

II.E. Discussion and Possible Action on Amendments to California Rule of Professional Conduct 5.4

September 14, 2021 Crispin Passmore:

The paper identifies a key issue in asking if we should put the 5.4 issue into the sandbox or deal with it separately. There may be a good argument to be made for putting the Rule 5.4 issue into the sandbox – collecting data and evidence to see the effects of reform and deferring the main decision until that analysis is complete seems rational. There are two main reasons why I do not think this is the correct way forward.

1. **The CTJG Working Group has not yet made a commitment to a broad and open sandbox that would allow a full and proper exploration of the deletion of 5.4.** If the sandbox was a genuine sandbox that allowed applications from any type of provider/model/service/client group then it may make sense to delay deletion or amendment of 5.4 ahead of the sandbox delivering evidence that is rooted in California. However, if the sandbox is narrow and Rule 5.4 not deleted, then we will have very limited routes to innovation that tackle the justice gap that ordinary Californians and small business owners face. Our efforts will be wasted.
2. **The main argument in favour of immediate change to Rule 5.4 is that there is clear and compelling evidence that deleting it would increase access to legal services, especially for those currently facing a justice gap, while the negative ethical impacts are negligible.** That evidence is clear, consistent, and overwhelming in that 5.4 serves no real-world purpose and that its removal does not impact negatively on lawyer ethics, competence, or quality of service. I struggle to see how an evidence based, rational approach to this question can justify retention of Rule 5.4. To put it another way, if Rule 5.4 did not exist (but all the other rules about lawyer ethics did) in what circumstances might we introduce such a Rule? It is hard to imagine the scale of evidence that we would require for such a dramatic restriction, and we simply do not have that evidence from the jurisdictions that have allowed fee sharing/non lawyer ownership.

Although I was nominated as a ‘consulting resource’ to this team I was not involved in this stage of developing ideas and recognise that as an ‘outsider’ my value may be mostly in bringing a different perspective, wider evidence and real-world experience of having delivered these reforms. I have presented to the Working Group on two occasions, highlighting the evidence from England & Wales on allowing fee sharing, non-lawyer ownership and external investment. England & Wales offers not just recent evidence of ABS. It also provides over 150 years of real-world experience of non-lawyers delivering legal services. Most legal services in England & Wales can be delivered by non lawyers/now lawyer owned and managed businesses and there is scant evidence of consumer harm. The roll out of ABS has confirmed that lawyers’ ethics are not so weak that they become unprofessional when working with non-lawyers - be it fee sharing or in non-lawyer managed or owned businesses. There remains a misconception that

non lawyer owned business are focused on corporate clients or personal injury – that is not correct and there are substantial services that reach people who are traditionally not well served by the legal market. I will not repeat all the evidence here but urge the CTJG Working Group to read all the independent research that has been provided.

I think that we should also look to the existing US legal market for a real world understanding of the risks and issues. Services are already delivered by non-lawyer owned business in areas of Federal law such as trademarks, immigration, tax etc. I have seen no evidence of ethical issues arising that are related to that non-lawyer involvement in businesses, nor evidence that the non-lawyers interfere with lawyer independence.

We should also be clear about the nature of the justice gap that is faced in California (and elsewhere across the US). The evidence shows that access to legal services is not even. In most research, conducted and repeated over many decades, across multiple jurisdictions, access is very low for middle class and small business owners. These are the people that are outside of the scope of any legal aid schemes and beyond the research of most pro bono and non-profit initiatives. This part of the justice gap is in addition to circumstances that the poorest and most vulnerable members of our communities face. This large justice gap can be addressed by new services and that should be our test for reform of 5.4.

The evidence that is emerging from Utah and Arizona confirms what decades of a more open approach in England & Wales tells us. Allowing fee sharing increases the range and combination of services available to those that face the justice gap. That manifests through non-profits that combine (for example) social work type activity with legal services; multi-disciplinary services that bring together divorce law and family support; and multi-disciplinary services that focus on specific types of small business. The multi-disciplinary approach is important because it enables the lower costs of being a single organisation, clearer focus that arises from a single vision and leadership, new ideas and insights that come from proper integration.

It might be argued that lawyers and law firms can already collaborate with other professions. Of course, they can (though they cannot combine into a single organisation with all the benefits that brings). But the reality is that they do not. Jurisdiction that have allowed fee sharing and non-lawyer ownership have a significantly wider range of multi-disciplinary services that are directly focused at the justice gap.

Furthermore, the Working Group needs to remind itself of what is at stake here. The question is not if fee sharing or non lawyer ownership should happen. It is 20 years too late to ask that question. There are models that simply bypass 5.4 restrictions, without breaching ethical obligations. That is why the US has a 20-year history of growing and successful legal tech and alternative legal service providers and is developing new and exciting start-ups. Asking if we should reform 5.4 is the wrong way to address the issue. The real question before us on 5.4 is if we should regulate these services and if we should allow law firms to compete with them, and if we should unleash their potential for the benefit of all members of society, especially those caught in the justice gap.

Unequivocally, the answer must be yes. Leaving 5.4 in place is akin to wishing we were in a different world. If 5.4 remains, corporate clients will continue to buy alternative services from new and emerging businesses; and more sophisticated retail consumers will continue to buy online as the technology and service widens and improves. Those that miss out will be the poorest and middle-class consumers and small businesses that cannot navigate the alternative market (the very justice gap we are tasked to tackle) and the thousands of attorneys with ideas and energy that can thrive in new models. As an aside I note again that through the liberalisations in England & Wales the number of attorneys has increased, and the turnover of law firms has grown. This is not an anti-lawyer reform.

As Arizona has shown, ethical issues are unaffected by removal of 5.4. Attorney's ethical obligations remain unchanged, and it is not difficult to place ethical obligations onto non-lawyer owners and managers of law firms.

The evidence is consistently telling us that lawyers ethics are robust. They can and do practice safely in firms owned by non-lawyers and can share fees in imaginative ways that bring client centric, multi-disciplinary, technology driven legal services that close the justice gap. This is not speculation: US lawyers and US law firms operate as ABS in the UK. US General Counsel buy legal services from non lawyer owned businesses. US law firms partner with and cooperate with alternative providers in the US and beyond. It is time to embrace the change that has already happened and trust ethical lawyers with a deletion of 5.4 either immediately or make a commitment to a broad and open sandbox.

September 15, 2021 Wendy Musell:

Regarding the Proposed Amendments to allow nonlawyer ownership or the sharing of fees that would otherwise be in violation of an unamended rule 5.4, I have concerns related to how this would work in practice. For example, regulation of trust accounts and conflicts issues would have to be addressed. The area of whether insurance would be required in cases of malpractice is also of concern.