is required. A lawyer may satisfy this duty by acquiring sufficient learning and skill or by associating with a professional whom the lawyer reasonably believes to be competent.</p>	<p>The Committee does not agree an additional sentence is necessary.</p> <p>The Comment is not changing existing law, but highlighting an aspect of existing law that is recognized in the relevant authorities. It does not create a new duty or modify or change the text of the Rule in any way. Because the duty highlighted in the Comment is one imposed under rule 1.1, it can be fulfilled in any manner permitted by the Rule, including by complying with rules that explicitly permit a lawyer to associate a person with greater expertise in the relevant technology, as rules 1.1(c) and 5.3—and the relevant ethics authorities—explicitly recognize. Nothing in the Comment suggests or implies otherwise.</p>

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Michael Young
City	Redlands
State	California
Email address	myoung@michaelyounglaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Matthew
City	Los Angeles
State	California
Email address	whitten@dfis-law.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	It is crucial in this day and age to have all practicing attorneys aware of the potential impact, positive or negative, of technologies that are, or can be, involved in their practice of law. It is a disservice to clients when attorneys do not take full advantage of available technology, particularly if due to ignorance of the technology's existence and/or benefits, to aid their practice. California should take all reasonable steps to help practitioners modernize their practice to provide more thorough, efficient, and environmentally-conscious services to clients.

Public Comment - Proposed Rule 1.1 Cmt 6

Name	Mark A Lester
City	Camarillo
State	California
Email address	mark@venturaestatelegal.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I oppose the ATILS proposal to amend Rule 1.1.

My reasons are:

1. At this difficult time for all policy makers, the State Bar should postpone consideration of these significant changes which do not require urgent attention.

2. The State Bar should immediately focus its best energies on the impending enormous shortfall in funding for the courts, since the state will surely have the worst budget crunch in at least a decade. This will inevitably mean tighter budgets for the courts.

The Los Angeles County Bar Association's own programs, as well as dozens of others around the state, have demonstrated that, in good times and bad, the best way to increase most legal services needed by the middle and lower classes (e.g., family law, conservatorships and guardianships, bankruptcy, etc.) is through programs that facilitate the public's use of court processes.

3. In particular, the proposed change to Rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution in search of a problem.

Thank you for considering my opposition.

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	James Gorton
City	Pasadena
State	California
Email address	jgorton@gjpatorneys.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

1. Pressing forward with radical changes to the notion of what is required as to attorney competence in the midst of a global health pandemic which is killing people in their hundreds of thousands and the beginnings of a significant and potentially devastating recession is plainly not appropriate at this time. These proposals should be aired and considered in a time and an atmosphere in which they can be discussed by all affected Californians, not buried in the devastating and unprecedented events now overtaking us. It is inconceivable that the task force cannot understand their own insensitivity and recklessness in regard to pushing forward with these proposals now. Is true public comment and debate desired? Then these proposals should be shelved until the emergency is past.

2. Changes to the Rules as to technological competence are far too vague and open to abusive enforcement. What is needed is specific guidance in each area of technology if this 'reform' is to be adopted. Further what constitutes the requisite level of competence should be specifically defined so that members of the Bar can know exactly what is expected of them. The rule should require the State Bar to develop a technological certification program to provide attorneys with a safe harbor certification of compliance. The proposed rule is additionally lacking in that it fails to consider the relative skill sets of attorneys, many of whom are skilled courtroom advocates but who may not personally be of a personality type which is able or comfortable with tech, but who nonetheless may employ persons to fill that need. Any rule to be adopted should recognize that technological competence may be satisfied by having adequate staff or independent contractor fulfillment.

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Galen Griep
City	Pasadena
State	California
Email address	estateplanners@aol.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I oppose the ATILS proposal to amend Rule 1.1.

My reasons are:

1. At this difficult time for all policy makers, the State Bar should postpone consideration of these significant changes which do not require urgent attention.

2. The State Bar should immediately focus its best energies on the impending enormous shortfall in funding for the courts, since the state will surely have the worst budget crunch in at least a decade. This will inevitably mean tighter budgets for the courts.

The Los Angeles County Bar Association's own programs, as well as dozens of others around the state, have demonstrated that, in good times and bad, the best way to increase most legal services needed by the middle and lower classes (e.g., family law, conservatorships and guardianships, bankruptcy, etc.) is through programs that facilitate the public's use of court processes.

3. In particular, the proposed change to Rule 1.1 adds a Comment stating that the duty of professional competence includes keeping abreast of technology that is employed in law practice. I am concerned that the amendment would hand a vague, hard to define, and potentially dangerous tool to State Bar prosecutors. This seems to be a solution

in search of a problem.

Thank you for considering my
opposition.

I oppose the ATILS proposal to amend Rule
5.4.

My reasons are:

1. At this difficult time for all
policy makers, the State Bar should postpone
consideration of these significant changes
which do not require urgent attention.

2. The State Bar should
immediately focus its best energies on the
impending enormous shortfall in funding for
the courts, since the state will surely have the
worst budget crunch in at least a decade. This
will inevitably mean tighter budgets for the
courts.

The Los Angeles County Bar
Association's own programs, as well as
dozens of others around the state, have
demonstrated that, in good times and bad, the
best way to increase most legal services
needed by the middle and lower classes (e.g.,
family law, conservatorships and
guardianships, bankruptcy, etc.) is through

programs that facilitate the public's use of court processes.

3. In particular, with respect to the proposal to change Rule 5.4 to allow lawyers to share fees with nonprofits, there is a clear upside but also risk. Although many nonprofits provide legal services to the underserved, it is also so easy to become a nonprofit that virtually anyone can become a non-profit. Moreover, there is already very little enforcement of the rule barring 501(c)(3)'s from involvement in political causes. This relaxation could exacerbate these problems.

Thank you for considering my opposition.

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	Mina Sirkin
City	Woodland Hills
State	California
Email address	minasirkin@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	This is a slippery slope. Technology is changing on a daily basis. As soon as a lawyer learns one thing, the tech system has changed. No industry is subjecting its members or licensees to discipline if they cannot keep up with the ever-changing technology. You can offer one unit of technology CLE, but I think the rule is too risky for lawyers, especially those above 50 years old. It prejudices good older attorneys and subjects them to unnecessary discipline.

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	No
Name	EFRAIN O GONZALEZ
City	COVINA
State	California
Email address	gontraserv@aol.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Attorneys like any other business needs to advertise their service, however is a misleading information when Law firms advertise the amount of money they were able to be awarded in any case. As you you know every case is different and the judgments are equally different.</p> <p>I am not an attorney, I am a consumer, and by the advertising to have collected millions for an car accident it is completely false. I believe that law firms should not advertise any amount of judgement because people will think that they will received that amount of money.</p> <p>Stop the misinformation.</p> <p>Efrain Gonzalez</p>

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	California Commission on Access to Justice
Name	Jasmine Kaddoura
City	Oakland
State	California
Email address	jkaddoura@calatj.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	CCAJ_Comment_Rule_1.1.pdf (192k)

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

350 Frank Ogawa Plaza, Suite 701, Oakland, CA 94612 · (510) 893-3000

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*Los Angeles County Superior Court
Los Angeles*

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JACK W. LONDEN
*Executive Director
San Francisco*

May 12, 2020

The State Bar Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Support for the Proposed Amendment to California Rule of Professional
Conduct 1.1 (Competence)

Dear Members of the Board of Trustees:

The California Commission on Access to Justice submits this comment to the State Bar Board of Trustees in support of the proposed amendment to California Rule of Professional Conduct 1.1 (Competence).

For 23 years, the Access Commission has worked to advance access to justice for all Californians using broad-based strategies informed by diverse stakeholders. The Access Commission proposes innovative solutions and oversees efforts to increase resources and improve methods of helping the poor, those of moderate-income, and others facing legal problems that they have no way to address and legal rights they have no way to realize.

Although Rule 1.1 addresses only a lawyer's responsibility for his or her own professional competence, nevertheless it may have access to justice implications—particularly as technology increasingly impacts the practice of law.

The increasing role of technology is not surprising given that technology has permeated almost every aspect of our personal and professional lives. Technology often is identified as a source of convenience, savings, and efficiency and its use has become prevalent in the profession. Thus, it makes sense to add proposed comment [1] to Rule 1.1, clarifying that “The duties set forth in this rule include the duty to keep abreast of the change in the law and its practice, including the benefits and risks associated with relevant technology.” This also is consistent with comment [8] to ABA Model Rule 1.1, which similarly addresses competence in connection with changing technology.

In addition to the increasing importance of technology generally, over the last number of years, there has been increasing awareness of and innovation related to the use of technology in addressing the needs of low- and moderate-income litigants and in increasing access to the courts. For example, legal aid organizations and courts have made significant advances in the use of websites, interactive resources, remote assistance, document assembly, e-filing,

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

e-service, online access to court records, electronic discovery, electronic recording, electronic calendars, social media, mobile devices, online learning, and other technology innovations for the delivery of legal services to low-income people and self-represented litigants.

In many ways, the practice of law, including aspects of access to justice and our daily lives, is transforming from an in-person, paper-based system to an electronic, technology-based realm. Lawyers, legal aid organizations and courts need to understand the benefits and risks associated with the use of technology to advance access to the courts. One clear example, during the current health crisis, is the Judicial Council's Emergency Rule 3, providing for court proceedings to be conducted remotely using technology.

Other examples — such as electronic filing systems in state and federal courts, online legal research, document assembly software used in transactional practice, and eDiscovery practices and procedures — demonstrate the necessity for lawyers to keep informed about technology in order to perform important aspects of their job today. The proposed comment may provide incentive to lawyers to adopt and incorporate useful technology into their practices, help lawyers appreciate the increasing role that technology plays in the practice of law, and lead to increased technology competence in the legal profession. The comment may be helpful in enhancing the delivery of legal services through the use of technology.

While the Access Commission does not view the proposed amendment to California Rule of Professional Conduct 1.1 as directly meaningful in the fight to address unmet legal needs, generally, increased incentives for the understanding and use of technology in the legal profession may be helpful in long-term efforts to reduce resistance to change and in encouraging positive acceptance of technology and innovation by all justice stakeholders in addressing the justice gap.

The California Commission on Access to Justice supports the proposed amendment to California Rule of Professional Conduct 1.1 (Competence), and encourages the State Bar to continue to look for ways to highlight and address the needs of low- and moderate-income people who participate in the justice system including through technology and innovation.

Sincerely,



Judge Mark A. Juhas
Chair

cc: Donna S. Hershkowitz
Interim Executive Director

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Sarah Ireland
City	Newport Beach
State	California
Email address	sireland@ocbar.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

May 14, 2020



**ORANGE COUNTY
BAR ASSOCIATION**

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OC WOMEN LAWYERS ASSOC.

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Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639
Via Email: angela.marlaud@calbar.ca.gov

**Re: Proposed Amendment to California Rules of Professional
Conduct Rule 1.1**

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning the Proposed Amendment to California Rules of Professional Conduct, Rule 1.1.

Founded over 100 Years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political leanings, has approved these comments prepared by the Professionalism and Ethics Committee.

We believe that the addition of the proposed comment provides valuable guidance. At the same time, we have comments and suggestions that we believe could clarify, strengthen and improve the proposed comment and provide even more clarity for practitioners.

Overall, there was substantial discussion within our Committee relating to whether a lawyer, as a result of the new comment, would be responsible for keeping abreast of all changes in the law and its practice or just those changes which are relevant to the lawyer's practice. The same discussion was held relating to a lawyer keeping abreast of the benefits and risks associated with relevant technology. By way of example, we do not believe that the proposed comment is meant to require a lawyer practicing business litigation to stay abreast of the changes in family law or child support programs used to compute such obligations. However, as written, the comment could be read to imply such an obligation.

To provide clarity, we suggest adding the word "relevant" between the words "the" and "changes". We also suggest adding ", as applicable to the particular lawyer's practice" at the end of the comment following the word "technology". In sum, we would suggest that the proposed comment be revised to state:

"The duties set forth in this rule include the duty to keep abreast of the relevant changes in the law and its practice, including the benefits and risks associated with relevant technology, as applicable to the particular lawyer's practice."

Re: Proposed Amendment to California Rules of Professional Conduct, Rule 1.1

May 14, 2020

Page | 2

These revisions would clarify for practitioners that the comment requires that a lawyer remain abreast of all changes in the law and technology only as applicable to his/her practice.

Thank you for your consideration of our comments and suggestions.

Sincerely,

Orange County Bar Association

A handwritten signature in black ink, appearing to read 'S. B. Garner', with a long horizontal flourish extending to the right.

Scott B. Garner
2020 President

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	The Legal Aid Association of California
Name	Zach Newman
City	Oakland
State	California
Email address	znewman@laaonline.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	LAAC_Rule_1.1_Support_Letter.pdf (219k)

“The Unified Voice of Legal Services” !



May 15, 2020

Standing Committee on Professional Responsibility and Conduct
State Bar of California
180 Howard St.
San Francisco, CA 94105

**Re: Proposed Amended California Rule of Professional Conduct 1.1 (Competence)—
SUPPORT**

To the Standing Committee on Professional Responsibility and Conduct,

I am writing on behalf of the Legal Aid Association of California (LAAC) to express our **support** for the proposed amended California Rule of Professional Conduct (RPC) 1.1 (Competence).

LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California’s unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice.

LAAC has followed the Task Force on Access Through Innovation of Legal Services (ATILS) from the beginning. ATILS represented the intention of the State Bar of California to ensure that the legal community does not unnecessarily hinder increasing access to justice through outdated regulatory models that impede innovation. ATILS proposed a number of ideas, some simple and easy fixes, others more system-wide and transformative. While only two complete recommendations were released for public comment—this proposed change of RPC 5.4 as well as RPC 1.1—we would like to commend the Bar for launching this task force, and for the Bar’s support of this and other access to justice initiatives, now and into the future.

In light of this, we view the proposed change to RPC 1.1 as positive. Specifically, this change would add a new Comment providing that a lawyer’s duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology. In essence, by recognizing that a lawyer should be “familiar with” and “competent in using” technology, the Comment will “alert lawyers to that duty and should provide them with an incentive to adopt and incorporate useful technology in their

practices.”¹ The ultimate intent is to ensure that lawyers use all of the tools at their disposal to efficiently and effectively represent their clients, and technology is ever-more important in this regard. ATILS notes that this rule is similar to the Comment provided by the American Bar Association in Model Rule 1.1, which also acknowledges the role of technology in maintaining competence.² The State Bar has adopted non-binding ethics opinions on this matter in the past.³

While this rule change does not have an absolutely direct relationship to the justice gap in California, it expands a culture of knowledge and utilization of technology in the legal community, which has implications system-wide. Legal technology is increasingly imperative in moving from a one-to-one model of legal services to a one-to-many version, wherein more clients can be served, with quality maintained. For the legal community in general, it presents a commitment to understanding and considering use of technologies that have the potential to serve all clients—including low- and moderate-income clients—as efficaciously as possible. While this Comment goes beyond legal aid lawyers, it ensures legal aid attorneys also stay up on technological tools that they and their organizations can use in increasing access to justice.

In sum, LAAC has followed the efforts of ATILS from the start. Our objective has been to ensure that ATILS lives up to its objective of using technology to increase access. Changing RPC 1.1 presents one small step forward in this regard. Changing our legal culture is pivotal, and adding a Comment to the competence rule initiates such a change.

We support this change to RPC 1.1. Thank you again for this opportunity to comment. Please do not hesitate to reach out to me with questions or comments.

Sincerely,



Salena Copeland
Executive Director, The Legal Aid Association of California

¹ *Id.* §

² REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025644.pdf>.

³ *Id.*

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Association
Name	Brandon N. Krueger
City	Los Angeles
State	California
Email address	bkrueger@sallspencer.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	LACBA_PREC_Comment_re_RPC_1.1.pdf (198k)



Los Angeles County Bar Association

1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553

Telephone: 213.627.2727 | www.lacba.org

May 15, 2020

State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Rule of Professional Conduct 1.1

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee opposes proposed Comment [1] to rule 1.1 as unnecessary and inappropriate. If proposed Comment [1] is adopted, it should be revised to state the following:

[1] Under paragraph (b), learning and skill necessary for the performance of a legal service includes keeping abreast of changes in the law and the benefits and risks associated with relevant technology applicable to such service.

Rule 1.1 states two basic duties. In rule 1.1(a), a lawyer's duty is to not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal service with competence. In rule 1.1(c), if a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer must (i) acquire the learning and skill before performance of the legal service is required, (ii) associate or consult with another lawyer whom the lawyer reasonably believes is competent, or (iii) refer the matter to another lawyer.

Proposed Comment [1] is unclear and will produce unnecessary confusion if adopted. Proposed Comment [1] states:

[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.

The Committee is aware that proposed Comment [1] is adapted from the Discussion to former rule 3-110. The former rule Discussion states that a member's duty under the former rule included the supervision of subordinate lawyers and non-attorney employees and agents. The former rule Discussion concerned a member's duty to supervise compliance with two basic duties in Rule 3-110, which are carried forward in Rule 1.1(a) and 1.1(c)

The formulation of the Discussion in Rule 3-110 is not appropriate for proposed Comment [1]. Proposed Comment [1] concerns what is encompassed within the meaning of competence. Rule 1.1(b) defines competence as meaning “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.” Proposed Comment [1] refers to the learning and skill element of competence in rule 1.1(b). However, proposed Comment [1] is based on a former rule Discussion that concerned the performance of the duties now found in rule 1.1(a) and 1.1(c).

Using the old Discussion language in proposed Comment [1] communicates that a lawyer has a duty to keep abreast of changes in the law and “relevant” technology independent of the performance of legal services. That duty is difficult to reconcile with the rule 1.1(a) duty to not fail perform legal services with competence, unless one recognizes that proposed Comment [1] concerns the learning and skill element of competence. Some may argue that proposed Comment [1] states a duty that is not tied to the performance of legal services, which would then raise other issues. Disconnected from the performance of legal services, there is no clear reference to what would be “relevant” technology in proposed Comment [1]. Of course, interpreting the Comment to expand the rule would be inconsistent with rule 1.0(c); but that may not be apparent to a lawyer not steeped in the rules, when that lawyer reads proposed Comment [1].

For these reasons, proposed Comment [1] does not provide clear guidance. The lack of clarity is resolved if proposed Comment [1] is linked to the learning and skill element in rule 1.1(b), which is accomplished in the version of Comment [1] the Committee proposes

Overall, however, the Committee believes that proposed Comment [1] is an unnecessary practice pointer that is not appropriate for a Comment. In its September 19, 2014 letter to the State Bar, which lead to the formation of the Second Commission for the Revision of the California Rules of Professional Conduct, the Court stated that the California Rules of Professional Conduct should stand on their own and “[c]omments to the proposed rules should be used sparingly and only to elucidate and not expand upon the rules themselves.”

As a result, the Second Commission, while emulating the ABA Model Rules in many ways, stripped out Model Rule Comments that were inconsistent with the Supreme Court’s direction. This includes Comment [8] in Model Rule 1.1, which states, “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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Model Rule 1.1 Comment [8] is not included in current rule 1.1 because it is not a needed explanation of the words of the corresponding rule. Like Model Rule 1.1 Comment [8], proposed Comment [1] to rule 1.1 is correct in that it would be advisable to pay attention to legal developments and relevant technology, but it is not an appropriate Comment because it does not elucidate the meaning of the language in the rule 1.1. Proposed Comment [1] would be even more inappropriate if it seeks to expand the current rule.

The rationale for proposed Comment [1] in the March 12, 2020 report to the Board of Trustees, underscores the advisory purpose of the Comment. It states:

Adding a comment to the competence rule that recognizes a lawyer's responsibility to be familiar with, and be competent in using, relevant technology will alert lawyers to that duty and should provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions of relevant technology could have a beneficial effect on a law practice's efficiency, which can in turn lead to savings that can be passed on to clients.

Not only is proposed Comment [1] advisory, but it seeks to produce an outcome that cannot be achieved through rule 1.1. Rule 1.1 does not concern whether lawyers adopt useful or cost saving technology. It concerns whether a lawyer has the learning, skill and ability necessary to perform a legal service. For example, a lawyer who wins a client's case in the courtroom, but used no technology whatsoever, would not violate rule 1.1, even if the lawyer might have been able to obtain the same result more efficiently or at less cost if the lawyer had employed technology to obtain that outcome. It is unlikely that the proposed Comment will produce the outcome for which it is proffered, unless technological knowledge becomes necessary to perform a particular legal service. When technology rises to that level, it will result from the demands of the legal service, rather than from proposed Comment [1].

For these reasons, the Committee believes that proposed Comment [1] to rule 1.1 should not be adopted. It is advisory and seeks to promote an outcome that cannot be achieved through rule 1.1, except in circumstances where it would be achieved without the Comment. If proposed Comment [1] is adopted, the Committee requests that it be revised as the Committee proposes.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brandon Niles Krueger', with a long horizontal flourish extending to the right.

Brandon Niles Krueger
Chair
Professional Responsibility and Ethics Committee,
Los Angeles County Bar Association

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	David Majchrzak
City	San Diego
State	California
Email address	DMajchrzak@Klinedinstlaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	ethics_committee_comments_RPC_1.1.pdf (201k)

May 15, 2020

Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Amended California Rule of Professional Conduct 1.1

Dear Trustees:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing the proposed amendment to Rule of Professional Conduct 1.1. Our committee was divided on its views of the proposed amendment.

The amendment would add a comment that resembles existing Comment 8 to ABA Model Rule 1.1. But the proposed new comment differs in that Comment 8 provides one way to address learning and skill, whereas proposed Comment 1 mandates a "duty" without qualification.

As a preliminary matter, when considering a comment to the rule, we should keep in mind the directive provided for in advance of its drafting. In its September 19, 2014 letter to Senator Joseph Dunn regarding the establishment of the 2014 Rules Revision Commission, the Supreme Court of California provided, "Comments to the proposed rule should be used sparingly and only to elucidate and not to expand upon the rules themselves."

Given this charge, it may be reasonable to conclude that the commission omitted an analogue to comment 8 because it was unnecessary to repeat what was already included in subparagraph (c): that one way that a lawyer can be competent is to "acquir[e] sufficient learning and skill before performance is required." Whereas no member of the Ethics Committee opposed an inclusion of the concept set forth in proposed Comment 1, the Committee was divided on whether the proposed comment was aligned with the other aspect of the Court's direction, to wit, whether the comment merely elucidated the rule, rather than expanded upon it.

At its heart, Rule 1.1 provides, among other things, that lawyers may not intentionally, recklessly, with gross negligence, or repeatedly fail to provide legal

services without application of the learning and skill and the mental, emotional, and physical ability reasonably necessary for the performance, whether personally or through another lawyer that is associated into the representation or the client is referred to. It does not within the language of the rule expressly provide for “a **duty** to keep abreast of the changes in the law and its practice.” Indeed, the rule provides that lawyers are competent when they have somebody else who the lawyers reasonably believe is competent assist the client.

A portion of the committee felt that the differences in the phrasing of proposed Comment 1 and Comment 8 of Model Rule 1.1 are significant. They view the ABA version as conditional and normative, recognizing the alternative options to satisfy competency within the rule; whereas the proposed amendment is unconditional and mandatory. That is, the ABA suggests that one way of fulfilling the duty of competency may be to stay abreast of changes. It allows for other practical options that may not be expressly stated in the rule, such as, for example, relying on competent members of an IT department for technological issues.

The proposed comment states, without qualification,¹ that it is mandatory for the lawyers to stay abreast the changes of the law and its practice. A portion of the committee felt this contradicts the rule itself, which provides, among other things, that the duty of competency may be met by other means, such as associating with, consulting with, or referring to another lawyer whom the lawyer believes is competent.

Another portion believes the distinction being drawn does not exist. Rather, Model Rule Comment 8 is unconditional and mandatory in that, whereas it does not use the word “duty,” as proposed Comment 1 does, Model Rule Comment 8 makes clear that the duty of competence as set forth in the rule includes the duty to “keep abreast of changes in the law and practice, including the benefits and risks of technology.” This segment believes that proposed Comment 1 is perhaps a more clear way of stating that than the ABA comment. And it believes that concerns that proposed Comment 1 may be overstated are addressed by the fact that these are intended to be rules of reason. So, they could not be interpreted as requiring lawyers to personally stay abreast of changes in the law or its practice when lawyers reasonably rely on others, such as IT professionals, or when, pursuant to subparagraph (c), a lawyer either associates with, professionally consults with, or refers the matter to another lawyer whom the lawyer reasonably believes to be competent.

¹ We note that proposed Comment 1 expressly refers to “the duties set forth in this rule” without identifying which duties. This also potentially leads to a broader reading of the comment that could be addressed by expressly limiting it to “the duties to have sufficient learning and skill or to acquire sufficient learning and skill.”

The Committee recommends considering whether an amendment is necessary to add understanding and, if it is, to consider the above when deciding whether to use language more closely mirroring from ABA Model Rule 1.1, comment 8, rather than the proposed language, such as “To maintain or acquire the requisite learning and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” The committee appreciates the opportunity to comment on the proposed rule and invites further discussion if the Board has any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Majchrzak".

David Majchrzak
Co-Chair
California Lawyers Association Ethics
Committee

Public Comment - Proposed Rule 1.1 Cmt 6

Commenting on behalf of an organization	Yes
Professional Affiliation	San Diego County Bar Association
Name	Steven Berenson
City	San Diego
State	California
Email address	sberenson@klinedinstlaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>The San Diego County Bar Association believes that further elaboration on lawyers' duty to keep up with relevant technology is appropriate. We recommend adding a second sentence to comment [1] as follows:</p> <p>The duties set forth in this rule include the duty to keep abreast of relevant changes in the law and its practice, including the benefits and risks associated with relevant technology, before performance is required. A lawyer may satisfy this duty by acquiring sufficient learning and skill or by associating with a professional whom the lawyer reasonably believes to be competent.</p>

**Rule 5.4 Financial and Similar Arrangements with Nonlawyers
(Proposed Rule – Clean Version)**

- (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 court-awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter; or
 - (6) a lawyer or law firm* may share with or pay a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter provided:
 - (i) the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code;
 - (ii) the lawyer or law firm* enters into a written* agreement to divide the fee with the nonprofit organization;
 - (iii) the lawyer or law firm* obtains the client’s consent in writing,* either at the time the lawyer or law firm* enters into the agreement with the nonprofit organization to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of the fact that a division of fees will be made, the identity of the lawyer or

law firm* and the nonprofit organization that are parties to the division, and the terms of the division; and

- (iv) the total fee charged by the lawyer or law firm* is not increased solely by reason of the agreement to divide fees.
- (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 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 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
 - (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.

[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, advocacy groups, and other nonprofit organizations 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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer or law firm* to share with or pay a legal fee arising from a settlement or other resolution of the matter with a nonprofit organization that is not engaged in the unauthorized practice of law. 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 lawyer or law firm* who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client's best interest. See rule 1.7 and 2.1.

[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).

**Rule 5.4 Financial and Similar Arrangements with Nonlawyers
(Proposed Rule – Redline Version to Current Rule)**

- (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 court-awarded legal fee to a nonprofit organization that employed, retained~~or~~, recommended, or facilitated employment of the lawyer or law firm* in the matter~~; or~~
 - (6) a lawyer or law firm* may share with or pay a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter provided:
 - (i) the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code;
 - (ii) the lawyer or law firm* enters into a written* agreement to divide the fee with the nonprofit organization;
 - (iii) the lawyer or law firm* obtains the client’s consent in writing,* either at the time the lawyer or law firm* enters into the agreement with the nonprofit organization to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of the fact that a division of fees will be made, the identity of the lawyer or

law firm* and the nonprofit organization that are parties to the division, and the terms of the division; and

(iv) the total fee charged by the lawyer or law firm* is not increased solely by reason of the agreement to divide fees.

- (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 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 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
 - (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.

[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, and other nonprofit organizations 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.) Under the specified circumstances, paragraph (a)(6) permits a lawyer or law firm* to share with or pay a legal fee arising from a settlement or other resolution of the matter with a nonprofit organization that is not engaged in the unauthorized practice of law. 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]~~[4] A lawyer or law firm* who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client’s best interest. See rule 1.7 and 2.1.

[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].)

~~[5]~~[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).

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	Crispin Passmore
City	Kenilworth
State	California
Email address	crispin.passmore@passmoreconsulting.co.uk
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I am a UK resident and offer my advice as an expert in regulation and the legal market. I have over 15 years very senior experience in reforming the legal market of England & Wales and now run a consultancy business working with law firms, legal businesses and regulators across the UK, US and the rest of the world. I started out running the UK's largest non profit Law Centre - as a non-lawyer/human.

First I would remind the Board of its obligation to act in the public interest rather than the interest of lawyers. There is shortage of supply - all of the evidence points to underserved individual and small businesses consumers and badly served corporate clients. Increasing supply is likely to assist with innovation and competitive pressures that are at the heart of our economies.

The proposals are weak and insignificant though they should not be opposed. They should also be modified to allow non-lawyer ownership in for profit organisations.

obvious: clients keep coming back to these businesses and they are growing the legal market. 25 million US adults and almost all Fortune 500 are ahead of you.

Therefore your proposals are too timid. They should be amended to allow full non lawyer ownership so that you can bring the established and successful business into the regulatory environment and ensure a level playing field. That would give you oversight over what is already happening - it answers the real question of whether these business should be regulated or left unregulated.

So I support your proposed change but it is a tiny step of a large journey. Each year you delay means that the unregulated market grows and moves further beyond your reach. Each year you delay means more Californian residents and small business miss out on legal advice that can improve their lives.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	Calif Advocates for Nursing Home Reform (CANHR)
Name	Prescott Cole
City	San Francisco
State	California
Email address	prescott@canhr.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Proposed Rule 5.4 sanctions litigation-bounty hunting.

Rule 5.4 (a)(5), as written, shall allow any lawyer or law firm to share settlement fees, directly or indirectly, with any nonprofit 501(c)(3) that recommends any matter to them. The matter doesn't even have to be connected to the 501(c)(3)'s mission statement. This literally means that any 501(c)(3) can make any kind of referral for anything that ends up in a lawsuit and anticipate a payday if the matter settles.

According to the National Center for Charitable Statistics (NCCS), there are currently 1.5 million nonprofit organizations registered in the United States. Rule 5.4 (a)(5) would be a tremendous financial incentive for questionable non-profits to search for viable California cases that they could direct to a California attorney or attorney group that would agree to give them a "finder's fee" if there was a settlement. As a State Bar-funded Legal Services Support Center, we certainly support additional funding for qualified not-for-profits legal services organizations. However, this rule goes far above and beyond supporting free and low fee legal services.

Under current State Bar rules, a Lawyer Referral Service must be certified by the California State Bar in order to operate and must adhere to stringent guidelines and rules of operation to ensure consumer protections. State Bar Certified lawyer referral services also have to pay annual fees (based on annual LRS income) to the State Bar. This rule appears to obviate the need for such certification since any not-for-profit can refer any case to any lawyer or law firm and share settlement fees.

CANHR recommends that Rule 5.4(a)(5) be amended to strike the term "recommends" or, at a minimum, include language that would create the requirement for a nexus between

the referring 501(c)(3)'s mission statement and
the matter being referred to the attorney.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	Mark A Lester
City	Camarillo
State	California
Email address	mark@venturaestatelegal.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I oppose the ATILS proposal to amend Rule 5.4.

My reasons are:

1. At this difficult time for all policy makers, the State Bar should postpone consideration of these significant changes which do not require urgent attention.

2. The State Bar should immediately focus its best energies on the impending enormous shortfall in funding for the courts, since the state will surely have the worst budget crunch in at least a decade. This will inevitably mean tighter budgets for the courts.

The Los Angeles County Bar Association's own programs, as well as dozens of others around the state, have demonstrated that, in good times and bad, the best way to increase most legal services needed by the middle and lower classes (e.g., family law, conservatorships and guardianships, bankruptcy, etc.) is through programs that facilitate the public's use of court processes.

3. In particular, with respect to the proposal to change Rule 5.4 to allow lawyers to share fees with nonprofits, there is a clear upside but also risk. Although many nonprofits provide legal services to the underserved, it is also so easy to become a nonprofit that virtually anyone can become a non-profit. Moreover, there is already very little enforcement of the rule barring 501(c)(3)'s from involvement in political causes. This relaxation could exacerbate these problems.

Thank you for considering my opposition.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	Public Law Center
Name	Leigh E Ferrin
City	Santa Ana
State	California
Email address	lferrin@publiclawcenter.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

To Whom It May Concern:

Public Law Center (“PLC”) writes to convey its comments on the Access Through Innovation of Legal Services Task Force’s (“ATILS” or “Task Force”) proposed regulatory change to Rule 5.4 that is currently available for public comment.

PLC is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC is a pro bono law firm and works with over 1,500 volunteer lawyers, paralegals, law students and others every year. Most of the cases that PLC places with the private bar are not eligible for attorney fee recovery. However, when the fees are able to be obtained from the opposing party, either by statute or by contract, PLC and its volunteers are eligible to recover fees. When a volunteer attorney or law firm recovers fees, many times those fees are either shared with PLC pursuant to the current Rule 5.4 or are donated to PLC.

Proposed Amended rule 5.4

PLC generally supports the proposed Rule 5.4. PLC only works in civil courts, where the majority of all cases are settled. Even in settlement, some attorneys fees are left to be determined by the court, leading to a court-ordered fee award, which would fall under the current Rule 5.4. However, many civil cases are fully settled out of court, and PLC would not want to be put in a position where the opposing party knew there were restrictions on how fees could be shared depending on whether the fees were court-ordered or through settlement.

PLC makes it clear, when working with its volunteer attorneys, that no pro bono case could be taken on contingency. A case is only truly a pro bono case when the attorney

recovers no fees from his or her client. If an attorney agrees not to charge the client up front but then takes a percentage of the client's recovery, that is not a pro bono case. There must be a negotiation of the client's recovery, separate from the negotiation of attorneys fees, for the case to remain a true pro bono case.

PLC's mission of access to justice may only be achieved through the collaboration of its staff and volunteers. Encouraging pro bono attorneys to share fees with PLC, even when a case is settled, is one of the best ways to ensure that PLC has additional unrestricted funds to be able to continue achieving its mission.

Initially, PLC had reservations about the freedom of non-profits that are not traditional pro bono organizations to obtain fee awards from cases it finds and places with the private bar. While that could occur under the current Rule 5.4, it would be much more difficult for a non-profit to take advantage of that situation since a court would need to review any fee award. However, even with that step in place, arguably a firm could obtain a fee award and then choose to make a donation to a non-profit, independent of the fee award itself. However, by expanding the fee sharing to settlement agreements, there is less oversight over the process of how the fee award is shared.

As discussed in ethical opinions addressing this proposal, it is not likely that a non-profit organization would be formed solely to access shared attorney fee awards. All non-profits will still have to comply with the Internal Revenue Code and other laws and regulations to qualify as a non-profit. These steps are not insurmountable, but they are not clear and straightforward either. To maintain non-profit status requires work as well. While some organizations may jump through the hoops to take advantage of this rule, we do not believe

it will be common, and we believe that most private attorneys will be cautious in identifying the organization with which they are willing to share an attorneys fee award.

PLC appreciates the cross-reference to the other Rules of Professional Conduct, such as notification to the client, which should also provide some protection against abuses. PLC would encourage the State Bar to implement a reporting requirement for cases where fees are shared with a non-profit as a result of a settlement, or conduct periodic audits of settlement awards to identify abuses. While this could create an additional administrative burden, PLC believes the number of cases the State Bar would need to monitor would be relatively minimal. In addition, or in the alternative, the State Bar could also conduct an education campaign among the private bar to encourage private attorneys to carefully screen any non-profit with which it may share fees.

Please feel free to reach out to us should any of our comments need clarification, or if we can expand on any of the information provided above.

Sincerely,
PUBLIC LAW CENTER

Leigh E. Ferrin
Director of Litigation and Pro Bono
(714) 541-1010 x290 *
lferrin@publiclawcenter.org

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	James Gorton
City	Pasadena
State	California
Email address	jgorton@gjpatorneys.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

1. Pressing forward with radical changes to fee sharing with non attorneys and the ability of non attorneys to own and control law practices in the midst of a global health pandemic which is killing people in their hundreds of thousands and the beginnings of a significant and potentially devastating recession is plainly not appropriate at this time. These proposals should be aired and considered in a time and an atmosphere in which they can be discussed by all affected Californians, not buried in the devastating and unprecedented events now overtaking us. It is inconceivable that the task force cannot understand their own insensitivity and recklessness in regard to pushing forward with these proposals now. Is true public comment and debate desired? Then these proposals should be shelved until the emergency is past.

2. Changes to the Rules as to technological competence are far too vague and open to abusive enforcement. What is needed is specific guidance in each area of technology if this 'reform' is to be adopted. Further what constitutes the requisite level of competence should be specifically defined so that members of the Bar can know exactly what is expected of them. The rule should require the State Bar to develop a technological certification program to provide attorneys with a safe harbor certification of compliance. The proposed rule is additionally lacking in that it fails to consider the relative skill sets of attorneys, many of whom are skilled courtroom advocates but who may not personally be of a personality type which is able or comfortable with tech, but who nonetheless may employ persons to fill that need. Any rule to be adopted should recognize that technological competence may be satisfied by having adequate staff or independent contractor fulfillment.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	James Gorton
City	Pasadena
State	California
Email address	jgorton@gjpatorneys.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Additional Comments:

1. Allowing non attorneys to form unlicensed entities and thus guide the work and duties of attorneys toward the client is a significant step backward toward 19th century lawlessness toward the client. Our goal for the past century has been to assure that the clients' interests come first. If non attorneys, not covered by or due to abide by the Rules of Professional Conduct can influence and control the decisions of attorneys as to their clients' affairs, then the centrality of the client's interest in our practices will have ended. If this is being done in the name of expanding justice, it will be a strange justice indeed for the clients' own interests to have been bargained away as part of the 'reform.'

The fact that this is proposed to be limited to non profits is not helpful or relevant in that the formation of a non profit is a matter of filing a page of paper with the Secretary of State and paying a small fee. Anyone at all may do so and claim such status, using it as a shield to engage and control attorneys without reference to their duties to the persons who should be their clients.

If the intent is sincere, then the rule should require that the entity be recognized as a 501c3 charity by the IRS and have also filed and been approved by Franchise Tax Board as such. Requiring the foregoing would at least limit the potentially abusive oversight by non attorneys to true public charities, not simply nonprofits, which may be formed and operated by anyone with \$30 in their pocket.

2. Where clients need assistance and overwhelmingly cannot afford it is in representation in the courts. There is no connection between allowing fee sharing or firm ownership with non attorneys which addresses that need in any way. What is needed is expanded court funding and programs for pro-pers, not a 'reform' stripping

away the rights of clients.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	Mina Sirkin
City	Woodland Hills
State	California
Email address	minasirkin@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Because anyone can become a non-profit entity, this proposal is opposed because it leaves a way for Amazon, LegalZoom and others like it to create an non-profit arm and share fees with attorneys, thereby indirectly controlling the attorneys.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	No
Name	Lisa Weinmann
City	Stevenson Ranch
State	California
Email address	lisa@probatecalifornia.attorney
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>At this time in history, considering the pandemic, I would prefer the State Bar direct focus to its members and courts. We will urgently need leadership and support just to address the backlogs and budget shortages we will undeniably be coping with in the near future.</p> <p>There has not been any type of request from members of the Bar or the public for this proposed rule. Please postpone this decision during this time.</p> <p>Thank you for considering my opposition.</p>

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	California Commission on Access to Justice
Name	Jasmine Kaddoura
City	Oakland
State	California
Email address	jkaddoura@calatj.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	CCAJ_Comment_Rule_5.4.pdf (199k)

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

350 Frank Ogawa Plaza, Suite 701, Oakland, CA 94612 · (510) 893-3000

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San Francisco*

HON. ERICA R. YEW
*Santa Clara County Superior Court
San Jose*

JACK W. LONDEN
*Executive Director
San Francisco*

May 11, 2020

The State Bar Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Support for the Proposed Amendment to California Rule of Professional Conduct
5.4 (Financial and Similar Arrangements with Nonlawyers)

Dear Members of the Board of Trustees:

The California Commission on Access to Justice submits this comment to the State Bar Board of Trustees in support of the proposed amendment to California Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers).

For 23 years, the Access Commission has worked to advance access to justice for all Californians using broad-based strategies informed by diverse stakeholders. The Access Commission proposes innovative solutions and oversees efforts to increase resources and improve methods of helping the poor, those of moderate-income, and others facing legal problems that they have no way to address and legal rights they have no way to realize.

Rule 5.4 relates to the professional independence of a lawyer and was recently revised to be patterned on ABA Model Rule 5.4 (Professional Independence of a Lawyer). The new rule gathered together in a single rule several concepts intended to promote the independence of a lawyer's professional judgment. Previously, these concepts were spread across separate rules. The new rule was intended to improve public protection by maintaining and expanding prohibitions on a lawyer's conduct, relationships, and fee-sharing arrangements that could pose a threat to the lawyer's exercise of independent professional judgment.

Rule 5.4 is at the heart of several proposed reforms separately under consideration to increase access to justice for low- and moderate-income people whose legal needs are not being met under the current system, to potentially allow for the increased use of technology and artificial intelligence in the practice of law, and to address concerns that the current rule unnecessarily limits innovation in the delivery of legal services. Many of the proposed reforms being separately considered, including allowing nonlawyers to hold financial interests in law firms and legal fees and allowing nonlawyers to provide limited legal services without the supervision of an attorney, are controversial.

The current proposed change to Rule 5.4, however, is not a controversial reform. Instead, the current proposal is limited to expansion of the existing rule that already allows a lawyer or law

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

firm to share legal fees with non-profit organizations in certain situations. Specifically, the proposed rule would revise the existing provision for sharing court-ordered fees with a non-profit organization that employs, retains, recommends, or facilitates employment of the lawyer to also allow the sharing of fees arising out of settlement or other resolution of the claim or matter, provided that the non-profit organization qualifies under section 501(c)(3) of the Internal Revenue Code. Because many matters are resolved without court-ordered fees, consideration and inclusion of other fee types makes sense and does not alter the purpose of the limited exception.

Moreover, the revised provision allows fee-sharing arrangements to accomplish what has long been done by many private lawyers who collect a fee earned as cooperating counsel with a non-profit organization then donate all or part of that money to the non-profit. There is no reason why fee-sharing arrangements that have the same substantive effects and incentives as this well-established practice of fee-donation should be discouraged. In both forms, such arrangements are beneficial.

Encouraging increased financial support of non-profit organizations is important to improving equal access and the fair administration of justice. Lawyers and law firms should be supported in sharing or donating legal fees or other money from revenues received for legal services with either legal services organizations or other 501(c)(3) non-profit organizations. While it is essential that financial arrangements for compensation of lawyers must be fair, consistent with the interests of the client, and not interfere with the independent professional judgment of the lawyers, Rules 1.5, 1.5.1, and 1.8.1 already so provide. These principles are not threatened by arrangements that provide financial support for non-profits.

We note that many lawyers and law firms already give significantly to legal services and other non-profit organizations. More is needed. Expanding financial support—through fee-sharing and otherwise—is critical.

Lawyers and law firms are permitted and encouraged to make financial contributions to legal services organizations. ABA Model Rule 6.1, for example, in addition to establishing the professional responsibility to provide voluntary pro bono service, makes clear that every lawyer also should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. As further noted in Comment [10] to ABA Model Rule 6.1, “Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.”

This is consistent with Business & Professions Code section 6073, and Comment [5] to California Rule of Professional Conduct 1.0 (Purpose and Function of the Rules of Professional Conduct), which both, in addition to encouraging voluntary pro bono legal service, encourage financial support to organizations providing free legal services to persons of limited means. All California lawyers are encouraged to devote professional time and resources to ensure equal access to the system of justice.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

The proposed change to Rule 5.4 may further facilitate financial support of non-profit organizations by lawyers and law firms through fee-sharing arrangements, and, therefore, has the Access Commission's support.

Although the Access Commission prioritizes needed increased support of legal services, the current rule and the proposed expanded rule are not limited to fee sharing with legal services organizations. To the extent there are concerns with other non-profit organizations, the proposed expansion for sharing other types of fees beyond court-ordered fees includes a limitation that requires the non-profit organization to be qualified under section 501(c)(3) of the Internal Revenue Code. This limitation may help ensure funds are used for charitable purposes.

The Access Commission does not expect the proposed amendment to California Rule of Professional Conduct 5.4 will significantly increase funding of legal services. Nevertheless, incentives and opportunities for fee-sharing with non-profit organizations may be helpful in long-term efforts focused on encouraging pro bono legal services and increased financial support of legal services and other non-profit organizations and, therefore, is helpful.

The California Commission on Access to Justice supports the proposed amendment to California Rule of Professional Conduct 5.4 (Competence), and encourages the State Bar to continue to look for ways to highlight and address the needs of low- and moderate-income people who participate in the justice system including through financial support of legal services and through technology and innovation.

Sincerely,



Judge Mark A. Juhas
Chair

cc: Donna S. Hershkowitz
Interim Executive Director

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Sarah Ireland
City	Newport Beach
State	California
Email address	sireland@ocbar.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	OCBA_Public_Comment_Letter_Rule_5.4.docx (65k)

May 14, 2020



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Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639
Via Email: angela.marlaud@calbar.ca.gov

Re: Proposed Amendment to California Rules of Professional Conduct,
Rule 5.4

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments to Proposed Amendment to California Rules of Professional Conduct, Rule 5.4.

Founded over 100 Years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors is made up of practitioners from large and small firms, with varied civil and criminal practices and of different ethnic backgrounds and political leanings. The Board has approved these comments prepared by the Professionalism and Ethics Committee.

Under the current rule, a nonprofit organization may share only in court-awarded legal fees. Because courts generally may award legal fees only in cases where fees are recoverable by statute, contract, or law (*see* Cal. Civ. Proc. Code § 1033.5(a)(10)), legal fees may be shared under the current rule only in cases where the legal fees are being paid by the opposing party, not by the sharing lawyer's client.

The current rule affords an important protection to clients by helping to minimize the inherent conflict of interest between lawyer and client that may arise where both the attorney's fee and the client's damages are being paid from a common source, particularly if the source is limited. In that circumstance, there may be tension between the lawyer's interest in maximizing the amount allocated to the attorneys' fees and the client's interest in maximizing the amount of damages.

The application of the current rule only to cases in which a contract, statute or law permits recovery of legal fees as costs ensures that legal fees will be paid by the opposing party, not the client who obtained the lawyer through the non-profit organization. The "court-awarded" requirement allows both lawyer and client to have a disinterested tribunal determine the appropriate amount of legal fees separate from damages.

Expanding the ability of nonprofit organizations to share in a legal fee that is not court-awarded "but arises from a settlement or other resolution of the matter," as proposed in new rule 5.4(a)(5)(ii), removes the client-protective requirements of the current rule. This would allow nonprofit organizations to share in legal fees where no fee-shifting statute, contract or law applies such that the legal fees would be paid by clients who are often among the most vulnerable and economically challenged and whom the lawyers are charged to protect.

Moreover, clients who currently receive a nonprofit organization's assistance in retaining a lawyer, and where fees are not subject to payment by the opposing party, may now be charged a standard or even discounted fee by the lawyer. But the fees for which the client would be responsible may increase if the lawyer is required by the nonprofit organization to share the fee with the organization – a result that cannot occur under the current rule. We do not believe ATILS has adequately explained the policy or other reasons for this significant expansion, and we are concerned that the proposed rule as drafted is less client protective than the current rule.

Even in fee-shifting cases where the opposing party will be paying the attorneys' fees, without the involvement of the court there would be no outside check on the inherent conflict of interest that arises when lawyer and client are receiving payment from the same source. In such circumstances, the conflict of interest between lawyer and client is manifest in the decisions that have to be made concerning how to allocate the settlement sum between fees and damages. We are concerned that vulnerable clients in non-court-awarded fee situations will lack the protections due process affords when these decisions are made by a disinterested tribunal.

We further believe that the limitation on proposed rule 5.4(a)(5)(ii) to nonprofit organizations who qualify under Internal Revenue Code section 501(c)(3) is an important protection that should be preserved if any version of this proposed rule is adopted. Because of the broader application of the rule to situations in which there may be no court oversight, further restrictions should be imposed on the types of nonprofit organizations permitted to share legal fees when cases are settled or otherwise resolved. Without such restrictions, current for-profit organizations engaged in providing legal-related services may attempt to take advantage of the new rule, forming non-profit organizations that primarily function as a referral source, not actually providing any service to under-served populations. To minimize that risk, we believe additional restrictions should apply.

We recognize the policy interest in allowing nonprofit organizations to share in legal fees, but we believe any rule permitting it in the context of out-of-court resolution must (1) limit the types of nonprofit organizations that can share in the fee, as suggested above, and (2) be limited to fee-shifting cases and emphasize the lawyer's obligation to exercise independent professional judgment (similar to the Comment in the District of Columbia's version of rule 5.4 cited in the ATILS report) and the lawyer's obligation to put the interests of the client first, before those of the lawyer or nonprofit organization, in negotiating and documenting any settlement or other case resolution.

Finally, on a less substantive note, we suggest changing the proposed new language in Comment [3] "as just one example" to "as just some examples," because the sentence to which the phrase is added contains three, not just one, example.

Re: Proposed Amendment to California Rules of Professional Conduct, Rule 5.4

May 14, 2020

Page | 3

Thank you for your consideration of our comments and suggestions.

Sincerely,

Orange County Bar Association

A handwritten signature in black ink, appearing to read "S.B. Garner", with a long horizontal flourish extending to the right.

Scott B. Garner
2020 President

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	The Legal Aid Association of California
Name	Zach Newman
City	Oakland
State	California
Email address	znewman@laaonline.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	LAAC_Rule_5.4_Support_Letter.pdf (213k)

“The Unified Voice of Legal Services” !



May 15, 2020

Standing Committee on Professional Responsibility and Conduct
State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Proposed Amended California Rule of Professional Conduct 5.4 (Financial and Similar Arrangements with Nonlawyers)—SUPPORT

To the Standing Committee on Professional Responsibility and Conduct,

I am writing on behalf of the Legal Aid Association of California (LAAC) to express our **support** for the proposed amended California Rule of Professional Conduct (RPC) 5.4 (Financial and Similar Arrangements with Nonlawyers).

LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California’s unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice.

LAAC has followed the Task Force on Access Through Innovation of Legal Services (ATILS) from the beginning. ATILS represented the intention of the State Bar of California to ensure that the legal community does not unnecessarily hinder increasing access to justice through outdated regulatory models that impede innovation. ATILS proposed a number of ideas, some simple and easy fixes, others more system-wide and transformative. While only two complete recommendations were released for public comment—this proposed change of RPC 5.4 as well as RPC 1.1—we would like to commend the Bar for launching this task force, and for the Bar’s support of this and other access to justice initiatives, now and into the future.

In this light, we view the proposed change to RPC 5.4 as positive. Specifically, this change would expand the existing exception for fee sharing arrangements with nonprofit organizations through a new exception to allow lawyers to share or pay legal fees to nonprofits. According to ATILS, the intent of this rule change is to “directly enhance the ability of a nonprofit legal services organization to expand its activities and funding options through sharing in legal fees

that are achieved through a settlement.”¹ We are in strong support of this intent, as well as any effort to serve it by creating additional modes of funding free legal services.

We would be remiss, however, if we failed to acknowledge some level of concern from our members about the potential for abuse. Because 501(c)(3) status is not a guarantee that an organization is a good actor—and this rule change does not provide the same level of oversight as is in place for certified lawyer referral services, nor is it limited to State Bar regulated legal aid organizations—perhaps an additional check would be prudent here. We recommend, for example, that the court hold final authority to approve a disbursement.

In a context of an extreme justice gap in California, all funding and fees paid to nonprofits—including legal aid nonprofits—allows those nonprofits to hire more personnel and, ultimately, provide an increased quantity and depth of services to those who need them most. This change to RPC 5.4 acknowledges the justice gap and presents an important yet commonsense move to allow for fee sharing arrangements with nonprofits where lawyers elect to do so. Ultimately, amending RPC 5.4 in this way is an opportunity to take a step in the right direction for access to justice, leveling the playing field for low-income litigants, and closing the justice gap in California.

We support this change to RPC 5.4. Thank you again for this opportunity to comment. Please do not hesitate to reach out to me with questions or comments.

Sincerely,



Salena Copeland
Executive Director, The Legal Aid Association of California

¹ REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025644.pdf>.

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Association
Name	Vanessa Villagomez
City	Los Angeles
State	California
Email address	villagomez@lacba.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	LACBA__Comment__Rule_5.4__05132020.pdf (182k)



Los Angeles County Bar Association

1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553

Telephone: 213.627.2727 | www.lacba.org

To: The State Bar of California Board of Trustees

From: Los Angeles County Bar Association

Date: May 13, 2020

Re: Los Angeles County Bar Association Response to Proposed Amendment of Rule of Professional Conduct, 5.4.

SUMMARY

For the reasons noted below, the Los Angeles County Bar Association (LACBA) respectfully opposes the proposed amendment to Rule of Profession Conduct, 5.4. Additionally, if the Trustees nevertheless were to decide to recommend to the Supreme Court a rule 5.4 amendment along the lines of the current proposal, LACBA believes the proposed draft of Rule of Professional Conduct 5.4 is overly vague and unclear.

DISCUSSION

The expansive nature of this proposed revision encroaches on bar associations and certified lawyer referral services throughout California. Here, there would be little practical difference between a bar association that invests significantly in lawyer referral certification, compliance, staffing, and quality control, and any 501(c)(3) organization in California. Both organizations would be entitled to share fees, while certified lawyer referral service and bar associations will pay the many costs of compliance and public protection.

There is a significant distinction between honoring a court awarded fee and advancing any type of fee sharing between any 501(c)(3) referrer and a lawyer. Under the proposed revisions, a recommending 501(c)(3) of any type would have a significant financial interest in referring clients. The same organizations, arguably, would have no interest in ensuring a quality recommendation to an experienced and insured lawyer. Lawyers, also, are likely to actively solicit 501(c)(3) organizations for referrals with various terms including rates, exclusivity, and other terms. Here, these transactions will likely disregard the many safeguards in place through the State Bar of

California's long-standing and successfully proven efforts to protect the public through certified lawyer referral services. This goes directly to the State Bar's mission of public protection and the proposed revision would "water down" the value of certified Lawyer Referral Services, which already play a significant role as a referral resource to 501(c)(3) organizations in California.

It is our opinion that, if the proposed rule change is adopted, many 501(c)(3) non-profit organizations may engage in loose and mostly unregulated referral operations to share fees with lawyers to generate income. Here, we believe that if any organization wishes to share fees with lawyers based on an arrangement between the organization and the lawyer, that organization should become a certified Lawyer Referral Service and comply with the regulatory scheme that is proven to work and designed to insure the public is protected from unscrupulous efforts to share fees with lawyers.

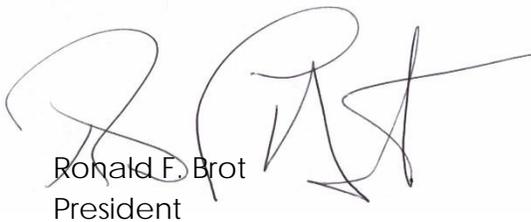
Here are the drafting problems created by the current proposal:

- 1) At what point does the organization have to qualify under 501(C)(3)? When: (a) the organization employed, etc., the lawyer; (b) the lawyer and the organization entered into a fee-sharing agreement; (c) the settlement is finalized; (d) the adverse party makes a payment to the lawyer; (e) the lawyer makes the payment to the organization (and if the settlement and payment are made in installments, at some or all of the payments); or (f) all of the above? The current drafting is vague on this important aspect.
- 2) It is common in estate planning to include charitable benefits to organizations that are conditional. Here is sample language: "... so long as it then is qualified as a charitable organization under IRC §501 (C)(3)" This is phrased in various ways that have the same effect, which is that the transfer will be deductible for estate tax purposes b/c the organization is qualified under 501(C)(3) when the gift is made to it. However, it is uncertain what might be meant in saying that an organization "qualifies" under 501(C)(3). Does that mean the organization then (and, again, the drafting leaves uncertain what is meant by "then") has IRS approval to receive gifts that can be tax deductible or that it might have IRS approval if it were to apply? The current drafting is vague on this important aspect.
- 3) Is the authorized fee sharing limited to amounts awarded to the lawyer by the terms of the settlement? Does "arises from a settlement" refer only to a defendant's contractual agreement to pay fees to a plaintiff's lawyer? What if the lawyer has been financed either by the nonprofit organization or by someone else and wants to share some or all of those fees with the nonprofit organization, perhaps as a result of events that occurred during or even after the representation? The current drafting again is uncertain on this aspect.

Rule drafting should not be conceptual but should be as precise as possible so that the protection of clients and the legal system intended by the rule is accomplished and so that lawyers are not subjected to claims of rule violations for conduct the rule was not intended to proscribe. This proposal does not meet that standard.

Our responses to the questions implicit in the three numbered paragraph are that, if the principal of the current proposal were adopted, fee sharing should be permitted (where there is no court order) only if the organization is qualified as a charitable organization under IRC §501(C)(3) when the lawyer makes the payment to the organization, and that the permitted fee sharing should be broadened to include any fee received by the lawyer with respect to the matter and should not be limited to amounts the lawyer receives from the adverse party.

Respectfully submitted,



Ronald F. Brot
President

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	Pangrle Patent, Brand & Design Law, P.C.
Name	Brian Pangrle
City	Burbank
State	California
Email address	brian@ppbdlaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see attached document
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	Pangrle-Comment-Rule-5-4.pdf (765k)

Re: Public Comment as to Proposed Amended Rule 5.4

Background per the State Bar

The State Bar seeks public comment regarding proposed amended California Rule of Professional Conduct 5.4. The proposed amendment would expand the existing exception for fee sharing arrangements with a nonprofit organization provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code.

The Task Force on Access Through Innovation of Legal Services (ATILS) drafted this proposed rule revision. Please note: ATILS will sunset on March 31, 2020. As a result, the Board has directed the State Bar of California Standing Committee on Professional Responsibility and Conduct to receive and review the public comments for this item.

Background material

- A. Proposed Rule 5.4 – Clean and Redline
- B. Board of Trustees Agenda Item – Report and Recommendations of the Task Force on Access Through Innovation of Legal Services
- C. State Bar of California Task Force on Access Through Innovation of Legal Services Final Report and Recommendations Report (The Task Force’s recommendation on rule 1.1 is discussed on pp. 19 – 21.)

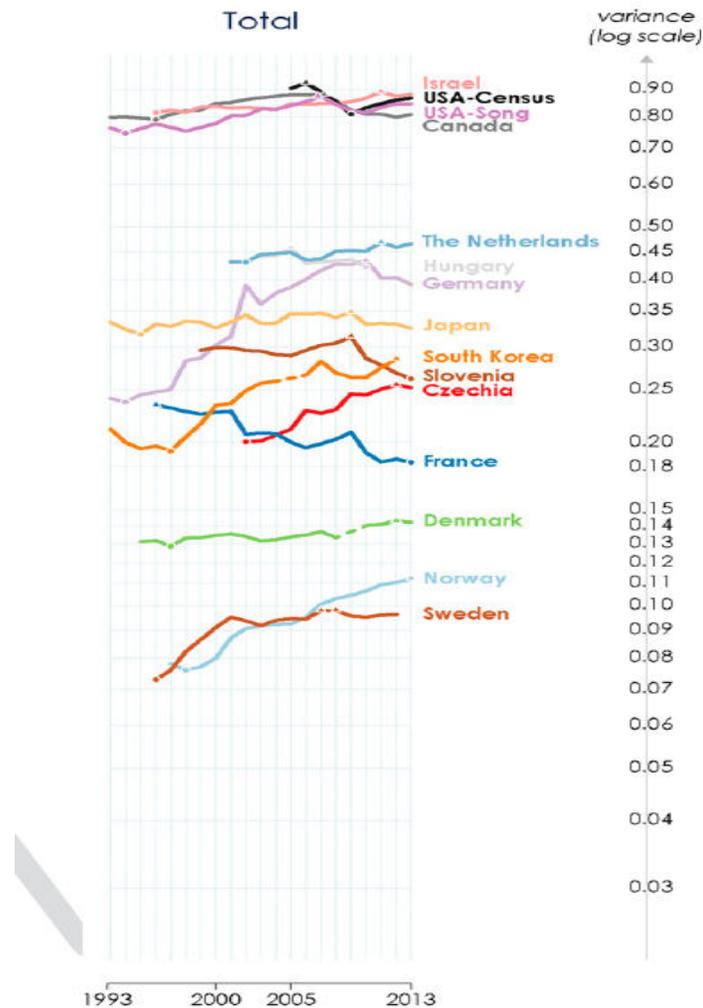
Comment

The proposed amended Rule 5.4 should not be adopted. The mission of the State Bar of California Task Force on Access Through Innovation of Legal Services (ATILS Task Force) changed, materially, from one of investing the use of technology to close the justice gap (2019 California Justice Gap Study, CJG Study) to one of effectively deregulating the practice of law per an economic ideology that has been a contributor to inequality, which is an underlying root cause of the access to justice and justice gap problem.

Common flaws to the CJG Study, the Henderson Report and the ATILS Task Force include a lack of data and analyses thereof as to economic and social inequality. The U.S. and Canada lead the world in between-workplace inequalities in high-income countries as indicated in Figure 1 of an article by Tomaskovic-Devey et al. (Rising between-workplace inequalities in high-income countries, Proceedings of the National

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Academy of Sciences (PNAS), April 28, 2020, vol. 117, no. 17, pp. 9277-9283), which is reproduced below.¹



Tomaskovic-Devey et al. state:

Rising between-workplace inequality occurs when workplaces become more dissimilar in their average pay. This can be produced by some firms becoming more powerful in their market positions and so accumulating larger shares of national (or global) income. Examples of these organizational dynamics include the rise of superstar firms, such as the global dominance of a few technology firms such as Microsoft, Apple, Facebook, Google, and Amazon (5), and the power of financial service firms in some countries to accumulate national and

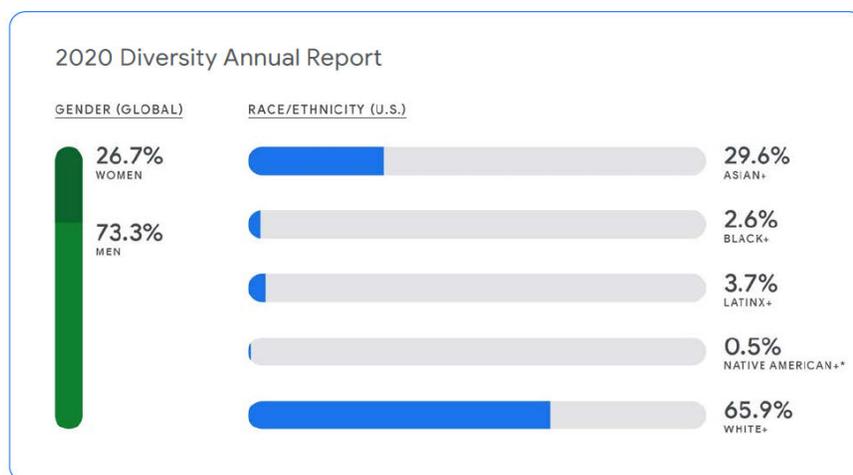
¹ Tomaskovic-Devey, D., et al., Rising between-workplace inequalities in high-income countries, Proceedings of the National Academy of Sciences (PNAS), April 28, 2020, vol. 117, no. 17, pp. 9277-9283.

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global income (14, 15). Akerman (16) suggests that this process leads to the concentration of more educated workers in higher-wage firms and the less educated in lower-wage firms.

Tomaskovic-Devey et al. also indicate that community segregation driven by the concentration of more educated workers in higher-wage firms and the less educated in lower-wage firms results in lower wage workers living in communities with less access to professionals, which though not explicitly stated, can be logically assumed to include lawyers. In that regard, data in the CJG Study and Henderson Report should be supplemented and then reassessed, particularly for long-term consequences of community segregation.

It is worth noting that firms listed by Tomaskovic-Devey et al. (Microsoft, Apple, Facebook, Google, and Amazon) include a strong presence in California. Data from Palo Alto, place of Stanford University and the Stanford Center on the Legal Profession (SCL), point to a median home price that has risen to approximately \$2,000,000 or more. Published diversity data from Google, based in Mountain View, California (bordering Palo Alto), show that its leadership lacks diversity, as illustrated in graphics below from the Google Diversity Annual Report 2020.²



² 2020 Diversity Annual Report (<https://diversity.google/>).

	Race (Plus system categories)					U.S. - Gender	
	Asian+	Black+	Latinx+	Native American+	White+	Women	Men
Leadership							
2014	24.2%	1.7%	2.2%	0.6%	73.2%	20.6%	79.4%
2015	25.0%	2.0%	2.0%	0.9%	72.2%	23.2%	76.8%
2016	25.8%	1.8%	2.1%	0.7%	71.3%	24.0%	76.0%
2017	27.1%	2.0%	2.4%	0.8%	69.6%	24.2%	75.8%
2018	27.3%	2.4%	2.7%	0.8%	68.9%	25.3%	74.7%
2019	28.9%	2.6%	3.3%	0.7%	66.6%	26.4%	73.6%
2020	29.6%	2.6%	3.7%	0.5%	65.9%	26.9%	73.1%

As shown above, in the U.S., Google has a workforce that is 2.6% Black, 3.7% Latinx and 0.5% Native American, while its leadership is only 26.9% women. As with many corporations, individual wealth tends to be greatest for the founders and their investors and diminishing for those that come later. The Google data need to be viewed with respect to time to understand their impact on inequality, which, again, is a root cause of the access to justice and justice gap problem. In other words, disadvantaged minorities and women were largely excluded from the wealth generation engine of “Silicon Valley”. Economic studies may demonstrate that the impact may be similar to the impact of the discriminatory practices of handling of home loans post-WWII.³ In essence, the lost opportunity for disadvantaged minorities and women is likely irreparable and will have consequences for generations to come.

As to another one of the firms mentioned by Tomaskovic-Devey et al., Amazon, it is known for “innovations” in state and local sales tax arbitrage (i.e., regulatory arbitrage), along with “efficient” low wage warehouses. Such disruptive innovations act to concentrate wealth at the expense of states and local communities. Amazon’s strategy stands as an example of “innovation” rushing ahead of regulation, as is the

³ See, e.g., Rothstein, R., *The Color Of Law: A Forgotten History Of How Our Government Segregated America*, 2017 (ISBN: 978-1631492853).

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current case with artificial intelligence (AI) or, more appropriately, machine learning (ML).^{4,5}

⁴ See, e.g., The Guardian in an August 2017 article entitled “Rise of the racist robots – how AI is learning all our worst impulses”:

In May last year, a stunning report claimed that a computer program used by a US court for risk assessment was biased against black prisoners. The program, Correctional Offender Management Profiling for Alternative Sanctions (Compas), was much more prone to mistakenly label black defendants as likely to reoffend – wrongly flagging them at almost twice the rate as white people (45% to 24%), according to the investigative journalism organisation ProPublica.

“If you’re not careful, you risk automating the exact same biases these programs are supposed to eliminate,” says Kristian Lum, the lead statistician at the San Francisco-based, non-profit Human Rights Data Analysis Group (HRDAG). Last year, Lum and a co-author showed that PredPol, a program for police departments that predicts hotspots where future crime might occur, could potentially get stuck in a feedback loop of over-policing majority black and brown neighbourhoods. The program was “learning” from previous crime reports. For Samuel Sinyangwe, a justice activist and policy researcher, this kind of approach is “especially nefarious” because police can say: “We’re not being biased, we’re just doing what the math tells us.” And the public perception might be that the algorithms are impartial.

<https://www.theguardian.com/inequality/2017/aug/08/rise-of-the-racist-robots-how-ai-is-learning-all-our-worst-impulses>

Pro Publica’s expose on was entitled “Machine Bias”, concluding: “There’s software used across the country to predict future criminals. And it’s biased against blacks.” (Angwin et al., ProPublica, May 23, 2016).

⁵ U.S. National Transportation and Safety Board (NTSB), Accident Report, NTSB/HAR-20/01, PB2020-100112 (Tesla Crash, Mountain View, California):

According to performance data downloaded from the vehicle, the driver was using the advanced driver assistance features traffic-aware cruise control and autosteer lane-keeping assistance, which Tesla refers to as “autopilot.” As the Tesla approached the paved gore area dividing the main travel lanes of US-101 from the SH-85 exit ramp, it moved to the left and entered the gore area.[1] The Tesla continued traveling through the gore area and struck a previously damaged crash attenuator at a speed of about 71 mph.[2] The crash attenuator was located at the end of a concrete median barrier. The speed limit on this area of roadway is 65 mph. Preliminary recorded data indicate that the traffic-aware cruise control speed was set to 75 mph at the time of the crash.[3] The impact rotated the Tesla counterclockwise and caused a separation of the front portion of the vehicle. The Tesla was involved in subsequent collisions with two other vehicles, a 2010 Mazda 3 and a 2017 Audi A4 (see figure 1).

NTSB identified the following safety issues:

- Driver distraction
- Risk mitigation pertaining to monitoring driver engagement
- Risk assessment pertaining to operational design domain
- Limitations of collision avoidance systems
- Insufficient federal oversight of partial driving automation systems
- Need for event data recording requirements for driving automation systems, and
- Highway infrastructure issues

As to the Covid-19 pandemic, it has exposed “weird” behavior in AI algorithms.⁶ As such, contrary to the statements of Mr. Solomon of the SCL to rush forward with “innovation” and amendment to Rule 5.4 because of the Covid-19 pandemic (see May 14, 2020 Board Meeting transcript), this is the time to take it slow.

As to Amazon, the Covid-19 pandemic has not only exposed AI issues (see, e.g., Heaven 2020) but also tensions resulting from between-workplace inequality. For example, consider the recent firing of warehouse employees that allegedly complained about a lack of personal protection equipment (PPE) as explained by Mr. Tim Bray, a Vice President and Distinguished Engineer at Amazon Web Services in his resignation blog post “Bye, Amazon” of May 2020:

We don’t need to invent anything new; a combination of antitrust and living-wage and worker-empowerment legislation, rigorously enforced, offers a clear path forward.⁷

The expert insider, Mr. Bray, is correct, “[w]e don’t need to invent anything new”. Antitrust enforcement against some California companies, living wages in places like Palo Alto (i.e., well-beyond \$15 per hour), and worker-empowerment legislation will go far to address the access to justice and justice gap problem.

The ATILS Task Force overlooks workplace inequalities and corporate antitrust issues as part of a solution to access to justice and rather hones its focus squarely on perceived antitrust issues of the State Bar and the licensing of attorneys. The ATILS Task Force seems to have missed the elephant in the room; perhaps because it is the elephant speaking.

⁶ Heaven, W.D., Our weird behavior during the pandemic is messing with AI models, Machine-learning models trained on normal behavior are showing cracks —forcing humans to step in to set them straight. Technology Review (MIT), May 11, 2020 (<https://www.technologyreview.com/2020/05/11/1001563/covid-pandemic-broken-ai-machine-learning-amazon-retail-fraud-humans-in-the-loop/>):

What’s clear is that the pandemic has revealed how intertwined our lives are with AI, exposing a delicate codependence in which changes to our behavior change how AI works, and changes to how AI works change our behavior. This is also a reminder that human involvement in automated systems remains key. “You can never sit and forget when you’re in such extraordinary circumstances,” says Cline.

⁷ Bray, T., Bye, Amazon (<https://www.tbray.org/ongoing/When/202x/2020/04/29/Leaving-Amazon>).

The ATILS Task Force exhibited a strong bias toward an economic ideology, which, as explained by Tomaskovic-Devey et al. and an expert insider, Mr. Tim Bray (former Amazon VP), appears to be an underlying cause of the access to justice and justice gap problem.

ATILS Evidence of Economic Ideological Bias

Perceptions of an economic ideological bias of the ATILS Task Force was highlighted in an article by the ABA Journal, entitled “Attorneys question presence of tech industry insiders on California bar task force for reforming legal industry”.⁸ The title of the article is open to question, particularly the use of “attorneys” being the questioners. For the ATILS Task Force, that may be a reason for its mission creep into mechanisms to deregulate the practice of law (i.e., to hide the elephant from attorney interrogation).

During the May 14, 2020 meeting of the Board of Trustees of the State Bar of California (State Bar), Mr. Jason Solomon, Director of the Stanford Center on Legal Profession (SCL) stated that “non-lawyer ownership is the key pillar to all the other recommendations” and that Prof. Deborah Rhode is “perhaps the leading authority in the world on access to justice, legal ethics rules and the relationship between the two” (emphasis in original).

Mr. Solomon continued, citing evidence in England, which has instituted a framework for so-called “McKenzie Friends”. In contrast to Mr. Solomon’s opinion, the author of a recent study as to McKenzie Friends concluded:

To help protect the many vulnerable people in these cases, we need to see a move towards a more regulated environment with increased transparency to make sure that people know the information they are accessing and the legal qualifications of those advising them.⁹

Further, the Law Society president Simon Davis added:

⁸ Moran, L., Attorneys question presence of tech industry insiders on California bar task force for reforming legal industry, ABA Journal, December 5, 2019 (<https://www.abajournal.com/web/article/california-nonlawyer>).

⁹ Slingo, J., McKenzie friends giving ‘biased and misleading’ advice, university study finds, The Law Society Gazette, December 10, 2019 (<https://www.lawgazette.co.uk/news/mckenzie-friends-giving-biased-and-misleading-advice-university-study-finds/5102464.article>).

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McKenzie friends are unregulated and the term covers a multitude of informal roles, so there is no centralised data we know of that shows how many people are assisted in this way, but as legal aid cuts bite deeper and more people are forced to deal with legal problems without a solicitor, unscrupulous McKenzie friends may take advantage of an unmet need.¹⁰

Given the foregoing 2019 evidence and opinions on McKenzie Friends, the statements of Mr. Solomon that rely on the UK experience deserve scrutiny.

As to the global “expert” mentioned by Mr. Solomon, Prof. Rhode of Stanford University, she seeks, not amendment, but repeal of Rule 5.4, as stated in the White Paper of April 2020 (SCL White Paper) referred to by Mr. Solomon in the May 14, 2020 Board meeting. Specifically Prof. Rhode contends: “there has long been a consensus among both legal ethics scholars and experts on the legal services market that Rule 5.4 should be repealed”.¹¹

In the SCL White Paper, Prof. Rhode points to LegalZoom and Rocket Lawyer in support of repealing Rule 5.4. LegalZoom’s business plan may be best understood by a U.S. Securities and Exchange Commission (SEC) filing and Rocket Lawyer may be best understood by its backers, which include a financial backer (Google Ventures) with ties to the world’s most widespread Internet search engine, an underlying platform for the world’s largest paid advertising service.^{12,13} Further, while LegalZoom and Rocket Lawyer are adverse to each other, Prof. Rhode, LegalZoom and Rocket Lawyer are unified in seeking to repeal Rule 5.4.¹⁴

Evidence pertaining to Prof. Rhode’s opinions and bias can be found elsewhere, for example, consider a talk of October 31, 2019 at the SCL, where Prof. Rhode had the following to say:

¹⁰ Id.

¹¹ Solomon, J., D. Rhode, A. Wanless, How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice, Stanford Center on Legal Profession, April 2020, at p. 2 (https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf).

¹² LegalZoom Amendment No. 5 to FORM S-1 REGISTRATION STATEMENT, as filed with the Securities and Exchange Commission on August 1, 2012, Registration No. 333-181332.

¹³ Rao, L., Rocket Lawyer Acquires LawPivot To Add A Quora-Like Q&A Platform To Online Legal Services, TechCrunch, January 14, 2013 (<https://techcrunch.com/2013/01/14/rocket-lawyer-acquires-lawpivot-to-add-a-quora-like-qa-platform-to-online-legal-services-site/>).

¹⁴ Evangelista, B., LegalZoom sues Rocket Lawyer, SF GATE, November 28, 2012 (<https://www.sfgate.com/business/article/LegalZoom-sues-Rocket-Lawyer-4075061.php>).

The legal profession's own regulatory rules are a big part of the problem.

I just had one of the leaders of the UK Regulatory Reform Initiative who was attending our conference come to my legal ethics class. In arguing that the U.S. needs an independent regulatory agency similar to the one in Great Britain, he asked students, 'How many of you think that Wells Fargo should decide what the regulations should be for the financial services industry? Raise your hands!' That thought experiment pushes us to ask: Why should American courts grant so much power to the organized bar to define and enforce conduct regulations when it has such a vested interest in protecting the status and income of its members?¹⁵

Prof. Rhode's citation to Wells Fargo, N.A., is quite misplaced. In reality, the U.S. Office of the Comptroller of the Currency (OCC) had a revolving door that essentially made it a self-regulatory scheme or, in other words, an agency acting under regulatory capture where it was able to "decide what the regulations should be for the financial services industry".

Further, Wells Fargo, N.A., is a national bank subject to federal authority, a status that sets it apart as "too big to fail". There are no law firms in the U.S. that have achieved the status of "too big to fail"; though, through repeal of Rule 5.4 and the inflow of investor cash and other resources (e.g., search engines and associated advertising and marketing), one day, there may be. And, if so, what then? Prof. Rhode appears to have no answer.

While Prof. Rhode may have some academic expertise, Prof. Rhode may not have been on the ground involved in lawsuits against the NA banks during the financial/mortgage crisis where homeowners were regularly shunted by the OCC, an agency captured by those it had been tasked to regulate. Prof. Rhode, under the guise of access to justice, appears to be posed to replicate the faulty regulatory framework (i.e., veiled self-regulation) that seriously harmed millions of consumers.

The story of the national banks and the OCC, the type of regulation identified by Prof. Rhode, is told in a U.S. Government Accounting Office (GAO) report entitled

¹⁵ Rhode, D. and S. Driscoll, Stanford Law School's Deborah Rhode on the Access to Justice Challenge in U.S., November 18, 2019 (<https://law.stanford.edu/2019/11/18/314315/>).

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“Large Bank Supervision: OCC Could Better Address Risk of Regulatory Capture”,
GAO-19-69: Published: Jan 24, 2019. Publicly Released: Feb 25, 2019.¹⁶

“Regulatory capture” is when regulators act in the interest of the industry they’re regulating, rather than in service of the public good. This can be a significant problem in banking regulation, where regulators may be swayed by future job offerings and more.

We looked at ways to reduce the risk of regulatory capture at the Office of the Comptroller of the Currency—which supervises the nation’s largest banks—and found weaknesses. For example, when OCC selects a team to examine a bank, it does not have a policy to check data that could indicate conflicts of interest.

Further evidence of Prof. Rhode’s economic ideology can be found in the talk of October 31, 2019 at the SCL, where she responded to a question “Are you optimistic about change?”, answering:

Yes. And here, technology has made an enormous difference. For many years, for example, the Bar was able to shut down non-lawyer providers who were largely solo practitioners or part of small-scale organizations. Now that they’re online, that’s a much harder task. And when you have large online platforms like Legal Zoom, with resources to fight the bar, and when you have demand bubbling up from consumers who want easily accessible affordable assistance online, the train to reform has left the station. Many enlightened members of the bar recognize that they need to be less part of the problem, and more part of the solution. And if they don’t figure out a way to do that, it will be done for them in ways that they don’t like. So yes, I am an optimistic. I think there’s much more possibility for change than when I started writing about this four decades ago, but I don’t underestimate the challenges in getting to where equal justice will be more than just a slogan that we put on courthouse doors.

A prior comment submitted to the ATILS Task Force pointed to issues in the opinion of Prof. Gillian Hadfield, who appears to abide by an economic ideology similar to Prof. Rhode:

An ABA journal article on the Task Force cited Prof. Hadfield, University of Toronto Faculty of Law and Advisor to LegalZoom, who authored of a 2008 CATO/Charles Koch Foundation position paper “Legal Barriers to Innovation”: “The bar’s control over corporate legal markets is growing more costly”.

¹⁶ Large Bank Supervision: OCC Could Better Address Risk of Regulatory Capture”, GAO-19-69: Published: Jan 24, 2019. Publicly Released: Feb 25, 2019 (<https://www.gao.gov/products/gao-19-69>).

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Hadfield distinguishes “two very different functions of the law”: (i) “democratic/political” and (ii) “supporting efficient market transactions”. Hadfield asserts that the latter is not to be judged by “how well it promotes the normative democratic goals of equality, autonomy, dignity, and so on, but rather by how well it promotes economic activity and efficiency”.

The Task Force blurs the bright line if it believes that “access to justice” for individuals and disadvantaged communities will be solved through deregulation-based “efficient market transactions” that are, by their very nature, in Hadfield’s words, not concerned with “equality, autonomy, dignity, and so on”.

Today, Hadfield’s 2008 opinion is clearly not enough for the proponents of “innovation”, and their tightly-leashed, overly-financed “start-ups”, who assert that the CA Bar is unjustly hindering their access to legal markets that differ significantly from corporate legal markets.

The CA Bar’s resources should not be used to entertain the overly-financed “for-profit dreamers” under the banner “Access [to Justice] Through Innovation”. It is clear that they conflate “innovation” with what they desire: “deregulation”. In deregulating hospitals, have health care costs decreased? No. Have outcomes improved? No. Is “universal access to legal services”, akin to universal health care services, worth consideration? Perhaps.

The SCL White Paper provides additional evidence to tie the opinions of Prof. Rhode and Prof. Hadfield to their underlying economic ideology, particularly as to how other “professions” have been deregulated. For example, at p. 9 of the SCL White Paper, Prof. Rhode states:

In this respect, law compares unfavorably to medicine, where doctors have considerably more flexibility in the contractual and organizational arrangements that they use to deliver care. Many doctors are employees of health care organizations such as hospitals or HMOs (not owned by physicians), which offers them a salary in exchange for the revenue they bring in. That is a practice that the bar’s ethical rules prohibit. Other doctors are part of a group medical practice where they may have an owner-ship stake, but also have revenue or profit-sharing arrangements with other entities – another structure impermissible in law.

To be sure, the presence of third-party payers such as private insurance or government programs has played a major role in expanding access to medical care. However, the delivery of those services has been achieved through a variety of contractual and organizational structures that share the risks, rewards, and incentives among physicians, people with business and management expertise, and investors.³⁸ Like lawyers, doctors have ethical obligations to their patients, which may conflict with financial considerations, but the profession has

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found ways to regulate such conflicts without banning cost-effective service delivery structures.

What is proposed by Prof. Rhode is a gig master/gig worker hierarchy, as aligned with the example of Amazon, above. The Covid-19 pandemic has exposed serious inequalities (who dies and who lives) and flaws in supply chains, including the supply of hospital beds, where those supply chains were honed to maximize profit without adequate resiliency, as alluded to by Nobel Laureate Prof. Joseph Stiglitz.¹⁷

We have a safety net that is inadequate. The inequality in the US is so large. This disease has targeted those with the poorest health. In the advanced world, the US is one of the countries with the poorest health overall and the greatest health inequality.

* * *

I hope we emerge from this with the perspective that multilateralism is even more important than we thought. It can't just be a corporate-driven globalisation. We have to make it more resilient.

Health insurance companies, while being "non-profit", actively seek to maximize profits. The Affordable Care Act's percentage limitations on profits drive costs upwardly to maximize health insurer profits, which have increased by billions, as reported this year by Oregon Public Broadcasting (OPB).¹⁸

In recent years, people who buy health insurance on the individual market have experienced steep premium hikes, higher deductibles and increases in other out-of-pocket expenses. At the same time, Washington's three biggest nonprofit insurers have amassed nearly \$4.5 billion in surpluses.

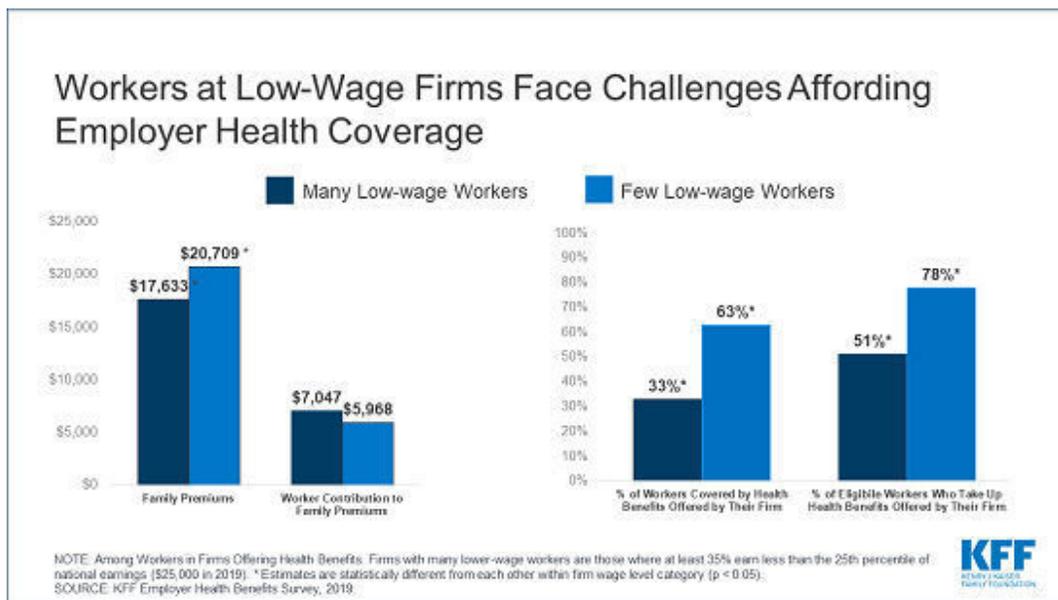
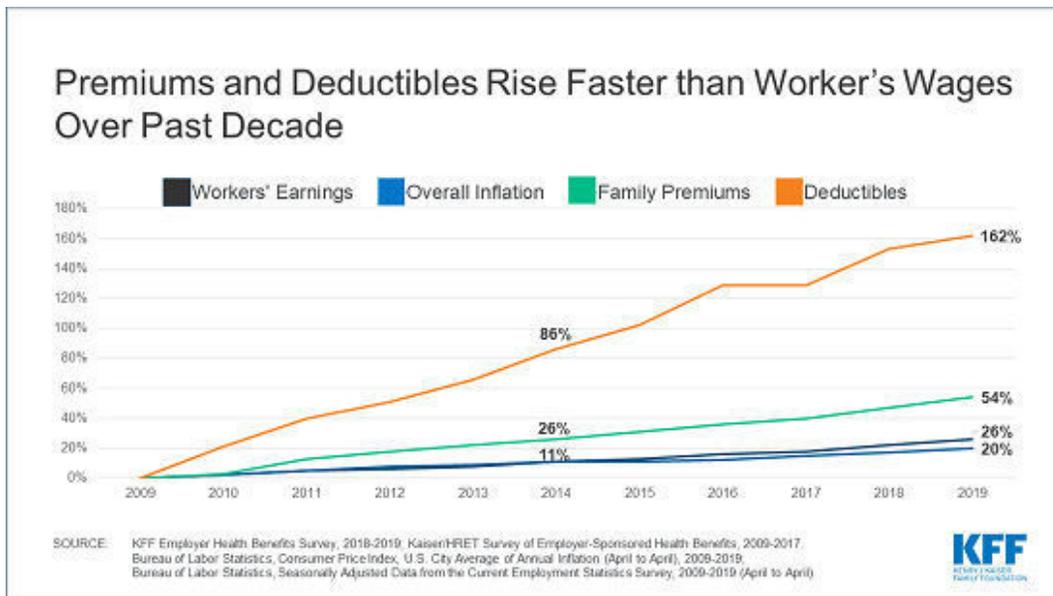
¹⁷ Elliott, L., Top economist: US coronavirus response is like 'third world' country, The Guardian, April 22, 2020 (<https://www.theguardian.com/business/2020/apr/22/top-economist-us-coronavirus-response-like-third-world-country-joseph-stiglitz-donald-trump>).

¹⁸ Jenkins, A., Washington State Lawmakers Eyeing Health Insurers' Billions In Premium Surpluses, Oregon Public Broadcasting, February 7, 2020 (<https://www.opb.org/news/article/washington-state-lawmakers-health-insurance-profits-private/>):

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Thus, the term “non-profit” is rendered meaningless by the insider crafting of “regulation”. For example, if profit is limited by regulation to 15% of gross, it’s child’s play to see that the way to increase profit is to increase gross. As such, health care costs have skyrocketed.¹⁹



¹⁹ Pace, F. Health care costs continue to rise faster than wages, inflation, The Herald-Dispatch, December 29, 2019.

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As to physician pay:

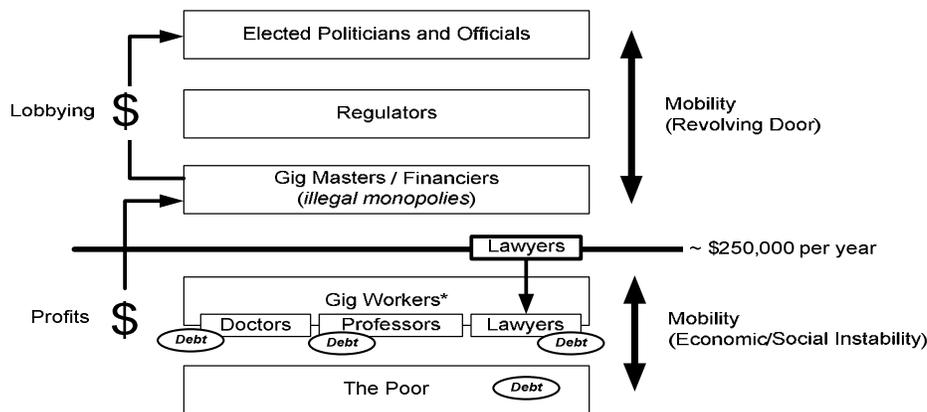
The mean annual salary of a MD physician specialist is \$175,011 in the US, and \$272,000 for surgeons. However, because of commodity inflation, increasing negligent costs, steep price rise of rental, the annual salary range of a physician varies and is not rising as fast as other professional pay.²⁰

Further:

The first step is getting into medical school. Besides high GPA, MCAT score and other factors, you need money. By the time a student starts residency training, which is when he first starts making money (see note below), he accumulates a debt of approximately \$250000. This includes the loan he receives for undergraduate degree and medical school. While four years of Bachelor degree costs around \$50000, four years of medical school tuition fee is almost four times that amount costing approx \$50000 per annum. Thus the entry level physicians earnings also goes into paying for student loan debt.

To facilitate the thrust of this comment in regards to the economic ideology of some of the experts before ATILS, consider the following diagram.

*Intent of Proposed Rule 5.4
(disruption of the legal profession)*



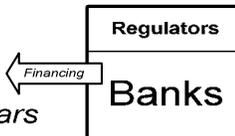
** Medical and Academic Professions have already been disrupted (e.g., via union busting)*

Costs of Higher Education:

MD Degree = \$250,000 and four years

JD Degree = \$150,000 and three years

PhD Degree = \$100,000 and ≥ three years



²⁰ Physician Salary, December 12, 2017 (<http://physician-salary.org/>)

As illustrated above, the intent of the proposed amendment to Rule 5.4 is to disrupt the legal profession just as the medical profession and academic profession have been disrupted. The opinions of Prof. Rhode must be viewed in light of data as to health care, the medical profession and, importantly, the between-workplace inequalities. Real data show that costs of health care and higher education have increased rapidly, greater than the rate of inflation, under the economic ideology promoted by Prof. Rhode.

Amendment of Rule 5.4 to include “non-profit” is a Trojan horse, as clearly demonstrated by the “non-profit” health insurance companies that are effectively the gig masters to gig worker doctors. What Prof. Rhode would like to see is gig master pay for controllers of the legal profession become the same as gig master pay for the controllers of the medical profession (i.e., a concentration of wealth). In a nutshell, the proposed amendment to Rule 5.4 is merely another chapter in the ongoing economic assault of unregulated MBA and economic “professions” against regulated professions, where the spoils go to those that force deregulation to gain control (i.e., regulatory disruption).

Underlying reasons for mission creep of the ATILS Task Force may include undisclosed interests. As the Board of Trustees is tasked to protect the public, it should demand full disclosures of all group members and academics or other “experts”.

Transparency

As recognized by the U.S. GAO, transparency is key to any regulatory framework that aims to protect the public. Transparency helps to prevent regulatory capture. The U.S. GAO identified the lack of a conflict of interest check as a weakness that increases the risk of regulatory capture.

For any group that is to consider proceeding under Option 1 of the ATILS Task Force, the Board of Trustees should require the completion of a conflicts of interest form, which should be available to the public. If a person is not willing to complete such a form and make it public, that person should not be allowed to participate. In so doing, the Board of Trustees will be acting to protect the public.

Conclusion

Mission creep of the ATILS Task Force has made it quite difficult for an ordinary member of the public to comment. The ATILS Task Force has generated and considered data and studies on a wide range of topics. The data and studies continue and overwhelm. The data and studies are supported by deep-pockets, which an ordinary member of the public does not have. Fact checking each of the studies is an arduous task, which would take hundreds if not thousands of hours. The volume of information involved is overwhelming, to the point of merely accepting “trust us”, which is a known lobbying strategy. However, “trust us” is not acceptable as to the consequences that may flow from the proposed amendment to Rule 5.4.

Many of the studies and opinions come from those with ties to Stanford University, which, as mentioned, is in Palo Alto, California. That community stands out as an example of wealth concentration achieved through deregulation and marketing/advertising schemes targeting consumers that have advanced more quickly than regulation. To label such schemes as rooted in “innovative technology” is highly questionable (i.e., controlling the ranking of search results in accordance with paid advertisements is not “high tech”).

The Canadian expert, Prof. Hadfield, holds JD and PhD degrees from Stanford University and was a fellow of the Hoover Institution; noting that Canada ranks high along with the U.S. in between-workplace inequalities. History has shown that Stanford University and the Hoover Institution are not infallible, as demonstrated by the Theranos scandal, where the rise of Ms. Elizabeth Holmes would have been improbable without the support of Prof. Channing Robertson (Chemical Engineering), esteemed members of the Hoover Institution (e.g., George Schultz) and a venture capital community overflowing with cash. The Theranos scandal is proof that experts fail and that where the public is to be protected, heightened scrutiny and caution are warranted.

On the facts, expert opinions may be right or they may be wrong. Biased opinions, however, are more costly as they demand additional resources to investigate the interrelationships between fact, opinion and bias.

When it comes to innovation in law, Stanford University's Prof. Channing Robertson should be applauded, as he served as an unbiased, scientific expert in numerous product liability cases:

Robertson's experience in discussing scientific issues in a judicial setting also led him to become a charter member of the National Academy of Sciences' Committee on Science, Technology and Law. Formed in 1999, the committee was charged with bringing the scientific and legal communities together to investigate issues such as the role of science in civil and criminal litigation, the use of human subjects in scientific trials and issues pertaining to science and national security.²¹

Prof. Robertson's work fostered the formation of the National Academy of Sciences' Committee on Science, Technology and Law (CSTL). As to the ATILS Task Force, one must logically ask, where was the CSTL?

This comment has identified various issues pertaining to the ATILS Task Force and the proposed amendment to Rule 5.4. The overall thrust of this comment is to take it slow and perform the required due diligence.

The author of this comment has been a practicing patent attorney since 1998 and was formerly a product development manager at Procter & Gamble, Europe, Middle East and Africa, where he sat on the American Chamber of Commerce Sub-committee for Consumer Affairs and Public Health before the European Community/European Union on behalf of Procter & Gamble, Europe, Middle East & Africa. From that experience, it is evident that technology has been utilized to transform advertising and manipulation of humans, largely through collection of personal data, again, utilized in a manner that ran far ahead of the regulators.

The author also served as a volunteer with the U.S. Small Business Administration's Service Corps of Retired Executives (SBA-SCORE), which should be a considered as a key partner in addressing the access to justice and justice gap problem. However, it seems like CSTL, SBA-SCORE was not at the table.

²¹ The not-so-retiring retirement of Channing Robertson: How an unassuming professor of chemical engineering helped save lives, change forensic science and bring down Big Tobacco, February 28, 2012 (<https://engineering.stanford.edu/news/not-so-retiring-retirement-channing-robertson>).

The author has performed pro bono work in Native American communities, including drafting testimony for presentation to the U.S. Senate concerning the Federal Indian Arts and Crafts Act of 1990 (P.L.101-644).

Additional pro bono experience includes serving as an Adjunct Lecturer at the National Law University of India (2004/2005), where a faculty member said: “Some profit off of poverty, as an untransformable and inexhaustible resource”. As to that point, the Board of Trustees of the State Bar of California should not entertain measures that promote profits from poverty, particularly when alternative strategies exist, which include formation of partnerships with entities such as SBA-SCORE, increasing pro bono demands on members, and advancements to the use of paraprofessionals.²²

In a broader view, the State Bar of California should promote human rights to health care, higher education and access to legal services. Certainly, such rights would be a realistic step toward addressing inequalities and the access to justice and justice gap problem.

As a member of the State Bar of California, I appreciate this opportunity to comment and thank the Board members for their service to protect the public of the State of California. This comment is submitted on my own behalf, albeit rushed given the short time frame between the May 14, 2020 meeting and the May 18, 2020 deadline for comments.

Sincerely,

/Brian J. Pangrle/

Brian J. Pangrle, JD, PhD

Licensed Attorney: CA, DC, NM

Reg. USPTO

Admitted Supreme Court of the United States

²² Prof. Hadfield’s opinion as to 900 hours per attorney to satisfy the demands of those lacking access to justice should be viewed in context, along with her position as legal advisor to LegalZoom (see, e.g., SEC filing of LegalZoom at footnote 12).

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	David Majchrzak
City	San Diego
State	California
Email address	DMajchrzak@Klinedinstlaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	ethics_committee_comments_RPC_5.4.pdf (198k)

May 15, 2020

Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Amended California Rule of Professional Conduct 5.4

Dear Trustees:

The California Lawyers Association Ethics Committee has considered the proposed changes to Rule 5.4, which restricts fee-sharing with non-lawyers. The CLA Ethics Committee supports the proposed change to add a limited exception to sharing legal fees with non-profits, but suggests that the structure of the changes be set forth in a clearer manner.

Rule 5.4 prohibits a lawyer or law firm from sharing legal fees with a non-lawyer as a general rule. There are limited exceptions, including paying fees for a period of time to the lawyer's estate following the lawyer's death; purchasing a practice of a deceased lawyer; including nonlawyer employees in a profit-sharing or retirement plan; paying a referral fee to a State Bar approved Lawyer Referral Service and sharing a court-awarded legal fees to a non-profit organization that employed the lawyer in the matter.

The purpose behind Rule 5.4 is to protect a lawyer's professional independence and judgment. It is designed to protect the integrity of the attorney-client relationship, prevent control over attorney's legal services shifting to laypersons and ensure the client's best interests remains paramount. (Los Angeles County Bar Assn. Form. Op. 510 (2003) [applying former Cal. Rules Prof. Conduct, rule 1-320(A)]). Generally, fee sharing with non-lawyers is precluded because of the danger of increasing the total fees charged. Such a practice risks encouraging competitive solicitation for lawyers and permitting referring non-lawyers to select the lawyer who pays the most generous fee-split. (*Gassman v. State Bar* (1976) 18 Cal.3d 125, 132).

The proposed change to Rule 5.4(a)(5) expands the exception for payment of fees arising from a settlement to a non-profit organization that qualifies under section 501(c)(3). This should enhance and encourage non-profits and their lawyers to take on "social change" litigation since a favorable result may benefit the financially strapped

non-profit. By limiting this exception to those non-profit organizations that are section 501(c)(3) organizations, the potential danger of interference with the lawyer's professional judgment and independence is reduced. This addition promotes access to justice concerns expressed by a number of commentators and formed one of the bases for the creation of the ATILS Task Force. Given the large number of cases that settle, allowing a lawyer to share fees with a non-profit 501(c)(3) entity involved in bringing the case to the lawyer would appear to promote providing legal services to the underserved.

In the opinion of the CLA Ethics Committee, the proposed change should be broken out into a separate subparagraph (6) and read as follows: (6) where a nonprofit organization qualified under IRS Code section 501(c)(3) employs, retains, recommends, or facilitates employment of a lawyer in a matter where the legal fees arise from settlement, the lawyer or law firm may share or pay the legal fee to that nonprofit organization. The current proposed amendment combines two distinct exceptions into a single paragraph which may result in confusion in interpreting its meaning.

In the opinion of the CLA Ethics Committee, such a fee split would constitute a significant development to be communicated to the lawyer's client as required by Rule 1.4 and Business and Professions Code section 6068, subdivision (m). (See proposed Comment [4] to Rule 5.4(a).) Notwithstanding the ability to share fees with a non-profit organization that is involved in referring the matter to the lawyer, it is important that the lawyer communicate the fee-sharing arrangement with the client and comply with the ethical duties under the Rules, the Business and Professions Code, and common law.

While fee-sharing with non-lawyers has many inherent dangers, the benefits of encouraging legal aid organizations to work with lawyers to bring "social change" litigation outweighs the risk in these limited circumstances.

Sincerely,



David Majchrzak
Co-Chair
California Lawyers Association Ethics
Committee

Public Comment - Proposed Rule 5.4

Commenting on behalf of an organization	Yes
Professional Affiliation	The Lacuna Consortium
Name	Steven Deolus
City	brooklyn
State	New York
Email address	s.deolus@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	The_Lacuna_Consortiums_submission_to_ATI_LS_on_Rule_5.4.pdf (264k)



THE LACUNA CONSORTIUM
FOR THE LACUNA COIN PROJECT

BROOKLYN LAW SCHOOL
BLIP CLINIC



To: Task Force on Access Through Innovation of Legal Services (ATILS)
State Bar of California
180 Howard Street
San Francisco, CA 94105

Fr: The Lacuna Consortium

Re: The Model Rules of Professional Conduct Commentary – The impact of Rule 5.4 and its amendments on the Lacuna Coin Project, and the potential unknown implications for Guarantors that may collect fees if they render legal services.

Date: May 18, 2020

Dear ATILS Task Force Members,

This comment is submitted by the Lacuna Consortium (“the Consortium”) represented by the Brooklyn Law School Incubator & Policy (BLIP) Clinic to address the impacts of Rule 5.4 on the Lacuna Coin Project. Specifically, the unknown implications for Guarantors,¹ who may collect fees and perform legal services that Lacuna Coin Contractors² are unable to fulfill.

At its initial conception, the Consortium was founded to explore the unclear and uncharted waters at the intersection of technology and the law. Etymologically, the word “lacuna” is derived from the Latin phrase “*lacunae intra legem*,” which translates to the idea that a law may proscribe behaviors and actions, but be silent or unclear (*non liquet*) when applied to the context of a specific situation. The situation we address herein concerns law school graduates (“graduates”) tokenizing³ themselves on the Ethereum blockchain and using the purchase of their tokens as consideration for option contracts that include a preferred rate on post bar legal services. Where the preferred rate on the future services are ensured by a Guarantor.

As an entity, the Consortium was born during the height of the novel coronavirus (COVID-19) global pandemic in 2020 at the BLIP Clinic. The BLIP community at large acknowledged the well-recognized and acute plight that graduates would face when exploring ways to cover costs between obtaining their Juris Doctor (JD) or Masters of Law (LLM) and sitting for the bar exam. Accordingly, the BLIP students, authorized to practice law under their supervising attorneys and professors, Jonathan Askin and Lynda Braun, realized that this plight would be exacerbated by the global pandemic, and the ripple effects would change job markets, society, the legal industry, and by extension the relationships between lawyers, graduates, and clients forever.

¹ Guarantors would include professional for-profit or non-profit legal services providers, who would guarantee fulfillment of the contracts described herein if the Contractor is unable to satisfy the contract.

² Contractors are law school graduates that are creating option contracts for a preferred rate on future legal services.

³ Here, tokenization is the process of creating digital assets that represents rights that an individual confers to future token owners; See also Tokens, and Coins vs Tokens, Blockchain & Crypto Vocabulary 101 TryCrypto, <https://www.trycrypto.com/blockchain-101/blockchain-crypto-vocabulary-101> (last visited May 18, 2020).

Introduction to the Lacuna Coin Project

As a result of contemplating the plight of graduates during the COVID-19 pandemic, the Consortium developed the Lacuna Coin Project with the aim to provide newly-minted graduates with a tool kit and platform to showcase and promote the knowledge, skills, experience, and overall expertise they have cultivated while earning their legal degree. Accordingly, the Consortium accomplishes the goal of the Lacuna Coin Project by implementing a new framework for tokenization, while affording potential future clients the unique opportunity to purchase the graduates tokens (“Lacuna Coins”).

In the current iteration of the Lacuna Coin Project, graduates would place themselves on the Ethereum blockchain by using the Consortium’s certification marked tool kit as a resource to facilitate the creation of their Lacuna Coins. Ultimately, by providing graduates with this framework, the Consortium would be encouraging the institutionalization of option contracts for a preferred rate on post bar admission legal services, while promoting access to justice and awareness of blockchain and distributed ledger technologies.

Purpose and structure of this Comment

However, despite the positive intentions of the Lacuna Coin Project, the Consortium realizes that the appointment of Guarantors could be threatened by the uncertainty of California ethics Rule 5.4 and its pending amendments. Therefore, the Consortium is submitting this comment to advocate for an amendment, clarification, declaration, or exception to Rule 5.4 that states that Guarantors would be compliant with the professional rules. Accordingly, the comment accomplishes this goal by outlining the need for the Project, exploring the context and structure of the Project, while also addressing the Project’s compliance with Rule 5.4.

The need for the Lacuna Coin Project

The need for projects such as the Lacuna Coin Project becomes evident when viewed through the perspective of access to justice and the needs graduates confront between graduating and taking the bar exam. For example, because of the adverse economic impact of COVID-19, graduates may be forced to—due to circumstances beyond their control—delay bar admission and/or increase their financial debt.

In order to address these concerns, a new paradigm must be developed and adopted. In a recent ABA article, Teresa J. Schmid, the director of the American Bar Association Center for Professional Responsibility, expressed her view on the need for novel concepts in the legal field.⁴ Ms. Schmid states:

“...the legal profession is confronting unprecedented barriers to its survival and to its capacity for meeting the dual demands of access to justice and protection of the public. If necessity was once called the mother of invention, that expression insufficiently captures these times. It is now more accurate to say that survival is an insatiable despot that demands continuous innovation as its

⁴ See Schmid, Teresa J., ABA Journal, Leadership, innovation and the new normal, <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/leadership-innovation-new-normal/> (last visited May 18,2020).

tribute. Continuous innovation is a tall order for any community, let alone one whose most influential institutional representative was founded in 1878.”⁵

The Consortium subscribes to Ms. Schmid’s rhetoric regarding the need for novel concepts and solutions in the legal system. Accordingly, the Consortium proposes that it answers Ms. Schmid’s call to action with the implementation of the Lacuna Coin Project.

The Lacuna Coin Project’s structure and implementation

Overall, the untenable paradigm of graduates requires a new, sensible, and workable solution. The Lacuna Coin tool kit would require graduates to inform Lacuna Coin purchasers (“Contractees”) that the digital tokens do not represent an investment, and there is no monetary return or financial gain for purchasers. The purchase of a graduate’s Lacuna Coin would be to strictly provide consideration for the option on preferred pricing for future legal services. Currently the Consortium envisions that the option contract would also govern the type of service to be offered and the reasonable duration for the option to remain open. Through the use of a Lacuna Coin certification mark, graduates that do not adhere to the policies and guidelines of the tool kit would be prohibited from using the Lacuna Coin branding for their tokens. In other words, graduates that conform to the policies and guidelines of the tool kit would be allowed to use the following naming convention for their tokens: “Lacuna Coin: graduates’ first and last name.”

The Consortium also envisions that the Lacuna Coin Project would have a public-facing website where graduates would create profiles that contain basic biographical and contact information, areas of law in which they intend to practice once they have gained admission to their state’s bar association, as well as the graduates various experiences during their law school career.

Contractual concerns: The need for Guarantors

As previously stated, to ensure Contractees have the ability to exercise their future options, the template option contract located in the Lacuna Coin tool kit would require graduates to appoint individual practitioners, law firms, non-profit organizations, or law school clinics as Guarantors for the preferred rate on future legal services. In other words, Guarantors would fulfill the Contractors obligations and step in to provide the legal service at the same rate contemplated between the Contractor and Contractee.

The scenarios in which a Guarantor would need to step in if a Contractor is unable to perform their contractual obligations include but are not limited to:

- The Contractor has secured a job at a law firm or other organization that forbids the Contractor from fulfilling the option contract;
- The Contractor has not passed the bar by the time in which the option could be exercised; or
- The Contractor is incapacitated and cannot practice law or has died.

In addition to the contractual issues, general aspects of the Lacuna Coin project may implicate ethical concerns outlined below.

⁵ *Id.*

Ethical concerns for the Lacuna Coin Project

The Consortium has structured the Lacuna Coin Project to be in compliance with various ethics rules, court decisions, and regulations. For example, the Lacuna Coin certification mark would prohibit the use of Lacuna Coins in a way that could be interpreted as the unauthorized practice of law. Specifically, Lacuna Coin option contracts would not offer legal services in consideration for the purchase of Lacuna Coins. Rather, they offer a set rate for future legal services. Again, as previously discussed, the consideration here is solely and exclusively for an *option to have future legal services at a preferred rate*. As per the Lacuna Coin certification mark, Contractors would only engage in the practice of law when they are licensed.

Once Contractors have been admitted to the bar, the certification mark would obligate Contractors to remove themselves from the Lacuna Coin Project website. This would mitigate and limit the ability for licensed Contractors to further sell their Lacuna Coins.

In the future, if Contractees choose to exercise their option, a second contract would be negotiated between the Contractor and the Contractee. The second contract would be a standard retainer agreement between a licensed attorney and a client for the preferred rate upon which they previously agreed. The second contract would clearly articulate the formation of an attorney-client relationship, the scope of the representation, the specific services to be rendered, and all other provisions of standard enforceable retainer agreements. Ultimately, the Consortium would not oversee, manage, or profit from the proceeds of Lacuna Coins purchases or any exercised legal service governed by a separate retainer agreement.

The Lacuna Coin Project's compliance with California Ethics Rule 5.4

To increase the likelihood of compliance with Rule 5.4, all Contractors displayed on the Lacuna Coin website would negotiate their option contracts with Contractees as independent sole contractors. The Lacuna Coin certification mark would require Contractors to act independently to forbear the interpretation that the Lacuna Coin website constitutes a “law firm,” as the term is understood in professional ethics rules. Moreover, the Consortium would not share or collect in any fees Contractors charge their Contractees. However, regardless of these affirmations, if Guarantors opt to collect the preferred rate upon rendering a legal service, the Consortium is aware that their compliance with Rule 5.4 may not be clear. Below we address the above concerns in detail.

Guarantors collecting fees for rendered services should not implicate a fee-sharing arrangement between Contractors and Guarantors (nonlawyers and lawyers)

The Consortium acknowledges that while a relationship between the Contractor and Guarantor exists insofar as the relationship is formed via contract for such purposes as to serve as a surety, a partnership does not exist as defined by Rule 5.4(b). In its current iteration, Rule 5.4(b) states, “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.” Ultimately, there is no partnership or agent relationship established between the Contractor and the Guarantor. The relationship that exists between the parties—if any at all—exists purely through the option contract. Cal. Corp. Code 16101 (9) defines a partnership as “an association of two or more persons to carry on as co-owners in a business for profit.” Here, there would be no

partnership between Contractors and Guarantors as defined by the California corporate code. Accordingly, Guarantors fulfilling a Contractor's contractual obligation and collecting the fees for services rendered should not constitute a violation of ethics Rule 5.4(b).

In addition to Rule 5.4(b), Rule 5.4(a) states "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." In the case of *Chambers v. Kay* the court addressed the issue of legal fees and held that legal fees encompass any division of fees where the attorneys working for the client are not partners or associates of each other.⁶ Here, there is no division of fees between Contractors and Guarantors. As previously stated, the Lacuna Coin Project includes two separate fee payments. The first fee is consideration for the option contract. In other words, the purchase of Lacuna Coins for a preferred rate on future legal services. This fee is collected solely by the Contractor, a non-lawyer, and would never be seen by the Guarantor. The second fee is paid **after** the Contractee decides to exercise the option contract. In other words, the second fee is the price the Contractee pays when the legal service is rendered. This fee can only be collected by a licensed lawyer in one of two ways: (i) The licensed attorney is the Contractor fulfilling their contractual obligations for the preferred rate or (ii) the Guarantor, a lawyer, collects the fee because they rendered a service the Contractor was unable to perform. In the latter scenario, any payments or fees collected by the Guarantor would not be shared with the Contractor. Because the legal service fee (the second fee) is not shared with any non-lawyer(s), nor is the fee for the referral of services, and because the fee is separate from the fee that avails the option, such conduct should not violate ethics Rule 5.4. In summary, there is no division in actual legal fees with the non-lawyer if the Guarantor performs the legal service. California ethics Rule 5.4 applies to fee divisions where work for the client is divided.⁷ Accordingly, Rule 5.4 should not apply to the conduct envisioned within the Lacuna Coin Project.

Benefits of the Lacuna Coin Project: Transparency

In addition to requesting an affirmation on compliance with the California ethics rules, the Consortium further advocates that the Task Force and the State Bar issues a supplementary amendment, clarification, declaration, or exception to Rule 5.4. The Consortium respectfully request that any additional amendments to Rule 5.4 should address or relate to the structure and/or implementation of the Lacuna Coin Project because of the myriad of benefits the Project provides to graduates, the public, and the legal industry at large.

For example, the Project has the added benefit of increasing trust within the legal industry. The blockchain technology that powers the Lacuna Coin Project relies on the concept of a public transparent ledger. All Lacuna Coins could be tracked on this public ledger while still providing anonymity for the identities of potential future clients. In other words, it is very easy for a third party, like the State Bar, to identify an approximate amount of Lacuna Coins a Contractor has sold without knowing the identity of purchasers. This information could enable the Consortium, the State Bar, and the public at large to understand the level of engagement between graduates and potential future clients. Such information could assist with solving issues of access to justice.

⁶ See *Chambers v. Kay*, 29 Cal. 4th 142, 56 P.3d 645, 126 Cal. Rptr. 2d 536, 2002.

⁷ See *Id.*

Benefit of the Lacuna Coin Project: Access to Justice

As previously stated throughout this comment, graduates are not the sole benefactors of the Lacuna Coin Project. The project benefits the general public because it promotes access to justice. Individuals who normally could not afford legal services from a licensed attorney would now have the option to provide consideration for a preferred rate on services in the future. The public would have the power to choose, acquire, and access rates that they may never had the opportunity to access otherwise. Additionally, given that Guarantors would largely be public service law firms, private firms, and non-profits offering themselves as Guarantors out of a desire to help recent graduates, these Guarantors will undoubtedly drive the types of services considered by the option contracts in virtuous directions. Moreover, Guarantors have the benefit of using the Lacuna Coin Project as another avenue to fulfill pro bono hour requirements when Contractors are unable to fulfill their obligations.

While the Consortium understands that this innovative endeavor may raise alarm or suspicions, it intends to quell and appease such concerns by assuring that parties uphold their contractual duties so that all parties benefit as intended. Furthermore, the Consortium intends to comply with and further achieve ATILS' Goal 4, Objective d., of the State Bar's 2017-2022 Strategic Plan which is to "[balance] the dual goals of public protection and increased access to justice."⁸

Conclusion

In conclusion, the Consortium submits that the Lacuna Coin Project is urgent and timely. In the initial phase of the project, the Consortium will offer Lacuna Coins only to family members and friends. The Consortium believes that the initial phase of the Project would mitigate any concerns legislatures, judges, and ethics committees may have for the risk of harm to the public. However, as the ethical and regulatory landscape evolves, the Consortium fully intends to have graduates use the tool kit to create and offer their Lacuna Coins to the general public.

Ultimately, if the Consortium does not work to shift this paradigm, someone else will. Other jurisdictions are looking towards new models to promote access to justice and the empowerment of young attorneys. These jurisdictions would likely be open to embracing innovative structures like the Lacuna Coin Project. It would be unfortunate if California, a state that pioneers in innovation within all industries, did not serve the function of being a preeminent thought leader during this crucial moment when graduates and society needs these types of innovations desperately.

Accordingly, the Consortium respectfully request for the Task Force and the State Bar to issue an amendment, clarification, declaration, or exception to Rule 5.4 that validates the structure of the Lacuna Coin Project, and clarifies that Guarantors in the form of solo practitioners, law firms, non-profit organizations, or clinics that participate in the Project and offer legal services in the absence of Contractors, would be compliant with Rule 5.4.

Sincerely,

The Lacuna Consortium

"Putting law school grads on the blockchain"

⁸ See The State Bar of California, www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2020-Public-Comment/Proposed-Amended-California-Rule-of-Professional-Conduct-54-Financial-and-Similar-Arrangements-with-Nonlawyers.

**Rule 5.4 Financial and Similar Arrangements with Nonlawyers
(Clean Version – As Proposed by ATILS)**

- (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) where a nonprofit organization employs, retains , recommends, or facilitates employment of a lawyer in a matter, (i) the lawyer or law firm* may share with or pay a court-awarded legal fee to that nonprofit organization, and (ii) where the legal fee in the matter is not court awarded but arises from a settlement or other resolution of the matter, the lawyer or law firm may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (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 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 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
 - (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.

[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), as just one example, 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] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

[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).

**Rule 5.4—Financial and Similar Arrangements with Nonlawyers
(Redline to Current Rule – As Proposed by ATILS)**

- (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 court-awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm* in the matter.~~
 - (5) where a nonprofit organization employs, retains, recommends, or facilitates employment of a lawyer in a matter, (i) the lawyer or law firm* may share with or pay a court-awarded legal fee to that nonprofit organization, and (ii) where the legal fee in the matter is not court awarded but arises from a settlement or other resolution of the matter, the lawyer or law firm may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (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 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 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
 - (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.

[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), [as just one example](#), 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.

[\[4\] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph \(a\)\(5\) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068\(m\).](#)

[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].)

[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).