



To: ATILS Task Force
From: Johann Drolshagen and Andrew Kucera
Date: October 7, 2019
Re: C.4. Recommendation 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.

Recommendation 3.3 has received a total of approx. 96 comments, 87 in opposition, 5 in support, and 4 with no stated position.

Below is the ABA Model Rule 5.7, as provided and without edit.

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.

It is important to note: Recommendation 3.3 was conceptual [not specific] and would presumably begin with the ABA Model Rule 5.7 with adjustments to come later intended to “promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of law related services through technology...”. The adjustments would come in the form of providing a safe harbor for legal practitioners.

PART I: Overview of the Recurring Points Table

This topic received just under 100 public comments with 90% opposing [O] the incorporation of the ABA Model Rule; and, the remaining 10% split between supporting [S] and no stated position [NSP].

Virtually all of the opposing commenters missed the point that there were no edits to the ABA Model Rule 5.7 provided and the value of a safe harbor to practitioners. Additionally, with a bit of time spent researching the Public Comment Synopsis Table v.2, evidence presented that virtually all of the opposing commenters were in opposition to all of the ATILS Task Force's Recommendations. Some opposing commenters simply copied their opposing comments into multiple, or all, Recommendations. Magically, many of the opposing commenters presented identical opposing comments without identifying themselves as part of any group. A random sample of 20 identities demonstrated that 19 were confirmed as practising California lawyers, the last had a common name, and several 'anonymous' comments were not identifiable.

A few opposing and NSP commenters [<10] commented that the designed purpose of this Model Rule 5.7 would be moot as *"California case law already provides the parameters of when an attorney providing non-legal services to a client may be subject to the Rules of Professional Conduct."* This point is accurate unless, or until, a change is made to Model Rule 5.7; or, adjacent changes would be made to UPL, ABS, Rule 5.4 Fee Sharing, etc. It should be noted that this comment was also delivered by several opposing commenters, presumably in a presumptive manner against any/all changes.

The opposition to this Rule 5.7 as broadened should actually increase the ability in terms of both scope and scale of all lawyers as well as provide a safe harbor for all licensed legal practitioners [definition: TBD] to venture toward increased capabilities. As such, the uniform opposition is counter intuitive and can only be attributed to an overall protectionist position at the sacrifice of critical thinking.

PART II: Boilerplate Response to Rule 5.7 Opposition

In the concluding point of PART I: Overview of the Recurring Points Table, it seems obvious that Recommendation 3.3 to adopt and broaden ABA Model Rule 5.7 gained opposition, but not because of the ABA Model Rule 5.7, intended Rule 5.7 as broadened, nor Recommendation 3.3 itself; therefore, a single boilerplate response statement should simply reiterate: a) the purpose of the Rule; b) the addition of a codified safe harbor [as intended, but not included]; and, c) the absence of impact on UPL or inclusion of other-than-lawyer entities.

Adoption of a version of ABA Model Rule 5.7 is intended to enhance the scale and scope of services provided to clients by a lawyer or a law firm as well as codify a safe harbor for those practitioners. This model does not directly involve any relaxation of prohibitions against UPL.

Most of the California State Bar Association's staff proposed responses included a second section or paragraph that addressed the extraneous part of the comments. This has been removed as it is deemed: a) more appropriate to be handled in contextual conjunction with the relevant Recommendation; and, b) due to the repetitive nature of many of the comments.

A few of the commenters [specifically 1062i and 1063i] draw to a greater context the fact that Rule 5.7, in any version, has components that rely upon the definition of The Practice of Law juxtaposed with the Delivery of Law-Related Services. The proposed single boilerplate response statement does not address the issue of these applicable definitions as the ATILS Task Force has decided not to define the Practice of Law; but, the point is significant and will be covered in PART III, Item No. 2.

PART III: Three (3) additional points that deserve consideration:

In reading the Public Comment Synopsis Table v.2 in the broadest scope, the top issues to deserve reconsideration are listed below. Please note that as stated in both PART I and II, many of the objections and NSP to Recommendation 3.3 diverted away from the actual purpose and intent of the ABA Model Rule 5.7 as broadened; therefore, the points listed below are directly relevant to Rule 5.7 as intended; but, they are also inclusive of the greater context of all Recommendations.

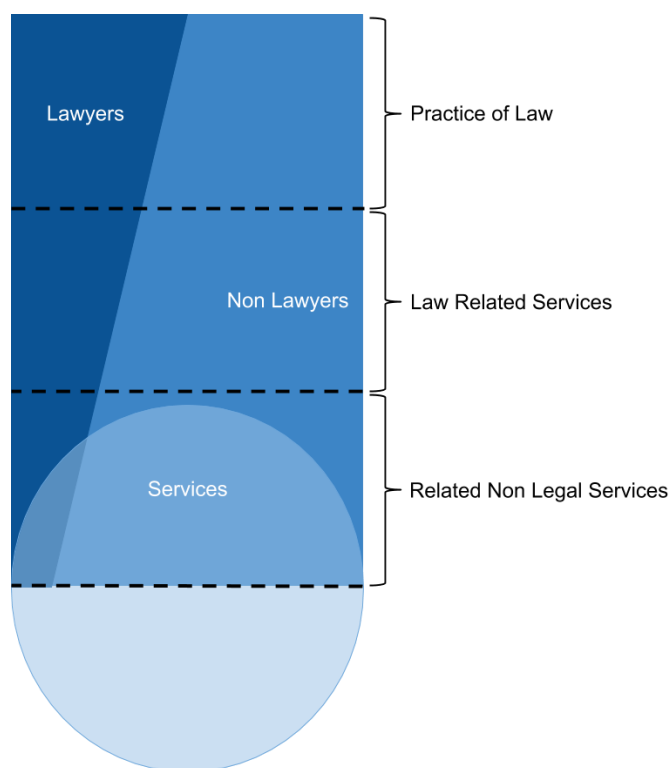
1. **Things the Bar/Court should be doing _____ in addition, or instead.** There are a large number of 'opposed' comments that read "the Court should be doing..." or "the Bar should be doing..." or "the problem is not with the lawyers, it is with delay, funding, time, etc...". This sentiment is correct in that it approaches the Justice System in a complete or holistic context. While the Judiciary does, for example, have initiatives for investigating the benefits of ADR and Diversion including a US\$13M commitment to understand the importance of video conferencing, it has not broadened the scope of the ATILS Task Force to include the tangential or adjacent items. That said, the Trustees and Justices will surely consider the greater context; therefore, it seems as the only error here was the lack of context given in the Recommendations and their subsequent explanations. Were these explanations given, the additional context might have drawn the conflict away from lawyer vs. nonlawyer and toward a more efficient model administration of the Judiciary with the inclusion of other-than-lawyer individuals, entities, and technologies. This context would be helpful as the Recommendations are finalized and delivered.

This Item No. 3 is in response to Comments No.(s): 606o; 623.

2. **Define the 'Practice of Law' and 'Delivery of Law-Related Services';** plus, add in the 'Delivery of Related Non Legal Services'. The ATILS Task Force has decided, and subsequently voted, not to define the narrow concept of the Practice of Law nor the broader concept of Delivery of Law-Related Services; but, instead to rely upon the case law precedents that exist currently. While this is reasonable and rational [even if overly conservative], this position fails to address or even give a clear grounds to consider the involvement of other players [individuals, entities, or technologies] that are utterly required to close the Justice Gap. Further, the precedent(s) inherently do not include Related Non Legal Services which would be instrumental to the effort. Therefore, we must embrace a new model for providing services in order to develop a new structure of regulation.

The Client Consent Model pictured below has one vertical market and a three-tiered approach with tier specific subdivision to the appropriate level of services and subsequent regulation structures:

Define the following:	Regulation Model
The Practice of Law	This <i>could</i> require little to no change from the current methodology for individuals; acquiescence for entities; and, adoption/endorsement for technologies.
Law-Related Services	This <i>could</i> be: <ol style="list-style-type: none"> 1. Individuals: a limited scope; lawyer oversight; or, board oversight. 2. Entity: a limited scope; lawyer involvement; or voluntary oversight 3. Technology: a requirement for transparent quantification of outcomes.
Related Non Legal Services	This <i>could</i> require little to no regulation at all.



The services that currently exist in each of these categories are moving amongst the categories. For example:

- a. Language translation and transliteration through the use of machine learning [ML] systems have recently surpassed human accuracy standards as established by the

Interagency Language Roundtable [IRL] scale. Case law/precedent requires interpreters to have a special qualification for legal interpretation and prohibits the interpreters from explaining anything other than very strict definitions of paperwork and communications. ML systems specific to individual platforms could move this service from the Law-Related category to the Related Non Legal Service category presently.

- b. 'Simple' or simplified law [similar to LegalZoom, TurboTax, etc.] platforms can easily and readily be incorporated into the vast majority of cases [Civil, Family, and Traffic Courts] immediately. As these products can be entirely self-serve, they would qualify as Related Non Legal Services where previously virtually all document preparation would fall under Law-Related Services.

This Item No. 3 is in response to Comments No.(s): 811o; 878h; 1062i; 1063i.

3. Oversight of lawyers and enforcement of UPL by the California State Bar Association is already very much in question as to efficacy. With regard to Recommendation 3.3 and the adoption of Rule 5.7 as broadened:

- a. Supervision of lawyers is currently passive [as opposed to active; not aggressive] in that a complaint must be filed before any review of performance, ability, or execution of duties is examined. New technologies are defaulted to active supervision.
- b. The leading piece of outward facing technology for the Bar is their website - which is not Section 508 compliant as it does not abide WCAG 2.0 standards. This compliance requirement is a statutory obligation.
- c. Neither the California State Supreme Court nor the California State Bar Association *properly* use language translation, or transliteration, for information and communications. Proper translation would, at a minimum, assist in solving the alleged¹ problem of notarios fraud. Most current technologies and ALL advanced technologies already have language translation integrated.

If the California State Bar Association cannot handle these most basic and fundamental pillars of technology then there is simply no way that they can hold other individuals, entities, or emerging technologies accountable.

With the recognition of these persistent limitations, the regulatory model that is outlined in PART III, Item No. 2 would place the emphasis on adoption, and endorsement, by the Judiciary [some 'solutions' being outside the scope of the Court(s)] of scale-able resources rather than intervene in moderated agreements between 3rd party service providers [e.g. Court Buddy].

This Item No. 3 is in response to Comments No.(s): 606o; 623; 738f.

¹ In this case 'alleged' refers not to whether or not the fraud is damaging [which is self evident]; but, rather that the activity may soon not fall under California State Bar Association enforcement as UPL.

PART IV: Bonus

With regard to Recommendation 3.3 in re the adoption of a broadened version of the ABA Model Rule 5.7 there is a glaring absence in the Public Comment Synopsis Table v.2 of recognition or acknowledgement of the basic assumptions made by the ATILS Task Force with regard to the Delivery of Law-Related Services by nonlawyers, entities, and technologies. Some assumptions were posited in Professor Henderson's Landscape Report on the Legal Market and others originated from the Task Force members' personal and professional experience. The primary known assumptions is: +/- 80% of civil case participants are under, or not, served by lawyers [a.k.a. the Justice Gap]; and, this rate is unacceptable. The unknown assumptions relative to the proposed Rule 5.7 has broadened are:

1. The Justice Gap has been quantified as present at the current level, or worsening, since 1994 [25 years]. This rate and duration are unacceptable.
2. The Justice Gap is present nationwide at relatively similar levels - hence, the Legal System is ensuring the consistent failure of the Justice System; and, no current US alternative model will sufficiently close *the Gap* en masse.
3. Access to Justice [A2J] is an obligation upon the Court; and, a moral imperative for any Country allegedly based upon the Rule of Law.
4. Current technology is as good or better than the human counterparts for providing services [even if available and affordable]. Too often, lawyers will claim complexity prohibits nonlawyer involvement; however, AI has conquered the Chinese game of Go with 10^{172} possible moves clearly demonstrating that complexity is not a viable objection. The error here is the anthropomorphizing of legal advice and services - which are commodities.
5. The prohibition of other-than-lawyers in the Legal System placed an unnecessary tiered hierarchical constraint upon the talent pool required for beneficial administrative efficiencies of the Justice System.

In Conclusion: We have clearly quantified the Justice Gap; and, the calculation of the Justice Gap has been recorded as unchanged for twenty-five (25) consecutive years; therefore, the Court's failure to bring about progress and/or adjustment has at some point transposed from mere negligence to being intentional. If we now knowingly inhibit the adoption of proven methodologies, scale-able resources, and willing individuals to assist in closing the Justice Gap - then the Court's continued failure to adapt/adopt can only be classified as malicious.