



The State Bar *of California*

CLOSING THE JUSTICE GAP WORKING GROUP

Date: May 26, 2021
To: Closing the Justice Gap Working Group (CTJG)
From: Merri Baldwin and Andrew Tuft
Subject: Rule 5.4 [Financial and Similar Arrangements with Nonlawyers] Assignment and Background Information

At the April 9, 2021 CTJG meeting, the Chair announced volunteers are being sought to provide initial input on the non-sandbox rule amendment issues in the [CTJG charter](#). This memorandum provides detailed information to facilitate a CTJG member's consideration of the request for volunteers for the Rule of Professional Conduct 5.4 [Financial and Similar Arrangements with Nonlawyers] assignment. Two volunteers will be selected to work together as a team to prepare a report to CTJG that is anticipated for discussion at the September meeting of the working group.

SPECIFIC QUESTIONS TO ADDRESS

Each separate rules team will be asked to address the following four questions in its report:

1. Scope of assignment: What has the CTJG been asked to advise on?
2. What is the status quo (current rules and/or statutes and how they operate)?
3. What are possible options for change, and what are the recognized advantages/disadvantages?
4. What steps should we take (request presentations, conduct interviews, review studies, etc.) to reach a fully informed recommendation?

SPECIFIC INFORMATION AND RESOURCES REGARDING RULE 5.4

In addition to the information below, the relevant sections and appendices in the [ATILS Final Report](#) may be reviewed. However, the information below has been derived or excerpted from that report.

RULE 5.4 – FINANCIAL AND SIMILAR ARRANGEMENTS WITH NONLAWYERS

Continue to study other possible revisions to rule 5.4.

CTJG members who volunteer for this assignment are asked to consider the following background and instructions derived from the ATILS report.

Background: Although ATILS drafted and recommended modest revisions to rule 5.4 to allow for expanded fee sharing with a nonprofit organization,¹ ATILS also recommended ongoing study of other amendments to the rule that could promote collaboration, innovation, and investment in new delivery systems that lower costs and increase access to legal services. The members of the ATILS Task Force identified revisions to rule 5.4 as being central to advancing innovation in the delivery of legal services. Rule 5.4 has been identified as a significant inhibitor of innovation that could be provided by nonlawyer entities, including individuals, organizations, and technologies.

While the Task Force only approved a revision to the rule which will allow expanded fee sharing with nonprofit organizations, a substantial majority of the members agree that additional revisions may be warranted, but that further study and data informing the specifics of those revisions is needed. In a memorandum dated December 26, 2019, ATILS considered a discussion draft of a proposed rule 5.4 “Alternative 1.” (See Attachment 1 for this memorandum.) This draft includes revisions recommended by Professor Stephen Gillers’ who provided public hearing testimony to ATILS addressing Model Rule 5.4 revisions developed by an ABA group that were never adopted by the ABA. (See Attachment 2 for Professor Gillers’ written submissions in support of his public hearing testimony.)

ATILS Instructions: ATILS recommended that further study of possible amendments to rule 5.4 include the experiences of other jurisdictions considering amendments to their versions of the rule 5.4.

OPC Staff’s Suggestions for Possible Issues to Address:

Consider whether to recommend amendments to rule 5.4 separately from a regulatory sandbox, that is, changes that would be made irrespective of whether a sandbox is implemented. Issues to consider include the following:

¹ ATILS proposed revisions were issued for public comment and public comments were reviewed by COPRAC. Following consideration of COPRAC amendments to the rule, the Board adopted the rule and submitted it to the California Supreme Court for approval. The Court approved the amended rule and it became operative on March 22, 2021.

1. Consideration of possible rule changes, and the advantages and disadvantages of each, including:
 - a. the proposed rule drafted by ATILS members in the December 26, 2019 memorandum (Attachment 1);
 - b. a rule modeled after [District of Columbia's Rule 5.4](#);
 - c. elimination of rule 5.4, as [Arizona has done](#) as part of a regulatory framework requiring Alternative Business Structures to be licensed;
 - d. other proposals for changes to rule 5.4, such as [the two proposals put forth by the New York City Bar Association](#), permitting litigation funding of law firms; or
 - e. other changes not otherwise identified.
2. Whether to wait to propose changes to rule 5.4 until after a regulatory sandbox has been created and relevant data collected, or, in the event the regulatory sandbox is not implemented, after further study is undertaken of the alternatives.

ATILS Comments on Overlap with a Sandbox: Some ATILS members believed that, if created, a regulatory sandbox would provide informative data, while others believed that further changes to rule 5.4 may be studied regardless of the creation of a sandbox.

Attachments:

Attachment 1 – ATILS December 26, 2019 Memorandum re: Proposed Rule 5.4 “Alternative 1”

Attachment 2 – Professor Gillers Written Submissions in Support of Public Hearing Testimony



The State Bar
of California

Task Force on Access Through
Innovation of Legal Services

To: ATILS Task Force
From: Kevin Mohr and Randall Difuntorum
Date: December 26, 2019
Re: Revised Rule 5.4 (Financial and Similar Arrangements with Nonlawyers)

You will find a revised proposed rule 5.4 Alternative 1 in accordance with the Task Force's December 2019 meeting discussion and comments provided by Prof. Giller's in his public comment testimony. This is a redline version to the draft previously circulated for public comment. Please note the drafters' comments that appear in the footnotes.

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;
 - (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,¹ 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) [and written notice of the nonlawyers’ responsibilities within the law firm is provided to the State Bar].²
- (b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold ~~a financial~~ an ownership interest in the firm unless each of the following requirements is satisfied:³
 - (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 and the ownership and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest ownership and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the ownership and voting interests of all lawyers in the

¹ Reference to 501(c)(3) has been retained for the reasons previously given, i.e., broadening the exception to include sharing of fees w/o the “court-awarded” limitation presents the potential for abuse. See D.C. Rule 5.4, Cmt. [11] (“To prevent abuse of this broader exception [i.e., fees to be shared not limited to court-awarded fees], it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.”) The 501(c)(3) limitation should still permit fee-sharing with nearly all groups that refer matters to lawyers or retain lawyers to handle matters. For example, the ACLU of Southern California is two entities, the main entity that might engage in activities such as lobbying which preclude it from claiming 501(c)(3) status and the ACLU Foundation of Southern California, which is a 501(c)(3) entity.

² This bracketed clause is added at the suggestion of Staff. It is modeled on a similar notice provision in CRPC 5.3.1(d) and is intended to provide an added assurance that the nonlawyers’ conduct conforms to the requirements of the rule.

³ Substitute “an ownership interest in the firm” for “a financial interest” to clarify that nonlawyers could be owners in the firm and not just have a financial interest, such as a profit sharing arrangement as is permitted under the current rule 5.4. See CRPC 5.4(a)(3) & Cmt. [1].

Pro: The intent of the paragraph (a)(6) exception is clarified.

Con: None determined.

firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;⁴

(4) the nonlawyers have each satisfactorily demonstrated that they are of good moral character as determined by the State Bar;⁵

(45) the nonlawyers (i) satisfactorily complete a class of legal education approved by the State Bar or offered by a State Bar-approved provider on the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct;⁶
(ii) 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 (iii) agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

⁴ This added language, taken verbatim from the Ethics 20/20 Commission proposal except that the word “ownership” has been substituted for “financial.” This provision engendered substantial debate in the Rules Subcommittee and was eventually deleted. The rationale was that regardless of ownership interest of the nonlawyers, they would never be able to direct or control the professional judgment of the lawyers in the firm.

In addition to the added language, Ethics 20/20 included the following comment:

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote on or veto a specific matter by reserving to the nonlawyers the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.

⁵ This language has been added at the suggestion of Prof. Stephen Gillers.

Pro: It is appropriate that a nonlawyer owner of a law firm that has as its sole purpose the provision of legal services must demonstrate good moral character as is required for any lawyer owners of the firm.

Con: None determined.

Although Prof. Gillers also suggested that the cost of the moral character review should be assumed by the nonlawyer, that requirement should be left to a State Bar rule.

⁶ This language has also been added at the suggestion of Prof. Gillers, to ensure that the nonlawyers are familiar with the duties owed by lawyers to their clients and to the justice system. Prof. Gillers did not believe that a simple written statement that the nonlawyers had read the Rules and State Bar Act would provide the necessary assurance that the nonlawyers were familiar with the duties lawyers owe.

This provision would be supplemented by a requirement that the nonlawyers fulfill continuing legal education requirements just as lawyers are required. See proposed new paragraph (b)(5). **[KEM: I think it would be beneficial to set out the minimum initial education requirements and any continuing education requirements in separate paragraphs to emphasize they are separate requirements. However, I'm not opposed to putting all the requirements in a single paragraph.]**

- (6) The nonlawyers must annually complete at least [X] hours of legal education approved by the State Bar or offered by a State Bar-approved provider on the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct. Each nonlawyer must report his or her compliance to the State Bar under rules adopted by the Board of Trustees of the State Bar.⁷
- (57) 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;
- (68) compliance with the foregoing conditions is set forth in writing.
- (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) 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.

⁷ Paragraph (b)(6)’s language is based roughly on Cal. Rule of Court 9.31(c), which sets forth continuing legal education requirements.

Rule 9.31 itself is authorized by Bus. & Prof. C. § 6070(a), which provides:

(a) The State Bar shall request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. The rule that the State Bar requests the Supreme Court to adopt shall require that, within designated 36-month periods, all active licensees of the State Bar shall complete at least 25 hours of legal education activities approved by the State Bar or offered by a State Bar-approved provider, with four of those hours in legal ethics. The legal education activities shall focus on California law and practice and federal law as relevant to its practice in California or tribal law. A licensee of the State Bar who fails to satisfy the mandatory continuing legal education requirements of the program authorized by the Supreme Court rule shall be enrolled as an inactive licensee pursuant to rules adopted by the Board of Trustees of the State Bar.

The nonlawyers’ requirement should probably not amount to 25 hours. Moreover, because those lawyers presumably would not be practicing law, legal ethics should be the primary, if not the exclusive focus of any such education. Another possibility for (b)(6) that I would not favor would more closely adhere to rule 9.31 and would provide:

(6) The nonlawyers must, within 36-month periods designated by the State Bar, complete at least [X] hours of legal education approved by the State Bar or offered by a State Bar-approved provider. Four of those hours must address legal ethics. Nonlawyers may be required to complete legal education in other specified areas within the [X]-hour requirement under rules adopted by the State Bar. Each nonlawyer must report his or her compliance to the State Bar under rules adopted by the Board of Trustees of the State Bar.

- (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) 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] 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).

[5] Notwithstanding paragraph (b)(1), a nonlawyer may provide law-related services to a client for whom the firm has provided legal services. For example, subject to rules 1.7 and 1.8.1, a nonlawyer financial advisor could provide investment advice to a firm client who has received a judgment in a personal injury action.⁸ [See also rule 5.7]⁹[d1]

⁸ Prof. Gillers also recommended that nonlawyers should be able to provide law-related services to firm clients. The intent of his recommendation was that services should have a nexus to the legal representation as the example indicates.

[56] 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].)

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

[8] This rule is not intended to abrogate the law governing lawyer referral services, or the law prohibiting running and capping. See Business and Professions Code sections 6151-6155. A runner or capper would not be deemed to “assist” a lawyer or law firm in providing legal services to a client within the meaning of paragraph (b)(2). Similarly, a lawyer referral service would not be deemed to “assist” a lawyer or law firm in providing legal services to a client under that paragraph.¹⁰

⁹ The reference to rule 5.7 is bracketed pending a recommendation that a California rule counterpart to ABA Model Rule 5.7 should be adopted. [KEM: I still believe that it would be cleaner to have a rule 5.7 but, even if there is a 5.7, I think a clarifying comment would be appropriate.]

Note that the following comment was included in the Ethics 20/20 Commission’s proposed draft of MR 5.5:

[5] Paragraph (b) does not preclude a lawyer from providing “law-related services”, as defined in Rule 5.7, whether through a law firm or other organization. A lawyer shall remain subject to the Rules of Professional Conduct with respect to his or her provision of law-related services pursuant to Rule 5.7 whether or not the entity through which the lawyer provides such services is a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule.

¹⁰ This comment has been added to address concerns raised in the public comment received that this rule would provide a means to avoid the application of the lawyer referral service and runner/capper restrictions.

**TESTIMONY OF STEPHEN GILLERS
BEFORE THE CALIFORNIA STATE BAR TASK FORCE ON
ACCESS THROUGH INNOVATION OF LEGAL SERVICES**

August 10, 2019
San Francisco, CA

Thank you for the opportunity to address the Task Force. I have been teaching a class on the Regulation of Lawyers at New York University School of Law since I joined the faculty in 1978. I am the author of a casebook on the subject, now in its 11th edition. Most of my research and writing is in this area. I was a member of the ABA's 20/20 Commission and its Multijurisdictional Practice Commission. A complete resume can be found on the school's website at the URL below.¹

Among the most important proposals in the Tentative Recommendations for Public Comment of the State Bar Task Force's Report on Access Through Innovation of Legal Services are those addressing Rule 5.4. The 20/20 Commission prepared a draft set of amendments to ABA Rule 5.4. Unfortunately the Commission never formally proposed those amendments to the House of Delegates, but I am pleased to see that the tentative recommendations in Attachment J draw heavily on them.²

For decades, Rule 5.4 and its predecessors have impeded access to civil justice. ABA Rule 5.4, with minor exceptions, says: "A lawyer or law firm shall not share legal fees with a nonlawyer." See also California Rule 5.4(a) to the same effect. The American Bar Association justifies the prohibition in Rule 5.4 this way: The "limitations on sharing fees...are to protect the lawyer's professional independence of judgment." Rule 5.4 cmt. [1]. This is a common view nationwide. Its effect is to limit the "supply side" in the delivery of legal services. Only lawyers may sell them, which tends to make them more expensive. And legal services are whatever the courts say they are.

Surprising for a profession that prides itself on reason and evidence, this explanation contains none of either. It implies that nonlawyers cannot be trusted *not* to take advantage of clients, that they will seek to cause lawyers to betray clients, *and* that lawyers will succumb to their efforts, risking disbarment.

¹ http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.full_cv&personid=19943

² I realize that other important tentative proposals (2.0 et seq.) would also enable nonlawyers to provide what is traditionally understood to be legal services. I would be happy to address these if the Task Force wishes. Here my focus is Rule 5.4.

Yet nonlawyers occupy positions of great trust in our nation: as bankers, business leaders, government officials, university presidents, leaders of charities, and military officers. Nor has the bar been consistent. Lawyers employed by corporations report to nonlawyers who control their status and income. We expect and trust them to resist and indeed to disclose the misconduct of superiors even when the wrongdoer is their own boss. We are inconsistent elsewhere, too. Law firms can include nonlawyer employees in a compensation or retirement plan based in whole or in part on a profit-sharing arrangement. ABA and California Rule 5.4(a)(3). Accountants do work that when lawyers do it is the practice of law yet it is permitted. In recent years, we've seen the growth of the profession of compliance officers, who need not be lawyers, yet one might ask: compliance with what? Litigation funding, allowed now in some states, is another exception to Rule 5.4.

In the five decades that I've been a lawyer, forty of them on a law faculty, uneven access to legal counsel has been a persistent theme and source of embarrassment. The bar has commendably, through support of legal services and pro bono work, done much to mitigate this disparity. Yet by some estimates, depending on income bracket, half to three-fourths of people who need civil legal assistance do not get it. Given the bar's alarm at such numbers, one would have expected it to explore ways to narrow the gap with creative amendments to Rule 5.4. But until the Task Force's Report, the American legal profession and judiciary have shown little willingness to do so.

How might the Task Force's Option 1 facilitate access to legal advice? Traditional law firms with particular concentrations can take on partners whose education and experience will contribute to their work. An antitrust firm can have an economist as a partner. A construction firm can have a civil engineer. A trusts and estates firm can have a financial planner. A medical malpractice firm can have a physician. A patent firm can have a scientist. A criminal defense firm can have an investigator.

More important is the fact that a revised rule, coupled with present and future advances in artificial intelligence, can allow law offices to organize in new ways in order to serve clients who could not afford them, at all or easily. I am thinking of landlord-tenant firms, personal injury firms, criminal defense firms, bankruptcy firms, firms representing debtors and consumers, family law firms, and firms that write wills and estate plans. Revising Rule 5.4 as proposed in Option 1 can unleash creative approaches that will reduce the cost of legal services in ways we cannot today even imagine, ways that have never been explored, let alone tried, because of the rule's absolute ban.

One of the more disreputable episodes in the history of the bar has been the use of ethics rules to weaken public interest law organizations, which are often run by boards

that include nonlawyers and which are managed by nonlawyers. This effort cannot be explained financially because these organizations do not ordinarily compete with private lawyers for clients. The apparent motive was ideological -- to impede access to courts by plaintiffs seeking to vindicate constitutional rights. The Supreme Court put an end to that in *NAACP v. Button*,³ where Virginia had tried to prevent the NAACP from using litigation to enforce *Brown v. Board of Education*, and *In re Primus*,⁴ where South Carolina targeted for discipline a cooperating ACLU lawyer who wrote a letter offering to represent a woman who had been sterilized under a state program. These defeats for the states are why today the limitation in ABA Rule 5.4(d) applies only to organizations that operate “for a profit” and why we have a robust public interest bar.

Another line of Supreme Court cases is also instructive and, like *Button*, reveals how ethics rules have been used to limit lay participation in the delivery of legal services and increase consumer costs. Here, the bars’ efforts in Virginia, Michigan, and Illinois can only be explained as financially motivated, not ideological. In the late 1960s and early 1970s, the Supreme Court rejected bar challenges to union efforts to reduce the cost of filing workers compensation claims. The unions hired staff counsel to represent members or negotiated with private lawyers for reduced rates. In three cases, Justice Black, for the Court, rejected efforts to outlaw the union plans.⁵ In the last of these cases, apparently fed up, Justice Black wrote: “The State Bar’s complaint appears to be a plea for court protection of unlimited legal fees.” And he concluded: “[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” Thereafter, the Code interpreted the constitutional right Justice Black identified in the narrowest possible way.⁶

I acknowledge that the prediction in the comment to Rule 5.4 – that if able, nonlawyers will seek to corrupt lawyers in for profit law firms and will succeed in doing so – is not entirely fanciful. Nonlawyers like lawyers sometimes behave badly. But the rule’s response of a *categorical* ban on any nonlawyer financial interest in for profit law firms, regardless of the benefits of a different rule, is indefensible. It presumes that any advantage we might gain in access to justice from a change in the rule, however

³ 371 U.S. 415 (1963).

⁴ 436 U.S. 412 (1978).

⁵ *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

⁶ Lawyers were so alarmed at the threat to their income that the ABA and 48 state and local bar associations asked the Court to rehear the 1964 case. It declined.

significant, presents too great a danger to the clients who would then be able to afford legal advice.

This is nonsense. There are ways to reduce the threat without a ban. The same people we allow to occupy other positions of trust in our society can also be trusted as managers and investors in law firms. We can have the benefits of lay participation in for profit firms while significantly reducing the perceived risk so that it is no greater than the risk, present today, of rogue lawyers. The Report's Option 1 does that in proposed Rule 5.4(b), which states:

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

An additional safeguard, which I favor, is a requirement that the nonlawyers attend a 4-5 hour class on the Rules of Professional Conduct and a refresher class once yearly, just as lawyers take continuing education classes in legal ethics. These classes can be done in-house, by firm lawyers or by outside speakers, or through a law school or bar association. The rule might also include a requirement of a character review of the nonlawyers, the cost of which they would fund.

There may be other requirements that give us confidence that the nonlawyers allowed to participate in law firm profits are trustworthy.

Attachment 2 – Professor Gillers Written Submissions in Support of Public Hearing Testimony

Because this is new, I suggest that Option 1, rather than Option 2, states the appropriate change. Experience under Option 1 will provide information on whether and how to implement Option 2.

Paragraphs (b)(1) and (b)(2) of Option 1 might be rewritten to facilitate the goals of the proposal. Paragraph (b)(1) requires that the “sole purpose” of the firm be “providing legal services to clients.” It should be clear that this sole purpose includes law-related services as defined in proposed Rule 5.7(b). While I assume that is the intention, it should be made clear. Paragraph (b)(2), further, requires that the “nonlawyers...services...assist the lawyer or law firm in providing legal services to clients.” Again, “legal services” should be understood to include law related services. The clarifications to paragraphs (b)(1) and (b)(2) can occur in the comment.

Separately, paragraph (b)(2) prompts the following suggestion, which may be resolved with the recognition that “legal services to clients” includes “law-related services.” After the legal services are completed, a client may need further advice within the expertise of a nonlawyer at the firm *and arising directly from the subject of the legal services*. For example, a client who receives a large judgment may want investment advice from a financial advisor at the firm. Even when the legal services are concluded, the rule should allow the advisor to address this need.

**ADDITIONAL TESTIMONY OF STEPHEN GILLERS
TO THE CALIFORNIA STATE BAR TASK FORCE ON
ACCESS THROUGH INNOVATION OF LEGAL SERVICES**

August 15, 2019

Thank you for this further opportunity briefly to address the task force.

I want to respond to a statement by a witness who followed me at the August 10 public hearing. He questioned whether there is empirical support for the prediction that the task force's tentative recommendations will reduce the cost of civil legal services. This is a pertinent question. If costs remain unchanged – if there is no payoff – why have this discussion?

The speaker's question raises the issue of burden of proof. Who has it -- those who would make changes to lower the cost of some legal services or those who claim to doubt that the changes will do so? Allocating this burden requires us to balance the risks and gains from action and inaction. We do that in law and public policy all the time.

We know the cost of inaction. Fifty to eighty percent of needs for legal help will continue to go unmet, the exact percentage depending on the cost of the service. That's a fact. Yet opponents of change offer no alternative, which suggests that they find the status quo unavoidable, even if not acceptable. In this view, while strict unauthorized practice rules may come at a price, it is a price that we – or more accurately, unrepresented persons – must pay in order to protect clients, including those who cannot afford to become clients because of those rules.

This result is not acceptable if we can have some confidence that we can lower the costs of legal advice while avoiding harm. The early evidence is that we can do so.

For example, in Washington State, LLLTs charge substantially less than lawyers for the services they are authorized to perform, about \$60 to \$120 hourly according to a 2018 article in the Seattle Times quoting a Washington State Bar officer.¹ These lower

¹ “A legal technician has more training than a paralegal, and those who take the courses and pass a final exam can practice law on their own without working under the supervision of an attorney, said Sara Niegowski, chief communications and outreach officer for the Washington State Bar Association. Currently, legal technicians are licensed to practice only family law (such as drawing up divorce papers), but more specialties are on their way. They charge significantly less than an attorney, but they still make good money — about \$60 to \$120 an hour, Niegowski said. So far, about 30 people have been certified statewide.” Katherine Long, “In Washinton, There’s a Low-Cost Alternative to Hiring (or Becoming) a Lawyer” (Seattle Times 3/5/2018).

Attachment 2 – Professor Gillers Written Submissions in Support of Public Hearing Testimony

fees make perfect sense because the cost of becoming a LLLT in 2017 was \$14,400, a tenth or less of the cost of becoming a lawyer.² It makes sense, too, because whatever market advantage LLLTs may have for services they are licensed to perform will depend on price competition. And it makes sense intuitively that a much lower financial barrier to entry will lead to lower fees.

There may be more data in Washington State or elsewhere, which the task force can explore. But even if there were no data, gradual change is justified in order to generate the data, so long as we can significantly reduce the risk of harm to clients with educational, testing, licensing, and ethical requirements and a regulator -- just as we have done for lawyers.

Paradoxically, those demanding proof of lower costs before making any changes impede discovery of the very information that we can examine in order to evaluate the benefits and risks of change.

What I have so far written is germane to proposals that would allow entities that are not law firms, and which include persons who are not lawyers (and possibly lawyers as well), to offer limited legal services under controlled conditions. The proposed amendment to Rule 5.4 is different. It would not alter the definition of unauthorized practice; no nonlawyer would provide legal help.

The justification for the Rule 5.4 amendment is not the prospect of lower costs. Rather, nonlawyers would be permitted to have financial interests in for profit law firms, subject to conditions, to enable the firms to better serve their clients. An economist at an antitrust firm, a doctor at a medical malpractice firm, and a social worker at a family law firm are examples. Lawyers will decide whether partnering with a particular person makes sense and we can expect that lawyers will act rationally.

In short, because cost reduction is not the reason for (although it could be a byproduct of) the Rule 5.4 amendment, the question the speaker posed at the meeting is not relevant.

Two other issues that arose at the hearing are passive investment in law firms or in entities that provide legal services and multidisciplinary practice. I don't read the task force's tentative recommendations to invite either of these and that reading should be made clear if there is any doubt.

² See "Preliminary Evaluation of the Washington State Limited License Legal Technician Program," a 2017 study funded by the American Bar Foundation and others.
http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf



The State Bar *of California*

CLOSING THE JUSTICE GAP WORKING GROUP

Date: May 26, 2021
To: Closing the Justice Gap Working Group (CTJG)
From: Merri Baldwin and Andrew Tuft
Subject: Rule 5.7 [Responsibilities Regarding Nonlegal Services] Assignment and Background Information

At the April 9, 2021 CTJG meeting, the Chair announced that volunteers are being sought to provide initial input on the non-sandbox rule amendment issues in the [CTJG charter](#). This memorandum provides detailed information to facilitate a CTJG member's consideration of the request for volunteers for the Rule of Professional Conduct 5.7 [Responsibilities Regarding Nonlegal Services] assignment. Two volunteers will be selected to work together as a team to prepare a report to CTJG that is anticipated for discussion at the September meeting of the working group.

SPECIFIC QUESTIONS TO ADDRESS

Each separate rules team will be asked to address the following four questions in its report:

1. Scope of assignment: What has the CTJG been asked to advise on?
2. What is the status quo (current rules and/or statutes and how they operate)?
3. What are possible options for change, and what are the recognized advantages/disadvantages?
4. What steps should we take (request presentations, conduct interviews, review studies, etc.) to reach a fully informed recommendation?

SPECIFIC INFORMATION AND RESOURCES REGARDING RULE 5.4

In addition to the information below, the relevant sections and appendices in the [ATILS Final Report](#) may be reviewed. However, the information below has been derived or excerpted from that report.

RULE 5.7 – LAWYER PROVISION OF NONLEGAL SERVICES

Issue for Public Comment a New Rule of Professional Conduct 5.7 Addressing the Delivery of Nonlegal Services Provided by Lawyers and Businesses Owned or Affiliated with Lawyers

CTJG members who volunteer for this assignment are asked to consider the following background and instructions derived from the ATILS report.

Background: [ABA Model Rule 5.7](#) addresses a lawyer's provision of law-related services. It describes when a lawyer's provision of such services would be subject to the rules and when it would not be. California does not have a version of Model Rule 5.7, but the issue of the Rules' application when lawyers provide nonlegal services has been addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, however, lawyers may be unsure of their duties in such situations and reluctant to explore innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. ATILS recommended issuing a proposed rule 5.7 for public comment. Such a rule would provide greater clarity about those duties and alleviate the obstacle of the uncertainty in the provision of nonlegal services. (See Attachment 1 for the text of ATILS draft rule.)

ATILS Summary of its Proposed Rule: Proposed rule 5.7 is intended to provide clarity regarding the obligations attorneys owe when providing nonlegal services. Proposed rule 5.7, however, is not intended to change California law on the application of the Rules of Professional Conduct to a lawyer's provision these services, with one possible exception. The exception is that some interpret the case law as standing for the proposition that a lawyer cannot disclaim an attorney-client relationship. While that is generally true and is supported in cases such as *In the Matter of Gordon* (Rev. Dept. 2018) 5 Cal. State Bar Ct. Rptr. 610 (2018 WL 5801495), lawyers should be permitted as a matter of public policy to engage in business with nonlawyers in the provision of innovative and cost efficient services to consumers outside the traditional attorney-client relationship where the services themselves are not governed by the Rules of Professional Conduct. As provided in the proposed rule, lawyers would still continue to be held to a higher standard under the Rules of Professional Conduct and State Bar Act depending on the nature of the services being provided. Moreover, the rule also recognizes there may be ethical consequences to the lawyer in performing nonlegal services. These issues are appropriately addressed in comments to the proposed rule.

Rule 5.7 is not intended to exclude a lawyer's conduct from the application of the Rules or the State Bar Act in circumstances that are not distinct from the lawyer or law firm's provision of legal services to clients. (Paragraph (a)(1)). Thus, a lawyer would still be subject to the rules and the State Bar Act where a lawyer or the lawyer's firm renders legal and nonlegal services to the same client or in the same matter, even if the nonlegal services might otherwise be performed by nonlawyers. *Layton v. State Bar* (1990) 50 Cal.3d 889, 904: "Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services,

services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them.”

The question of whether a lawyer’s conduct in rendering nonlegal services is governed by the Rules is distinct from the question of whether the lawyer may be subject to discipline in performing nonlegal services. Lawyers are subject to discipline for conduct outside the practice of law even where the conduct is not governed by the Rules of Professional Conduct. Rule 1.0, Comment [2] – “While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity;” and see rule 8.4(b) and (c) and Comment [1]. The same is true with respect to certain provisions of the State Bar Act (e.g., Bus. & Prof. Code, § 6106 – acts involving moral turpitude, dishonesty or corruption). State Bar Formal Opinions 1995-141, 1999-154. Proposed rule 5.7 is not intended to change the law in these contexts and a comment to the rule is recommended to make this point clear. See proposed rule 5.7, Comment [3].

Lawyers may encounter conflicts of interest and other ethical consequences as a result of providing nonlegal services in a law firm or in an organization that is owned and operated with nonlawyers. Rule 5.7 is not intended to immunize lawyers from these consequences. A comment to this effect is included in the rule (see proposed rule 5.7, Comment [6]).

ATILS Instructions: ATILS indicated that its proposed new rule 5.7 was ready to be issued for a 60-day public comment period, as consideration of such comments would inform the further study of the issues raised by adding this rule to the existing Rules of Professional Conduct.

OPC Staff’s Suggestions for Possible Issues to Address:

- 1) Is the proposed rule ready to be issued for public comment as drafted by ATILS?
- 2) If the answer to the above question is “no,” then what changes should CTJG implement before the rule is issued for public comment?

Attachment 1 – Proposed Rule 5.7

Rule 5.7 Responsibilities Regarding Nonlegal Services

- (a) A lawyer is subject to these rules and the State Bar Act with respect to the provision of nonlegal services, as defined in paragraph (c)(1), if the nonlegal services are provided by the lawyer:
 - (1) in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or
 - (2) in other circumstances by an organization other than a law firm* that is (i) owned separately by the lawyer or (ii) owned with others unless written disclosure as defined in paragraph (c)(2) is provided to the recipient of the services that (i) the services are not legal services and (ii) that the protections of the lawyer-client relationship do not exist.
- (b) When a lawyer knows* or reasonably should know* that a recipient of nonlegal services provided pursuant to paragraph (a)(2) does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role with respect to the provision of nonlegal services and the lawyer’s role as one who represents a client.
- (c) For purposes of this rule:
 - (1) “Nonlegal services” means services that might reasonably be performed in conjunction with the practice of law, including services that may be lawfully performed by a person who is not authorized to practice law.
 - (2) “Written disclosure” means advance written notice is communicated to the person receiving the services that explains that the services are not legal services and that the protections of a lawyer-client relationship do not exist with respect to the nonlegal services.

Comments

[1] Rule 5.7 applies to the provision of nonlegal services as defined in paragraph (c)(1) by a lawyer even when the lawyer does not provide legal services to the person for whom the nonlegal services are performed and whether the nonlegal services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Rules apply to the provision of nonlegal services. Even when those circumstances do not exist, the conduct of a lawyer involved in the provision of nonlegal services is subject to those rules and provisions of the State Bar Act that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. (see, e.g., Rule 8.4 and Business and Professions Code § 6106).

[2] When nonlegal services are provided by a lawyer under circumstances that are not distinct from the provision of legal services to clients, the lawyer involved in the provision of nonlegal services is subject to the Rules and the State Bar Act. For example, a lawyer must conform to the Rules and the State Bar Act as to all nonlegal services the lawyer renders in a

dual capacity along with legal services for a single client or in a single matter, even if the nonlegal services might otherwise be performed by nonlawyers. (See, e.g., *Layton v. State Bar* (1990) 50 Cal.3d 889, 904 [268 Cal.Rptr. 845] (serving as executor and lawyer for estate); *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298] (serving as lawyer and business agent).)

[3] A lawyer who assumes a fiduciary relationship in the provision of nonlegal services to a person who is not a client of the lawyer or the lawyer's firm and who violates a fiduciary duty in a manner that would justify disciplinary action if there was an lawyer-client relationship may be subject to discipline for the misconduct. (See, e.g., *Schneider v. State Bar* (1987) 43 Cal.3d 784, 796-797 [239 Cal.Rptr. 111] (lawyer acting as a trustee); *Worth v. State Bar* (1976) 17 Cal.3d 337, 341 [130 Cal.Rptr. 712] (lawyer acting as a real estate broker); *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 429 [121 Cal.Rptr. 467] (lawyer representing administrator of estate and acting as agent for estate beneficiary in sale of estate property held to be in fiduciary relationship with beneficiary); *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355 [90 Cal.Rptr. 600] (lawyer acting as an escrow holder); *In the Matter of Schooler* (Rev. Dept. 2016) 5 Cal. State Bar Ct. Rptr. 494 (lawyer acting as trustee).)

[4] When a lawyer-client relationship exists with a person and the lawyer refers that client to a separate organization owned by the lawyer individually or with others for the provision of nonlegal services, the lawyer must comply with rule 1.8.1. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 8112-813 [239 Cal.Rptr. 121].)

[5] Under some circumstances the legal and nonlegal services rendered in the same matter may be so closely entwined that they cannot be distinguished from each other, and the requirements of paragraph (a) cannot be met. In such a case, the lawyer is responsible for assuring that the lawyer's conduct, and to the extent required by rule 5.3, the conduct of non-lawyers in the firm or in separate organization complies with the rules.

[6] A lawyer who is obligated to accord recipients of nonlegal services the full protection of the rules and the State Bar Act must adhere to the requirements of the rules addressing conflicts of interest (rules 1.7 – 1.11), the requirements of rules 1.6 and 1.8.2 relating to the protection of client confidential information, and lawyer advertising rules (rules 7.1 – 7.5).



The State Bar *of California*

CLOSING THE JUSTICE GAP WORKING GROUP

Date: May 26, 2021
To: Closing the Justice Gap Working Group (CTJG)
From: Merri Baldwin and Andrew Tuft
Subject: Lawyer Advertising and Solicitation Rules Assignment and Background Information

At the April 9, 2021 CTJG meeting, the Chair announced that volunteers are being sought to provide initial input on the non-sandbox rule amendment issues in the [CTJG charter](#). This memorandum provides detailed information to facilitate a CTJG member's consideration of the request for volunteers for the Lawyer Advertising and Solicitation Rules assignment. Two volunteers will be selected to work together as a team to prepare a report to CTJG that is anticipated for discussion at the September meeting of the working group.

SPECIFIC QUESTIONS TO ADDRESS

Each separate rules team will be asked to address the following four questions in its report:

1. Scope of assignment: What has the CTJG been asked to advise on?
2. What is the status quo (current rules and/or statutes and how they operate)?
3. What are possible options for change, and what are the recognized advantages/disadvantages?
4. What steps should we take (request presentations, conduct interviews, review studies, etc.) to reach a fully informed recommendation?

SPECIFIC INFORMATION AND RESOURCES REGARDING LAWYER ADVERTISING AND SOLICITATION RULES

In addition to the information below, the relevant sections and appendices in the [ATILS Final Report](#) may be reviewed. However, the information below has been derived or excerpted from that report.

LAWYER ADVERTISING AND SOLICITATION RULES

Consider Recommendations for Amendments to the Rules of Professional Conduct on Advertising and Solicitation Informed by the Current American Bar Association Model Rules, the Proposed Advertising and Solicitation Rules Developed by the Association of Professional Responsibility Lawyers, and Recent Amendments to the Advertising Rules in Other Jurisdictions. In Particular a Reconsideration of the Existing Designation of “Real-Time Electronic Contact” as Prohibited Solicitation

CTJG members who volunteer for this assignment are asked to consider the following background and instructions derived from the ATILS report.

Background: The regulation of lawyer advertising has traditionally placed restrictions on information regarding the availability of lawyers and legal services in an effort to protect consumers from lawyers actively soliciting business and promoting litigation, especially when consumers are particularly vulnerable. Based on an empirical study initiated by the Association of Professional Responsibility Lawyers (APRL) in 2014-2016 and a subsequent analysis of APRL’s reports and public hearings conducted by the ABA Standing Committee on Ethics Professional Responsibility (SCEPR), the advertising rules were found to be outdated and overly restrictive;¹ and the lack of uniformity and inconsistent enforcement unreasonably restrict the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet and other forms of electronic media.²

The recent amendments to the ABA Model Rules on lawyer advertising streamline and simplify³ the rules that enable lawyers to use new technologies that can inform consumers accurately and efficiently about the availability of legal services while maintaining the prohibition against engaging in false or misleading communications and adhering to constitutional limitations on restricting commercial speech.

The Internet and social media has revolutionized the practice of law, including attorney advertising and client solicitation. The current California rules on lawyer advertising and solicitation were adopted before the recent amendments to the ABA Model Rules. Since then several states have or are in the process of modernizing their advertising rules based on APRL’s two reports and the ABA’s recent amendments. Attorneys are increasingly posting, blogging and tweeting more efficiently at minimal cost. Their presence on websites, Facebook, LinkedIn,

¹ Association of Professional Responsibility Lawyers [2015 Report of the Regulation of Lawyer Advertising Committee](#), at pp. 20–25.

² [Id. at p. 27.](#)

³ The ABA Standing Committee on Ethics and Professional Responsibility [Memorandum in Support of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising](#), December 21, 2017, at p. 15.

Twitter, and blogs expands exponentially each year.⁴ Under these recent amendments, the legal profession is better able to reach out to a public that has become savvy in the use of social media and the Internet and is in greater need of more, and not less, useful information regarding the availability of legal services. These trends suggest that traditional restrictions on the dissemination of accurate information about legal services hinder the public's access to useful information and may constitute an unconstitutional restraint of trade.

ATILS suggested that amending the lawyer advertising rules to conform to the recent amendments to the ABA Model Rules will better serve the public by expanding opportunities for lawyers to use modern communications technology to increase the public's awareness of and access to information about the availability of legal services, and protecting the public by focusing the State Bar's resources on content that is false or misleading. ATILS also observed that consideration of such rule revisions would be complemented by a study of the LRS rules and regulations because the topic of compensation paid for client referrals is included in the advertising rules.

ATILS Instructions: ATILS specifically recommended that the study include consideration of the recent amendments to ABA Model Rules 7.1, 7.2 and 7.3, APRL's [Report of the Regulation of Lawyer Advertising Committee](#) (June 22, 2015) and APRL's [Regulation of Lawyer Advertising Committee Supplemental Report](#) (April 26, 2016), the changes to advertising rules under consideration by the State of Washington⁵ and other jurisdictions, as well as the impact of the current advertising rules in Oregon, Virginia and the District of Columbia on access to justice and public protection.

ATILS also listed the following issues as specific examples⁶ of what could be studied:

- Whether provisions on false and misleading communications should be combined into rule 7.1 and its comments, including rule 7.5 [Firm Names and Trade Names] which largely relates to misleading communications.
- Whether specific rules on lawyer advertising should be consolidated into rule 7.2.
- Whether in rule 7.2(c), "office address" should be changed to "contact information" to address technological advances that influence how lawyers may be contacted and how advertising is presented.
- Whether the ban on direct solicitation in rule 7.3 should apply solely to live person-to-person contact, including in person, face-to-face, telephone, and real-time electronic or

⁴ [Id. at p. 8.](#)

⁵ Please note, Washington adopted their amended advertising and solicitation rules effective January 6, 2021: http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC.

⁶ Additional examples are provided in Appendix 13 of the ATILS Final Report.

other communications such as Skype. It is recommended that the rule be changed to no longer prohibit solicitations such as chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

OPC staff recommends addressing all of the specific issues identified by ATILS.

ATILS Comments on Overlap with a Sandbox: Some members of ATILS believed that advertising rule amendments might be informed by data generated by a regulatory sandbox because participants could experiment with new marketing and communication methods, especially if a participant is a business that exists exclusively online. Other members of ATILS believed that sandbox data would not inform all of the rule amendments proposed because some changes are completely unrelated, such as the amendment to replace “office address” with “contact information.”



The State Bar *of California*

CLOSING THE JUSTICE GAP WORKING GROUP

Date: May 26, 2021
To: Closing the Justice Gap Working Group (CTJG)
From: Andrew Tuft, Supervising Attorney
Subject: Lawyer Referral Service Rules Assignment and Background Information

At the April 9, 2021 CTJG meeting, the Chair announced that volunteers are being sought to provide initial input on the non-sandbox rule amendment issues in the [CTJG charter](#). This memorandum provides detailed information to facilitate a CTJG member's consideration of the request for volunteers for the Lawyer Referral Services assignment. Two volunteers will be selected to work together as a team to prepare a report to CTJG that is anticipated for discussion at the September meeting of the working group.

SPECIFIC QUESTIONS TO ADDRESS

Each separate rules team will be asked to address the following four questions in its report:

1. Scope of assignment: What has the CTJG been asked to advise on?
2. What is the status quo (current rules and/or statutes and how they operate)?
3. What are possible options for change, and what are the recognized advantages/disadvantages?
4. What steps should we take (request presentations, conduct interviews, review studies, etc.) to reach a fully informed recommendation?

SPECIFIC INFORMATION AND RESOURCES REGARDING LAWYER REFERRAL SERVICES

In addition to the information below, the relevant sections and appendices in the [ATILS Final Report](#) may be reviewed. However, the information below has been derived or excerpted from that report.

LAWYER REFERRAL SERVICES

Consider Authorizing a Study of Potential Amendments to the Certified Lawyer Referral Service Rules and Statutes, and Amendments to Relevant Rules of Professional Conduct to Ensure that Together They Properly Balance Public Protection and Innovation in Light of Access to Justice Concerns and with a Particular Emphasis on Ascertaining if Existing Laws Impose Unnecessary Barriers to Referral Modalities (including Online Matching Services) that are in the Public Interest

CTJG members who volunteer for this assignment are asked to consider the following background and instructions derived from the ATILS report.

Background: ATILS recommended a study of potential amendments to the [Certified Lawyer Referral Service \(LRS\) rules](#) and [statutes](#) in light of [Jackson v. Legalmatch.com \(2019\) 42 Cal.App.5th 760](#) [255 Cal.Rptr.3d 741] [holding that an online matching service was engaged in lawyer referral activity subject to State Bar regulation]. ATILS also observed that lawyer referral services regulations may not reflect modern expectations for how consumers will find a lawyer. Social media, search engines, and other technology-based marketing should be considered to determine if existing lawyer referral regulations are causing an unintended chilling effect on a lawyer's use of technology to provide information about the availability of legal services. The provisions of the [California Rules of Professional Conduct](#) governing lawyer advertising and compensation for referrals should also be addressed as establish that a lawyer who pays compensation to an uncertified business or service engaged in a referral activity is subject to discipline.

Rule 7.2 in part provides that:

(b) A lawyer shall not compensate, promise or give anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

* * * * *

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;

Rule 5.4 in part provides that:

(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:

* * * * *

(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

* * * * *

ATILS Instructions: ATILS recommended a study of whether existing regulations strike a proper balance between public protection and innovation in light of access to justice concerns and the need of consumers for find qualified legal services. ATILS specifically stated that this study should ascertain if the existing law imposes unnecessary barriers to referral modalities including online matching services that are in the public interest.

OPC Staff's Suggestions for Possible Issues to Address:

- 1) Should the same rules and regulations apply to both traditional LRS programs and technology-driven programs, including those that are online only programs.
- 2) If the answer to the above question is "no," then how should the rules and regulations differ?
- 3) In general, should the rules and regulations permit certified programs to seek "good cause" waivers of certain requirements. At present, there only limited waivers (e.g., a waiver of the requirement that each LRS subject matter panel must have at least four panel attorneys).

ATILS Comments on Overlap with a Sandbox: Some members of ATILS believed that LRS reforms could be informed by data generated by a regulatory sandbox because participants could experiment with new delivery systems that might, for example, involve a business offering consumers a combination of online services that include an online matching service. Other members of ATILS believed that sandbox data is not likely to inform LRS reforms because LRS activity ordinarily does not raise UPL or nonlawyer ownership concerns. ATILS noted that these differing views seem to presuppose the scope of a sandbox and the kinds of applicants who might be admitted.