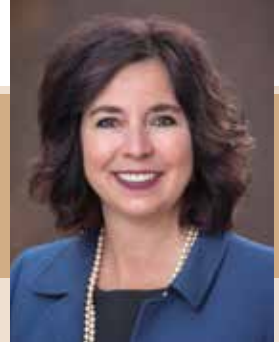


Questions Arising from the Push to Change Rule 5.4



Jennifer M. Grieco

The profession is responding to changes thrust upon it by technology, especially the profound shift created by the so-called digital revolution. The question is whether that shift will provide an opportunity to transform the delivery of legal services to benefit the profession and, more importantly, the public we serve.

The impact of technology

By now, most of us are familiar with the opportunities and headaches brought by around-the-clock attorney-client availability afforded by emails and smartphones. But even more disruptive technology has crossed from the horizon into everyday practice of the most innovative law firms.¹ Artificial intelligence (AI) is being used to automate the less interesting, more mundane tasks of legal work such as contract review of routine agreements used by corporate clients and to reduce the time and expenses of data-based work such as e-discovery with predictive coding that searches for concepts and not simply keywords.² AI can dramatically reduce time spent on trademark and patent searches with greater precision and

accuracy, and is even being used to predict litigation outcomes.³ AI proponents boast that it can improve both efficiency and accuracy while allowing lawyers to focus on the higher-level skills they have been uniquely trained for such as strategy and client advice, court appearances, and settlement negotiations.⁴ Legal innovation enthusiasts hope that AI will drive down the cost of routine legal work, making it affordable to those for whom legal services are now out of reach, without threatening the livelihood of lawyers who, with practices enhanced by AI, can create value for more clients at greater volume.

While AI is beginning to alter the practice of law and the billable-hour framework, legal applications on smartphones and other online platforms provide immediate access to consumers. The growth of LegalZoom demonstrates that individuals will look toward technology-based legal services because of the reduced cost, perceived value, and convenience.⁵ The State Bar of Michigan's enhanced profile directory and online Legal Resource and Referral Center are being developed with that consumer behavior in mind. Michigan lawyers are also fortunate that the State Bar has developed a strong working relationship with the nationally recognized Michigan Legal Help, created to assist individuals with their legal issues through self-help tools and a triage

of questions designed to help identify and respond to their needs and potentially connect them with a lawyer. The State Bar's Legal Resource and Referral Center receives an average of 700 referrals per week from Michigan Legal Help website users.

Courts are also using technology to expand access and convenience through online dispute resolution, which also portends huge changes for practicing lawyers. In Canada, for example, all civil matters under \$5,000 and all condominium disputes must be resolved through an online system, the Civil Resolution Tribunal.⁶ This structured online mediation process is handled by case managers, without lawyers, and resolves 95 percent of the disputes. Recently, the Civil Resolution Tribunal added motor vehicle injury disputes to its online offerings and can award up to \$50,000 for total damages.⁷

In Michigan, as a result of the University of Michigan Law School's Online Court Project, Matterhorn by Court Innovations was launched to help courts address a variety of cases—including small claims, family court compliance, traffic tickets, and civil infractions—and to resolve warrants and pleas online without an attorney.⁸ Several Michigan circuit and district courts now use online case review for traffic tickets to determine if the individual can be offered a lesser charge without having to appear in court.⁹

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Partially in response to these developments, there is a push in the legal tech space for changes to Rule 5.4 of the Rules of Professional Conduct concerning the independent judgment of a lawyer and law firm, most specifically the prohibition of nonlawyer ownership or investment in law firms.¹⁰ Some argue that rather than protecting the public, prohibiting nonlawyer ownership or investment in law firms hinders access to justice by preventing law firms from obtaining the capital needed to invest in technology and innovation, which would create greater efficiency in delivering legal services and make legal services more affordable.¹¹

The definition of the practice of law and who is subject to regulation for engaging in legal services is also under stress. An attorney-entrepreneur has even sued regulators, claiming that as an attorney he is subject to restrictive regulations while his nonattorney competitors are not.¹² The Department of Justice is already on record stating that “overbroad” scope of practice and unauthorized practice of law rules that restrict competition between licensed attorneys and nonattorney providers of legal services such as interactive software increases prices that consumers must pay for legal services and reduces their choices.¹³

Jurisdictions outside the U.S. permit nonattorney investment and ownership

Several jurisdictions have had relaxed requirements for attorney-only ownership and investment in law firms for years. Since 2001, the Australian state of New South Wales has permitted law firms to incorporate, share receipts, and provide legal services alongside other providers who may or may not be legal practitioners.¹⁴ These entities, known as incorporated legal practices, may be listed on Australia's public stock exchange.¹⁵

The United Kingdom's Legal Services Act of 2007 permits lawyers to practice in licensed “alternative business structures” in which nonlawyers can either hold an ownership interest and participate in the delivery of law-related services or be passive investors in firms that deliver legal services.¹⁶ The act also created a Legal Services Board to oversee the regulation of

legal services.¹⁷ Scotland approved its Legal Services Act in 2010, regulating alternative business structures in which attorneys may partner with nonlawyers and seek capital from outside investors provided that lawyers continue to hold controlling ownership of the firm.¹⁸ In each of these jurisdictions, a nonlawyer participant in the business structure must meet a “good character” requirement.¹⁹

Multidisciplinary practices allow lawyers and nonlawyers to practice together to advise consumers if the delivery of legal services is controlled by lawyers and the multidisciplinary practice agrees to be regulated and adhere to the core values of the legal profession.²⁰ Multidisciplinary practices are now permitted in the Canadian provinces of Ontario, British Columbia, and Quebec; Germany; the Netherlands; and Belgium's capital city, Brussels.²¹

In the United States, the District of Columbia is the only jurisdiction that permits nonlawyers to hold an ownership interest in a law firm.²² Such an arrangement is permitted if the partnership or organization's sole purpose is to provide legal services to clients, all persons with managerial authority or ownership agree to abide by the D.C. Bar Rules of Professional Conduct, and the lawyers agree to be responsible for the nonlawyers' conduct.²³ The prohibition of alternative business arrangements in all other U.S. jurisdictions has limited the impact of these rules and the number of alternative business firms in D.C.²⁴ However, that may change as Arizona, California, and Utah are reviewing whether to amend Rule 5.4 to allow either investment by nonlawyers in law firms or nonlawyer-owned legal providers.²⁵

The State Bar of California appears ready to modify Rule 5.4

On July 20, 2018, the State Bar of California's Board of Trustees directed the creation of a task force to consider the unauthorized practice of law and whether the ethical requirement of a business engaged in the practice of law being owned and controlled by lawyers “limits both the opportunity and incentive” for nonlawyer entrepreneurs to enter the legal market.²⁶ The task force was charged with evaluating whether

modifying the ethics rules to allow lawyers and nonlawyers to collaborate in innovation would drive down costs and improve access to justice and the reputation of the legal profession.²⁷

The task force completed its initial work and issued two alternative proposals to the Board of Trustees to change Rule 5.4 related to nonlawyer ownership and investment in law firms. The task force, comprised of a majority of nonlawyer members, noted that innovation requires changes in perception with new knowledge and collaboration, and multidisciplinary participation and funding/investment.²⁸ “Expecting new innovation in access to happen utilizing the same knowledge, perceptions, and people (lawyers) with little to no reward or incentive for new partners to the industry is expecting innovation to foster in a place that has yet to achieve meaningful innovation in access to justice.”²⁹ Further, as noted in the report, “[p]rovided that an entity authorized to practice law is subject to appropriate regulatory standards and can be held accountable by an effective enforcement system, requiring lawyer ownership or management would not necessarily add additional public protection.”³⁰

Alternative 1 to proposed amended Rule 5.4 would expand the existing exception for fee sharing with nonprofit organizations and provide that a lawyer may share legal fees with a nonlawyer and be a part of a firm in which a nonlawyer holds a financial interest, as long as the lawyer or law firm's sole purpose is to provide legal services to clients, the nonlawyer assists the lawyer or law firm in delivering those services, and the nonlawyer has no power to direct or control the lawyer's professional judgment.³¹

Alternative 2 would amend Rule 5.4 to largely eliminate the general prohibition against partnering with or sharing fees with a nonlawyer, and would substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with the requirements intended to ensure that the client gives informed written consent to the lawyer's fee-sharing arrangement with a nonlawyer.³²

On July 11, 2019, the Board of Trustees voted to authorize a 60-day public comment period.³³ If the State Bar of California adopts these changes, it would be the largest

Can innovation increase access to justice without changes to Rule 5.4?

jurisdiction and first state in the Union to allow private businesses to deliver legal services without the requirement of even a majority of the firm being owned or managed by lawyers.³⁴

Michigan's continuing efforts to evaluate access and innovation

The State Bar of Michigan has monitored these developments and is considering its response to the entry of nonlawyer legal service providers. In 2015, the SBM commissioned the 21st Century Practice Task Force to take a comprehensive look at the impact of technology on the future of the law. The *21st Century Practice Task Force Report*, issued in 2016, had the following among its visions: (1) regulation of the legal profession responsive to both the risks and benefits of existing and emerging technology and new business models for legal service delivery and (2) helping Michigan lawyers navigate the rapidly changing legal marketplace and deliver services to their clients more cost-effectively, consistent with longstanding ethical standards that protect the public.

In 2016, the ABA House of Delegates adopted Model Regulatory Objectives for the Provision of Legal Services.³⁵ The objectives are intended to apply not just to regulation of lawyers, but also to regulation of nontraditional legal service providers, including those providing legal services online.³⁶ The SBM Board of Commissioners was asked to support the objectives before their adoption by the House of Delegates, but took no position.³⁷

However, in response to the 21st Century Practice Task Force, the Regulatory Objectives Workgroup was created in 2017. The workgroup proposed regulatory objectives to guide future regulation of legal service providers in Michigan and help ensure that regulation meets the public's legal needs while following identified core values for delivery of legal services.³⁸ The workgroup

recognized that although nonlawyers may prepare routine legal documents that do not require the exercise of legal discretion and may provide general legal information, the activities of these unregulated legal service providers may take hold in the legal marketplace and develop without regard to their impact on legal consumers. Therefore, the workgroup recommended that new categories of providers performing an array of legal services be licensed and regulated. As the workgroup stated, regulating the provision of legal services must extend to activities by nonlawyers, and therefore, regulatory objectives would apply to all providers of legal services.³⁹

The regulatory objectives came before the Board of Commissioners in 2018. After much debate, the objectives were tabled and later removed from consideration.⁴⁰ If the State Bar of California adopts the rule change, will there be a domino effect in the United States? With multijurisdictional law firms, it seems only a matter of time before Michigan will again have to answer the question of whether regulations should be created for nontraditional legal service providers entering the legal market.

In response to the continuing discussion, and in part to address the American Bar Association's recent amendments to the Model Rules of Professional Conduct governing lawyer marketing, the SBM recently formed its Task Force on the Ethics & Regulation of Legal Services Marketing.⁴¹ This group will evaluate the recommendations of the Regulatory Objectives Workgroup, consider regulation of advertising programs used by lawyers and nonlawyer legal service providers, and explore expanded access to legal services funding (e.g., nonlawyer ownership) and lending (e.g., third-party litigation funding). The task force's recommendations will again come before the Board of Commissioners and Representative Assembly and, if approved, advance to the Michigan Supreme Court for consideration.

Meanwhile, many unanswered questions

Legal innovation, including AI, legal tech applications, and online consumer products, have been developed despite the restrictions in Rule 5.4. In some circumstances, lawyers, with the assistance of nonlawyers, have developed legal technology through separate entities and either used the technology to obtain a competitive advantage for their law firms or marketed the technology for use by other firms.⁴² NextLaw Labs, for example, is an autonomous subsidiary of the global law firm Denton, created to develop innovative solutions for the firm's clients. It also maintains an advisory group that conducts research on ideas in the market and either attempts to partner with or provide investment capital for legal technology.⁴³

Can innovation increase access to justice without changes to Rule 5.4? Even the California task force members noted in their favorable report that there is "little or no concrete evidence that this proposal would increase access to justice." It's interesting that there appears to be an acknowledgement that the potential rule changes in California will open up Big Law to competition from the Big Four accounting firms that have been eager to get into the legal space and capture some of the market.⁴⁴ Some might argue that the accounting firms are already pushing this envelope with merger and acquisition due diligence, corporate transactions, compliance, contract and document drafting, and litigation support.⁴⁵ In European markets permitting alternative business structures, the Big Four have the alternative business licenses.⁴⁶ While the European models have demonstrated that alternative business structures have increased the availability of capital and funding for law firms to innovate, the jury is out on whether it will move the profession closer to meeting the unmet needs of lower- and middle-class populations.⁴⁷ As conceded by the ABA Commission on the Future of Legal Services, there is "little reported evidence that ABS (alternative business structure) has had any material impact on improving access to legal services."⁴⁸

If innovators are working with lawyers in separate entities to create legal tech in order

to “get around” the restriction, is Rule 5.4 necessary to protect the public? While there is a serious concern about the loss or impairment of a lawyer’s independent professional judgment with nonlawyer ownership, the ABA Commission on the Future of Legal Services noted that its review of studies of alternative business jurisdictions has not revealed evidence of harm to the core values of the legal system, including a deterioration of lawyers’ ethics or professional independence resulting in harm to clients and consumers.⁴⁹ Maybe it is simply too early to determine the impact of the alternative business structures on access to justice or the independence of the profession.

Nonlawyer legal service providers are already established in the legal marketplace, notwithstanding rules and regulations on the practice of law (and unauthorized practice of law); whether or not they are helping to close the justice gap that prices out legal services to the poor, should these nonlawyer providers be subject to regulation? Perhaps the real question is whether the future of law will be an industry in which lawyers are only one of several kinds of players in the legal services delivery process.⁵⁰ The decisions made and steps taken during the next year in California may play a significant role in shaping that answer. Michigan intends to be an important player in the conversation that follows. ■

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