New York Law Journal

Rethinking Lawyer Regulation: The California Way

By Anthony E. Davis
New York Law Journal
August 30, 2019

As published on Page 3

California is in the middle of a dramatic and fundamental review of how lawyers, and much more broadly legal services generally, should be regulated. In this article we will describe the remarkable *State Bar Task Force on Access Through Innovation of Legal Services Report* (the "report") which is the centerpiece of the project, and consider its broad implications for the profession generally, and for New York in particular.

In examining and considering the report, it is of fundamental importance for readers to keep a critical question constantly in mind: whose interests are the Rules of Professional Conduct primarily intended to protect: clients or lawyers? If the answer seems obvious (presumably, clients), then, as we review the report, the need for comprehensive reform of the regulatory structure for the profession will become apparent. But those who prefer the status quo at all costs argue that regulation for the benefit of the profession should continue to prevail above all other considerations.

The report opens with a brief executive summary, which begins as follows:

> The Board of Trustees (Board) authorized the formation of a Task Force on Access Through Innovation of Legal Services (ATILS) (here, the "Task Force") to identify possible regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. ATILS has prepared tentative recommendations presented as options under consideration by the Task Force.

The report was ordered by the board and developed in response to another report to the board in 2018, the *Legal Market Landscape Report* prepared by Professor William Henderson, a central conclusion of which was that "ethics rules…and the unauthorized practice of law… are the primary determinants of how the current legal market is structured…."

Before turning to the contents of the report, it is worth noting the membership of the task force, which is described in the report as follows:

> ATILS is comprised of twenty-three members: eleven public members; ten lawyers; and two judges. Collectively, the expertise on ATILS includes but is not limited to knowledge and experience in: legal services programs; artificial intelligence and "big data;" attorney professional responsibility and UPL; lawyer referral services; information technology and data security/privacy; online provision of legal information, document preparation and law-related services; paralegal and law office legal support services; and online dispute resolution. Two members of the Task Force are appointees nominated by the Legislature.

The report's recommendations are intended to achieve the dual goals of public protection and increased access to justice and are expressed in the form of concept or policy positions proposed for certain key regulatory issues, and with a menu of options including recommendations that represent competing or alternate approaches to certain issues or policies.

The context for the proposals is that there are enormous unmet legal service needs in our society; that technology is increasingly providing the means to remedy that deficit; and that what is needed is regulation that focuses on the provision of legal services of all kinds, not limited by the traditional constraints of who is, or is not a lawyer, or what does or does not constitute the practice of law.

For purposes of this discussion, the critical recommendations are:

> 1.2 – Lawyers … and law firms … should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.
>
> …

2.0 – Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

2.1 – Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

2.2 – … State-certified/registered/approved entities [should be permitted] to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

…

2.4 – The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

2.5 – Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality.

3.1 – Adoption of a proposed amended rule 5.4 [Alternative 1] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of firm (sic) in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

3.2 – Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee sharing arrangement with a nonlawyer.

3.3 – Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

A simple summary of these proposed changes could be written as a proposal to adopt multi-disciplinary practices that include nonlawyer investment in or ownership of law firms, and eliminating all (in 3.2) or some (in 3.1) of the existing prohibitions on such arrangements.

The report is currently the subject of a 60-day public comment period. As might be expected, those favoring the current and traditional model of lawyer regulation are coming out in large numbers and vociferously opposing all of these proposals. Others who recognize that the world has changed, that similar systems are working effectively and efficiently in England and Australia, and that only through these changes (1) can the public be better served with access to legal assistance using the new and developing technologies and the investment capabilities that are beyond the ability of lawyers and even large firms to provide, and (2) that all providers of legal services—not just lawyers—should be subject to a common regulatory regime designed to protect the public.

It is too early to tell if California will adopt these proposals in any form in the immediate future. But at a minimum, the cat is out of the bag in terms of opening public discussion on a large scale of the shortcomings of the current regulatory system in place in every state, and the potential benefits for the public of sweeping reform that would focus on regulating *legal services* not *lawyers*, and that would eliminate the restrictions on sharing fees with, or investment by nonlawyers in providing legal services.

Why should lawyers outside California care about these proposals? Because these issues desperately need to be addressed everywhere. Sitting on the beach like old English King Canute telling the tide to turn simply will not work with the advent of the myriad of AI-driven legal services already in use or currently in development. And under the present exclusionary "unauthorized practice of law" based regulatory regime as a practical matter all this means is that those services are not now and in the future will not be regulated at all. And if—when?—California (or any other jurisdiction) adopts these proposals, the pressure on everyone else to follow suit will be monumental.

And what of New York? Hitherto, the New York State Bar, and the New York courts have determined to set their collective face against the adoption of any form of what in the past was referred to as multidisciplinary practice. Rather, New York has consistently sought to shore up the exclusionary walls that are supported by the twin pillars of the unauthorized practice rules and the prohibitions against fee sharing or non-lawyer investment in or ownership of law firms. In other words, New York has sought to protect the legal profession, arguably for the benefit of the profession and to the

detriment not only of clients but of the segments of our society that are unable to access lawyers at all.

An argument often used to justify opposition to changing these rules is the need to protect lawyer independence. In fact, this is a red herring, as evidenced by the fact that when all legal services are regulated, as in England and Australia, lawyer independence continues to be protected. It is an open question how New York can be brought to the table even to consider the same questions as California is now addressing head on. But if we do not do it, voluntarily and in an orderly manner, then surely "après nous le deluge…"

Anthony E. Davis *is a partner of Hinshaw & Culbertson and is a past president of the Association of Professional Responsibility Lawyers.*