

On July 11, 2019, Task Force on Access Through Innovation of Legal Services (ATILS) issued a report with its tentative recommendations on regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models (“ATILS Report” or “Report”).

The growing changes in how legal and law related services are advertised, marketed and delivered to consumer are well-documented, as well as how consumers find, access and use such services. The Committee agrees that the State Bar and the legal profession should support these changes, especially if it could result in providing greater access to affordable legal services. Of course, this must be effectuated and implemented in a way that continues to protect California consumers.

Since the Committee’s primary directive is advising the Board of Trustees on issues related to professional responsibility and conduct, our comments are mostly limited to the proposed changes to the California Rules of Professional Conduct (CRPC) that are articulated in Recommendations 3.0 through 3.4, and will mostly focus on proposed changes to rule 5.4. However, we do not believe that any consideration of changes to the CRPC, especially rule 5.4, can or should be viewed in isolation. Evaluation of proposals to amend or repeal the prohibitions against non-lawyer participation in the delivery of legal services requires evaluation of issues of public policy that involve more than legal ethics. Changes to the rules of professional conduct must be accompanied by regulatory reform. For example, any changes that are contemplated to rule 5.4 to allow lawyers and non-lawyers to form partnerships and/or share fees, to varying degrees, must also take into account overall regulatory changes that are being proposed by ATILS to regulate non-lawyer owners and entities that provide legal or law related services, such as Recommendations 2.0-2.5.

Recommendations 3.1 and 3.2 on Proposed Changes to Rule 5.4.

The CRPC are intended to regulate the professional conduct of lawyers and to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote administration of justice and confidence in the legal profession. CRPC 1.0(a). California’s relatively new version Rule 5.4 closely tracks the ABA Model Rule and the same public policy underlies it (MR 5.4, Comments 1 and 2; CRPC, Rule 5.4 Comment 1). California’s current rule 5.4 presently prohibits the sharing of legal fees between lawyers and non-lawyers with five exceptions.

Comments on Alternative 1 to Proposed Rule 5.4

In its proposed Alternative 1, ATILS does not recommend any changes to exceptions (a)(1) through (a)(4). COPRAC generally supports the changes suggested to exception (a)(5) regarding sharing legal fees with nonprofit organizations, which adopts a modified version of D.C. Rule 5.4(a)(5), adding only the word “facilitate” and the phrase “including but not limited to”, which was described in Attachment J to the ATILS Report as being

substituted to expand the kinds of representations that can generate fee sharing beyond litigation.

- Nonlawyer Ownership/Partnership of Law Firm Under Alternative 1

Most significantly, Alternative 1 recommends “expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services,...” by adding a sixth exception to Rule 5.4. Recommended exception (a)(6) states: “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).” The addition of (a)(6) seems a bit repetitive of (a) and may be unnecessary, particularly in conjunction with proposed paragraph (b).¹ Recommended paragraph (b) limits the sixth exception to the sharing of legal fees between lawyers and nonlawyers with only nonlawyers who “hold a financial interest as an owner/partner in a law firm,” so long as six proposed requirements are met. Paragraph (b) is largely borrowed from D.C. Rule 5.4(b), which has been in existence since 1997. However, unlike D.C. Rule 5.4, Alternative 1 recommends adding requirement (b)(3) which states: “nonlawyers have no power to direct or control the professional judgment of a lawyer. It further requires that nonlawyers state in writing that they have read, understood, and agree to abide by the CRPC, State Bar Act and other laws regulating lawyer conduct.

Alternative 1 maintains requirement (b)(1) of D.C.’s rule, mandating that “the firm’s sole purpose is providing legal services to clients[.]” According to Attachment J of the ATILS Report, this provision is included in Alternative 1 solely to eliminate the possibility of the “Big 4” scenario. Many believe that without (b)(1) the Big 4 accounting firms will expand to legal services, which may lead to conflicts, breaches of confidentiality and fiduciary duties as well as private equity concerns. These concerns seem largely unsupported. Instead, Attachment J states that the main reason for trying to prevent a “Big 4” scenario is that it will not result in a corresponding increase in the access to justice. On the other hand, the ATILS Report acknowledges that such a requirement “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. Simply including a requirement aimed at the Big 4 because it may not increase access to justice is not consistent with all of the objectives sighted by the ATILS. Access to justice is just a piece of the overall goals of the ATILS. The ATILS states in Attachment J that its proposed revisions are also intended to facilitate “the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting edge technology[.]” and enhance practice efficiency. Crafting Rule 5.4(b)(1) to primarily avoid the “Big 4” scenario could cause more harm than good. Accompanying regulations may be a better way to protect California

¹ We find the proposed exception under rule 5.4 (a)(6) for Alternative 1 confusing in terms of how it is meant to read with subsection (b). Subsection (a)(6) suggest ATILS is recommending lawyers and law firms can share fees with non-lawyers so long as they comply with subsection (b). However, subsection (b) suggests that those requirements are specifically for circumstances in which lawyers and non-lawyers share ownership in a law firm, thereby suggesting that fee sharing between lawyers and non-lawyers can only take place in the context of a law firm. This is how we have read this provision. If that is not ATILS intention, that should be made clear.

consumers and the integrity of legal profession against any such concerns without limiting such financial and professional relationships all together. See proposed changes to Alternatives 1 & 2 below, which address this issue.

- The Missing Exception Under Alternative 1

Despite identifying a goal of incentivizing the adoption of “cutting edge legal technology” to help enhance the practice of law and make it more efficient, Alternative 1 is a very limited expansion of the current rule, merely allowing law firms to have non-lawyer owners if the firm’s sole purpose is providing legal service to clients (among other requirements.). Glaringly absent from these six proposed exceptions is an exception for fee-sharing with nonlawyers and nonlawyer owned businesses operating outside of law firm ownership or partnership.

Many nonlawyers and nonlawyer owned businesses are presently operating in the legal marketplace in various capacities, such as by simply referring legal matters to lawyers, operating as alternative legal service providers (ALSP), or other law related businesses, whose “sole purpose” may not be to provide “legal services to clients,” but whom provides law related services. Examples include, but are not limited to, an accountant who refers clients to a trust & estates attorney, legal marketing and advertising services, online legal marketplaces, attorney directories, matching services, social media platforms, and other such technology businesses operating in the legal industry.

As stated in Attachment J, excluding an exception for nonlawyers and nonlawyer owned entities was not an oversight, but by design to preemptively address concerns that nonlawyer marketing businesses would (1) interfere with a lawyer’s independent judgment; or (2) will direct clients to lawyers who are/were not qualified for a fee. We have seen no evidence that these concerns are founded.

ALSP and other law-related services, including, but not limited to, technology-based nonlawyer marketing/matching services, have been in existence for years, attracting the participation of California lawyers and California consumers alike. In the last ten years, Legal Zoom, UpCounsel, Avvo Legal Services and other legal service providers leveraging technology to provide low cost legal services have emerged and openly challenged traditional rules regarding the unauthorized practice of law and division of legal fees with non-lawyers with mixed results. These nonlawyer owned services use technology and innovation to not only help California consumers more easily access affordable legal services, but to also assist lawyers to affordably advertise/market their services to reach new, potential clients. It is very clear from the data that there is a magnitude of unmet need for legal services, especially in areas like family law, where in pro per litigants are the rule. Some part of the increase in nonattorney involvement is probably related to unmet need, sometimes called “the justice gap”. Although, at this time, there is no empirical evidence that allowing nonlawyers outside of law firms to divide fees will actually fill “the justice gap”, there is no evidence that it won’t, and there is also no evidence that it will create more harm. The sheer number of consumers and lawyers who are presently participating in such nonlawyer owned services, as well as the growing number of similar platforms being launched in California, clearly evidences

that they are filling a void in the state's legal marketplace. By adopting Alternative 1 as recommended, we would be preventing the possibility of fee sharing with nonlawyers and nonlawyer owned businesses that are not owners/partners in a law firm, including those which are presently trying to assist California consumers and lawyers.

We must remember that rule 5.4 does not operate in a vacuum. Lawyers are required to know and comply with all of the rules of the CRPC and State Bar Act or they could face discipline and perhaps even criminal charges. A lawyer who presently participates in an ALSP or other such nonlawyer business for the payment of an advertising/marketing fee is just as beholden to his/her professional responsibilities now, as he/she would be if sharing a portion of the legal fees were permitted under rule 5.4.

Under the CRPC, a lawyer must now, and will continue to be required, to protect each client from a conflict that might arise from interference with the attorney-client relationship, a lawyer's independent judgment, a lawyer's responsibilities to another client or third person, and/or a lawyer's own interests. See rule 1.5 (fees for legal services); rule 1.6 (confidential information of a client); rules 1.7, 1.8.1, 1.9, 1.10, 1.13, and 1.18 (collectively, conflicts); and, rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."). Under the CRPC, a lawyer must now, and will continue to be required, to truthfully communicate with consumers and provide competent and qualified representation to each client. See rule 1.1 (competence); rule 1.3 (diligence); rule 1.4 (communication with clients); rule 2.1 (advisor); and, rules 7.1-7.3 (attorney advertising). A lawyer's decision to participate in one of these nonlawyer owned services does not diminish his/her duties under the Rules of Professional Conduct regardless of the type of fee owed. Further, a California consumer's participation in one of these services does not eliminate the right to counsel of his/her choice, nor does it eradicate a client's right to terminate his/her lawyer at any time for any reason. See rule 1.16 (declining or terminating representation). Comments to many of these current rules further stress a lawyer's paramount duties of competence, loyalty and independent judgment. See, for example, rule 1.7, Comment [1]; rule 1.8.1, Comment [2]. Alternative 1, subsection (b)(3) and Alternative 2, subsection (c) each expressly require that there can be no interference with a lawyer's independent professional judgment.

Although there are many discipline cases reflecting violations of the Rule 5.4 under a variety of circumstances, many reflect the lawyer's abdication of independent judgment to nonlawyers in various degrees. Most of those cases involve personal injury practice.² However, some more recent cases have involved lawyers involved with non-lawyers in providing loan modification services in the wake of great recession.³ While most

² For example, In the Matter of Nelson (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 1990 WL 140525; In the Matter of Jones (1993) 2 Cal. State Bar Ct. Rptr. 411 1993 WL 156262; In the Matter of Steele (Review Dept. 1997) , 3 Cal. State Bar Ct. Rptr. 708, 1997 WL 438845; In the Matter of Bragg (1997) 3 Cal. State Bar Ct. Rptr. 615, 1997 WL 215942.

³ For example: In the Matter of Huang (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 2014 WL 232686; In the Matter of DeClue (Review Dept. 2016) 5 State Bar Ct. Rptr ___, 2016 WL 3004465); In the Matter of Gordon (Review Dept. 2018) 5 State Bar Ct. Rptr ___, 2018 WL 5801495 (It is worth noting in

attorneys who seek to become involved with nonlawyers through financing mechanisms like fee division and equity ownership, as well as the nonlawyers themselves, may not be evil people, nonattorney involvement may potentially increase the risk that business exigencies and profit will carry undue weight, at the expense of client protection. However, there is no indication that the inherent risks created by nonattorney involvement have changed or will increase if Rule 5.4 were changed to allow the sharing of legal fees between lawyers and nonlawyers. Separate and apart from whether a lawyer shares attorney's fees with a nonlawyer, every lawyer is required to conduct him/herself in accordance with all of the rules under the CRPC and State Bar Act, specifically to protect the consumer from harm. Simply changing the fee charged by many nonlawyer owned businesses from a permissible advertising or marketing fee to a percentage of the attorney's fees earned by the participating lawyer will not suddenly result in a complete breakdown of a lawyer's duties and responsibilities to his/her client(s) as prescribed under the CRPC and State Bar Act. For example, a lawyer who is provided a matter generated from a marketing or matching service is personally responsible for determining if there are any conflicts of interest and whether competent and diligent representation can be provided to that client in accordance with these rules. If the lawyer accepts the representation and fails to adhere to any of the rules of professional conduct or the State Bar Act, then that lawyer is accountable and can be subject to discipline.

Although nonlawyers and nonlawyer owned entities that operate in the legal marketplace either by providing legal services or law-related services may not be directly regulated under the CRPC, they are presently subject to California's statutes regarding the unauthorized practice of law (Business & Professions Code sections 6125-6127) and wrongful solicitation of clients (Business & Professions Code sections 6152-6155). We also cannot ignore that non-lawyer owned services are businesses that want to succeed. Most understand now, and will continue to appreciate, that in order to provide good service that consumers will continue to use, or rate well, they need to entice responsible, qualified California lawyers to participate. And in many cases these nonlawyer owned businesses must respect and adhere to the CRPC and State Bar Act in an effort to not only protect the participating lawyers from possible discipline, but to also to protect their participating consumers from harm. However, as stated above, in our view ATILS recommendations to regulate non-lawyers and non-lawyer owned entities that provide legal or law related services will be key to the success of these changes and to helping preserve a lawyer's independent judgment. While no specific details have been provided about how Recommendations 2.0 through 2.5 will be implemented, we generally support this approach to ensure consumers are protected if we loosen restrictions on non-lawyer ownership and/or fee sharing with non-lawyers.

- Summary of Comments and Suggestions to Alternative 1

connection with concept of "entity regulation" the various loan modification businesses operated by Mr. Gordon and his non-attorney partner were aggressively prosecuted by the Consumer Protection Finance Bureau (CPFB) before the disciplinary process in State Bar Court went forward.).

COPRAC does not endorse the adoption of Alternative 1 to Rule 5.4 as it is written. First, adopting a version of 5.4 that excludes the sharing of legal fees outside of the nonlawyer ownership/partnership of a law firm is not in line with the stated objectives of the ATILS, ignores nonlawyer owned services presently operating in the legal marketplace and being successfully utilized by California lawyers and consumers, and will ultimately require revisions to the rule in the near future. Second, failing to incentivize nonlawyers and nonlawyer owned businesses outside of the law firm could stifle innovation and improvement of their technologies and could serve to discourage them, and future businesses, from operating in a marketplace that may not be financially viable. On the other hand, regulation of these nonlawyers and nonlawyer owned businesses and continued enforcement of the CRPC and State Bar Act, coupled with the imposition of the requirements detailed in subsections (a)-(d) in Alternative 2, should serve to sufficiently protect California consumers and the integrity of the legal profession.

- **Comments on Alternative 2 (Recommendation 3.2)**

Unlike Alternative 1, proposed Alternative 2 to Rule 5.4 “is meant to create a major shift in Rule 5.4 around ownership and fee sharing with very limited regulation.” Fee-sharing with nonlawyers, ALSPs and other related nonlawyer businesses would be permitted under Alternative 2 so long as the four proposed requirements are met to ensure that the client provides informed, written consent to the fee-sharing and that there is no interference with the lawyer-client relationship. Attachment K to the ATILS Report states that Alternative 2 is also meant to allow for nonlawyer owners/partners of law firms, although some have suggested that this is not clear on its face. To clarify the inclusion of this exception, a comment could be added to Alternative 2 or a revision could be made to the rule itself.

Above, we have discussed the stated concerns about nonlawyer ownership and policy reasons for this prohibition. One view is that if we recommend Alternative 2, many of the concerns can and should be addressed through entity regulation as proposed in recommendations 2.0-2.5.

Suggested Alternatives

Suggested Alternative #3: Other than taking the position that no changes should be made to 5.4, this is the most conservative approach. This alternative would remove the possibility of ownership of nonlawyers as articulated in 5.4(b), and stay with the current version, but with changes to (a)(6) to provide more clarification regarding fee sharing. If we adopted this approach, our position would be that: COPRAC generally supports the change to sharing of legal fees with nonlawyers in limited circumstances, but we do not endorse AITLS’ proposed rule to the extent it allows nonlawyers to hold an ownership stake in a law firm.

Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 3]

(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:

...

(6) a lawyer or law firm may share legal fees with a nonlawyer if:

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

(ii) there is no interference by the nonlawyer with the lawyer or law firm's independent professional judgment or with the lawyer-client relationship and the nonlawyer has no power to direct or control the lawyer or law firm;

(iii) the lawyer or law firm enters into a written* agreement to share the fee with the nonlawyer;

(iv) 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 the fact the fee will be shared with a nonlawyer, the identity of the nonlawyer, and the terms of the fee sharing; and

(v) 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.

(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.

Suggested Alternative #4: Somewhere between Alternative 1 & 2. It takes the language regarding fee sharing from Alternative 2, 5.4(a), which is more expansive, and inserts paragraph (b) from Alternative 1 that allows for nonlawyer ownership in firms under certain conditions, but removes the 5.4(b)(1) requirement that the firm's "sole purpose is providing legal services to clients." If we adopted this approach, our position would be that: COPRAC supports the change to sharing of legal fees with non-lawyers, and it supports broader changes to nonlawyer ownership, including outside of the law firm context, but with certain express conditions.

Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 4]

(a) A lawyer or law firm* shall not share a legal fee with a person* or organization [outside of the law firm] not authorized to practice law unless:

(1) the lawyer or law firm* enters into a written* agreement to share the fee with the person or organization not authorized to practice law;

(2) 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;

(3) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and

- (4) 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.
- (b) A lawyer shall not practice law in a law firm [or entity that provides legal services in whole or in part] in which individual nonlawyers in that firm [or entity] hold a financial interest unless each of the following requirements is satisfied:
- (1) ~~the firm's sole purpose is providing legal services to clients;~~ (Comments: According to Attachment J, this provision is included in Alternative 1 solely to eliminate the possibility of the "Big 4" scenario. This restriction will also limit many partnerships with lawyers and nonlawyers in the development of technology and continue the debate over what providing "legal services" really means.)
 - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; (Comments: According to Attachment J, this provision is meant to preserve attorney-client privilege and confidentiality – Is this is the best way to do this or can it be done through statutory changes? If best way, we should include it as the protection of attorney-client communications is paramount to effective representation)
 - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
 - (4) the nonlawyers [assisting the lawyer or law firm in providing legal services to clients] 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;
 - (5) the lawyer partners in the law firm [or entity that provides legal services in whole or in part] are responsible for these nonlawyers [who assist the lawyer or law firm in providing legal services to clients] 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.

Finally, the Committee also believes that if the ATILS was to Recommend Alternative 2 [as is or with any suggested changes thereto], it would need to make sure that Recommendations 2.0 through 2.5 provided adequate regulation for non-lawyers and non-lawyer owned entities. For example, Recommendation 2.1 states that: "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." We believe that any entity (outside of a traditional law firm) that provides legal services should include at least one lawyer as an

owner and manager. In other words, such a business should not be owned and managed by entirely by nonlawyers. Requiring lawyers to be owners and managers of any business that provides legal services, as opposed to just law related services, would help ensure compliance with the CRPC and the State Bar act with respect to the legal services provided.

Conclusion:

COPRAC does/does not endorse Alternative 1/Alternative 2 as written. Instead, COPRAC encourages ATILS to consider adopting our suggested changes to Alternative 1/Alternative 2, specifically Alternative 3/Alternative 4 in an effort to stay true to its intended objectives and to avoid the need for additional revisions to Rule 5.4 in the near future. These changes to Rule 5.4 cannot be taken in isolation and if made must be coupled with regulation as suggested in Recommendations 2.0 through 2.5.