Stanford Law School

Deborah L. Rhode
Ernest W. McFarland Professor of Law
Director, Center on the Legal Profession

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723.0319
rhode@stanford.edu

May 12, 2020

Alan Steinbrecher, Chair
Sean M. SeLegue, Vice-Chair
State Bar of California, Board of Trustees
180 Howard Street
San Francisco, CA 94105

Dear Mr. Steinbrecher, Mr. SeLegue, and Members of the Board:

We are professors in California who teach and write about legal ethics, and who are committed to the understanding of law as a profession guided by ethical norms. As you know, a significant component of the lawyer's professional ideal is a commitment to serving the public and ensuring access to justice. But despite heroic individual efforts, we are falling far short of fulfilling this commitment as a profession in California. The reality is that as things now stand, many millions of people in California simply do not have access to legal services.

We therefore write to strongly encourage you to move forward with the proposed regulatory "sandbox" that would allow people and organizations to provide legal services without Rule 5.4's prohibitions against fee-sharing, ownership, or investment by those who are not lawyers. Though we do not suggest this will be a full response to the challenges of unmet legal needs, we believe that reforming Rule 5.4 holds the promise of enabling new ways of providing competent and ethical legal services to California residents and small businesses who urgently need assistance.

In our view, the current prohibitions on fee sharing and outside investment by nonlawyers contribute to the lack of affordable choices for many individuals and organizations. Without the ability to enlist management and technology experts as full partners or investors, legal service providers are not able to benefit from the best expertise in how to reach and serve potential consumers. Countries that allow lay investment in or ownership of legal service providers consistently rank ahead of the United States in access to and affordability of legal services. Moreover, there is no evidence to support the claims of ethical problems that opponents of reform often invoke.

The experience of the UK and Australia is particularly instructive. England and Wales have allowed nonlawyer ownership and investment since 2011, and research from the Solicitors Regulation Authority finds no evidence that these models result in adverse effects on consumers. Rather, the research indicates increased choice and competition, improved services to consumers, reduced prices, and increased innovation in the provision of legal services. Australia has also successfully allowed such ownership and investment, which has

helped enable the development of widely accessible law firms serving consumers in a breadth and scope not available in the U.S.

Some worry that if multidisciplinary practices and non-lawyer investment were allowed, lawyers' independent professional judgment would be compromised. But the experience in the United Kingdom is that alternative business structures have thus far dealt better with complaints and had no more disciplinary sanctions than traditional lawyer-owned practices. Indeed, regulating legal service providers as entities can help improve practices that mitigate the risk of ethical violations. And of course, the existing ethical rules around conflicts of interest, confidentiality, and other issues would still apply to individual lawyers.

No doubt, conflicts of interest will arise that need to be handled carefully. But they are not different in kind from conflicts that already arise in current legal practice. Any provider may have conflicts that prevent it from taking on certain matters. This is a good reason to have many such providers who are subject to the same conflict of interest rules, whether 100% lawyer-owned or otherwise; it is not a reason to ban affiliations with nonlawyer providers entirely.

Allowing nontraditional legal service providers to participate in a regulatory sandbox should not and need not equal the "wild west" where anything goes. The idea of a sandbox is to have a time-limited, controlled environment in which the regulator will monitor how services are being provided in order to make sure that consumers are protected. To be considered for entry to the sandbox, potential providers should be required to give information about their proposed approach, ownership and structure, plans for mitigating risk, and creation of consumer complaint processes. Applications that appear to present real risk of consumer harm can be rejected.

Critics often claim that allowing nonlawyer ownership and investment would somehow introduce the "profit motive" to the legal services market. But private-sector lawyers are already driven by their desire to maximize their own profits while providing ethical service. Reforming Rule 5.4 to permit full participation by other profit-seeking entities would not appreciably increase the risk of misconduct if appropriate regulatory safeguards are in place. A regulatory sandbox is a proven way to monitor potential problems and devise appropriate rules without risk to the public.

Reforming Rule 5.4 is an opportunity to regulate in a way that benefits both lawyers and consumers. The current rule prohibiting lawyers from partnering with nonlawyers discourages beneficial business practices, leaving law firms unable to access capital and increasing their vulnerability to economic downturns. Meanwhile, consumers suffer from a lack of access to affordable, easy-to-use legal services. Utah is now encouraging nontraditional legal service providers who provide low-cost or no-cost services to individuals and businesses facing legal issues arising from Covid-19 to enter its sandbox on an expedited basis. The State Bar of California could do the same, and in so doing, better serve the public and achieve the ideals of the profession.

We believe that the rationale for reforming Rule 5.4 is compelling, and a profession truly committed to providing affordable, quality services would benefit from the changes under review. Thank you for your consideration.

Sincerely,

Deborah Rhode, Stanford Law School
Richard Zitrin, UC-Hastings College of the Law

Susan Smith Bakhshian, Loyola Law School
Swethaa Ballakrishnen, UC-Irvine School of Law
Paul Belonick, UC-Hastings College of the Law
Stephen Bundy, UC-Berkeley School of Law
Scott Cummings, UCLA School of Law
Joshua Davis, University of San Francisco School of Law
Nora Freeman Engstrom, Stanford Law School
James Fischer, Southwestern Law School
Seth Flagsberg, Santa Clara University School of Law
David Jargiello, UC-Berkeley School of Law
Sung Hui Kim, UCLA Law
David McGowan, University of San Diego School of Law
Michele Benedetto Neitz, Golden Gate University School of Law
Gregory Ogden, Pepperdine University/Caruso School of Law
Robert Pugsley, Southwestern Law School
Lois Schwartz, UC-Hastings College of the Law
Jeff Selbin, UC-Berkeley School of Law

Cc: Hannah-Beth Jackson, Chair, Senate Judiciary Committee
Mark Stone, Chair, Assembly Judiciary Committee