



Re-regulating Lawyers for the 21st Century

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Do lawyer ethics rules prohibit innovation in the delivery of legal services and contribute to the access to justice gap? Yes, according to a task force on lawyer regulation formed last summer by the California State Bar’s Board of Trustees. The task force has recommended changing some key lawyer ethics rules.

California isn’t alone in exploring this issue. Arizona and Utah have also convened task forces. Illinois has been studying similar issues for some time. In

addition, there are national organizations attuned to lawyer regulation issues.

Whether new ethical rules are adopted by one or more states, indicators point to a dramatic restructuring of the legal market. Lawyers in every state should follow these developments with interest.

Backstory on Lawyer Re-Regulation

About a year ago, [William Henderson](#), a prolific author and lecturer on the legal market who holds the Stephen F. Burns Chair on the Legal Profession at Indiana University Maurer School of Law, issued a watershed report on the changing legal market. The report became a clarion call to action.

Henderson’s [Legal Services Landscape Report](#), which was written at the request of the State Bar of California, was released in July 2018. The report squarely points to ethics rules as contributing to the access to justice gap as well as the flat demand for legal services. Henderson wrote,

“the legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services. Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession.”

California Task Force

Soon after the Landscape Report, the California Bar’s Board of Trustees formed the Task Force on Access Through Innovation of Legal Services (ATILS). ATILS was charged with identifying possible regulatory changes for enhancing the delivery of, and access to, legal services using technology, including artificial

intelligence and online legal service delivery models. The task force was to make recommendations that included an explanatory rationale reflecting a balance of the dual goals of public protection and increased access to justice.

ATILS' 23 members—which includes 11 public members, 10 lawyers and two judges—have leveraged widespread expertise on technology, professional responsibility and online legal information. During late 2018 and early 2019, ATILS formed various working groups, held meetings and heard presentations.

ATILS' recommendations

On July 11, 2019, ATILS delivered sweeping [recommendations](#) to the State Bar of California with a request to circulate the recommendations for a period of public comment. The recommendations were described as “tentative,” and it's expected they may be revised based on the comments received. A report setting forth ATILS' final recommendations is to be submitted to the Board of Trustees no later than December 31, 2019.

The recommendations released on July 11 provide a general framework for lawyer regulation reform rather than specific amended language for the ethics rules. However, there are two cutting-edge areas where regulatory easing is recommended: restrictions on the unauthorized practice of law and restrictions against fee-sharing reflected in Rule of Professional Conduct 5.4.

ATILS recommended several exceptions to restrictions on the unauthorized practice of law, including:

- To allow individuals who are not lawyers to offer certain types of legal services to consumers, with regulation. Alternative regulation schemes include: regulating the entity the individual works in and requiring the entity to ensure quality control (entity regulation); creating a new licensing scheme for individuals who are not lawyers; or certifying paraprofessionals and allowing them to provide legal advice as an exemption from the UPL statutes.
- To allow state-certified/regulated/approved entities to use technology-driven legal services to engage in authorized law practice activities. In this case, the regulator must establish adequate ethical standards governing both the provider and technology. Specifically, client communications with technology-driven legal service delivery systems should receive equivalent protections as afforded by the attorney-client privilege and a lawyer's duty of confidentiality.

ATILS contemplates that the regulatory process will be funded through application and renewal fees.

Another series of recommendations is intended to remove financial barriers to collaboration between lawyers and other professionals through the modification of Rule 5.4. Perhaps anticipating controversy over this issue, two versions were set forth: alternative 1 is a narrow approach and alternative 2 is a broader approach.

- Alternative 1 would allow a lawyer to share fees with another individual and be part of a firm in which another individual holds a financial interest if: the firm's sole purpose is providing legal services; the other professionals provide services that assist the lawyer in providing legal services; and the other individuals have no power to direct or control the professional judgment of a lawyer. This alternative, which is modeled on the revisions to ABA Model Rule 5.4 proposed by the ABA Ethics 20/20 Commission in 2011, is more limiting than the proposal of the Multidisciplinary Commission in 1999. The Multidisciplinary Commission contemplated that

owners who were not lawyers could separately and independently provide services of a nonlegal nature, such as accounting or financial planning services.

- Alternative 2 would dramatically revise Rule 5.4, allowing fee sharing with someone who is not a lawyer if the lawyer or law firm obtains a client's informed written consent to the arrangement. The ATILS report notes that innovation requires collaboration, multidisciplinary participation and funding/investment. Alternative 2 is "meant to create a major shift in Rule 5.4 around ownership and fee sharing with very limited regulation."

Lawyer Re-Regulation in Other States

Arizona

The [Arizona Supreme Court](#) also relied on Henderson's Legal Services Landscape Report in forming its Legal Services Task Force (LSTF) in early 2019. Noting that court rules haven't kept pace with the changes impacting the delivery of legal services, the Arizona Supreme Court charged the task force with reviewing the regulation of the delivery of legal services in the state, focusing on "how rules and codes governing the practice of law in Arizona can be revised to improve the delivery of legal services to consumers by lawyers and others, such as document preparers."

Coincidentally acting on the same date as ATILS in California, on July 11, 2019, the Arizona LSTF voted to streamline, delete and amend many ethical rules as well as move forward with considering entity regulation. This is according to veteran Arizona ethics attorney Lynda Shely, who is assisting in the process. Next steps are for the Arizona Judicial Council to review and possibly approve the task force's recommendation of a period of public comment. The review is likely to take place in fall 2019.

Although there may be further amendments throughout the process, the LSTF's recommendations on lawyer regulation are significant and worth following. They include:

- Eliminate all of Rule 7.2 governing advertising and referrals, retaining only a requirement that advertising include a name and contact information;
- Eliminate Rule 5.4 and make revisions to other ethical rules that would: permit Arizona firms to include partners who aren't lawyers, allow lawyers to share fees with professionals who aren't lawyers and allow passive investment in law firms, while also reaffirming that lawyers are responsible for maintaining all ethical obligations to firm clients, including conflict considerations and confidentiality.

Utah

Utah, as those following the access to justice issue may recall, has rolled out various initiatives to increase access, including becoming the second state behind Washington to create a new license for professionals delivering certain legal services, the [licensed paralegal practitioner](#).

In late 2018, the Utah Supreme Court embarked on what [it described](#) as the "most promising initiative" moving toward equal access to justice, involving "profoundly reimagining the way the law is regulated in order to harness the power of entrepreneurship, capital and machine learning in the legal arena."

The Court tapped John Lund (former president of the Utah State Bar) and Utah Supreme Court Justice Deno Himonas to lead a working group that's studying and will make recommendations to the Court on

“optimizing the regulatory structure for legal services in the Age of Disruption in a manner that fosters innovation and promotes other market forces so as to increase access to and affordability of legal services.”

The working group is charged with examining a new regulatory structure including:

- Loosening restrictions on lawyer advertising, solicitation and fee arrangements, including referrals and fee sharing;
- Providing for broad-based investment and participation in business models that provide legal services to the public, including non-lawyer investment and ownership of these entities; and
- Creating a regulatory body under the auspices of the Utah Supreme Court that would develop and implement a risk-based, empirically grounded regulatory process for legal services.

A final report and specific recommendations were due to the Court by June 30, 2019, but the date has been pushed back a few months. I’ve spoken to both Himonas and Lund, who advise that the recommendations will likely include establishing a “regulatory sandbox” that will allow legal service providers other than lawyers to experiment with innovative models during a pilot or test phase.

Illinois

My home state of Illinois issued a [study of client-lawyer matching services](#) and proposed a regulatory framework to ease the dual problems that (1) many of the civil legal needs of poor and moderate-income individuals are not met even while (2) many lawyers are underemployed or unemployed.

The Attorney Registration and Disciplinary Commission (ARDC) of the Supreme Court of Illinois issued a comprehensive report proposing soft regulation of matching-service providers and has been studying the comments received. The draft proposal includes:

- Matching service providers be required to register with and subject to regulation by the ARDC;
- Including for-profit client-lawyer matching services as well as existing referral services, providing more options for consumers;
- Allowing fee-splitting with registered matching services.

Lawyer Re-Regulation at the National Level

APRL

As I’ve written before, the ethical rules are passed by the supreme courts in each state. Some pressure for ethical reform concerns the fact that regulations are inconsistent, inhibiting efficiencies and efficacy in client representation across state lines. It would be nice to see some harmonization or even uniformity among these reform options, lest we replicate the confusing patchwork of regulations that have developed over time with respect to advertising rules. There is some hope this may occur.

The Association of Professional Responsibility Lawyers (APRL), a national bar association of legal ethics lawyers, has formed a Future of Lawyering Committee. APRL started the national dialogue on the need for revised ethical rules around advertising and solicitation, which resulted in the changes adopted or being considered by many state supreme courts.

[APRL's Future of Lawyering Committee](#) is exploring the intersection between technology, the delivery of legal services and the access to justice gap with a “goal to make meaningful proposals for change in the area of lawyer regulation so that the profession may both embrace evolving technology and increase the delivery of competent legal services to the American public, with full accountability and without unreasonably restraining competition.”

The Future of Lawyering Committee (full disclosure, I am a member) is studying the Rules of Professional Conduct that regulate the sharing of legal fees with non-lawyers, referral services and the unauthorized practice of law with a goal of delivering a comprehensive report and set of recommendations regarding rule amendments.

Importantly, the committee is including diverse perspectives from outside the organization. These liaisons include attorney regulators (National Organization of Bar Counsel), the Federal Trade Commission, the Legal Marketing Association, the ABA Center for Professional Responsibility and the Conference of Chief Justices. Committee chairs regularly report their progress to the chief justices of the state supreme courts.

IAALS

The [Institute for the Advancement of the American Legal System](#) (IAALS) collaborates with thought leaders across the country to force innovative solutions to problems in our legal system. One of IAALS' latest projects is tackling issues around the regulation of the profession.

I participated in an IAALS workshop on entity regulation in April 2019. The workshop included APRL members as well as some of the judges driving the changes in Utah and Arizona.

IAALS' intent in convening the gathering was to explore how the existing regulatory environment may impede innovation and access to legal services, examine new regulatory models and evaluate rules changes that might lead the way into the future.

Noted economist Gillian Hadfield and Lucy Ricca, a fellow at the Center on the Legal Profession at Stanford Law School, presented a draft concept for an independent national nonprofit that would regulate legal service providers—this includes lawyers as well as others. A conference report and discussion on next steps is expected soon.

Be Part of the Dialogue

I've followed lawyer regulation for more than a decade. At no other time have I seen the rapid action that has characterized the past year. I encourage you to stay tuned and get involved as follows:

- Provide feedback on the draft California recommendations. On July 23, the State Bar of California [published](#) a 60-day comment period for the report “Options for Regulatory Reforms to Promote Access to Justice.” Comments should be submitted using the online [Public Comment Form](#). The deadline for comment is September 23.
- Learn more about APRL's Future of Lawyering Committee at APRL's Annual Conference, August 8-10, 2019 in San Francisco. On Saturday, August 10, I'm moderating a panel [Revolution in the Wild West & Update on APRL's Futures Effort](#). During the panel you'll hear directly from folks on the ground in California, Arizona and Utah.

- Follow developments on the websites of thought leaders of change: [California](#), [Arizona](#), [Utah](#), [Illinois](#), [APRL](#) and [IAALS](#).

Finally, let me know about advancements in lawyer regulation in other states. I will report further on developments as they occur.

Updated July 24, 2019.