



To: Subcommittee on Rules and Ethics Opinions
From: Tara Burd
Date: February 10, 2019 (revised on March 28, 2019 – added Kucera’s comments)
Re: Revisions to the Rules Subcommittee’s December 31, 2018 Memo

The following memorandum serves as a draft summary of the assignment directed to the Rules and Ethics Opinions Subcommittee. After initially identifying existing legal and law related services that are believe to be constrained by the professional rules of conduct and other lawyer conducts laws, we now move towards identifying those constraining rules and laws.

As to each rule, the following is a summary that identifies a) the public policy concerns, b) whether the rule possibly constrains attorney-driven innovation, and c) initial considerations concerning alternative business structures and changes to the unauthorized practice of law. The responses are largely based on our committee’s discussions and that of the task force in which we participated.

This is a draft may be built upon and revised as the ATILS task force continues its discussion and ultimately prepares its proposal.

[Please note: Andrew Kucera’s comments to this memo were added on March 28, 2019. They appear in the footnotes.]

SUMMARY OF EXISTING LEGAL AND LAW RELATED SERVICES THAT ARE BELIEVED TO BE CONSTRAINED BY THE PROFESSIONAL RULES OF CONDUCT AND OTHER LAWYER CONDUCT LAWS

The following summary of existing legal and law related services was drawn from the more extensive memorandum prepared by Allen Rodriguez and Lori Gonzalez; Kevin Mohr for the January 2019 meeting:

1. Paraprofessionals¹ – Would be particularly helpful in the areas of family law, estate planning, veteran’s benefits, small claims and low-value claims, welfare benefits assistance, veterans benefits assistance, school discipline issues, minors in group homes, and disputes involving administrative discretion.
 - a. Limited Scope Services
 - b. Form Specific or Process Specific Certifications
2. Software Services
 - a. Fastcase BK (formerly TopForms) – This is a bankruptcy form subscription model sold to lawyers.
 - b. WealthCounsel and Fore! – like Fastcase BK, WealthCounsel and Fore! provide document automation for estate planning documents to lawyers.

¹ Kucera Comment: State Bar rules do not provide for licensing of paraprofessionals – does this really constrain innovation of legal services?

- c. Online service providers like LegalZoom could be expanded to incorporate additional but basic legal advice.
 - d. Legallnc - Business formation services sold directly to lawyers. The form generation and services provided by Legallnc. are then sold to the public at a markup by the lawyers.
 - e. SmartLien – This service assists construction professionals with filing a lien for unpaid services. The company is owned and operated by attorneys, so while providing legal services, the funding options for this startup - which is consumer facing - is limited and affected by ethical rules around fee sharing.
 - f. ZLien.com – In contrast to SmartLien, Zlien.com is a very well-funded legal tech company that provides similar services related to the generation of liens but cannot provide legal advice. UPL restrictions limit the ability of both consumer facing solutions in ways that minimize their effect on access to justice for these smaller construction claims.
 - g. AI Powered Website Bots –AI powered chatbots could be built that help people navigate and prepare various claims in areas such as family law, consumer debt, small claims courts or claims under certain amounts for which getting legal assistance may not be cost effective.
 - h. Models like tax preparation software (such as Turbo Tax) could be created for the legal field.
3. Expanded Lawyer Referral Services.
 4. Full Service (Multidisciplinary) Businesses.
 5. Incubator Models for Law Firms – The creation of franchise style law firms wherein less experienced lawyers could gain access to these pre-built systems for a portion of their profits in lieu of expensive front-end costs.
 6. Expanded marketing-based referral partnerships.
 7. Expanded Limited Scope Representation wherein technology is used by an attorney firm to provide lower cost services and advice to clients.²
 8. Subcontracted legal advice and services offered by the courts for pro se litigants.
 9. In-court kiosks and other self-help systems offered within the courthouse.

² Kucera Comment: See <https://republic.co/trustandwill>. I have been using this as an example in subcommittee discussions.

EXISTING RULES AND LAWS POTENTIALLL CONSTRAINING LEGAL INNOVATION

Rule 1.1 Competence

A. Public Policy Issues

An attorney who utilizes new technology or offers tech-related legal products, has a duty to do so competently. This Rule instills an obvious obligation on attorneys to research and prepare to carry out the tasks for which they are hired. However, most attorneys are not likely to be intimately familiar with many aspects of cutting edge innovations.

Email, efilings, and eDiscovery are three examples of technological advances that many attorneys must know how to competently utilize in 2019. Similar principals should apply to more cutting edge technology, but attorneys may face greater challenges if they are involved in untested waters on the forefront of innovation.

B. Impact on Attorney-Managed Tech

Existing rules appear to sufficiently protect the public and can be applied to attorney-managed tech. However, California should consider whether to follow the Florida State Bar and require attorneys to take MCLE courses in technology. Additionally, an Ethics Opinion or Comment that specifically addresses *new* innovation should be considered to offer attorneys a better understanding of what is required. For example, a Catch-22 may exist if attorneys are afraid to implement something new and different out of fear that such product may be considered a violation of this Rule if the new idea ultimately fails.³

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The rule may need to be revised to include a competency requirement for any non-attorney engaged in providing legal related services.

Additionally, if alternative business structures are permitted, the rule may need to be revised – or clarified– that an attorney is required to exercise care and due diligence prior to entering into a partnership with a non-attorney.

Rule 1.2 Scope of Representation and Allocation of Authority⁴

A. Public Policy Issues

The current rule allows an attorney to limit the scope of representation so long as that representation is reasonable. An attorney must also comply with the requests and direction of the client.

³ Kucera Comment: I am for expression of technology as a component of Rule 1.1, preferably in the body of the rule itself rather than a comment. An MCLE requirement Would be beneficial as well.

⁴ Kucera Comment: This issue intersects with the issue of whether and when an atty-client relationship is formed when a consumer of legal services uses legal technology. An ethics opinion or other direction would be helpful. The current factor-based framework is difficult to anticipate determinations.

B. Impact on Attorney-Managed Tech

The Rule does not generally prohibit attorney-managed innovation. However, reasonableness has not been tested with respect to the use of attorney tech and attorneys may have fear that certain limited scope offerings (such as do-it-yourself forms on an attorney website) may constitute unreasonable limitations.

For example, is it unreasonable for an attorney to offer client-facing self-help products with the express limitation that the attorney will not ever review the client's completed forms for accuracy or otherwise offer advice independent of the self-directed program? If the State Bar (or court) found this to be *unreasonable* the result could be a costly malpractice claim. Greater clarity by an Ethics Opinion or Comment on this issue could give attorneys greater comfort and lead to an increased use of these products.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The concerns are the same as above. Limited scope representation would be essential to any revision to the UPL rules and laws. To what extent this Rule would require revision would depend on exactly what UPL rule revisions are proposed.

Rule 1.5 Confidential Information of a Client⁵

A. Public Policy Issues

An attorney's duty of confidentiality is related to but exceeds attorney-client privilege. (*See also* Evid. Code, §§ 952-955.) Confidentiality is imperative for a client to speak honestly to his or her attorney so that the attorney can render the best possible advice. Without confidentiality, clients would be unable to speak honestly with their attorney, and attorneys could easily exploit clients' often sensitive information.

B. Impact on Attorney-Managed Tech

There are challenges to protecting attorney-client communications over the internet as opposed to in-person communication. First, it is possible for electronic transmissions to be hacked. Second, the more third party platforms are used, the more vulnerability there is to outside invasion of the information. There is also risk that a third party entity could be subpoenaed. Even if a client is advised that the communication is not secure, what level of warning or notification to the client would be required?

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Non attorneys could be subject to the confidentiality requirements in the same way that attorney staff is subject to it. However, the privilege is limited to "those who are present to further the interest of the client in the consultation and those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted..." (Bus. & Prof. Code, § 952.) Clarity by Opinion or Comment may be helpful as to

⁵ Kucera Comment: I think this rule needs to address technology. The technology solutions we've been discussing all raise issues with protecting client confidentiality.

whether a non-attorney who partners with an attorney would be entitled to the privilege by virtue of the relationship. In other words, does the existence of the partnership meet the standard identified above, or is more required?

Rule 1.7 Conflict of Interest: Current Clients

A. Public Policy Issues

The duty of loyalty and prohibition of conflicts of interest is reasonably necessary to protect clients from bad legal advice guided by conflicting interests. This is generally a sound public policy.

B. Impact on Attorney-Managed Tech

The issue is whether an attorney offering legal tech services relating to litigation or disputes would be required to run a conflict check. For example, an attorney who offers self-guided divorce help on his website may risk offering the same help to both a husband and his soon-to-be ex-spouse.⁶ In a purely do-it-yourself format there may be no conflict. If, however, the attorney also offers limited-scope legal advice, conflicts of interest may arise. Clarification may be helpful as to what point that line is drawn.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

This Rule would likely need to be extended to any non-attorneys offering legal services for the same reason it applies to attorneys.

If alternative business structures are permitted, the rule may need to be clarified as to whether a firm that represents individuals in one capacity (such as a CPA providing tax advice to a married couple) is necessarily precluded from offering either of those same clients legal advice.

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client⁷

A. Public Policy Issues

As to the general public, this Rule offers sound protections against an attorney taking advantage of his fiduciary relationship with a client.

B. Impact on Attorney-Managed Tech

No apparent concerns with this rule as applied to attorney-managed tech.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

If alternative business structures are permitted, this rule may be violated by an attorney who gives advice to the company of which he is also a part of.

⁶ Kucera Comment: This is a legitimate concern. Again, an ethics opinion offering guidance would be helpful. Can't we fulfill the goal of protecting the public while also offering low-cost tech solutions to bring legal services to more people?

⁷ Kucera Comment: There is probably little or no issue with this rule

Rule 1.8.8 Limiting Liability to Client⁸

A. Public Policy Issues

A lawyer may not prospectively limit malpractice liability to a client. Generally, this rule protects the public by allowing them full recovery of injuries caused by attorney malpractice.

B. Impact on Attorney-Managed Tech

Attorneys are typically risk averse. New technology and innovation will necessarily lead to uncertainty as to what constitutes “reasonableness” under a variety of circumstances that have not been previously considered. This could easily expose attorneys to an influx of potential malpractice claims. Malpractice insurance rates may similarly be affected which could make offering innovative services cost-prohibitive. Limiting liability under certain, limited, circumstances may help to keep malpractice insurance costs down and reduce an attorney’s fear of testing new products that could increase the public’s access to legal services.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Attorney and non-attorney partnerships require equal risk and reward. Attorneys will not be incentivized to partner with non-attorneys if the non-attorney has the freedom to limit his/her liability to the client while the attorney must suffer full exposure of liability.

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1. to 1.8.9

A. Public Policy Issues

This rule increases public protection by expanding the foregoing rules to include any clients of the firm, as opposed to limiting it to the one-on-one attorney-client relationship.

B. Impact on Attorney-Managed Tech

NOT YET DISCUSSED.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

NOT YET DISCUSSED.

Rule 1.9 Duties for Former Clients

SEE RULES 1.5 AND 1.7

Rule 1.10 Imputation of Conflicts of Interest: General Rule

SEE RULES 1.5 AND 1.7

⁸ Kucera Comment: OK, but this rule is relaxed, for example, in the representation of pro-bono clients. Can we do the same for tech solutions? Can this issue be addressed through insurance or a common fund?

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons⁹

A. Public Policy Issues

Trust accounting is necessary to protect client funds from attorney misuse.

B. Impact on Attorney-Managed Tech

Existing online services such as LawPay allow attorneys to receive client funds into their trust account but pay expenses out of their business account so that clients funds are not improperly invaded. Similar processes could and should be implemented if and when attorney-managed tech is used.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Existing rules would necessarily need to be extended to any non-attorneys in the case of alternative fee or business structures. Additionally, enforcement of the Rules against any non-attorneys would be imperative.

Rule 1.16 Declining or Terminating Representation¹⁰

A. Public Policy Issues

Relevant here, an attorney must not represent a client when the attorney knows the client is pursuing the matter for an improper purpose.

B. Impact on Attorney-Managed Tech

An attorney's obligations may need to be clarified with respect to attorney tech to the extent that an attorney is engaging in a limited scope representation through the use of technology. For example, where an attorney manages a self-help client-facing product to assist clients in litigation, an attorney may receive information that would warrant a declination or termination of representation under the Rule. In such a case, however, the attorney may not be aware of the information if the terms of the site/attorney-client agreement do not require the attorney to personally review the materials provided by the client.

Similarly, an attorney might generally be liable for missing a statute of limitation or improperly filing an action after the expiration of a statute of limitation. Clarification may be necessary to determine whether an attorney – or his tech – has any obligation to warn a client of an impending or expired SOL and/or the obligation – or right – to refuse such a client.

⁹ Kucera Comment: There is probably no issue here, as long as payment for tech services is handled appropriately

¹⁰ Kucera Comment: This needs to be considered. During full-service representation, an atty can usually ferret out a client's improper purpose. Not so, if there is little or no face time with the client.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The same rules may need to be extended to any non-attorney.

Rule 1.18 Duties to Prospective Client

SEE RULES 1.5 AND 1.7.

Rule 2.1 Advisor

A. Public Policy Issues

A lawyer shall exercise independent professional judgment and render candid advice. The purpose of the rules protects the client from the lawyer giving advice that is influenced by third parties.¹¹

B. Impact on Attorney-Managed Tech

This rule may be violated if an attorney develops technology wherein basic legal advice is offered based on a series of questions and answers without the attorney personally reviewing the responses of each client. Similarly, this rule may be violated if an attorney develops a program that utilizes artificial intelligence to render the legal advice.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Full service professional firms that include attorneys may cause conflicts for attorneys who may render advice that is in the best interest of the firm rather than the best interest of the client.

The same issues that apply to attorney-managed tech would also apply to any non-attorney tech.

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

A. Public Policy Issues

This rule requires supervising lawyers and managers to take responsibility for all members of the firm complying with the Rules and State Bar Act. This further ensures the underlying Rules are enforced.

B. Impact on Attorney-Managed Tech

As a practical matter, attorney tech should not be impacted. Clarification by Opinion or Comment as to an attorney's "reasonable" requirements with respect to certain technology may increase an attorney's comfort level with implementation of certain technology or services.

¹¹ Kucera Comment: What is "influenced by third parties"? Again, an ethics opinion would be instructive on this.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

The committee should consider whether this Rule should be extended to include non-attorney attorney-service managers and supervisors.

Rule 5.2 Responsibilities of Subordinate Lawyer

A. Public Policy Issues

The rule extends responsibility to comply with these Rules to all attorneys, even in the face of contrary direction by their superiors.

B. Whether Change is Recommended to Stimulate Attorney Tech

No apparent impact or change is necessary.

C. Whether Change is Required if Alternative Business Structures are Permitted

No apparent impact or change is necessary. Currently, non-attorneys within law firms are not subject to these same rules. Therefore, we can presume that even in an alternative business structure, non-attorney subordinates would not be expected to ignore their supervisor/manager in order to comply with the rules.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants¹²

A. Public Policy Issues

1. Attorneys are responsible for the non-lawyers that work for them. ABA Model Rule 5.3 uses the term “Assistance” versus California’s term, “Assistants.” Could this rule apply to an attorney’s use and oversight of technology as opposed to human assistance?

2. In addition to attorney oversight of tech, the requirement of attorney oversight of non-lawyer assistants may impede increased access to paraprofessionals. Paraprofessionals could also utilize technology developed by or with the assistance of attorneys.

B. Impact on Attorney-Managed Tech

The current Rule states that it applies to a “nonlawyer” and refers to a “person” which could easily be argued does not include technology. If this rule is to be applied to non-human lawyer assistance, it should be so clarified.

There is also little guidance on the extent of an attorney’s responsibility over such tech. If an attorney creates a do-it-yourself program for public use for free, what constitutes “reasonable” oversight of such product?

Many of the existing software services identified above, could be client-facing do-it-yourself type products instead of attorney-facing products.

¹² Kucera Comment: We probably need to look at this more carefully in terms of the “assistants” vs “assistance” distinction. I agree this could be applied to tech in either case.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Under the language of this rule, attorneys bear full responsibility for the non-attorneys they work for. This could create significant issues of inequity if attorneys are permitted to partner with non-attorneys. In such a situation, the attorney and non-attorney would be entitled to equal reward, while the attorney is strapped with all the risk.

Attorneys are typically risk-averse, partly because a misstep or failure on their part could result in the loss of their license to practice and thus the end of their legal career. In contrast, an entrepreneur merely risks the loss of a particular business and/or money but can otherwise continue his or her trade.

Should this Rule be adapted to minimize an attorney's risk of disbarment for the conduct of a non-attorney business partner? If so, how can we continue to protect the public?

Suggestions:

- High limit insurance policies for the non-attorneys
- Loss of the right of the non-attorney to partner with an attorney to offer legal services.

Rule 5.4 Financial and Similar Arrangements with Nonlawyers

TO BE COMPLETED BY OTHER SUBGROUP

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

TO BE COMPLETED BY OTHER SUBGROUP

ABA Rule 5.7 Law Firms and Associations¹³

This rule does not presently exist in California, but there is a question as to whether it should. The language of the ABA Model Rule is as follows:

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

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

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

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

¹³ Kucera Comment: The absence of a rule won't have any negative effect on tech

A. Public Policy Issues

As a matter of public policy, this rule would extend a lawyer's ethical obligations to any law related activity that meets the identified criteria. This would reasonably include attorney-related tech. This would increase public protections.

B. Impact on Attorney-Managed Tech

This rule would likely extend to attorney-managed tech and may fill a gap in public protections that existing rules do not address.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Clarification of this rule, if implemented, would likely be necessary if multidisciplinary practices are permitted. If a lawyer shares a business with a CPA, for example, might the CPA's efforts constitute law-related services such that the lawyer would then be subject to all of the Rules of Professional Conduct as they relate to the work performed by the CPA.

Rule 6.5 Limited Legal Services Program

A. Public Policy Issues

This Rule limits the application of the foregoing Rules to attorneys in certain circumstances in order to increase the Attorney's opportunity and willingness to provide legal services.

B. Impact on Attorney-Managed Tech

As written, this Rule is limited to programs sponsored by a "court, government agency, bar association, law school, or non-profit." This rule could potentially be extended to apply more broadly to other privately-offered programs/services. Alternatively, courts, agencies, bar associations, law school and non-profits could be incentivized to increase their programs.

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

No identified concerns. Extending the application of this Rule could further the implementation of legal tech for limited services.

Rule 7.1 Communications Concerning a Lawyer's Services¹⁴

A. Public Policy Issues

A lawyer is not permitted to make false or misleading statements about the lawyer or the lawyer's services. This is clearly necessary to protect the public against fraudulent attorneys and attorney marketing.

B. Impact on Attorney-Managed Tech

No identified impediment to innovation.

¹⁴ Kucera Comment: The rule should be no problem for attorney tech

C. Concerns if Alternative Business Structures are Permitted or UPL rules are Revised

Rule would need to extend to non-attorneys offering attorney services and it should be clear to what extent an attorney is or is not participating in any limited scope offerings.

Rule 7.2 Advertising

NEWLY IMPLEMENTED RULES RE LAWYER REFERRAL SERVICES HAVE NOT YET BEEN DISCUSSED.

Rule 7.3 Solicitation of Clients¹⁵

A. Public Policy Issues

The current rule prohibits lawyers from soliciting potential clients *in person*, by *live telephone* or *real-time electronic* contact when a significant motive for doing so is the lawyer's pecuniary gain, subject to limited exceptions. Written communications or electronic communications are permissible so long as the communication is labeled as an "Advertisement." The purpose of the Rule is to prohibit "ambulance chasing," wherein a potential client may be vulnerable to the undue influence or pressures of an attorney. The result, however, is that this may also prohibit an attorney from using technology to proactively contact potential clients that the attorney knows is in need.

Possible limitations could include live chat bots or pop-ups that appear in response to a potential client entering search terms that refer to a legal issue. For example, if a client types "final will and testament," current rules would likely restrict any type of immediate outreach by an attorney or attorney service. Also consider an application that refers a potential client to a personal injury and/or criminal attorney automatically when a vehicle has been in a car accident.

B. Impact on Attorney-Managed Tech

The current Rule may limit an attorney's ability to utilize social media and other modern forms of real-time communication to solicit clients for full-cost or *lo bono* services, including cost effective do-it-yourself services.

C. Concerns if Alternative Business Structures are Permitted

The same rules that apply to an attorney would need to apply to any non-attorney offering legal services. Otherwise, the non-attorney business would have the benefit of being able to target larger groups of people. Consider if Google or Facebook could analyze a person's searches or posts and then proactively respond by offering the legal services that the potential client appears to need.

¹⁵ Kucera Comment: This rule needs to be analyzed in greater detail. I think it could be a problem for attorney tech