



To: Rules and Ethics Opinions Subcommittee
From: Johann Drolshagen
Date: June 14, 2019
Re: B.3. Recommendation: Adoption of Proposed Rule 5.4 [Alternative 2]

Recommendation Not Yet Approved by the Task Force: Adoption of Proposed Rule 5.4 [Alternative 2]

Proposed Rule 5.4 Financial Arrangements with Nonlawyers

A lawyer or law firm shall not share a legal fee with a person or organization not authorized to practice law unless:

- (a) the lawyer or law firm enters into a written agreement to share the fee with the person or organization not authorized to practice law;
- (b) the client has consented in writing, either at the time of the agreement to share fees or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that the fee will be shared with a person or organization not authorized to practice law; (ii) the identity of the person or organization; and (iii) the terms of the fee sharing;
- (c) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

How the Recommendation Relates to the Charter: In recommending the proposed comment, the Task Force considered its Charter, which includes the direction to:

2) Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need.

The subcommittee is proposing 2 alternate rule recommendation changes to Rule 5.4. The subcommittee proposes both versions of the Rule 5.4 recommended rule changes be submitted to the public for comment in an effort to gauge discussion/concerns and support for both potential recommendations. While either recommendation may not be the ultimate recommendation of the task force in its final report, gauging the public (and legal field's) reaction to both versions of the proposed

rule changes could result in useful data and suggested new business models should either version of the proposed rule ultimately be implemented.

Alternative 1 proposed rule change recommendation began with an ABA proposed Rule 5.4 change that was never implemented by the ABA. It is a continuing step in changing the way legal services are delivered but is part of conversations that have existed in the legal space for some time. This proposed change, while considered by many in the existing legal sphere as a major shift, is not innovative or new thinking but a continuation of ideas that have been previously evaluated and discussed.

Alternative 2 is meant to create a major shift in Rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in A2J to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in A2J. In fact, a recent survey has suggested that A2J gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing A2J crisis.

The #ATILS task force charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is non-lawyer ownership or investment - a specific area the current Rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the task force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to “ensure that the recommendations of the Task Force are focused on protecting the interest of the public.” Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of A2J needs go unmet. The statistics evidencing the failure to meet the A2J needs are immense and well documented.

The Alternative 2 proposed rule change allows a rule change that brings about the same change in increasing access to justice by harnessing the power of technology as it did for building a task force to study regulatory changes. It invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. The State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for A2J.

- The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivised by partnering with lawyers in a multitude of ways.
- The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided the citizens.
- The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.

- The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.
- The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
- The proposed Rule provides for the inclusion of oversight by a licensed legal professional.