



# The State Bar of California

**ATILS AGENDA ITEM C.3.  
10-07-19 MEETING**

## Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force  
From: Tara Burd and Lori Gonzalez  
Date: October 7, 2019  
Re: C.3. Recommendation 3.2: Adoption of Proposed Rule 5.4 [Alternative 2]

Recommendation 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.

*Recommendation 3.2 has received a total of approx. 157 comments, 125 in opposition, 30 in support, and 2 with no stated position.*

### **Public Comments to be Discussed:**

- **Anonymous (515)**
- **Tsong Ralph (593)**
- **Moore, Jennifer (761j)**

<b>Recommendation 3.2 (Rule 5.4 Fee Sharing Alternative 2)[Rules/Ethics Opns]</b>		
<b>Recurring Point</b>	<b>Possible Response</b>	<b>Revised comment</b>
<p>This would legitimize the unlawful practice of law and cause more harm to those in need of help with no repercussions. At least if the people who are causing this damage are lawyers, there is some recourse with the bar and some deterrent because of the risk of discipline.</p>	<p>This proposal does not permit a nonlawyer to render legal services. The terms of the illustration draft of a possible rule revision requires that lawyers render legal services in a law firm. The change to current law would be to allow lawyers to share legal fees with nonlawyers with the goal of facilitating the ability of lawyers to enter into financial arrangements with nonlawyers who develop or administer cutting-edge legal technology or innovative delivery systems.</p> <p>The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such arrangements is the inability of lawyers to share with nonlawyers any portion of the legal fees paid by clients. The Task Force hopes that by expanding the kinds of situations under which nonlawyers can share in legal fees, this deterrent to collaboration will be minimized or completely alleviated, and innovation through technology or new delivery systems will be encouraged.</p>	<p>This proposal does not permit the practice of law by anyone other than lawyers. The change submitted to the current law would allow lawyers to share legal fees but does not allow legal services to be provided by others. The protections and recourses that currently exist would continue.</p> <p>The task force was informed from discussions with technologists, legal professionals, and others (on the task force and otherwise) that a primary impediment to such arrangements is the inability of lawyers to share any portion of the legal fees paid by clients. The Task Force believes that by expanding the kinds of situations under which others can share in legal fees, lawyers will be able to truly partner with experts to develop new delivery systems and innovative technology solutions.</p>
<p>This would increase profit motive and water down the quality of legal services. Cost cutting would cause a decrease in ethical obligations.</p>	<p>Notwithstanding this rule change, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The illustration draft of this possible rule revision has, among other client protection requirements: (i) a requirement there is no interference with the lawyer's independent professional judgment or with the lawyer-client</p>	<p>A lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The draft of this possible rule revision includes requirements that the lawyer's independent professional judgement is maintained, and that the fee cannot be excessive or</p>

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	relationship; and (ii) a requirement that the total fee charged to a client must not be excessive (i.e., unconscionable) and not be increased solely by reason of the agreement to share the fee.	<p>increased solely to allow fee sharing.</p> <p>Additionally, data provided to the task force highlights that a high amount of costs and labor within firms are spent on administrative tasks. Cutting these types of costs by allowing partnerships with those who can do this work for less should encourage an increase in the quality of legal services provided even as costs are cut.</p>
This would be a gateway to more abuse and only benefit investors. Lawyers are highly regulated with good cause. Fee sharing would give non-lawyers power and limit public protection.	Notwithstanding this rule change, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The illustration draft of this possible rule revision has, among other client protection requirements: (i) a requirement there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and (ii) a requirement that the total fee charged to a client must not be excessive (i.e., unconscionable) and not be increased solely by reason of the agreement to share the fee.	<p>A lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The draft of this possible rule revision includes requirements that the lawyer's independent professional judgement is maintained, and that the fee cannot be excessive or increased solely to allow fee sharing.</p> <p>The regulations would continue to offer protection, but the revised rule would also create many new opportunities for lawyers to partner with others to provide services to the 70% of Californians who aren't currently getting those needs met.</p> <p>A drastic change to the status quo is necessary to empower lawyers to find new ways to deliver legal</p>

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		services, however, this rule change ensures each lawyer decides independently what type of relationship they are comfortable creating with others.
The Bar states that its mission "is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys; the advancement of the ethical and competent practice of law ...." This proposal and the others considered by the ATILS Task Force work to do the exact opposite of the Bar's mission and must not be implemented.	Where about 70% of all Californians are not receiving legal services to address a civil justice legal problem, the public is not being adequately protected. This proposal seeks to increase access. The terms of the illustration draft of a possible rule revision requires that lawyers render legal services in a law firm. The change to current law would be to allow lawyers to share legal fees with nonlawyers with the goal of facilitating the ability of lawyers to enter into financial arrangements with nonlawyers who develop or administer cutting-edge legal technology or innovative delivery systems. The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such arrangements is the inability of lawyers to share with nonlawyers any portion of the legal fees paid by clients. The Task Force hopes that by expanding the kinds of situations under which nonlawyers can share in legal fees, this deterrent to collaboration will be minimized or completely alleviated, and innovation through technology or new delivery systems will be encouraged.	Where approx. 70% of all Californians are not receiving legal services to address a civil justice legal problem, the public is not being adequately protected. This proposal seeks to increase access for the public.  The change submitted to the current law would allow lawyers to share legal fees but does not allow legal services to be provided by others. The protections and recourses that currently exist for the ethical and competent practice of law would continue.
Law school does little to prepare people to run a business. Lawyers will be taken advantage of by "businessmen" looking to commit fraud and disservice the public by abusing their "partners'" bar cards.	Notwithstanding this rule change, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The illustration draft of this	The task force does not take lightly the current state of education for lawyers as it relates to business operations.

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	possible rule revision has, among other client protection requirements: (i) a requirement there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and (ii) a requirement that the total fee charged to a client must not be excessive (i.e., unconscionable) and not be increased solely by reason of the agreement to share the fee.	<p>The draft of this possible rule revision includes requirements that the lawyer's independent professional judgement is maintained, and that the fee cannot be excessive or increased solely to allow fee sharing.</p> <p>A drastic change to the status quo is necessary to empower lawyers to find new ways to deliver legal services, however, this rule change ensures each lawyer decides independently what type of relationship they are comfortable creating with others.</p>
The State Bar would have no jurisdiction over non-attorneys. In theory, a disbarred attorney could come back to practice law as a business partner.	<p>Compliance enforcement for Rules of Professional Conduct is focused on a licensee through the attorney discipline system. However, the implementation of a fee sharing concept could include consideration of a requirement that nonlawyers who share in fees must become subject to State Bar jurisdiction. For example Oregon has approved the concept of sharing fees with a LLLT where a LLLT is a regulated person. Regarding disbarred persons, the implementation of a fee sharing concept could include a ban against any sharing with a disbarred lawyer. In current rule 5.3.1, there is precedent for imposing special restrictions on a licensed person's interactions with a disbarred person in a law practice.</p>	<p>Compliance enforcement for Rules of Professional Conduct is focused on a licensee through the attorney discipline system.</p> <p>This proposal does not permit the practice of law by anyone other than lawyers. The change submitted to the current law would allow lawyers to share legal fees but does not allow legal services to be provided by others. The protections and recourses that currently exist would continue.</p> <p>Regarding disbarred persons, the implementation of a fee sharing concept could include a ban against any sharing with a disbarred lawyer. In current rule</p>

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		5.3.1, there is precedent for imposing special restrictions on a licensed person's interactions with a disbarred person in a law practice.
Rather than opening up legal practice to a host of persons with little or no competence in the law, with little or no training in ethics or interest in the zealous representation of their clients' interests, the committee ought to be thinking of ways which access to justice in our courts can be expanded, namely a major increase in the number of judges available to hear matters and the courtrooms available to do so.	The Task Force was given a specific charge to study AI, technology and online delivery systems with the dual goals of increased access to legal services and public protection. A list of other potential different initiatives (i.e., not technology-driven initiatives) will be compiled as an appendix to the Task Force's final report. Court reform and increasing the number of judges will be included in this list.	<p>The Task Force was given a specific charge to study AI, technology and online delivery systems with the dual goals of increased access to legal services and public protection. A list of other potential different initiatives (i.e., not technology-driven initiatives) will be compiled as an appendix to the Task Force's final report. Court reform and increasing the number of judges will be included in this list.</p> <p>Additionally, the Task Force notes that persons who are not licensed, should not be assumed to have little or no competence in the law, training in ethics or interest in zealous representation of legal consumers. The legal industry is made up of many individuals who are not licensed to practice law but whose expertise and contributions are vital to the successful delivery of legal services.</p>
Fee sharing would benefit the consumer by allowing law firms to be more financially stable and invest in helpful technology. [NOTE: this comment is in support.]	The Task Force agrees that the concept of fee sharing may lead to innovation and increased access to legal services.	The Task Force agrees that the concept of fee sharing may lead to innovation, improved legal services delivery and increased access to legal services.
Too many attorneys are taking	The Task Force believes that the	The Task Force believes the

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<p>advantage of consumers. More competition would be better. [NOTE: this comment is in support.]</p>	<p>current legal services market is structured by UPL and attorney conduct rules, including the rule restricting fee sharing with nonlawyers. The concept of relaxing the fee sharing prohibition may lead to innovation and increased access to legal services.</p>	<p>current legal services market structured under UPL and attorney conduct rules, do not promote competition in a way that increases consumer choice and options. The concept of relaxing fee sharing, including the specific concept of a broad client consent exception, may lead to more collaboration allowing for more innovation, improved (and new) delivery services and increased access to justice.</p>
<p>This is similar to investments from non-lawyer firms in cases and would allow lawyers without significant financial means to have a chance to start a practice by raising capital, to help offset risk, and drive new innovations to the legal field. This system has already been established in the U.K. and Australia [NOTE: this comment is in support.]</p>	<p>The Task Force agrees that the relaxation of the restrictions on fee sharing with a nonlawyer, including the specific concept of a broad client consent exception, may lead to collaboration, innovation and increased access to legal services.</p>	<p>The Task Force agrees that the relaxation of fee sharing restrictions, including the specific concept of a broad client consent exception, may lead to more collaboration allowing for more innovation, improved (and new) delivery services and increased access to justice.</p>
<p>As long as client consent is given, it is ok. Other businesses share fees and give referral bonuses with few problems. [NOTE: this comment is in support.]</p>	<p>The Task Force agrees that the relaxation of the restrictions on fee sharing with a nonlawyer, including the specific concept of a broad client consent exception, may lead to collaboration, innovation and increased access to legal services.</p>	<p>The Task Force agrees that the relaxation of fee sharing restrictions, including the specific concept of a broad client consent exception, may lead to more collaboration allowing for more innovation, improved (and new) delivery services and increased access to justice.</p>
<p>Expanding the universe of people who can help solve legal problems will tend to make the provision of legal services more efficient. [NOTE: this comment is in support.]</p>	<p>The Task Force agrees that the relaxation of the restrictions on fee sharing with a nonlawyer, including the specific concept of a broad client consent exception, may lead to collaboration, innovation and increased access to legal services.</p>	<p>The legal industry is made up of many individuals who are not licensed to practice law but whose expertise and contributions are vital to the successful delivery of legal services.</p>

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		<p>The Task Force agrees that the relaxation of fee sharing restrictions, including the specific concept of a broad client consent exception, may lead to more collaboration allowing for more innovation, improved (and new) delivery services and increased access to justice.</p>
<p>It is questionable whether merely requiring a client's informed written consent to such arrangements is sufficient. There are doubts whether those underserved clients in most need of legal services have the sophistication to evaluate whether or not to consent to receiving legal services from firms that share fees with nonlawyers and the risks of doing so. Any amendment to rule 5.4 should include provisions to ensure that nonlawyers receiving a share of a firm's fees are doing so in exchange for services that actually reduce the cost of, or increase access to, legal services, rather than just as an investment opportunity.</p>	<p>The burden would be on a lawyer to assure the validity of any client consent. This already the case when a lawyer must seek client consent to address a conflict of interest and the client is, for example, a person with very little formal education and little or no English language proficiency.</p> <p>In addition, notwithstanding this rule change, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. The illustration draft of this possible rule revision has, among other client protection requirements: (i) a requirement there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and (ii) a requirement that the total fee charged to a client must not be excessive (i.e., unconscionable) and not be increased solely by reason of the agreement to share the fee.</p>	<p>The burden would be on a lawyer to assure the validity of any client consent. This is already the case when a lawyer must seek client consent to address a conflict of interest and the client is, for example, a person with very little formal education and little or no English language proficiency.</p> <p>Where approx. 70% of all Californians are not receiving legal services to address a civil justice legal problem, the public is not being adequately protected. This proposal seeks to increase access for the public in a way that our current sophisticated and complicated system does not.</p> <p>The legal industry is made up of many individuals who are not licensed to practice law but whose expertise and contributions are vital to the successful delivery of legal services.</p> <p>The Task Force believes that</p>



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		the relaxation of fee sharing restrictions, including the specific concept of a broad client consent exception, may lead to more collaboration allowing for more innovation, improved (and new) delivery services and increased access to justice.

## ATILS - Public Comment Form

Commenting on behalf of an organization	No
Name	Anonymous
City	Sherman Oaks
State	California
Select the reform option you would like to comment on from the list below:	3.2 - Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	I support this movement. I believe it's time for a major change. Too many attorneys are taking advantage of consumers. I believe this change will bring a lot of attorneys down to earth and will make them compete with reality again.

## ATILS - Public Comment Form

Commenting on behalf of an organization	No
Name	Ralph Tsong
City	Cerritos
State	California
Email address	<a href="mailto:RALPH@TSONGLAW.COM">RALPH@TSONGLAW.COM</a>
Select the reform option you would like to comment on from the list below:	3.2 - Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Currently there are lawyers who are fee sharing with referral sources, cappers, etc. in violation of the rule but there is no way for a lawyer to prove the violation. The fact that the laypersons who are receiving the rule have no punishment encourages these third parties to shop around until they find a lawyer willing to share a fee which they eventually will.</p> <p>This puts the ethical lawyers at a serious disadvantage from their fee sharing counterparts. Allowing fee sharing will level the playing field by removing a rule that some lawyers were violating without repercussion. It is further a rule that many lawyers may simply be unaware of, unlike concepts like confidentiality and conflicts of interest which are taught in law school ethics classes.</p>

## Comment Regarding Support of Proposed Changes to Regulatory Reform:

As our society becomes more technologically focused, and technologically driven, professionals in the legal field have two things they must consider. The first is to maintain their ability to practice law in a way true to their legal ethics. The second is to keep astride of other industries and stay competitive within the market, so as not to become antiquated or obsolete.

When an industry doesn't keep up with technology, they fall behind other industries, and put a burden on clients to pay more than needed because of a lack of innovation, which displays a lack of customer focus (that is a client focus). By remaining staunch to old customs and ways, an industry robs customers of a streamlined experience, and falls short of an ethical responsibility to protect the public<sup>1</sup>.

Technologically speaking many aspects of the legal industry are behind when it comes to technology. For example, legal software's for firms are only now starting to move past local backups of data, and become cloud based so that lawyers can access their information outside the office. But this recent switch to the cloud is something that many other industries performed and perfected almost a decade ago.

The most probable reason for this lag is based on Rule 5.4, and in some ways Rule 5.5 which prohibits non-lawyers from becoming business partners with lawyers, and thus keeps many advances in technology and industry from benefiting the law industry, and the clients that firms would be better able to serve. As Professor Henderson notes in his 2018 report to the California State Bar:

"Under Rule 5.4, which exists in some variation in all 50 states, lawyers must be the exclusive owners of any business that engages in the practice of law. ***This regulatory constraint may be a primary reason why the PeopleLaw sector has entered a period of serious decline.***"<sup>2</sup> (Emph. mine).

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<sup>1</sup> California State Bar's mission is to protect the public: "The State Bar of California's principal mission is protecting the public..."[ <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline> ]

<sup>2</sup> D. Henderson, William D. Legal Market Landscape Report: Commissioned by the State Bar of California July 2018: Page 15; [ <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf> ]

### Comment Regarding Support of Proposed Changes to Regulatory Reform:

As such the legal industry is moving slower than other industries towards technological advance. As Professor Henderson notes: “The combining of law with technology is driven by powerful economic forces.”<sup>3</sup>

If these economic factors aren’t considered and implemented by the legal industry, then the ability of lawyers to properly serve their clients will be found by other sources, such as off-shore legal groups that have already embraced collaborations with technology (such as those operated in England and Australia, and soon possibly Canada)<sup>4</sup>.

Specially, it is imperative for a change to happen now since: “If the law firms themselves can’t have outside investors, the market will continue to chip away at every part of a law firm that is not the pure provision of legal advice, ... anything that can be provided legally by a third party will be.”<sup>5</sup>

I am writing to urge the State Bar of California to approve the proposed changes and amend Rule 5.4 to include the technological advances that partnerships with innovators outside the legal industry can provide by allowing non-lawyers to own parts of a law firm; to share legal fees with non-lawyers; and for non-lawyers to provide legal advice within the constraints to be provided by the State Bar of California. Specifically, I want to urge the State Bar to accept ATILS recommendations: 2.0, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, and either 3.1 or 3.2.

Sincerely,

Jennifer Moores

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<sup>3</sup> Ibid, page 11.

<sup>4</sup> Ibid, page 12

<sup>5</sup> Quoting: Nick Baughan in ABA Journal Sept. 2010 [ [http://www.abajournal.com/magazine/article/law\\_the\\_investment](http://www.abajournal.com/magazine/article/law_the_investment) ]