

The justice gap is driving a legal ethics reform movement

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This is a very exciting time to be in the business of attorney regulation. No, really—I mean it. More than ever people are asking, “Are the ethics rules striking the right balance between protection of the public and access to justice?” And: “How do the ethics rules inhibit innovation in the delivery of legal services?”

Several states are exploring revisions to their ethics rules in response to the growing access to justice gap and general challenges in the legal profession. As many of you already know, Minnesota has established a Legal Paraprofessional Pilot Project, the aim of which is to permit greater use of legal paraprofessionals in chronically underserved areas of consumer law such as housing disputes, family law, and creditor-debtor disputes. Washington and Utah have already taken action in this area.

Several other states are focused on broader ethics changes. Most notably, California—which finally adopted a set of ethical rules similar to the American Bar Association’s model rules in November 2018—has charged straight ahead to considering significant changes to those just-adopted rules. Arizona, Utah, and Illinois are considering changes as well. I thought you might be as interested as I am to see the changes under consideration.

California

In July 2018, California formed a Task Force on Access through Innovation of Legal Services (ATILS).[Ftn 1](#) The focus of the task force was to remove regulatory barriers to innovation in the delivery of legal services, keeping in mind the dual goals of consumer protection and increased access to legal services. In July 2019, ATILS issued a 251-page (!) report to the trustees of the California bar.[Ftn 2](#) The report includes 16 reform options upon which ATILS is seeking public comment through September 2019.[Ftn 3](#) Most of the recommendations relate to ethics Rule 5.5 (the unauthorized practice of law) and Rule 5.4 (fee-sharing).

As it relates to Rule 5.5 (generally, who can practice law), the options—similar to the ones Minnesota is considering—include allowing non-lawyers to offer certain legal services within varying regulatory frameworks. The types of regulation under consideration include (1) entity regulation of where the non-lawyer works, (2) creating a new licensing scheme for providers who are not lawyers, and (3) certifying paraprofessionals to allow them to provide limited legal advice. Perhaps most interestingly, the options also include allowing approved entities to provide technology-driven legal services under a yet-to-be-developed regulatory

scheme—that is, authorizing technologies that perform the analytic work of lawyers, and regulating the companies that sell these products as well as the products themselves.

As it relates to Rule 5.4 (fee-sharing), there are two options. Alternative 1—the narrower rule change—would allow a lawyer to share fees with a non-lawyer under certain circumstances, such as sharing with a nonprofit that employed the lawyer, and would allow a non-lawyer to hold a financial interest in a legal entity whose purpose was to provide legal services, provided the non-lawyer has no power to direct or control the professional judgment of a lawyer. This alternative resembles the unsuccessful proposed revisions to Rule 5.4 by the ABA Ethics 20/20 Commission. The broader Alternative 2 basically scraps Rule 5.4 and allows fee sharing with any non-lawyer or non-legal entity as long as the client gives informed written consent. This option does not contemplate any additional ownership or entity regulation. While ATILS proposed some “illustrative” rule language, the task force is mainly seeking input at this point on the concepts rather than any specific rule language. ATILS plans to submit its final report by December 31, 2019.

Arizona

In November 2018, the Arizona Supreme Court created a Task Force on the Delivery of Legal Services, and tasked it with (1) examining legal document-preparer programs, (2) recommending whether certain non-lawyers should be allowed to provide limited legal services before limited-jurisdiction courts, administrative hearings, and family courts, (3) proposing any rule changes that would encourage broader use of limited scope representations under Rule 1.2; and (4) weighing whether co-ownership by lawyers and non-lawyers in entities providing legal services should be allowed.[Ftn 4](#) The Arizona task force continues its work, but the most recent draft materials on its website disclose that it plans to recommend substantial changes to its ethics rules. These include allowing lawyers and non-lawyers to form legal entities for the provision of legal services, recommending adoption of limited-license practitioners, and possibly authorizing Domestic Violence Lay Advocates to assist in the preparation of court documents. The task force is expected to finalize its recommendations by the end of December 2019.

Utah

Last year, Utah created a program to license paralegal practitioners. Like California and Arizona, Utah also formed a work group to look at lawyer regulation and its impact on innovation and access to justice. The work group was tasked specifically with (1) loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referral fees and fee-sharing; (2) reviewing the merits of non-lawyer investment and ownership of various legal service business models; and (3) creating a regulatory body under the court (Utah is a unified bar) designed to regulate and test innovative legal service models and delivery systems. The work group had hoped to complete its report by June 2019, but its work is still in progress.

Illinois

Illinois focused its initial efforts on client-lawyer matching services. In 2018, the Illinois Attorney Regulation and Disciplinary Commission (ARDC) issued a study and sought comment

on a draft framework to regulate entities that connect clients and lawyers (largely in response to Avvo and related services). The proposal included a framework for regulating for-profit and non-profit referral services and permitting fee-splitting with registered matching services. The ARDC is in the process of reviewing the comments received.

Association of Professional Responsibility Lawyers (APRL)

APRL is a bar association for legal ethics lawyers. Most recently, APRL spurred a movement to change lawyer advertising rules that was embraced by the ABA and resulted in several changes to the advertising rules, which are currently under consideration in Minnesota. APRL has also formed a Future of Lawyering Committee focused on technology, the delivery of legal services, and the access to justice gap.^{Ftn 5} This committee is specifically looking at changes to the ethics rules and regulatory process. The committee has several subcommittees, including (1) referral fees/fee sharing (Rule 5.4/7.2); (2) multijurisdictional practice/unauthorized practice of law (Rule 5.5); (3) alternative business structures (Rule 5.4); and (4) firm management and related legal services (Rules 5.6/5.7). The committee has several liaisons members—including members from the National Organization of Bar Counsel (NOBC), a bar association for ethics regulation counsel like me. This committee anticipates its work will take approximately two years, likely wrapping up in mid-2020.

Conclusion

Exciting, huh? The law is undeniable hidebound in many respects, but the trade winds are blowing strong toward regulatory reforms that aim to improve access to justice for the many consumers who cannot afford counsel for basic legal services. It is also true that tech companies and other business service providers see this as an opportunity to break into the “practice of law” juggernaut that has been closely guarded, and rightly so, by the legal profession. I’m not sure what the right mix of changes will be, given the paramount regulatory goal of protecting legal consumers. But I’m excited to see the deep dives taking place, and I’m very glad the questions are being asked and debated.

Notes

1. <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services>
2. <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf>
3. <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/board-approves-public-comment-on-tech-task-forces-regulatory-reform-options-under-consideration>
4. <https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force>
5. <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/>