



To: ATILS  
From: Kevin Mohr and Randall Difuntorum  
Date: January 27, 2020  
Re: Revised Rule 5.4 (Financial and Similar Arrangements with Nonlawyers)

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### Executive Summary

Following ATILS' January 10, 2020 action on RPC 5.4 to approve black letter amendments to paragraph (a)(5), the drafting team has prepared conforming changes to the comments to the rule. The revisions include a clarifying change to existing Comment [3] and a new Comment [4] (with existing Comments [4] and [5] renumbered as Comments [5] and [6]). The changes to Comment [3] clarify that court awarded fees are just one example of a fee sharing arrangement with a nonprofit organization that is permitted under the amended version of paragraph (a)(5). New Comment [4] implements the general consensus during the January 10<sup>th</sup> discussion of RPC 5.4 that the rule should alert lawyers to the possibility that a fee sharing arrangement under paragraph (a)(5) could constitute a "significant development" for purposes of a lawyer's communication duties to keep a client reasonably informed (see RPC 1.4 and Bus. & Prof. Code § 6068, subd. (m)).

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### Discussion

A redline/strikeout version of proposed amended RPC 5.4 is provided as Attachment A. A clean version is provided as Attachment B. ATILS members should carefully review the amendments to paragraph (a)(5) to confirm it accurately reflects the approved amendments.

The proposed amendment to existing Comment [3] adds the phrase "as just one example" towards the beginning of the comment. No other changes to Comment [3] are recommended. By adding the phrase "as just one example," the comment retains the existing focus on court awarded fee sharing that is discussed in the *Frye v. Tenderloin Housing Clinic* case which is cited in the comment. At the same time, the addition of "as just one example" conveys the essential substantive change to the paragraph (a)(5), namely that the exception to fee sharing with a nonprofit has been expanded to cover arrangements that do not involve a court ordered award of attorney fees as in the *Frye* case.

The proposed new Comment [4] provides that:

Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

During the January 10<sup>th</sup> discussion, a comparison was made to the professional conduct standards applicable when a lawyer shares a fee with another attorney who is not a member of the same law firm. This fee sharing among lawyers is governed by [RPC 1.5.1](#). One of the requirements under [RPC 1.5.1](#) is that the lawyers participating in a fee sharing arrangement must give the client a written disclosure and obtain client consent in writing to the terms of the fee sharing arrangement. Given the implementation of this “client right to know” policy for fee sharing among lawyers in different law firms, it was suggested that ATILS’ expanded exception for sharing fees with a nonprofit organization might also include a similar requirement.

Although there did not appear to be an interest in using a written disclosure and informed consent protocol, there was interest in recognizing in a comment that fee sharing arrangements with a nonprofit organization might in some circumstances constitute a “significant development” that triggers a lawyer’s general duty to affirmatively communicate with a client. Proposed new Comment [4] implements this change and includes cross references to RPC 1.4 and Business and Professions Code § 6068, subd. (m).

### **Alternatives Considered**

The drafting team considered adding more detailed information to the comments, such as the example of permitted fee sharing when a claim settles before litigation is filed, but the drafting team believes that the changes to paragraph (a)(5) are sufficiently clear and that it would be more appropriate and more helpful for a potential advisory ethics opinion to address examples of expanded fee sharing with a nonprofit organization under the revised rule. For the same reasons, the drafting team also did not include an example of a fee sharing arrangement that might trigger the duty to communicate.

### **Conclusion**

The drafting team welcomes feedback on this proposal and requests that any comments submitted prior to the meeting include suggested language for any changes to the proposed revisions to RPC 5.4.

## ATTACHMENT A

(Redline/strikeout version showing changes to current RPC 5.4)

### Rule 5.4 Financial and Similar Arrangements with Nonlawyers

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
  - (5) a lawyer or law firm\* may share with or pay a ~~court-awarded~~ legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained ~~or~~, recommended, or facilitated employment of the lawyer or law firm\* in the matter-, including but not limited to qualified legal services projects, qualified support centers and law school programs that receive funding distributed pursuant to Article 14 of the State Bar Act Business and Professions Code and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
- (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;
  - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
  - (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

#### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5), as just one example, permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by this rule paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

[45] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

**ATTACHMENT B**  
(Clean version)

**Rule 5.4 Financial and Similar Arrangements with Nonlawyers**

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
  - (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
  - (5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, recommended, or facilitated employment of the lawyer or law firm\* in the matter, including but not limited to qualified legal services projects, qualified support centers and law school programs that receive funding distributed pursuant to Article 14 of the State Bar Act Business and Professions Code and (ii) qualifies under Section 501(c)(3) of the Internal Revenue Code.
- (b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.
- (c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:
  - (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;
  - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
  - (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

#### **Comment**

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5), as just one example, permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] Depending on the specific facts and circumstances, a lawyer's sharing of fees as permitted by paragraph (a)(5) might constitute a "significant development" that must be communicated to a client under rule 1.4 and Business and Professions Code section 6068(m).

[5] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[6] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

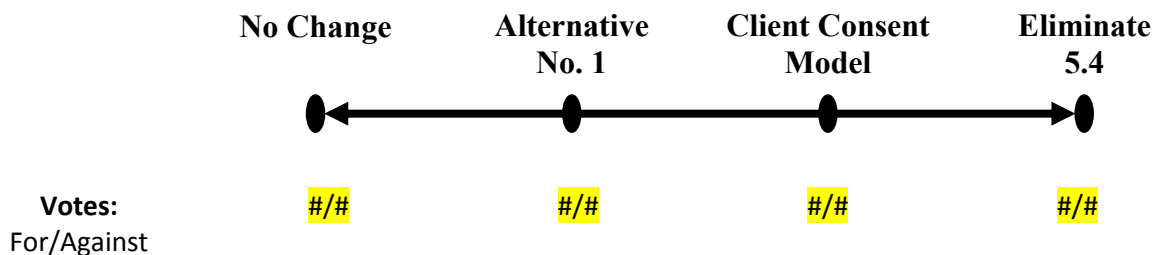


To: ATILS Task Force  
From: Johann Drolshagen  
Date: January 27, 2020  
Re: Revised Rule 5.4 (Financial and Similar Arrangements with Nonlawyers)

Recommendation in re Rule 5.4

*Fee-Sharing, Firm Ownership, and Investment*

The members of the ATILS Task Force have identified Rule 5.4 as being the crux for all issues regarding innovation within the Legal and Justice Systems. Rule 5.4 has equally been identified as the primary inhibitor to any modern innovation or involvement of other-than-lawyer entities, to include: individuals, entities, and technologies. The members, however, could not reach a consensus on how to edit, restructure, or deconstruct the Rule. For this reason, the members have chosen to present this summary of the efforts so that the issue may survive the current Task Force and be decided by the leadership moving forward.



The scope of approaches to affecting change to Rule 5.4 is broad and consists of mutually exclusive logic paths. Below, each path has been briefly presented by the key points of structure and objective. All of the paths equally endeavor to protect the public; and, the members all desire an outcome that can *provide* increased access to justice.

**Summary of Positions**

***No Change***

The single point that is unanimous among the ATILS Task Force members is that ‘no change’ to Rule 5.4 is ***not*** an option. The members also recognize that this sentiment was presented in Professor Henderson’s Legal Market Landscape Report and conveyed within the Task Force’s Charter.

***Alternative No. 1***

Alternative No. 1 sought to maintain the current structure of Rule 5.4 with a number of edits and additions to the list of exceptions. The sole passing exception to be added was that of not-for-profit

organizations; however, the added exception limited the organizations to only those with 501(c)(3) status. This was highly contentious as being perceived as excessively limited; but, better than nothing. Supporters of Alternative No. 1 claim the rule to be protective of the public; however, according to the various experts the Task Force heard from, Alternative No. 1 is not expected to provide substantial change access to justice. *See Attachment A.*

### ***Client Consent Model [a.k.a. Alternative No. 2]***

The Client Consent Model sought to change the very nature of Rule 5.4 to a model that allowed for, and required, full disclosure and acknowledgement by the client as to the involvement of other-than-lawyer entities. The Client Consent Model also sought to make the rule permissive by default, rather than prohibitive in nature. This is an effort to codify an open nature to the rule and thereby promote access to justice. *See Attachment B.*

See also expert evaluation from Professor Stephen Bundy of Berkley for additional details regarding the anticipated improvements to access to justice with a permissive model. *See Attachment C.*

### ***Eliminate Rule 5.4 Entirely***

Members of the Task Force felt strongly that Rule 5.4 is the primary inhibitor to innovation and the introduction of other-than-lawyers. Some felt that simply removing the rule entirely would suffice.

In addition to the members of the Task Force, Professor Gillian Hadfield, another expert who presented to the Task Force, described Rule 5.4 as the sole inhibitor of access to justice.



## ATTACHMENT A

(Redline/strikeout version showing changes to current RPC 5.4)

### Rule 5.4 Financial and Similar Arrangements with Nonlawyers [Alternative 1] (as Circulated for Public Comment but Not Adopted)

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; ~~or~~
  - (5) a lawyer or law firm\* may share with or pay a legal fee, including but not limited to a fee awarded by a tribunal or received in settlement of a matter, to a nonprofit organization that (i) employed, retained, ~~or~~ recommended, or facilitated employment of the lawyer or law firm\* in the matter and (ii) qualifies under Section 501©(3) of the Internal Revenue Code; or
  - (6) a lawyer or law firm may share legal fees with a nonlawyer if the lawyer or law firm complies with the requirements set forth in paragraph (b).
- (b) ~~A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~ A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:
- (1) the firm's sole purpose is providing legal services to clients;
  - (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
  - (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
  - (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;
  - (5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

## ATTACHMENT A

(Redline/strikeout version showing changes to current RPC 5.4)

(6) compliance with the foregoing conditions is set forth in writing.

- © A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.
- (d) ~~A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:~~
- ~~(1) a nonlawyer owns any interest in it, except that a~~ Notwithstanding paragraph (a), a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest in a law corporation or other organization authorized to practice law for a reasonable\* time during administration~~;~~
- ~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~
- ~~(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.~~
- © The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
- (f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person\* to practice law in violation of these rules or the State Bar Act.

### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4<sup>th</sup> 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.)

## ATTACHMENT A

(Redline/strikeout version showing changes to current RPC 5.4)

Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[4] A nonprofit organization that provides logistical or operational support, such as physical facilities or clerical assistance, to a lawyer facilitates the employment of the lawyer as provided in paragraph (a)(5).

[45] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4<sup>th</sup> 1388 [120 Cal.Rptr.2d 392].)

[56] Paragraph © is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other Than Client).



## ATTACHMENT A

(Redline/strikeout version showing changes to current RPC 5.4)

### Rule 5.4 Financial and Similar Arrangements with Nonlawyers

(as Approved for Recommendation to the Board by the Task Force at the January 10, 2020 Meeting)

- (a) A lawyer or law firm\* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:
- (1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;\*
  - (2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;
  - (3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;
  - (4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or
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- (1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;
  - (2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or
  - (3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

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- (e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.
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### Comment

[1] Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

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[56] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

## ATTACHMENT B

(Excerpt From July 11, 2019 Board of Trustees Open Session Agenda Item 701)

**3.2 - Adoption of an 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 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.**

**What will this recommendation do?** – To promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this expansive revision of rule 5.4 would permit fee sharing with a nonlawyer, including compensation paid to a nonlawyer for client referrals, so long as the client provides informed written consent.

**Background:** The proposed revisions to rule 5.4 Alternative 2 are meant to create a major shift in rule 5.4 around ownership and fee sharing with very limited regulation. Innovation requires changes in perception, new knowledge, and often unexpected occurrences. It requires collaboration, multi-disciplinary participation and funding/investment. Expecting new innovation in access to justice to happen utilizing the same knowledge, perceptions and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in access to justice. In fact, a recent survey has suggested that the access to justice gap has continued to increase, suggesting that a major shift in the legal field is necessary to disrupt the continuing access to justice crisis.

The Task Force’s charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is nonlawyer ownership or investment - a specific area the current rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the Task Force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to “ensure that the recommendations of the Task Force are focused on protecting the interest of the public.” Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of access to justice needs go unmet. The statistics evidencing the failure to meet the access to justice needs are immense and well documented.

The Alternative 2 proposed rule revision invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. In establishing ATILS, the State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for access to justice.

### **Pros:**

1. The proposed Rule provides for highly skilled and trained individuals with unique skill sets not

## **ATTACHMENT B**

(Excerpt From July 11, 2019 Board of Trustees Open Session Agenda Item 701)

common to lawyers to be properly vested and incentivized by partnering with lawyers in a multitude of ways.

2. The proposed Rule would open up the market to both investment/funding and current/future technologies resulting in greater choices to be provided to the public.
3. The proposed Rule allows the California Supreme Court to consider delivering many of the services that could be implemented state-wide under a new interpretation.
4. The proposed Rule provides for informed consent and ultimately a much greater choice of services for the consumer. Recent surveys suggest consumers may not come to lawyers first for legal needs. Allowing new services to be created by partnering with community partners may result in consumers finding services early on in a dispute resulting in quicker resolutions with perhaps less court involvement.
5. The proposed rules allows for many, new types of partnership. The existing rules have often discussed the issue of fee sharing within the context of referral fees only. This proposed rule allows a wide breadth of new opportunity for innovating legal services which allows lawyers to collaborate w/ others to share both the burdens and rewards.
6. The proposed Rule provides for the inclusion of oversight by a licensed legal professional.

### **Cons:**

1. There is no mechanism for regulating nonlawyers under this proposal because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.
2. Little or no concrete evidence that this proposal would increase access to justice.

**Selected Resources:** Attachment K – Clean and redline versions of proposed rule 5.4 [Alternative 2]



## **ATTACHMENT B**

(Excerpt From July 11, 2019 Board of Trustees Open Session Agenda Item 701)

### **Attachment K - Clean and redline versions of proposed rule 5.4 [Alternative 2]**

#### **Rule 5.4 Financial Arrangements with Nonlawyers [Alternative 2]**

A lawyer or law firm\* shall not share a legal fee with a person\* or organization not authorized to practice law unless:

- (a) the lawyer or law firm\* enters into a written\* agreement to share the fee with the person or organization not authorized to practice law;
- (b) the client has consented in writing,\* either at the time of the agreement to share fees or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of: (i) the fact that the fee will be shared with a person\* or organization not authorized to practice law; (ii) the identity of the person\* or organization; and (iii) the terms of the fee sharing;
- (c) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.

## ATTACHMENT B

(Excerpt From July 11, 2019 Board of Trustees Open Session Agenda Item 701)

### Rule 5.4 Financial ~~and Similar~~ Arrangements with Nonlawyers [Alternative 2]

(a) A lawyer or law firm\* shall not share a legal ~~fees directly or indirectly with a nonlawyer or with an~~ fee with a person\* or organization ~~that is~~ not authorized to practice law, ~~except that~~ unless:

- ~~(1) an agreement by a lawyer with the lawyer's firm,\* partner,\* or associate may provide for the payment of money or other consideration over a reasonable\* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~
- ~~(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;~~
- ~~(3) a lawyer or law firm\* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;~~
- ~~(4) a lawyer or law firm\* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or~~
- ~~(5) a lawyer or law firm\* may share with or pay a court awarded legal fee to a nonprofit organization that employed, retained or recommended employment of the lawyer or law firm in the matter.~~

~~(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.~~

~~(c) A lawyer shall not permit a person\* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.~~

~~(d)~~ (a) ~~A~~ the lawyer ~~shall not practice with or in the form of a professional corporation or other~~ or law firm\* enters into a written\* agreement to share the fee with the person or organization not authorized to practice law ~~for a profit if:~~

(b) the client has consented in writing,\* either at the time of the agreement to share fees or as soon thereafter as reasonably\* practicable, after a full written\* disclosure to the client of: (i) the fact that the fee will be shared with a person\* or organization not authorized to practice law; (ii) the identity of the person\* or organization; and (iii) the terms of the fee sharing;

- ~~(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable\* time during administration;~~
- ~~(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or~~

## ATTACHMENT B

(Excerpt From July 11, 2019 Board of Trustees Open Session Agenda Item 701)

- (3c) ~~a nonlawyer has the right or authority to direct or control~~there is no interference with the lawyer's independent professional judgment- or with the lawyer-client relationship; and
- (d) the total fee charged is not unconscionable as that term is defined in rule 1.5 and is not increased solely by reason of the agreement to share the fee.
- (e) ~~The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.~~
- (f) ~~A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person\* or organization to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person,\* organization or group to practice law in violation of these rules or the State Bar Act.~~

### Comment

[1] ~~Paragraph (a) does not prohibit a lawyer or law firm\* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm\* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.~~

[2] ~~Paragraph (a) also does not prohibit payment to a nonlawyer third party for goods and services provided to a lawyer or law firm;\* however, the compensation to a nonlawyer third party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third party collects on the lawyer's behalf.~~

[3] ~~Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. See also rule 6.3. Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.~~

[4] ~~This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].~~



January 8, 2020

Justice Lee Edmon, Chair  
ATILS Task Force  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Dear Justice Edmon:

This is a public comment on issues raised by Professor Mohr and Mr. Difuntorum's December 26, 2019 redraft of Alternative 1 for revision of Rule 5.4 and by Professor Mohr and Mr. Tuft's December 23, 2019 memorandum on Rule 5.7. I hope that these views can be transmitted to the members of the Task Force prior to its January 10 meeting. I regret that a prior commitment on the East Coast prevents me from delivering them in person.

These comments are submitted in my capacity as private citizen and lawyer-academic. Though I am the current Chair of the State Bar's Committee on Professional Rules and Conduct ("COPRAC"), this letter represents solely my own personal views, and not those of COPRAC or its staff. For COPRAC's views, many of which remain directly relevant to pending Rule 5.4 and 5.7 issues, I refer the Task Force to the letter from Chair Amy Bomse to Justice Edmon dated September 10, 2019.

This letter is driven by the concerns reflected in Professor Henderson's inspiring and path-breaking July 2018 Legal Landscape Market Report. Like that Report my focus is on whether and how the Professional Rules are serving consumers, not how they benefit lawyers or regulators. Henderson Report at 24. Moreover, like Professor Henderson, I believe that "[t]he law should not be regulated to protect the 10 percent of customers who can afford legal services while ignoring the 90 percent who lack the ability to pay." *Id.* at 28. Instead, the State Bar should take "an expansive view of protection that includes greater access to the legal system." *Id.* at 25.

### **Revised Alternative 1 of Rule 5.4—Non-Lawyer Investment**

As revised, Alternative Version 1 of Rule 5.4 raises many issues. I focus on non-lawyer investment.<sup>1</sup> Professor Henderson's report describes as "persuasive" the argument—advanced by scholars like Professor Gillian Hadfield, formerly of Berkeley and USC—that "outside sources of capital are most needed in the PeopleLaw sector to develop and finance innovative low-cost solutions to legal problems" that would improve access for the 90%. *Id.* at 24. He also cites with

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<sup>1</sup> The COPRAC September 10 letter analyzes in detail a number of other important issues raised by Alternative 1. It is not clear to me whether or how revised Alternative 1 responds to any of that analysis.



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evident approval Professor Hadfield's observation that current limitations on outside investment are "unnecessary and costly" and that "no one has, or could, demonstrate [that those Rules] improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all." *Id.* Finally, he notes that the leading common law jurisdictions (U.K, Australia) that have studied the issue have ended the probation on non-lawyer investment. *Id.* at 28.

Unfortunately, there is no prospect that the ownership provisions in Alternative 1 will improve law firm access to outside capital, or to the kind of management or technical expertise that often accompanies it. That is because from the outset, that Alternative has limited non-lawyer's rights to participate in ownership to natural persons who are assisting the lawyers in the firm in providing legal services. To put it bluntly, law firm employees performing such roles are contributing "sweat equity." They will not bring with them the capital or business expertise required to drive disruptive, large scale innovation in the PeopleLaw sector. The revised version of Alternative 1 makes this situation worse, by piling on the regulatory requirements imposed on even these employee-owners.

Alternative 1 thus cuts off a promising avenue of reform, but without the careful analysis of consumer welfare that Professor Henderson recommends. Strikingly, the brief, sketchy pro and con discussion that accompanied the first version of Alternative 1 did not even mention that the Rule would bar all access to outside investor funding or the consequences of that bar for disruptive innovation. Nor does it address any of the arguments that such restrictions are "unnecessary and costly" or that they ignore the interests of the 90% of customers who cannot afford legal services. The only argument advanced against non-lawyer outside investment is that disclosure of privileged communications to such investors could result in waiver of the privilege. To the extent that this concern is genuine, existing doctrine could be modified to ensure that disclosure to such investors, if necessary, would not result in a privilege waiver. As presented, then, the argument in favor of Alternative 1 seems clearly to privilege the interests of the 10 percent who can afford services over the interests of the 90% of customers who can't.

The Alternative 2 version of Rule 5.4 would have permitted outside investment in law firms. That Alternative was sweeping and not carefully worked out. Moreover, the pro and con discussion failed to analyze the regulatory risks created by outside investment or the question whether the existing regulation was sufficient to deal with those risks. But Alternative 2 moved in the right direction. The solution to its problems, one would think, would have been to revise Alternative 2, and/or do the required supporting analysis, not to abandon any possibility of meaningful equity financing for law firms.

On the current record, the Task Force has before it a strong endorsement of outside investment in law firms—coupled with the decision of the leading Commonwealth jurisdictions, reached after long study, to allow such investment. The Task Force does not appear to have done independent research or systematic analysis that would justify wholesale rejection of that approach. If there is not time to conduct an appropriate analysis of such financing, the solution is to acknowledge that the analysis has not been done and seek more time. If there is not enough experience with outside financing to permit a confident conclusion, then the Task Force should recommend the Utah approach and to allow controlled experimentation with such financing under the "regulatory sandbox model." On this record, it would be a serious mistake—and a heart-breaking missed opportunity to improve

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access for the 90 percent--to abandon the possibility of outside funding for law firms without further study.

### **Rule 5.7 and Current California Law—the Mohr/Tuft Memorandum**

The Mohr/Tuft memorandum's suggestion that additional time is necessary to study ABA Model Rule 5.7 makes sense. A central premise of the Mohr/Tuft memorandum, however, is that when that further study occurs, it should be guided by the memorandum's conclusion that the Rule would have to be significantly modified to reflect settled California law and sound regulatory policy. With due respect, that conclusion is not correct and is not supported by the materials that are attached to the memorandum—the Mohr Memorandum on Rule 5.7, COPRAC Proposed Formal Opinion 16-0003, and the OCTC Memorandum concerning the COPRAC Opinion. Opinion.

What those materials show is that there is a legitimate dispute about whether California's common law of lawyering is consistent with Rule 5.7, but that the better view is that the two can be read as consistent. Moreover, even if California's common law of lawyering could somehow be read as inconsistent with Rule 5.7, common law rules can and should be changed where they would result in outcomes—or cast regulatory shadows—that are inconsistent with public protection goals, including access to justice. The disinterested access-sensitive policy analysis that shows the superiority of current California law to Model Rule 5.7 has not yet been done, and further study of the Rule should not proceed on the assumption that the outcome of that analysis will require modification of the Rule.

**How Rule 5.7 Works.** Rule 5.7 deals with the question of when the Rules of Professional Conduct should be applied to the conduct of a lawyer who is not practicing law.<sup>2</sup> It defines a class of services that, while not the practice of law, are “law related.” A lawyer whose conduct is not law-related is not subject to discipline under the Rules of Professional Conduct. A lawyer whose services are law-related is subject to the Rules of Professional Conduct unless those services are (1) distinct from the lawyer's legal practice and (2) the lawyer has taken “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 lawyer-client relationship do not exist.” Model Rule 5.7 (a) (1)-(2).

The rationale of Rule 5.7 is essentially consumer protection—that the lawyer's customer should receive the protections that the customer reasonably expects to receive. When the client cannot reasonably believe that the lawyer's conduct involves the practice of law or the formation of a lawyer-client relationship, however, there is no reason to apply rules specifically designed to regulate the practice of law to activities that are not the practice of law, are not understood by the relevant actors to be the practice of law, and that may be governed by rules different from or inconsistent with the professional rules.

**How Rule 5.7 Increases Access to Justice.** Rule 5.7 sounds technical, but it is a big deal. The rule is about regulating activities that are law-related but not the practice of law. If the Task Force persists in rejecting outside financing for law firms, this is the sector where outside capital will

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<sup>2</sup> California lawyers are also subject to discipline for certain types of criminal conduct and conduct involving dishonesty whether or not that conduct occurs in the practice of law. Business & Professions Code §6106 and Rule 8.4 (b) and (c). Nothing in Rule 5.7 would change the availability of discipline under those provisions.

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remain available and where the potential for disruptive innovation that can benefit the 90% can be realized. As the Henderson Report notes, the strategy will be to identify every activity or process in law firm delivery of legal services that is not the provision of legal advice and to establish separate businesses to conduct those law-related activities or processes. In those separate businesses, synergies between lawyer expertise, access to capital, technology and outside management expertise that are unavailable to law firms can generate lower-cost means of access. Henderson Report at 16-17. In that context, Rule 5.7 improves access to justice by allowing businesses that involve both lawyers and lay persons to obtain investment capital and to innovate in lowering costs for those services under rules designed to regulate the non-law conduct at issue—rules that may also involve lower compliance or insurance costs. Insofar as law related services better enable customers to obtain access to justice, the resulting lower costs should further that goal.

**California’s Common Law Is Consistent with Model Rule 5.7.** California has no statute or rule similar to Model Rule 5.7. Instead, the California law on the subject is non-statutory and made on a case by case basis—part of the common law of lawyering. That common law is broadly consistent with Rule 5.7, though some of the issues resolved by that rule have not been the subject of any reported California opinion:

- California law recognizes a distinction between non-law activities that are related to or resemble the practice of law and those that are/do not. *See, e.g.*, Formal Opinion 1995-141, Mohr Memorandum at 7; Proposed Opinion at 4-5; OCTC Memorandum at p.1 fn.1. Though the precise language used in the California case law differs from that in the Model Rule, it has not been suggested that that difference would lead to any change in the outcome of decided cases.
- California law recognizes that the Rules of Professional Conduct can properly be applied to lawyers whose law-related activities are conducted in circumstances not distinct from the lawyer’s law practice, such as when the lawyer is playing a dual role in a transaction, *Layton v. State Bar*, 50 Cal. 3d 888, 904 (1990), Mohr Memorandum at 7, Proposed Opinion at 4, OCTC Memorandum at 9 and n. 15, or is personally providing both legal and non-legal services from the same office. *Libarian v. State Bar* (1944) 25 Cal. 2d 214, 317-18; Mohr Memorandum at 7-8; OCTC Memorandum at 7 and n. 12.
- California law also recognizes that a lawyer who conducts a law-related business that is distinct from the lawyer’s practice can still be subject to the Rules of Professional Conduct to the extent that the circumstances “could reasonably lead prospective clients to misperceive the nature of the services being offered.” Formal Opinion 1999-154; Mohr Memorandum at 8; Proposed Opinion at 4.
- California law expressly recognizes that an important rationale for applying the Rules of Professional Conduct to conduct that is not the practice of law is the protection of the client’s reasonable expectations. Formal Opinion 1999-154; Mohr Memorandum at 8; Proposed Opinion at 4-5.
- California case law also clearly recognizes that the client’s reasonable expectations are a function of the circumstances, including the client’s sophistication and the lawyer’s statements and conduct. Thus a client cannot rely on the client’s belief in the existence of an attorney-client relationship or a duty of confidentiality if that belief is not reasonable



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in light of the lawyer's conduct and statements. See cases discussed in Mohr Memorandum at 10; Draft Opinion at 6-7.

Any controversy about how Rule 5.7 might change California law arises from two issues. First, the California courts have never decided a case raising the issue whether the Rules of Professional Conduct are applicable to law-related services that are not the practice of law, that are distinct from the lawyer's practice of law, and that the lawyer has clearly explained are not legal services and are not intended to give rise to an attorney-client relationship. Mohr Memorandum at 9-10; Proposed Opinion at 6; OCTC Memorandum at 16. As the Mohr Memorandum notes, there is non-binding ethics authority that in those circumstances the Rules of Professional Conduct do not apply. Formal Opinion 1999-154. But the issue has not arisen in any decided case. The Proposed Opinion concludes the courts would resolve the issue by reference to settled law holding that client expectations about the existence of an attorney client relationship are protected only when they are reasonable, so that the Rules of Professional Conduct would not apply. The OCTC memorandum contends otherwise, but it does not consider or discuss the cases on reasonable client expectations discussed above and the cases upon which it does rely involve unrelated questions. OCTC Memorandum at 14.

The second potential source of controversy stems from numerous discipline cases stating that "an attorney who accepts the responsibility of a fiduciary nature is held to the same high standards of the legal profession whether or not he acts in the capacity of an attorney." Often this rule is cited in cases involving intentional misconduct, dishonesty or deception where discipline is available without regard to whether a specific professional rule has been violated. See Proposed Opinion at 3 and n. 6. Rule 5.7 would have no impact on those cases.

There are many cases, however, where the rule has been invoked to justify discipline under a Rule of Professional Conduct. There are two ways that the fiduciary cases could create tension with Rule 5.7. First, fiduciaries come in many varieties: trustees, conservators, guardians, brokers, agents of all kinds, escrow holders, corporate directors, controlling shareholders, partners, executors, investment advisors, liquidators and trustees, even spouses. It is conceivable that some of these roles may not be law related. In practice, however, the decided cases all seem to involve conduct that was clearly law related. See OCTC Memorandum at 16. Accordingly, Rule 5.7's definition of law-related services would not change the outcome of those cases.

Second, the fiduciary rule could be read as demanding that the Rules of Professional Conduct apply even to fiduciary roles that are wholly distinct from a lawyer's practice and even though the lawyer has taken measures to make clear to the person receiving that service that no legal services are being provided or attorney client relationship being created. That is the OCTC's reading of the law. Normatively, that would be a difficult result to justify—it would amount to saying that a very wide range of ordinary business activity is subject to the Rules of Professional Conduct, even though no one thinks that the activity is the practice of law or involves the formation of a lawyer-client relationship and even though those Rules would conflict with the other legal rules that might apply, simply because a lawyer is involved in conducting that business. Importantly, however, no decided case endorses that outcome, and the facts of the decided cases in which the Rules of Professional Conduct have been applied to law-related services all involve situations where the services were not distinct from the lawyer's practice and where the lawyer did not take any measures to clarify that the

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services were non-legal and that the protections of the attorney client privilege would not apply. Proposed Opinion at 9 & nn. 13-14.<sup>3</sup> All those cases would be decided the same way under Rule 5.7.

The bottom line: adoption of Rule 5.7 is consistent with the principles announced in California cases and with the results of those cases. Its adoption would not change the outcome of any decided case. Rule 5.7 would also resolve the undecided and important issue of whether such lawyer involvement in law-related services, whether or not they qualify as fiduciary in nature, can ever occur in a manner which does not trigger the application of specific Rules of Professional Conduct, such as rules that could limit the ability of law-related businesses to accept outside equity investment from non-lawyers. Accordingly, existing law provides no basis for rejecting or modifying Rule 5.7.

Even if California law were inconsistent with Rule 5.7, however, it is common law that could be changed by disciplinary rule. Accordingly, the choice between Rule 5.7 and any California common law rule that is found to be inconsistent with it should rest on analysis of which rule represents a better policy outcome under the relevant tests of fairness and public protection. The Task Force has not conducted that analysis. When that analysis is finally conducted, by the Task Force or its successor, in analyzing the issue of public protection, care should be taken to give appropriate weight to access to justice issues. Without wanting to prejudge the outcome of that analysis, I respectfully submit that it is not easy to see how a California version of Rule 5.7 that limits cost-reducing innovations or increases regulatory costs for providing law-related services that all relevant actors understand are not the practice of law would be consistent with treating access to justice as part of public protection.

Thank you for your consideration of these comments.

Very truly yours,

s/Stephen Bundy

Stephen McG. Bundy  
Professor of Law, Emeritus

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<sup>3</sup> It is not possible here to discuss every case cited by OCTC. But the core California cases which OCTC argues are inconsistent with a Rule 5.7 approach in fact would all be decided the same way under Rule 5.7. All involve the application of one or more Rules of Professional Conduct to law-related activity by the lawyer that grew out or was closely connected to the lawyer's practice of law, was not in any way distinct from the lawyer's practice, and did not involve even a hint that legal services were not being provided or that an attorney client relationship was not being formed. *In the Matter of Gordon*, 2018 WL 5801485 (loan modification services provided directly from the lawyer's office); *Crawford v. State Bar* (1960) 54 Cal.2d 659 (law-related services performed in the attorney's office for firm clients); *Schneider v. State Bar* (1987) (lawyer client business transaction rule applied to lawyer's dealings with client funds as trustee of a trust that he drafted for the clients); *Guzetta v. State Bar* (1987) 44 Cal.3d 962, 969 (trust accounting rules applied to a lawyer whose role as escrow agent grew directly out of his representation of a client and involved holding funds belonging to the client's wife in the lawyer's trust account). None involve law-related activities distinct from the lawyer's practice or where the client was advised of the nature of those activities and the fact that no attorney-client relationship was being formed.