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Date: February 10, 2019  
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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.

**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:

- Paraprofessional<sup>1</sup> – 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
- 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.
  - 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

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<sup>1</sup> [AK: State Bar rules do not provide for licensing of paraprofessionals – does this really constrain innovation of legal services?](#)

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.
- Expanded Lawyer Referral Services.
  - Full Service (Multidisciplinary) Businesses.
  - 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.
  - Expanded marketing-based referral partnerships.
  - Expanded Limited Scope Representation wherein technology is used by an attorney firm to provide lower cost services and advice to client.<sup>2</sup>
  - Subcontracted legal advice and services offered by the courts for pro se litigants.
  - In-court kiosks and other self-help systems offered within the courthouse.

#### **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, efiling, 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.

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

## **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.<sup>3</sup>

## **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.<sup>4</sup>

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 Authority**<sup>5</sup>

### **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.

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<sup>3</sup> KEM: I don't believe we need to recommend required MCLE courses in legal technology. We have recommended that a comment based on ABA MR 1.1, Cmt. [8], be added to CRPC 1.1. I think that will sufficiently alert California lawyers that they have to be reasonably aware of the advantages and limitations of technology and will educate themselves, as required under CRPC 1.1(c).

<sup>4</sup> KEM: With respect to competency of nonlawyers, I think this is covered by CRPC 5.3 (Supervision of nonlawyer assistants) regarding a nonlawyer providing law-related services. Ultimately, the lawyer will be responsible.

Regarding nonlawyers providing such services in the context of a multidiscipline practice ("MDP") or some other kind of alternative business structure ("ABS"), where the nonlawyer is not necessarily being "supervised" by the lawyer, I think rather than modify the rule, nonlawyers would simply be required to agree to comply with the rules of professional conduct when involved in the delivery of legal services. See proposed MR 5.8(c)(4) in Appendix A to ABA MDP Report (1999).

<sup>5</sup> KEM: Responding to Andrew Kucera's comment that the current factor-based test for determining the formation of a lawyer-client relationship is not sufficiently predictive, I don't believe that a bright-line rule can be fashioned. Ultimately the test comes down to whether the person reasonably believed that the person was consulting a lawyer in the lawyer's professional capacity. State Bar Ethics Ops. 2003-161 and 2005-168 are on point here. We also have to remember that regardless of whether a lawyer-client relationship is formed, a preliminary consultation will impose a duty of confidentiality on the lawyer. The foregoing opinions discuss that.

AK: 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.<sup>6</sup>

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.<sup>7</sup>

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<sup>6</sup> KEM: If the forms are made available w/o lawyer review, then I'm not sure it is limited scope representation as I understand that term. We briefly discussed this issue during the April 8, 2019 meeting. I suggested there might be an issue of misleading the client into believing that the forms are endorsed by the lawyer. I would guess that if the lawyer charges for the forms, then the lawyer could be deemed to have endorsed them.

The issue of forms on a lawyer's web site might be better addressed in the context of MR 5.7 (ancillary law-related services). The analysis, however, might be different depending on whether the service is offered on the lawyer's web site or on the web site (or through an app) of an ancillary business that the lawyer owns. The issue is probably too complex for a rule comment; it would likely require an ethics opinion to flesh it out sufficiently.

<sup>7</sup> KEM: I don't think this rule would need further revision to accommodate MDPs or other ABSs. Again, most of the concerns regarding those structures would be addressed either in CRPC 5.4 or in a standalone rule, as was suggested by the ABA in its MDP Report, Appendix A (1999) and again in a 2011 report by the ABA Ethics 20/20 Commission.

## **Rule 1.6 Confidential Information of a Client**<sup>8</sup>

### **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<sup>9</sup> 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?<sup>10</sup>

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<sup>8</sup> KEM: I agree with Andrew Kucera that the confidentiality concerns raised by technology are very important. The problem is that we can't really address those concerns in CRPC 1.6, which is a very narrow rule tied to Bus. & Prof. Code § 6068(e), where a lawyer's duty of confidentiality resides in California. Amending 6068(e) would require a substantial effort that would involve all three branches of Government. In any event, the confidentiality issues that Andrew identifies are for the most part confidentiality concerns as related to a lawyer's duty of competence to protect confidentiality and we might be able to circumvent the amendment process by simply noting that the competence duties require that a lawyer protect the confidentiality of client communications and other information related to the representation.

I also note that the ABA did add a comment to MR 1.6 that addresses a lawyer's duty to protect confidential information, MR 1.6(c), which provides: "(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Although the paragraph is not specific to technology, the use technology would fit within it the duty. See Comments [18] and [19] to MR 1.6.

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

<sup>9</sup> LG: I think we should be careful in assuming that confidentiality is always required. Clients should have full disclosure of what any technology processes are and whether they are privileged or confidential. But, ultimately clients should also have a choice to utilize technology if it is helpful to them even if it may be subject to subpoenas, etc. There are many ways every day individuals give up their rights to privacy and confidentiality willingly. We should not create barriers if they are not wanted by the consumer.

<sup>10</sup> KEM: Cal. Evid. Code § 917(b) provides: "(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." Nevertheless, lawyers often deal in highly sensitive information for which unencrypted communication is not adequate. The question is at what point is the use of unencrypted communications not reasonable. In many instances, clients make that decision for lawyers and require that the lawyer or law firm communicate only by highly secure means. However, what about clients who are not technologically sophisticated? At what point must a lawyer make special efforts to protect the client's information in communications. The ABA has issued a lengthy opinion on this issue, ABA Formal Ethics Op. 477R (5/22/2017) [NOTE: This link is available only to members of the ABA's Center for Professional Responsibility]. The opinion's Digest states:

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when 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 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?<sup>11</sup>

### 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.<sup>12</sup> In a

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by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

<sup>11</sup> KEM: This section captures one of the major concerns, if not the primary concern, with MDPs: the protection of a legal client’s confidential information in the context of an MDP or other ABS. If the nonlegal services are being provided as part of the legal services, e.g., a nonlawyer partner economist or accountant is working up a damages estimate for a litigation matter, then it is probable that the disclosure is “reasonably necessary for ... the accomplishment of the purpose for which the lawyer is consulted.” A problem could arise, however, if the nonlawyers in the MDP firm have complete access to the client “file,” electronic or otherwise, in order to provide nonlegal services. I’m not sure how this should be addressed. In a paper world, I suppose you could keep separate files. In the electronic world, I’ve read about “siloeing” information, i.e., restricting access to certain people. Lawyers should have unlimited access but nonlawyers should have more limited access. There would be problems in defining what those limits should be, but probably any lawyer-client communication, which necessarily is subject to the attorney-client privilege, should not be available to nonlawyers unless it is necessary for the accomplishment of the “purpose for which the lawyer is consulted.”

<sup>12</sup> KEM: The conflict issues arise not just with respect to the concept of “loyalty,” which is addressed in CRPC 1.7, but also with respect to “confidentiality,” which is addressed in CRPC 1.9 (duties to former clients) and CRPC 1.18 (duties to prospective clients). The problem arguably is exacerbated with respect to AI-based services, which I believe would require a continuous input of information to improve the program. However, I believe the UPL-AI subcommittee is satisfied that information can be culled w/o compromising the duty of confidentiality. We should follow up on this with the UPL-AI subcommittee at the May meeting.

AK: 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?

LG: While this may be an important discussion, I don’t think a rule change is necessary to increase innovation in A2J. This feels like an education need for lawyers – not a rule change to encourage innovation.

DR: What constitutes a reasonable effort to guard attorney-client information when communications are stored on third party servers at rest? SaaS platforms often contain privacy terms that state they will share user data with partners. Are attorneys liable for use of such platforms? Are attorneys being discouraged from using efficient cloud technologies for fear they will be liable for data leaks?

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.<sup>13</sup>

If<sup>14</sup> 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 Client**<sup>15</sup>

**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.<sup>16</sup>

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<sup>13</sup> KEM: As already noted w/ respect to rule 1.2, I believe that this can be accomplished by revising either CRPC 5.4 or adopting a standalone rule, as was suggested by the ABA in its MDP Report, Appendix A (1999) and again in a 2011 report by the ABA Ethics 20/20 Commission. See note 7, above.

<sup>14</sup> LG: While this may be an important discussion, I don't think a rule change is necessary to increase innovation in A2J. This feels like an education need for lawyers – not a rule change to encourage innovation.

<sup>15</sup> AK: There is probably little or no issue with this rule

<sup>16</sup> KEM: I generally agree that CRPC 1.8.1 does not on its face present an issue. However, if nonlawyer professionals do not have a similar restriction on entering into business transactions with their clients/patients, etc., then this rule might be highly relevant, particularly in light of CRPC 1.8.11, which imputes the prohibition of any lawyer to all other lawyers (and nonlawyers?) in the firm.

### **Rule 1.8.8 Limiting Liability to Client<sup>17</sup>**

#### **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.<sup>18</sup>

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

Attorney<sup>19</sup> 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.<sup>20</sup>

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<sup>17</sup> KEM: I’m not sure I agree that the rule is relaxed with respect to pro bono clients. The rule does not so state and I am not aware of any trade custom that would so suggest. I’ve always been advised that pro bono clients deserve the same level of competence as a paying client. This rule is very important. In effect it provides that the duty of competence is unwaivable. That is how it should be.

CRPC 6.5 provides a “suspension” of conflicts rules in the limited context of a one-time advice session, e.g., during a Law Day program where volunteer lawyers are recruited to provide services to those in need. It does not apply generally to pro bono services. Any such services a law firm provides except in the context of a Law Day type provision of legal services still must comply with all of the conflicts rules.

AK: 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?

<sup>18</sup> KEM: See note 17. I would vehemently oppose a proposal to limit malpractice liability with respect to technology. This is a critical rule.

<sup>19</sup> LG: I disagree overall w/ the premise that attorneys will not be incentivized to partner w/ non-attorneys if they are not required to carry insurance, etc. I also believe that this discussion is much more tailored to attorney protection than client/consumer protection. If we are tasked w/ protecting consumers, there are already ways consumers are protected under basic consumer protection laws, etc.

<sup>20</sup> KEM: Again, I think that this can be addressed by providing that the nonlawyer professional partners agree to comply with the rules of professional conduct. The disincentive may be greater for the nonlawyer professional partners. So be it. Presumably, the incentive of increased referrals from the firm’s lawyers will outweigh the disincentive of giving up a “prerequisite” of their own profession.



### **Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1. to 1.8.9<sup>21</sup>**

#### **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 1.5-6 AND 1.7<sup>22</sup>

### **Rule 1.10 Imputation of Conflicts of Interest: General Rule**

SEE RULES 1.5 AND 1.7<sup>23</sup>

### **Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons<sup>24</sup>**

#### **A. Public Policy Issues**

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

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<sup>21</sup> KEM: See note 16. I also think that CRPC 1.8.2 (use of a current client's confidential information), is also of particular concern in an MDP context.

<sup>22</sup> KEM: I want to emphasize that the same issues are not present in prohibitions under CRPC 1.9, which primarily concerns the duty of confidentiality (former clients), and 1.7, which primarily involves the duty of loyalty (current clients)

<sup>23</sup> KEM: Imputation of prohibitions to all other lawyers in the firm and, in an MDP context, all other lawyers and nonlawyer professionals, is an important consideration. In an MDP, I think that the prohibition should be imputed to all other members of the firm (lawyers & nonlawyers), regardless of whether the personal prohibition is based on the provision of services to a client in the legal end or nonlegal end of the firm. For example, a client of an accountant in an MDP should not be sued by a lawyer in the same MDP. This is the approach that was taken by the ABA in its proposed rules submitted with the ABA MDP Report in 1999. See Appendix A to that report, proposed comment to Model Rule 1.10.

<sup>24</sup> KEM: Given that one of the surefire ways for a lawyer to be disciplined is to fail to comply with CRPC 1.15, I think this is a rule that will require a bit more of our consideration, e.g., do all funds received or held by the lawyer for the benefit of a client or another person, regardless of whether the client is a legal client or a nonlegal client, have to be deposited in the firm's trust account, including any advance fees? I suspect that many of the tech services we are contemplating will require the client to enter credit card or other information before the services are provided. One of the requirements in proposed rule 5.8 (never adopted) as suggested by the ABA MDP Commission required a "written undertaking" by the CEO and board of directors that: "(3) it [i.e., the MDP] will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds." See proposed MR 5.8(c)(3), in Appendix A to ABA MDP Report.

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

## **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.<sup>25</sup>

## **C. Concerns<sup>26</sup> 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 Representation<sup>27</sup>**

### **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.<sup>28</sup>

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

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<sup>25</sup> DR: [What constitutes a reasonable effort to guard attorney-client information when communications are stored on third party servers at rest? SaaS platforms often contain privacy terms that state they will share user data with partners. Are attorneys liable for use of such platforms? Are attorneys being discouraged from using efficient cloud technologies for fear they will be liable for data leaks?](#)

<sup>26</sup> LG: [I don't believe a rule like this would be enforceable against businesses/individuals. More discussion would be needed before a recommendation could be suggested.](#)

<sup>27</sup> KEM: [I don't think that issue \(ferreting out an improper purpose in a limited scope representation\) ever came up during the Commission's deliberations \(either the first or the second Commission\). There is a knowledge requirement. That doesn't mean the lawyer and engage in deliberate ignorance, but there have to be some warning signs before any duty to look further is triggered. See definitions of "know" and "reasonably should know" in the terminology rule, CRPC 1.0.1. I'm not sure that it is an issue that requires any revision to the rule.](#)

AK: [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.](#)

<sup>28</sup> KEM: [If the lawyer doesn't review any form the client uses, when will the lawyer have an opportunity to decline or accept a representation?](#)

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.<sup>29</sup>

**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**<sup>30</sup>

SEE RULES 1.5-6, 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.<sup>31</sup>

**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.<sup>32</sup>

**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.

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<sup>29</sup> KEM: I think this has been mentioned in other contexts, e.g., isn't this issue similar to the issue we discussed where a person seeking to use a will generation program and the person is worth over \$600,000? If the person is, then the program would simply notify the person that a lawyer should be consulted.

<sup>30</sup> KEM: The primary issue involved here is confidentiality, i.e., information the client might have disclosed during the consultation with the lawyer (or nonlawyer professional?) An important issue here is imputation and ethical screening, as permitted by CRPC 1.18.

<sup>31</sup> KEM: More specifically, the *financial* interests of those third parties, i.e., the nonlawyer partners or managing partner or CEO, etc.? For example, would it be financially more attractive for the lawyer's firm to settle a contingency case for a low ball offer with minimum expenditure of time rather than pursue a valid claim for a higher amount but which will require a substantial expenditure of time by the firm? Yes, lawyers balance these concerns all the time and ultimately the client has to consent to accepting the settlement offer, but this rule is intended to protect against a third person from putting pressure on the lawyer.

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

<sup>32</sup> KEM: I'm not sure the rule would be violated if the lawyer has developed the program and the decision tree has been designed to respond to each answer the client gives. I might be wrong but I think that under those circumstances the lawyer would have exercised independent professional judgment in the development of the program.

As for a program that is purchased, the lawyer would have exercised independent professional judgment in evaluating the program, asking questions about how it arrives at any recommendations that are provided to the client, etc. I don't think this rule would be implicated in that case.

LG: I don't believe a rule like this would be enforceable against businesses/individuals. More discussion would be needed before a recommendation could be suggested.

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**<sup>33</sup>

##### **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.

##### **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.<sup>34</sup>

#### **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.

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<sup>33</sup> KEM: I don't think tech is relevant to this rule. It is addressed to supervising subordinate lawyers.

However, with respect to nonlawyer professionals working in the firm, any nonlawyer partner or manager would have to be included under its requirements. For example, paragraph (a) of CRPC 5.1(a) could be rewritten to provide:

(a) A lawyer or another person who individually or together with other lawyers and persons possesses managerial authority in a law firm;\* or multidisciplinary practice firm shall make reasonable\* efforts to ensure that the firm\* or multidisciplinary practice firm has in effect measures giving reasonable\* assurance that all lawyers and nonlawyer professionals in the firm\* or multidisciplinary practice firm comply with these rules and the State Bar Act.

This is just a quick suggestion based on the language used by the MDP Commission in Appendix A. It's not intended to be in final form. However, technology should not be an issue. However, see discussion of CRPC 5.3.

<sup>34</sup> KEM: I'm not sure what is meant by non-attorney service managers and supervisors. Unless they are partners or some kind of officer in the MDP or ABS firm, I don't think this rule would be applicable to them.

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**<sup>35</sup>

#### **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.

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

Under<sup>36</sup> the language of this rule, attorneys bear full responsibility for the non-attorneys they ~~work for~~ **employ or with whom they contract**. 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.<sup>37</sup>

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.

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<sup>35</sup> KEM: I think to clarify that this rule applies not only to human “assistants” (whether employees or contractors, whether outsourced or offshored) but also to programs and other technology that a lawyer might employ to provide legal services, we should recommend substitution of the word “assistance.” The downside is that a lawyer might be concerned with being responsible for the proper functioning of the program. However, someone has to be responsible and that is the gist of this rule. In any event, one can argue that technology would be covered by CRPC 1.1, as clarified in the proposed Comment [1].

AK: 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.

<sup>36</sup> LG: All this discussion within this section seems to be geared towards attorney protectionism and not consumer protectionism. More discussion would be needed to explain how this rule change suggestion actually protects consumers.

<sup>37</sup> KEM: Again, any such nonlawyer who is a partner or in a management/ownership position will have to make an undertaking to comply with the rules of professional conduct. The only question is whether that compliance should be limited to instances when the nonlawyer professional is involved in the firm’s provision of legal services. See, e.g., Proposed Model Rule 5.8(c)(4), in Appendix A to ABA MDP Report.

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**<sup>38</sup>

TO<sup>39</sup> BE COMPLETED BY OTHER SUBGROUP

**Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**

TO<sup>40</sup> BE COMPLETED BY OTHER SUBGROUP

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<sup>38</sup> KEM: Although this rule is being addressed by the ABS/MDP subcommittee, we can also consider it. Please refer to Appendix A of the ABA MDP Report. In 1999, the ABA addressed the MDP issue by proposing a standalone rule 5.8, and cross-reference that rule with a proposed revision to MR 5.4 by adding paragraph (e), which would have provided: "(e) To the extent provided in Rule 5.8, the provisions in subsections (a), (b), or (d) above do not apply to a lawyer in an MDP."

<sup>39</sup> LG: I am suggesting a change to Rule 5.4 to allow fee sharing. Arguments against fee sharing, I believe are all based on an assumption that is false. The false assumption is that the current state of the legal system and the rules are effective at protecting the public. The various discussions seem to center on the idea of whether a rule change will CONTINUE protections that exist. What we ignore is the vast data that states that our current system has failed most of the consumers who need it. It is undisputed that 77 – 80% of consumers who need legal services don't receive the help they need. In fact, many of those consumers do not even recognize their needs as legal needs. Of the 20% or so who do receive assistance, there is also ample evidence that the system is unfair to those who have means vs those who do not. Suggesting that rule changes should not happen because there is no evidence that rule change will protect the public incorrectly suggests that the rules as written have done the job of protecting consumers. If any other industry failed to meet 80% of the need, it would not be considered a successful industry. We should recognize our industry requires stark change and a large influx of assistance to meet the overwhelming needs completely unaddressed under our current rules.

I suggest a rule change as follow:

- (a) A lawyer or law firm is permitted to share legal fees with a person organization not authorized to practice law provided:
  - i. Any prospective client is informed before engaging the lawyer that legal fees will or may be shared with a person or organization not authorized to practice law
  - ii. The fee sharing does not interfere with the lawyer's independent professional judgment or with the lawyer-client relationship.

<sup>40</sup> LG: While I think the same argument for fee sharing should be applied to UPL rules, it is my understanding that statutory changes would also be required so a rule change here would have little effect.

## **ABA Rule 5.7 Law Firms and Associations**<sup>41</sup>

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.*

### **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.

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<sup>41</sup> [KEM: The inclusion of a rule patterned on MR 5.7, however, could serve to alert lawyers to the alternative of creating an ancillary business that would provide law-related services.](#)

[AK: The absence of a rule won't have any negative effect on tech](#)

## **Rule 6.5 Limited Legal Services Program**<sup>42</sup>

### **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 Services**<sup>43</sup>

### **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.

### **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.

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<sup>42</sup> KEM: This rule applies only in very limited circumstances and should remain so. It is not a pro bono rule. It is intended to apply on to "one time" legal advice scenarios, e.g., Law Day and the like. It was adopted in California in 2009 to address the loan modification crisis following the economic implosion of 2007-2008. The concern it addressed was that lawyers in large firms that had banks as clients were concerned that they would be unable to clear conflicts in these limited advice situations. Therefore, lawyers from these firms did not participate in these seminars. The rule addressed this by in effect suspending the conflicts rules – and only the conflicts rules (1.7, 1.9(a) & 1.10) – when a lawyer participates in these programs. In short, it absolved the lawyer of screening for conflicts whenever a person participating in of these limited programs sought the lawyer's advice. This rule's scope is limited by design and should not be revised in any way.

<sup>43</sup> KEM: I've submitted the materials concerning the ABA's recent revisions of the Model Rules re lawyer marketing to be discussed during our May 2019 meeting.

AK: The rule should be no problem for attorney tech



### **Rule 7.3 Solicitation of Clients**

#### **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.

#### **D. 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.