



# The State Bar *of California*

ACCESS THE  
OF LEGAL SERVICES (ATILS)

F.4. ATILS  
07-26-19 Meeting  
Open Session

## LIST OF TENTATIVE RECOMMENDATIONS

### General Recommendations

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

### Recommendations for Specific Exceptions to the Current Restrictions on the UPL

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

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

### **Rules of Professional Conduct Recommendations**

- 3.0** - Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.
- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.
- 3.2** - Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.
- 3.3** - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.
- 3.4** - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.

## GENERAL RECOMMENDATIONS – EXPLANATIONS AND PROS AND CONS:

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

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

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

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

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

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

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

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

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

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

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

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

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

**Pros:** The primacy of the judicial branch's regulation over the practice of law and the administration of justice militate in favor of retaining the current regulatory paradigm of a lawyer as client representative and advocate, as an officer of the legal system and as a person having special responsibilities for the quality of justice. Lawyers, both as individuals and as members of law firms (defined in rule 1.0.1(c) to include an association authorized to practice law) are obligated to increase public access to legal services through innovation and technology

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

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

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

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

**Pros:** Absent a plan and methodology for capturing data and applying measures to evaluate the impact of regulatory changes, there would be no reliable way of knowing whether regulatory changes are having any positive effect on the access to justice crisis. Particularly where the providers to be regulated are developing technology-driven delivery systems, the regulator's plan and methodology for capturing data and applying quantitative and qualitative metrics should be considered by the providers at the time that the technology itself is being developed.

In addition, the details of the regulatory changes should be thoughtfully considered to determine whether rules should require certain data collection and reporting, as long as such requirements do not unduly burden user privacy or data security.

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

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

These recommendations would add exceptions to the existing restrictions on UPL to permit provision of specified services by regulated persons or entities. Recommendations 2.0 and 2.1 are not limited to activities by an entity or by technology-driven delivery systems. Recommendations 2.2–2.6 are limited to activities by an entity using a technology-driven delivery system. The Task Force is considering all of these options for regulatory reform with the goal of public protection and increasing access to legal services through innovation.

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

**Background:** Unlike the entity regulation model contemplated by Recommendations 2.2–2.6, this recommendation describes a policy that would permit regulated nonlawyers to provide specified legal advice and services without a requirement that the delivery system be technology-driven. For example, it would encompass nonlawyers practicing as limited licensed legal technicians<sup>1</sup> similar to the nonlawyer provider program implemented in [Washington State](#).

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<sup>1</sup> Recommendation 2.0 is consistent with the conclusion reached in the Report of the State Bar of California Commission on Legal Technicians (July 1990) that, in part, states:

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

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

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

The Task Force considered the following structural options for permitting nonlawyers to provide legal advice and services to consumers:

### **Option 1: Entity Regulation only**

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

### **Option 2: Hybrid Entity/Individual Regulation**

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

### **Option 3: Certification of Paraprofessionals/Exemption from UPL**

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

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

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

**Cons:** This type of regulation requires a very delicate balance. Defining the permissible scope of practice for legal services delivered by nonlawyers may be challenging and could also lead to overregulation. Entities may be discouraged from employing nonlawyers to perform these

tasks, or individuals may be hesitant to seek permission to deliver the limited services, if it is perceived that the qualifications are too onerous. On the other hand, if regulations are too lax, critical aspects of public protection, including the maintenance of client confidentiality and the avoidance of conflicts may be compromised.

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

**What will this recommendation do?** – This policy will clarify the wide variety of regulated entities that would be permitted to provide specified legal, or law-related, advice and services, without a technology requirement (similar to Recommendation 2.0 that contemplates regulated individuals being permitted to render specified services), and that the particular regulations imposed would be tailored to the type of entity structure (e.g., lawyer and nonlawyer entity or 100 percent nonlawyer entity).<sup>2</sup>

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

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

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<sup>2</sup> By virtue of including this recommendation, ATILS is interpreting its charter as inclusive of recommendations for reform authorizing practice of law activities that do not inherently involve lawyer ownership or control. The charter’s inclusion of “ABS” and “MDP” structures led some ATILS members to wonder whether the charter implicitly limited the possible reforms to lawyer owned/controlled structures.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

evidentiary privilege notwithstanding the fact that communications might be exclusively with nonlawyers.<sup>3</sup>

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

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

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

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

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

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<sup>3</sup> See the statutory privilege that protects a client's communications with a certified lawyer referral service, Evidence Code sections 965 – 968.

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

## **RULES OF PROFESSIONAL CONDUCT RECOMMENDATIONS - EXPLANATIONS AND PROS AND CONS**

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

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

**[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.**

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

### **Pros:**

1. Including a Comment to the competence rule, rule 1.1, that recognizes a lawyer's duty to be familiar with and be competent in using relevant technology will alert lawyers to that duty and provide them with an incentive to adopt and incorporate useful technology in their practices. Such adoptions can have a beneficial effect on a practice's efficiency, which can in turn lead to reduced costs that can be passed on to clients.
2. Although there are State Bar ethics opinions that have already embraced the substance of the proposed Comment, (see, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179), such opinions are merely persuasive. Further, those opinions, for the most part, rely on reasoning that depends on the interaction of various rules that can create confusion. A direct statement of the lawyer's duty is preferable in providing the aforementioned incentives for lawyers to familiarize themselves with, and adopt available legal technology.

3. A Comment is preferable to black letter text. There are many different kinds of knowledge and skills that serve as the foundation for a lawyer's competent delivery of legal services. For example, the [ABA MacCrate Report on Law Schools and the Profession \(1992\)](#) identified 10 separate skills and four values that every lawyer should possess. A black letter rule on competence should be more generally written, for example, it should identify the general components of competence, with comments included to flesh out the more generally-stated components. That is precisely what rule 1.1 does by defining "competence" in providing any legal service to mean that a lawyer applies "the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service." Familiarity with the benefits and risks of using technology in providing legal services is just one aspect of the knowledge and skills a lawyer must bring to bear in providing services to a client. The proposed Comment clarifies that.
4. Using a Comment to clarify the scope of a rule is preferable to the ABA Model Rule approach.<sup>4</sup> First, the Comment to ABA Model Rule 1.1 uses the word "should," which is merely aspirational in nature. Such non-mandatory language is not appropriate in a disciplinary rule. Second, including a Comment similar to the Discussion section to former rule 3-110 is preferable to the Model Rule approach because such language could not be interpreted as adding to a lawyer's duties, which is not a permitted use of a comment. Instead, using the syntax and general style of the former rule Discussion should be viewed as merely elucidating what the black letter of the rule encompasses. Explaining the scope of a rule's application is an appropriate use of a comment. Moreover, that competence includes a familiarity with and appreciation of relevant technology is supported by several State Bar ethics opinions on this topic.
5. Importantly, a lawyer's familiarity not only with the benefits of technology, but also its risks, (e.g., the risk of confidential client information being disclosed when using electronic means of communication) should also enhance client protection.
6. The addition of the Comment would bring California in line with a substantial majority of jurisdictions that have incorporated the ABA Model Rule Comment into their rules.

#### **Cons:**

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

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<sup>4</sup> Model Rule 1.1, Cmt. [8], provides in relevant part: "To maintain the requisite knowledge and skill, a lawyer *should* keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ...." (Emphasis added)

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

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

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

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

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

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

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

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

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

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

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<sup>5</sup> The Task Force welcomes public comment on the issue of whether “nonprofit organization” ought to be limited to a 501(c)(3) corporation.

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

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

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

**Pros:**

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



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

**Cons:**

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

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

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

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

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

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

law-related services would have any of the protections ordinarily present when legal services are being rendered, thus enhancing client protection.

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

**Selected Resources:** Attachment M excerpt – ABA Model Rule 5.7

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

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

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

**Pros:** In part, the 2018 ABA revisions to the advertising rules: repeal rule 7.5 and move some of the content concerning firm names and letterhead to the Comments to rule 7.1; repeal rule 7.4 and move some of the content concerning fields of practice and specialization to rule 7.2 and the Comments to rule 7.2; and amend the concept of prohibited direct contact solicitations to focus on the concept of “live person-to-person contact” rather than the concept of “real-time electronic communication,” which had caused numerous application issues with respect to technological advances. Generally, these changes reduce and streamline the regulatory burden imposed on lawyer advertising. In particular, removing the restriction on real-time electronic communication could facilitate development of innovative online delivery systems that primarily utilize electronic communication for both the marketing and delivery of online legal services.

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

**Selected Resources:** Attachment N excerpt – ABA Model Rules 7.1–7.3.



## **Proposed Rule 5.4 [Alternative 1] – Clean Version**

### **Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]**

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
  - (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services;
  - (5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
  - (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).
- (b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:
  - (1) the firm's sole purpose is providing legal services to clients;
  - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
  - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
  - (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

#### **Proposed Rule 5.4 [Alternative 1] – Clean Version**

- (5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;
- (6) compliance with the foregoing conditions is set forth in writing.
- (c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable\* time during administration.
- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

#### **Comment**

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal

#### **Proposed Rule 5.4 [Alternative 1] – Clean Version**

services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[6] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).

## Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

### Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1]

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; ~~or~~
  - (5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm\* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or
  - (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).
- (b) ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~ A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:
- (1) the firm's sole purpose is providing legal services to clients;
  - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
  - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
  - (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct



## Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

(6) compliance with the foregoing conditions is set forth in writing.

(c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) ~~A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~

~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a),  
a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable\* time during administration;

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

## Redline Comparison of Proposed Rule 5.4 [Alternative 1] to Current California Rule 5.4

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[\[4\] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph \(a\)\(5\).](#)

[45] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).



# The State Bar of California

## Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

To: Rules and Ethics Opinions Subcommittee  
From: Kevin Mohr  
Date: June 18, 2019  
Re: Recommendation: Adoption of Proposed Rule 5.4 [Alternative 1]

\* \* \* \* \*

### I. Overview of the Proposed Revisions to CRPC 5.4

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

The proposed amendments are four in number. *First*, the subcommittee recommends that current paragraph (b)(5), which permits a lawyer or law firm to share with or give *court-awarded* fees to a nonprofit organization be expanded to permit such sharing or giving of legal fees to a nonprofit organization regardless of whether the fees have been awarded by a tribunal. *Second*, the subcommittee recommends the addition of a sixth exception to paragraph (a)'s fee sharing prohibition, new subparagraph (a)(6), which would permit fee sharing in a law firm in which nonlawyers hold a financial interest so long as the lawyer or law firm has complied with each of the requirements of paragraph (b). Paragraph (b), which replaces paragraph (b) of current CRPC 5.4, prohibits fee sharing in a law firm in which nonlawyers hold a financial interest unless each of the requirements set forth in subparagraphs (b)(1) through (b)(6) have been satisfied. *Third*, paragraph (d) is substantially revised to conform it with the changes made to paragraph (b). *Fourth*, new comment [4] has been added, and current comments [4] and [5] renumbered [5] and [6], respectively.

It is important to note that paragraph (b) is substantially more limiting than what was proposed as a "multidisciplinary practice" (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to "assist" the firm's lawyers in the firm's sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature,

e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.

Each of the foregoing changes is discussed in detail in the next section.

## II. Recommendation & Explanation of Proposed Changes to CRPC 5.4

### A. Paragraph (a)

The introductory paragraph of paragraph (a) provides:

(a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

The basic prohibition on fee sharing is preserved. The concept is that lawyers should not share fees with nonlawyers. There is a concern that such fee sharing would result in nonlawyer marketing businesses that would direct clients to lawyers who pay the most for the referral, even if the lawyer is not qualified. Similarly, the absence of this provision would permit a business operated by a nonlawyer to employ lawyers to represent clients and permit interference with the lawyers' independent professional judgment or the lawyer-client relationship. However, there are six exceptions to this basic rule (five in current rule, for which one of them the subcommittee has recommended amendments). A new exception, similar to one proposed by the ABA Ethics 20/20 Commission in 2011 (but never adopted), is provided in subparagraph (a)(6).

#### 1. Subparagraphs (a)(1) through (a)(4).

No changes are recommended for subparagraphs (a)(1) through (a)(4).

Subparagraph (a)(1) is a long-standing exception that permits fee sharing with a deceased lawyer's survivors.<sup>1</sup>

Subparagraph (a)(2) is another long-standing exception that conforms with the rule that permits sale of a deceased or disabled lawyer's practice to another lawyer (CRPC 1.17).<sup>2</sup>

Subparagraph (a)(3) recognizes that many businesses provide for employees to share in the businesses' profits. Without this exception, such profit sharing arrangements would not be

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<sup>1</sup> It provides an exception to the fee sharing prohibition for "(1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*"

<sup>2</sup> It provides an exception to the fee sharing prohibition for "(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;"

permitted in a law firm.<sup>3</sup> Comment [1] to the rule clarifies that the amount of bonus or profit share may not be based on a percentage or share of fees in specific cases or legal matters.

Subparagraph (a)(4) is a long-standing exception that conforms the rule's application to the statutes and rules governing lawyer referral services in California.<sup>4</sup>

2. Subparagraph (a)(5) – Sharing legal fees with a nonprofit organization.

The following amendments to current CRPC 5.4(a)(5) are recommended:

(5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm\* in the matter and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code; or

At its June 3, 2019 meeting, the subcommittee voted to recommend adoption of a modified version of D.C. Rule 5.4(a)(5).<sup>5</sup> The inclusion of the word “facilitate” is intended to capture the concept of a law practice incubator. See comment [4].

The phrase “including but not limited to” was substituted to expand the kinds of representations that can generate fee sharing beyond litigation.

The rationale for limiting the kinds of nonprofit organizations to those that qualify under Internal Revenue Code § 501(c)(3) is found in D.C. Rule 5.4, cmt. [8], which provides in relevant part:

“Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.”

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<sup>3</sup> It provides that “(3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;”

<sup>4</sup> It provides “(4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California’s Minimum Standards for Lawyer Referral Services;”

<sup>5</sup> D.C. Rule 5.4(a)(5) provides: “(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.”

**Pros:**

(1) By not limiting the (b)(5) exception to court-awarded fees, access to justice might be increased by providing an increased source of revenue to nonprofit legal service providers such as the ACLU.

(2) Concerns regarding potential abuse by a nonprofit specifically formed to share in legal fees are obviated by the limitation to those organizations that qualify under IR Code § 501(c)(3).

**Cons:**

(1) There is no evidence that expanding the exception beyond “court-awarded” fees will increase access to justice.

(2) The limitation to court-awarded legal fees ensures that “[n]ot only does this circumstance guarantee that the fee will be fairly determined and proportionate to the work performed, but it also recognizes that the litigation in which the fee was generated will have been determined to be of a kind that serves a useful public purpose.” ABA Formal Ethics Op. 93-374, at page 6.

(3) Further, limiting the exception to “court-awarded” legal fees “underscores the fact that economic considerations are of relative unimportance in the relationships between the lawyer, the sponsoring organization, and the client, and hence unlikely to be controlling of any litigation decisions.” *Id.*

(4) The limitation stated in paragraph (a)(5) restricting fee sharing to a non-profit 501(c)(3) may be too limiting by excluding other non-profits. The Task Force welcomes comments on expanding the type of organizations that ought to be permitted for this fee-sharing exception.

3. *Subparagraph (b)(6) – Sharing legal fees with nonlawyers in a law firm that satisfies all requirements set forth in paragraph (b).*

Subparagraph (a)(6) provides an explicit exception to the general prohibition against sharing fees with nonlawyers so long as the lawyer or law firm complies with each of the conditions set out in paragraph (b). It is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011.

Paragraph (a)(6) carves out the exception. Paragraph (b) sets out the six requirements or contingencies that the firm must satisfy to come within the scope of the exception. As explained in section I, above, the requirements in paragraph (b) make any firm that qualifies substantially more limited than what was proposed as a “multidisciplinary practice” (MDP) by the ABA MDP Commission in 1999.

The subcommittee has added the full statement of what is required so that there is no confusion as to what a law firm must do to qualify. The Ethics 20/20 version simply provided:

(x) a lawyer or law firm may do so pursuant to paragraph (b).

Although “do so” could be substituted, the subcommittee thought it important that the black letter text clarify that permission to “do so” mandates that “the lawyer or law firm complies with the requirements set forth in paragraph (b),” all of which requirements are mandatory.

The gist of paragraph (a)(6) is that lawyers and nonlawyers are permitted co-own a law firm, which is defined in the rules as follows:

(c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization. CRPC 1.0.1(c).

Because sharing in the profits of such a firm requires that the legal fees, which would be the source of profit in such a firm, be shared, there must be an express exception to the paragraph (a) prohibition. Subparagraph (a)(6) provides an explicit exception that affords that opportunity.

The subcommittee concluded that no further changes need to be made to the definition of “law firm” because (i) the definition focuses on an organization that practices law and (ii) the kind of firm as envisioned in paragraph (a)(6) is one whose “sole purpose” is “providing legal services to clients.” See (b)(1). That would not have been true had the recommendation been to amend CRPC 5.4 to permit an MDP.

Rather than identify pros and cons for the exception in general, the subcommittee has identified pros and cons for each of the requirements in subparagraphs (b)(1) through (b)(6) that must be satisfied for a firm to qualify under the subparagraph (a)(6) exception.

#### B. Paragraph (b)

As noted, paragraph (b) is based on the amendments to Model Rule 5.4 proposed by the ABA Ethics 20/20 Commission in 2011. The ABA never adopted those proposed changes to the rule.

The introductory paragraph of (b) is substituted for current CRPC 5.4(b), which absolutely prohibits lawyers from forming a partnership or other organization with a nonlawyer if any of the activities of the organization involve practicing law.<sup>6</sup> The proposed introduction would provide:

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

The preceding paragraph differs from the Ethics 20/20 proposal in two ways. *First*, the clause “each of the following requirements is satisfied” has been added to emphasize that each of the requirements is mandatory. *Second*, the introductory paragraph has been rewritten to be

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<sup>6</sup> Current CRPC 5.4(b) provides: “(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.”

prohibitory (“shall not ... unless”) as is standard in the California Rules rather than permissive (“may ... but only if”) as in the ABA Ethics 20/20 proposed rule 5.4.

1. Subparagraph (b)(1).

Subparagraph (b)(1) is identical to the same paragraph in Model Rule 5.4 as proposed by the Ethics 20/20 Commission. It would provide:

(1) the firm’s sole purpose is providing legal services to clients;

**Pros:**

(1) Limiting the type of firm to one whose sole purpose is providing legal services enhances public protection because the lawyer partners, subject to codes and statutes imposing specific duties owed clients, will ultimately be responsible for decisions relating to those services.

(2) This limitation on the services provided should avoid the negative implications of a full-fledged MDP, which was soundly rejected by the ABA in 2000. See note **Error! Bookmark not defined..**

(3) This limitation on the services provided should also avoid the concerns stated in Sam Skolnik and Amanda Iacone, [\*Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)\*](#), which likely would create pushback by the legal profession. This article suggests that some rules proposals that would open up the ability of lawyers to enter professional and financial relationships with nonlawyers will merely function as stalking horses and enable the Big Four accounting firms to expand their presence in providing legal services without a corresponding increase in access to justice.

(4) Although limited, this proposal should nevertheless provide nonlawyer technologists with a financial incentive to join forces with lawyers to fashion technological solutions to the justice access problem in concert with the lawyers’ provision of legal services.

**Cons:**

(1) There is little or no concrete evidence that even this modest proposal will increase access to justice. The only jurisdiction that has adopted a similar rule is D.C., and that rule appears primarily intended to provide a means for nonlawyer lobbyists to share in a law firm’s profits (and enhance the law firm’s profits in that environment.)

(2) See Pro #3, above.

(3) The limitation stated in paragraph (b)(1) restricting fee sharing to a law firm, as defined by the rules, may limit the ability of law firms to join with other service providers or disciplines that would offer valuable services to clients but would not be provided by a law firm.



2. Subparagraph (b)(2).

Subparagraph (b)(2) is identical to the same paragraph in Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;

**Pros:**

(1) By limiting the role of nonlawyers to providing services “that assist” the provision of legal services, this provision addresses to some extent a concern expressed by members of ATILS regarding whether a tech solution can retain the protection of the privilege or work product in providing services. So long as the nonlawyers, whether through their own efforts or through apps they have designed, are assisting lawyers in providing services to the firm’s clients, the protections of privilege and work product should be preserved.

For example, with respect to privilege, see Evid. Code 952, which provides:

As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those *who are present to further the interest of the client* in the consultation or *those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added)

**Cons:**

(1) This rule would not address the stated concern as to a nonlawyer’s business that is engaged in providing legal services directly through technology, unless that business is majority owned or at least controlled by a lawyer or lawyers.

**Possible Issue:** Should nonlawyer ownership be limited to nonlawyers who “assist” the lawyers of the firm in providing legal services?

If not so limited, e.g., the firm is a true MDP (i.e., providing legal, accounting, etc., services independent of one another), which could open the door wider than intended. See Sam Skolnik and Amanda Iacone, [Big Four May Gain Legal Market Foothold With State Rule Change, Bloomberg \(4/11/19\)](#).

Compare the rule revision proposal of the ABA MDP Commission in their [Appendix A](#).

3. Subparagraph (b)(3).

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;

Subparagraph (b)(3) is comprised of the first clause of paragraph (b)(5) of Model Rule 5.4 proposed by Ethics 20/20. Paragraph (b)(5) provided:

(5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

The subcommittee believes that the balance of subparagraph (b)(5) of the Ethics 20/20 version of the rule is confusing and unnecessary. There will likely be many different ways in which nonlawyer ownership of a law firm will be implemented. The key point is that the nonlawyers in the firm must not direct or control the lawyers' independent professional judgment. This provision will allow some flexibility in setting up a firm's management structure, so long as this cardinal principle is not violated.

**Pros:** (1) A simple declarative statement that nonlawyers in the firm have no power to direct or control the professional judgment of a lawyer should provide sufficient assurance that the lawyers' professional judgment will not be impinged by the nonlawyers in the firm.

(2) The statement should also provide sufficient guidance on how the various ownership and voting interests should be structured in a firm set up under subparagraph (b). For further clarification, a comment could be added. Consider, for example, a variant Comment [8] to Model Rule 5.4, as proposed by Ethics 20/20, which provided:

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

However, the subcommittee does not believe that such a comment is necessary to further explain subparagraph (b)(5), which explicitly prohibits nonlawyers from controlling or directing the lawyers' decisions.

**Cons:** (1) This black letter provision lacks specificity as to how the goal of preventing nonlawyer control of lawyers' professional judgment will be attained.

4. Subparagraph (b)(4).

Subparagraph (b)(4) is based on paragraph (b)(3) of Model Rule 5.4 as proposed by Ethics 20/20.<sup>7</sup> It would provide:

(4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

The additional language in subparagraph (b)(4) recognizes that in California, lawyer conduct is regulated not only by the Rules of Professional Conduct. Under subparagraph (b)(3), the nonlawyers must agree to undertake to conform their conduct to that of lawyers under the Rules of Professional Conduct, the State Bar Act, and the other laws that govern lawyer conduct (e.g., Evidence Code, Probate Code, Penal Code, etc.)

**Pros:**

(1) This provision, when read in conjunction with subparagraph (b)(5), which imposes on the firm's lawyer partners the duty to ensure the firm's nonlawyers' compliance with the Rules, etc., provides assurance that the services provided by the firm will be in compliance with the Rules.

(2) Requiring certification would not increase public protection. The key element in ensuring legal services are being provided in compliance with the Rules, etc., will be the continued monitoring of nonlawyer conduct by the lawyer partners in the firm.

**Cons:**

(1) The provision does not provide sufficient public protection, even when read in concert with subparagraph (b)(5). The public would be better protected by requiring that each nonlawyer partner be certified by an appropriate authority. See "Issue2," below.

Although the subcommittee concluded that the provision as drafted should provide sufficient protection when read in conjunction with subparagraph (b)(5), it did identify two further issues that the Task Force as a whole might want to address:

**Issue1:** The provision requires nonlawyers agree to "undertake to conform their conduct." Should the provision provide that the nonlawyers agree "to conform their conduct." In

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<sup>7</sup> Ethics 20/20 proposed rule 5.4(b)(3) provided:

(3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;

other words, we're not asking you to attempt to conform your conduct but telling you that you must agree to do so.

**Issue2:** In addition to the foregoing issues presented for the May 13-14, 2019 meeting, during the May 14 subcommittee meeting, there was a discussion whether this provision provides sufficient protection or whether each nonlawyer should be certified by some process implemented by the State Bar. The subcommittee concluded that this provision was sufficient. On reflection, perhaps a slightly revised provision that specifies that *each* nonlawyer must agree in a *signed* writing that the nonlawyer will conform his or her conduct would be an acceptable compromise. For example, subparagraph (b)(4) could be revised as follows:

(4) ~~the each~~ nonlawyer~~s~~ states in a writing signed by the nonlawyer that ~~they~~ have the nonlawyer has read and understands the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agrees in that writing to undertake to conform ~~their~~ his or her conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

See also note 8.

5. Subparagraph (b)(5).

Subparagraph (b)(5) is identical to paragraph (b)(4) of Model Rule 5.4 proposed by Ethics 20/20. It would provide:

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

**Pros:** (1) Subparagraph (b)(4) clarifies that managerial and supervisory lawyers are still responsible for the nonlawyers, even though they might be co-owners in the firm. There could be circumstances where a particular nonlawyer might have a larger ownership share in the firm. Nevertheless, the lawyer would still ultimately be responsible for that nonlawyer as if the nonlawyer were a nonmanagerial partner/shareholder or a subordinate lawyer.

(2) This provision would fill a gap in the current rules that would arise should the subcommittee's proposed amendments to CRPC 5.4 be adopted. Under current CRPC 5.1, managerial and supervisory lawyers are responsible for subordinate or non-managerial lawyers. Under current rule 5.3, lawyers in a firm are responsible for nonlawyer assistants (or in ABA Model Rule 5.3, nonlawyer "assistance.") This provision clarifies that the lawyers in the firm remain responsible for the nonlawyers even if they are co-owners in the law firm. See also note 8.

**Cons:**

(1) None identified.

6. Subparagraph (b)(6)<sup>8</sup>

Subparagraph (b)(6) is identical to paragraph (b)(7) of Model Rule 5.4 as proposed by Ethics 20/20. It would provide:

(6) compliance with the foregoing conditions is set forth in writing.

Subparagraph (b)(6) simply requires that the firm keep a written record, including the writings required under subparagraph (b)(4), to demonstrate that it has complied with all the requirements of paragraph (b).

**Pros:**

(1) This provision should have a similar effect as a lawyer failing to keep adequate trust account records, i.e., failure to keep adequate records is a violation in itself and even if records are kept, but are inadequate, that would also be a violation. Further, the lack of sufficient writings would constitute evidence of the violation.

**Cons:**

None identified.

C. Paragraphs (c), (e) and (f)

The subcommittee does not recommend any changes to paragraphs (c), (e) or (f) of current CRPC 5.4.

Paragraph (c) prohibits a lawyer from permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct the lawyer's independent professional judgment or interfere in the lawyer-client relationship.

Paragraph (e) requires that the Board of Trustees formulate and adopt Minimum Standards for Lawyer Referral Services, and prohibits lawyers from participating in any such service that is not in compliance with the Minimum Standards.

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<sup>8</sup> In addition to the six subparagraphs proposed by the subcommittee, Ethics 20/20 also proposed a seventh, subparagraph (b)(6), which provided:

(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results;

At its May 14 meeting, the subcommittee concluded that this provision was not necessary in light of subparagraph (b)(5) regarding the lawyers' duty to be responsible for the nonlawyers as if the nonlawyers were lawyers under rule 5.1.

Paragraph (f) prohibits a lawyer from practicing in a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person to interfere with the lawyer's independent professional judgment or the lawyer-client relationship.

#### D. Paragraph (d)

The subcommittee proposes that current CRPC 5.4(d) be amended as follows:

(d) ~~A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~

~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable\* time during administration;

~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~

The proposed changes to paragraph (d) parallel those recommended by Ethics 20/20. These changes are necessary because the prohibitions in former paragraphs (b) and (d) have been subsumed in new paragraph (b). Thus, former paragraph (d) is deleted except for current subparagraph (d)(1) regarding the fiduciary of a lawyer's estate, which is not affected by the changes to paragraph (b).

#### E. Comments

Current CRPC 5.4 includes five comments. The subcommittee does not recommend any changes to these existing comments as they each address a provision in the current rule that the subcommittee does not recommend amending.

##### 1. New Comment [4].

The subcommittee proposes the addition of new Comment [4], which would clarify the application of subparagraph (a)(5) by explaining the addition of the word "facilitate" in that subsection. New Comment [4] would provide:

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

At its 6/3/19 meeting, the Subcommittee voted to include Comment [4] to clarify that subparagraph (a)(5) is intended to also apply to law practice incubators in addition to legal services organizations.

## Conclusion

The subcommittee recommends that the Task Force include in its Report a recommendation that the proposed changes to CRPC 5.4 outlined in this memo be adopted by the Board of Trustees and approved by the Supreme Court.





## **Proposed Rule 5.4 [Alternative 2] – Clean Version**

### **Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 2]**

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

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

## Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

### Rule 5.4 Financial ~~and Similar~~ Arrangements with Nonlawyers [Alternative 2]

~~(a)~~ A lawyer or law firm\* shall not share a legal ~~fees directly or indirectly with a nonlawyer or~~  
~~with an~~fee with a person\* or organization ~~that is~~ not authorized to practice law, ~~except that~~  
unless:

- ~~(1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~
  - ~~(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;~~
  - ~~(3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;~~
  - ~~(4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or~~
  - ~~(5) a lawyer or law firm\* may share with or pay a court awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.~~
- ~~(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~
- ~~(c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.~~
- ~~(d)~~ (a) ~~A~~the lawyer ~~shall not practice with or in the form of a professional corporation or~~  
~~other~~or law firm\* enters into a written\* agreement to share the fee with the person or  
organization not authorized to practice law ~~for a profit if;~~
- (b) the client has consented in writing,\* either at the time of the agreement to share fees or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of: (i) the fact that the fee will be shared with a person\* or organization not authorized to practice law; (ii) the identity of the person\* or organization; and (iii) the terms of the fee sharing;

## Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

- ~~(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;~~
- ~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~
- ~~(3)c) a nonlawyer has the right or authority to direct or control~~there is no interference with  
the lawyer's independent professional judgment. or with the lawyer-client relationship;  
and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.
- ~~(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.~~
- ~~(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,\* organization or group to practice law in violation of these rules or the State Bar Act.~~

### Comment

~~{1} Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.~~

~~{2} Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.~~

~~{3} Paragraph (a)(5) permits a lawyer to share with or pay court awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40~~

## Redline Comparison of Proposed Rule 5.4 [Alternative 2] to Current California Rule 5.4

~~Cal.Rptr.3d 221]. See also rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.~~

~~[4] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].~~



# The State Bar of California

## Task Force on Access Through Innovation of Legal Services – Subcommittee on Rules and Ethics Opinions

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

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\* \* \* \* \*

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

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

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

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

**Pros:**

- 1) The proposed Rule provides for highly skilled and trained individuals with unique skill sets not common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.
- 2) The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
- 3) The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
- 4) The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.
- 5) The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
- 6) The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

**Cons:**

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

### **ABA Model Rule 5.7 Responsibilities Regarding Law-related Services**

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
  - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
  - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

#### **Comment**

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.



[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).



## **ABA Model Rules of Professional Conduct: Chapter 7 (Rules 7.1 – 7.3)**

### **ABA Model Rule 7.1 Communications Concerning a Lawyer's Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

#### **Comment**

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm,

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with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

### **ABA Model Rule 7.2 Communications Concerning a Lawyer’s Services: Specific Rules**

- (a) A lawyer may communicate information regarding the lawyer’s services through any media.
- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
  - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
  - (3) pay for a law practice in accordance with Rule 1.17;
  - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
    - (i) the reciprocal referral agreement is not exclusive; and
    - (ii) the client is informed of the existence and nature of the agreement; and
  - (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.
- (c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

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- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
  - (2) the name of the certifying organization is clearly identified in the communication.
- (d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

### **Comment**

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

#### *Paying Others to Recommend a Lawyer*

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the

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lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule

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does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

### *Communications about Fields of Practice*

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

### *Required Contact Information*

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

## **ABA Model Rule 7.3 Solicitation of Clients**

- (a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

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- (b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:
  - (1) lawyer;
  - (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
  - (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.
- (c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:
  - (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
  - (2) the solicitation involves coercion, duress or harassment.
- (d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
- (e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

#### **Comment**

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal



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services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary

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capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).