



The State Bar of California

**ATILS AGENDA ITEM C.1.
11-06-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Staff (includes October materials from Kevin Mohr and Allen Rodriguez)
Date: November 6, 2019
Re: C.1. Recommendation 3.1: Adoption of Proposed Rule 5.4 [Alternative 1]

Recommendation 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.

Recommendation 3.1 has received a total of approx. 301 comments, 251 in opposition, 44 in support, and 6 with no stated position.

Meeting Plan:

For the November 6th meeting, there will not be any subcommittee break-out sessions. The Task Force will meet as a whole to discuss the various recommendations under the Task Force’s two broad concepts for regulatory reform. An outline of the plan is provided below and is consistent with the meeting agenda.

1. UPL Exceptions (Agenda Item B)
(Recommendations: 1.0; 1.1; 2.0; 2.1; 2.2; 2.3; 2.4 and 2.5)
 - Exceptions for Individuals
 - Exceptions for Entities/Organizations
2. Fee Sharing/Non-lawyer Ownership (Agenda Item C)
(Recommendations: 3.1; 3.2; and 3.3)
 - Compensation for Referrals, Including “Running and Capping” (CRPC 5.4 & 7.2(b))
 - Passive Investment
 - Protecting Independent Professional Judgment, Including Lawyer Majority Ownership (CRPC 5.4)
 - Provision of Law Related Services (ABA Model Rule 5.7)
3. Other Proposals (Agenda Item D)
(Recommendations: 1.2; 1.3; 2.6; 3.0; and 3.4)
 - Findings re Proposing Definitions of “AI” and the “Practice of Law”

- Funding of Regulatory Programs and Data Collection/Success Metrics
- Technology Competence (CRPC 1.1)
- Advertising and Solicitation Rule Revisions (CRPC 7.1 – 7.5)

Recommendation 3.1:

Recommendation 3.1 will be discussed with other related Fee Sharing/Non-lawyer Ownership proposals. Recommendation 3.1 has received a total of approximately 304 written comments, 253 in opposition, 45 in support, and 6 with no stated position. Staff has completed processing of all written comments received and the public hearing testimony. Updated public comment synopsis tables and the full text of public comments are available at the ATILS DropBox.

Some of the general themes derived from the written public comments, the public hearing testimony, various articles, podcasts, social media posts and the oral input conveyed at the bar association Town Hall Outreach meetings include the following:

- Allowing fee sharing among lawyers and nonlawyers would be a significant threat to the independence of professional judgment in the delivery of legal services as profit motives may override compliance with fiduciary duties.
- Allowing fee sharing with nonlawyers may lead to institutionalized “running and capping” or other improper direct solicitation of prospective clients.
- Changing the fee sharing prohibition would have far reaching repercussions and would not simply provide a means for lawyers and technologists to collaborate on the development of innovative delivery systems aimed at improving access to legal services because, it might for example, encourage mega corporations such as the Big 4 professional services networks to own and operate law firms.
- It is not clear whether passive investment is permitted under this proposal.
- A rule providing that a lawyer must render independent professional judgment while employed at firm that has nonlawyer owners fails to appreciate the coercive authority that a nonlawyer owner might exercise over a lawyer’s representation of clients.
- Rules requiring competence, avoidance of conflicts of interests, and mandatory withdrawal in the face of illegal or unethical practices will persist and provide client protection even if there are new exceptions to the prohibition on fee sharing with a nonlawyer.
- Fee sharing with any nonlawyer may pose more risks than benefits, but fee sharing with a regulated nonlawyer professional might be possible with appropriate limitations.
- Allowing more fee sharing with legal services organizations (beyond the existing permitted sharing of court awarded fees) is appropriate and would help improve access to legal services.
- There is precedent in Washington D.C. and in other countries for permitting lawyers to share fees with nonlawyers.

- Absent a rule change, entrepreneurs and technologists with novel and potentially ground breaking solutions cannot partner directly with lawyers to develop new legal services delivery systems.
- Innovators who might otherwise focus on how to meet consumer needs are spending dollars and energy trying to maneuver new business models around the risk of being accused of UPL, or they are just avoiding the legal services market all together.
- Allowing fee sharing with a LDA and UDA may provide options for law firms to reduce the costs of legal services.
- Other requirements could be added to the proposed rule revision to enhance client protection, such as a requirement that a nonlawyer must pass a test on lawyer professional responsibility before being deemed eligible to participate in fee sharing.

Percentages showing categories of commenters and the relative positions expressed by those commenters is summarized in the table provided below.

Proposal 3.1	Total	Support	Oppose	SNP
Lawyer	65%	8%	92%	1%
Public Member	2%	67%	33%	0%
Lawyer Organization (bar association, law firm, legal aid)	12%	17%	71%	11%
Public Organization (insurance companies, non and for profit nonlawyer organization)	2%	0%	100%	0%
Unknown (not enough information)	20%	33%	65%	2%
Total	100%	15%	83%	2%

For the October meeting, the Task Force member(s) assigned to Recommendation 3.1 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 3.1. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (12)	Support (2)	Support if Modified (5)	Support if Nonprofit (3)	Support if Sandbox/Pilot Program (2)	Support if Nonprofit Sandbox/Pilot Program (2)	Other Reform (0)
Orange County Bar Association [1134j]	Legal Value Firm (Donini) [626]	California Lawyers Association (Rosing) [1363e]	Consumer Attorneys Association of Los Angeles (Zanville) [1339e]	Association of Discipline Defense Counsel (Lear) [1364m]	Los Angeles County Bar Association (Brot) [1355m]	

Oppose (12)	Support (2)	Support if Modified (5)	Support if Nonprofit (3)	Support if Sandbox/Pilot Program (2)	Support if Nonprofit Sandbox/Pilot Program (2)	Other Reform (0)
de Lira, Matthew [536h]	Moore, Jennifer [761i]	LACBA PREC (Krueger) [1063g]	LACBA SFSP (Furman) [909m]	Passmore, Crispin [1031]	Consumer Attorneys of California (Serna) [1097m]	
Illinois State Bar Association (Sosin) [1133c]		MyShingle.com (Elefant) [1202a]	OneJustice (Wilson) [1227b]			
Morrison Foerster LLP (Hendricks) [1188c]		Stephen Gillers (Testimony)				
Public Law Center (Ferrin) [1233h]		Responsive Law (Gordon) [1197e]				
State Bar of California COPRAC (Bomse) [1229j]						
The Court Buddy Company (McGlone) [774n]						
Becerra, Alejandro [964f]						
Georghiou, Anton [13b]						
Gorton, James [584d]						
Hart, Matthew [756c]						

Oppose (12)	Support (2)	Support if Modified (5)	Support if Nonprofit (3)	Support if Sandbox/Pilot Program (2)	Support if Nonprofit Sandbox/Pilot Program (2)	Other Reform (0)
Waud, Christopher [281f]						

The recurring points table circulated at the October meeting has been updated to accept the proposed responses provided by the members assigned to this recommendation. Any new recurring points found in public comments that were not considered at the October meeting have been added.

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
I oppose as I believe it directly incentivizes the practice of law by nonlawyers, and/or provides financial incentives for a non-lawyer to attempt to coerce a lawyer to act in a way that is not in the best interest of the client (but is in the best interest of the non-lawyer business or individual).	<p>Notwithstanding this proposed rule change, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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, <i>provided that</i> the lawyer or law firm complies with certain important public protection requirements including, among other requirements, that: (i) the firm's sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with the rules, the State Bar Act and other laws regulating lawyer conduct.</p>

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Recurring Point	Possible Response
While access to the legal market might be marginally increased, it will only do so at the expense of the quality of legal services and with an increase in the profit motive in the legal field, making the services provided worse. Maintaining professionalism is far more important than creating the ethical concerns of a more profit driven legal market that substitutes cost cutting for ethical obligations.	<p>The Task Force's proposal to change rule 5.4 to allow lawyers to share legal fees with nonlawyers is intended to facilitate the ability of lawyers to enter into financial arrangements with nonlawyers to 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 others who have closely studied the legal system and issues related to access to justice, that a key 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 contemplates that by expanding the kinds of situations under which nonlawyers can share in legal fees, this current deterrent to collaboration can be minimized or completely alleviated, and innovation through technology or new delivery systems will be encouraged. Notwithstanding this proposed rule change, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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, <i>provided that</i> the lawyer or law firm complies with certain important public protection requirements including, among other requirements, that: (i) the firm's sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with</p>

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Recurring Point	Possible Response
	the rules, the State Bar Act and other laws regulating lawyer conduct.
This will result in non-lawyers making the ultimate decisions, and this will have a negative impact on consumers and further reduce trust in the legal profession.	<p>Notwithstanding this proposed rule change, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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, <i>provided that</i> the lawyer or law firm complies with certain important public protection requirements including, among other requirements, that: (i) the firm's sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with the rules, the State Bar Act and other laws regulating lawyer conduct.</p>
It is increasingly more expensive to practice law; it is important that lawyers be able to get as many clients as possible and people are more likely to refer us clients if we share fees with them [NOTE: this comment is in support.]	The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
<p>The risks and negative outcomes associated with this proposal outweigh the potential benefit. These include abuse of the system, scams or misleading advice, and shady business deals. I'm not confident we could have a regulatory system to counter these issues.</p>	<p>Notwithstanding this proposed rule change, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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, <i>provided that</i> the lawyer or law firm complies with certain important public protection requirements including, among other requirements, that: (i) the firm's sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with the rules, the State Bar Act and other laws regulating lawyer conduct.</p>
<p>Nonlawyers should be able to contribute to the success and development of a law firm without practicing law. The rise in technology and online presence as a necessity for lawyers requires that the law evolve as well. [NOTE: this comment is in support.]</p>	<p>The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.</p>
<p>Allowing non-lawyers to have a financial interest in law firms seems very dangerous. They would not have the ethical training required of lawyers and would have a strong profit motive that would be antithetical to the Bar's long standing history of ethics.</p>	<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 Washington has approved the sharing of fees</p>

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
	between a lawyer and a Limited License Legal Technician (“LLLT”) so long as the LLLT is a regulated person. See Wash. Rule 5.9 .
Capping is Crime which should not be legalized: This would do away with the Anti-Capping as set forth in B&P 6150-6156. Cappers were deemed as criminals in B&P 6152-6153. The State Bar should not allow a change to this rule as it protects the public from persons who will create fraudulent cases in order to obtain a referral fee.	<p>KEM: Is running or capping an issue with Proposal 3.1? As defined in B&P Code § 6151(a), a runner or capper “is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, whether the attorney or any member of the law firm is admitted in California or any other jurisdiction, in the solicitation or procurement of business for the attorney at law or law firm as provided in this article.” Section 6151(b) provides an agent “is one who represents another in dealings with one or more third persons.” The rule requires that “the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients.” Proposed CRPC 5.4(b)(2). Is a runner or capper a person that “assists the lawyer ... in providing legal services to clients”?</p> <p>That is not the intent. In any event, a lawyer’s use of a capper would be a violation of CRPC 7.3’s prohibition on solicitation; 7.3(e) defines solicitation to refer “to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.” (Emphasis added). Employing a capper would be a violation of the CRPC.</p> <p>Even assuming CRPC 5.4(b)(2) could be interpreted broadly, i.e., the runner or capper “assists” the lawyer in providing legal services by “providing a client” (because the lawyer cannot provide legal services unless there is a client to whom services can be provided), I think a simple fix would be a comment that “the term ‘assist the lawyer in providing legal services’ does not include running or capping or something to that effect.</p> <p>In sum, I’m not sure that the second sentence in the first paragraph below is an appropriate</p>

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Recurring Point	Possible Response
	<p>response w/ respect to ALT1. It may be w/ respect to ALT2 (the “client consent” model) but I don’t think it’s necessary here.]</p> <p>The Task Force believes that the concept of fee sharing with nonlawyers within a law firm may lead to innovation and increased access to legal services. It is not intended open the door to allow running or capping. The implementation of this fee sharing concept could include a comment to the rule that “the term ‘assist the lawyer in providing legal services’ does not include running or capping. so Such a comment should preserve the existing statutory prohibitions on running and capping.</p> <p>In addition, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client. The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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, <i>provided that</i> the lawyer or law firm complies with certain important public protection requirements including, among other requirements, that: (i) the firm’s sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with the rules, the State Bar Act and other laws regulating lawyer conduct.</p>

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
Dentists, doctors, electricians, and realtors do not share fees with unlicensed persons. Why should lawyers?	The Task Force believes that UPL and attorney conduct rules, including the rule restricting fee sharing with nonlawyers, circumscribe and arguably constrain the current legal services market and the availability of affordable legal services. The goal of relaxing the fee sharing prohibition is to promote beneficial collaboration with nonlawyers that leads to efficiencies and innovation, with a corresponding increased access to legal services.
There should a way for certain non-lawyers to partner with lawyers but only non-lawyers who are also in a professional field and who understand ethics obligations. Lawyers and accountants should be able to partner up where only the lawyer can give legal advice and only the accountant can give accounting advice. I support this rule change but I think it should be expanded to allow nonlawyers (but only those non-lawyers who are also part of other professions that understand the importance of ethics, such as the accounting profession) to also offer their own non-legal services through the partnership but subject to the limitations mentioned above (only the lawyer can give legal advice and only the accountant can give accounting advice). [NOTE: this comment is in support subject to change.]	<p>The Task Force believes that UPL and attorney conduct rules, including the rule restricting fee sharing with nonlawyers, circumscribe and may arguably constrain the current legal services market and the availability of affordable legal services. The goal of relaxing the fee sharing prohibition is to promote beneficial collaboration with nonlawyers that leads to efficiencies and innovation, with a corresponding increased access to legal services.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 would: (1) expand the existing exception for fee sharing with a nonlawyer that permits a lawyer to share a court awarded legal fee with 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 important public protection requirements including, among other requirements, that: (i) the firm's sole purpose is providing legal services to clients (i.e., this change alone would not authorize multidisciplinary services (MDP), such as the provision of legal and accounting services to a client); (ii) the nonlawyers have no power to direct or control the professional judgment of a lawyer; and (iii) the nonlawyers state that they understand and will comply with the rules, the State Bar Act and other laws regulating lawyer conduct.</p> <p>As drafted, the proposed rule change would only permit nonlawyer owners in the firm to assist the</p>

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
	<p>firm lawyers in providing legal services. It would not permit the nonlawyers to provide professional services independent of the legal services the firm would provide. The Task Force believes the proposal is an appropriate modest first step that can be studied to assess its effectiveness in meeting the legal services needs of California consumers.</p>
<p>Non-lawyer owners are not subject to the fiduciary duties that the lawyers are. Despite the words prohibiting control of non-lawyer owners over lawyer activity, the mere fact of ownership and the financial incentives it brings is itself poisonous to the fiduciary nature of the attorney-client relationship.</p>	<p>Compliance enforcement for Rules of Professional Conduct is focused on a licensee through the attorney discipline system and notwithstanding any relaxation of fee sharing restrictions, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>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 Washington has approved the sharing of fees between a lawyer and a Limited License Legal Technician (“LLLT”) so long as the LLLT is a regulated person. See Wash. Rule 5.9. Other examples of detailed regulatory standards that may be considered in any change in law firm ownership include: requirements for lawyer majority ownership of law practices (compare ABS in Italy) and fitness to own scrutiny for nonlawyers (compare ABS in the U.K.).</p>
<p>It is generally a good thing for the practice of law to evolve. It is a changing world with increasing specialization. Allowing partnership between someone with legal knowledge and someone with technical knowledge only makes sense. [NOTE: this comment is in support.]</p>	<p>The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.</p>

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
I support allowing non-lawyer business persons to manage law firms on their own or in partnership with lawyers.	The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.
We fully support the first suggested change to Rule of Professional Conduct 5.4 to authorize non-profits to share fees with attorneys who recommend them or otherwise facilitate their employment. Currently, these non-profits can only share court awarded fees. To tackle the justice gap head on, greatly expanding the reach of Legal Aid and Neighborhood Legal Services, so that these non-profits and others like them can provide legal services to underserved communities is the answer. [Support]	The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.
This carve-out to Rule 5.4 should be sufficient to incentivize non-attorneys to invest capital in law firms to increase the use of technology, while taking steps to ensure that the professional judgment of the attorney is not compromised, and the public is protected. The rule change should be adopted solely on a pilot project basis, after new regulations are adopted to ensure that these law firms with non -attorney partial ownership comply with the new rule's requirements. [Support]	<p>The Task Force agrees that with appropriate regulation, the availability of fee sharing between lawyers and nonlawyers could lead to beneficial collaboration, efficiencies and innovation, with a corresponding increased access to legal services.</p> <p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 is conceptual only at this stage, and concepts for regulatory reform and implementation will require further study and work to develop actual proposed changes to laws. A pilot program or a regulatory sandbox are possible methods for carefully considering implementation with appropriate regulation.</p>
We are concerned that it will be difficult for any regulator to enforce either proposed version of rule 5.4 against savvy lawyers or nonlawyers, who may not leave a paper trail and may set up operations in which lawyers do not independently control the provision of legal services. We are not suggesting that lawyers will violate their own ethical obligations as a result of the influence of nonlawyer business partners. Rather, we believe the central question that needs to be addressed is how this would be effectively regulated.	<p>The illustration draft of the Alternative 1 fee sharing amendments to rule 5.4 is conceptual only at this stage, and concepts for regulatory reform and implementation will require further study and work to develop actual proposed changes to laws. A pilot program or a regulatory sandbox are possible methods for carefully considering implementation with appropriate regulation.</p>

Recommendation 3.1 (Rule 5.4 Fee Sharing Alternative 1) [Rules/Ethics Opns.]	
Recurring Point	Possible Response
<p>If nonlawyers (individuals or entities) can profit directly from the legal business in which they are partners, there would necessarily be an incentive for them to “help” their investment. This is potentially problematic if the nonlawyers are not bound by the same ethical standards as the lawyers. And even if the intent is for the nonlawyer business partners to be bound by these same standards, they would not be licensed by or subject to the regulatory or disciplinary jurisdiction of the State Bar. Thus, the State Bar would have no remedy available for a nonlawyer’s violation of the standards.</p> <p>Issues are likely to arise in the context of the advertising and solicitation rules and other areas. Would the lawyers who get cases simply choose to turn a blind eye as to how the cases are coming to the firm or fail to ask their nonlawyer business partners critical questions about how the clients were obtained? Would the nonlawyer investors potentially ask the lawyers to sue a competitor of theirs for a competitive advantage without disclosing key facts to the lawyers that would not be discovered in the course of the lawyers’ ordinary due diligence? If large public companies start investing in law firms, would shareholder interests drive the agenda? Would inevitable tensions be created between the fiduciary duties that lawyers would owe to their nonlawyer partners and the fiduciary duties that lawyers owe to their clients?</p>	<p>Compliance enforcement for Rules of Professional Conduct is focused on a licensee through the attorney discipline system and notwithstanding any relaxation of fee sharing restrictions, lawyers would remain bound by their related duties to competently and diligently represent their clients and to supervise nonlawyers, their duty to avoid conflicts of interest, and their duty to exercise independent professional judgment on behalf of each client.</p> <p>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 Washington has approved the sharing of fees between a lawyer and a Limited License Legal Technician (“LLLT”) so long as the LLLT is a regulated person. See Wash. Rule 5.9. Other examples of detailed regulatory standards that may be considered in any change in law firm ownership include: requirements for lawyer majority ownership of law practices (compare ABS in Italy) and fitness to own scrutiny for nonlawyers (compare ABS in the U.K.).</p>