



To: ATILS Task Force
From: Staff (includes October materials from Tara Burd and Lori Gonzalez)
Date: November 6, 2019
Re: C.2. 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.

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 3.2:

Recommendation 3.2 will be discussed with other related Fee Sharing/Non-lawyer Ownership proposals. Recommendation 3.2 has received a total of approximately 161 written comments, 127 in opposition, 32 in support, and 2 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:

(See themes for Recommendation 3.1 in addition to the ones listed below.)

- At least one U.S. jurisdiction is considering a complete repeal of its version of ABA Model Rule 5.4.
- There is no precedent for using client consent to authorize otherwise prohibited fee sharing with a nonlawyer in any U.S. jurisdiction.
- In complying with the revised CRPC 5.4, a client's consent should be informed so a lawyer should not dispatch that requirement in a boilerplate manner and depending on the nature of a nonlawyer's fee sharing involvement, an initial client consent might need to be refreshed at a later time because all adverse consequences might not be known at the time that client consent is first obtained.
- Due to the potential for unforeseen consequences, the Alt. 1 version of revised CRPC 5.4 should be implemented first and assessed before considering a subsequent step of implementing the broader fee sharing authorization in the Alt. 2 version of CRPC 5.4.

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

Proposal 3.2	Total	Support	Oppose	SNP
Lawyer	65%	13%	86%	1%
Public Member	1%	50%	50%	0%
Lawyer Organization (bar association, law firm, legal aid)	17%	18%	79%	4%
Public Organization (insurance companies, non and for profit nonlawyer organization)	3%	60%	40%	0%
Unknown (not enough information)	14%	41%	59%	0%
Total	100%	20%	79%	1%

For the October meeting, the Task Force member(s) assigned to Recommendation 3.2 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 3.2. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (11)	Support (5)	Support if Modified (4)	Support if Nonprofit (1)	Support if Sandbox/ Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (0)
Los Angeles County Bar Association (Brot) [1355n]	The Court Buddy Company (McGlone) [774o]	LACBA PREC (Krueger) [1063h]	OneJustice (Wilson) [1227b]	Passmore Crispin [1031]		
Orange County Bar Association [1134k]	Anonymous [515]	MyShingle.com (Elefant) [1202a]				
California Lawyers Association (Rosing) [1363f]	Legal Value Firm (Donini) [626]	State Bar of California COPRAC (Bomse) [1229i]				
Alameda County Bar Association (Chalmers) [1189]	Moore, Jennifer [761j]	Responsive Law (Gordon) [1197f]				
Association of Discipline Defense Counsel (Lear) [1364n]	Tsong, Ralph [593]					
Consumer Attorneys Association of Los Angeles (Zanville) [1339f]						
Consumer Attorneys of California (Serna) [1097n]						

Oppose (11)	Support (5)	Support if Modified (4)	Support if Nonprofit (1)	Support if Sandbox/ Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (0)
de Lira Matthew [536h]						
Illinois State Bar Association (Sosin) [1133d]						
LACBA SFSP (Furman) [909n]						
Public Law Center (Ferrin) [1233i]						
Becerra, Alejandro [964g]						
Hart, Matthew [756c]						

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 3.2 (Rule 5.4 Fee Sharing Alternative 2) [Rules/Ethics Opns]	
Recurring Point	Revised comment
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>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</p>

Recommendation 3.2 (Rule 5.4 Fee Sharing Alternative 2) [Rules/Ethics Opns]	
Recurring Point	Revised comment
	to truly partner with experts to develop new delivery systems and innovative technology solutions.
This would increase profit motive and water down the quality of legal services. Cost cutting would cause a decrease in ethical obligations.	<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>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.	<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 services, however, this rule change ensures each lawyer decides independently what type of relationship they are comfortable creating with others.</p>

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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.	<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.</p> <p>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.</p>
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.	<p>The task force does not take lightly the current state of education for lawyers as it relates to business operations.</p> <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.</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 5.3.1, there is precedent for imposing special restrictions on a licensed</p>

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	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.	<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, improved legal services delivery and increased access to legal services.
Too many attorneys are taking advantage of consumers. More competition would be better. [NOTE: this comment is in support.]	The Task Force believes the 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.
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.]	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.

Recommendation 3.2 (Rule 5.4 Fee Sharing Alternative 2) [Rules/Ethics Opns]	
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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.]	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.
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>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 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>
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>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 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>

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<p>This recommendation presents an unacceptable risk of harm for clients and the public and prioritizes the mass market profit motive above any duty to clients by eliminating entirely the overriding judgment of the attorney. The judgment of an attorney working in this environment will be constrained by business concerns of the firm even at the expense of client needs. I am distressed that the State Bar would be asked to condone conduct that has resulted in so many attorney disciplinary actions. As California lawyers, I have long rejected the fundamentally unethical practice of capping, and always regarded the duty to clients as one of ultimate fidelity that cannot, by its fiduciary nature, be compromised by the attorney's own desire to make money. It defies reason to suggest that encouraging the worst of self-interest by those providing legal services will lead to greater access to justice.</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 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>