

COMMENT ON RULE OF PROFESSIONAL CONDUCT 5.4

We write on behalf of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, in response to the District of Columbia Bar Global Legal Practice Committee request for comment on Rule of Professional Conduct 5.4. We urge the D.C. Bar to expand Rule 5.4 to facilitate the development of new, innovative business and service offerings that also permit outside investment and/or multi-professional business models. Doing so will expand D.C. attorneys' ability to offer legal services to their clients and could benefit their firms' bottom line.

Research from England and Wales on alternative business structures (ABS) operating under the Solicitors Regulation Authority suggests that overall innovation among legal services providers, including innovation that reduces the cost of delivery legal services, is higher than among traditional providers. ABS are three times as likely to make use of technology compared to other providers. Specifically, ABS are twice as likely as other providers to use any of the following ten emerging technologies: interactive websites, live chat or virtual assistants, cloud or similar data storage mechanisms, ID-checking tools, custom-built smart device apps, TAR, ADA, RPA, predictive technology, and DLT.¹

The beneficial impacts of technology on the quality of services is widely recognized, and technology has also been shown to reduce the costs of legal services delivery. Along with ABS entities, larger organizations and newer providers operating under the SRA were also more likely to innovate in a way that would result in more efficiency (reduced costs/increased profitability).² Respondents to a 2018 survey of legal service providers also attached higher levels of importance to training staff on both legal competence and developing newer services than other providers.

A 2016 review of the Law Society of England and Wales similarly illustrated that ABS firms were active in numerous, diverse areas, including residential conveyancing, personal injury, ADR/other litigation, corporate/commercial, and others.³ Thus, the evidence shows that by allowing attorneys to partner with other professionals those attorneys are far more likely to create efficiencies that lead to better client service and a more sustainable practice overall—a change that would be welcome for many attorneys, particularly among the solo and small firm practitioners who make up the bulk of the legal profession.

¹ TECHNOLOGY AND INNOVATION IN LEGAL SERVICES – MAIN REPORT: AN ANALYSIS OF A SURVEY OF LEGAL SERVICE PROVIDERS, LEGAL SERVICES BOARD 1, 11 (November 2018), <https://www.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>.

² *Id.* at 43.

³ THE FUTURE OF LEGAL SERVICES, THE LAW SOCIETY OF ENGLAND AND WALES (January 2016), <https://www.lawsociety.org.uk/news/documents/future-of-legal-services-pdf/>.

Alternative business structures are not just beneficial to attorneys, firms, and other providers. The public stands to benefit too. The movement toward regulatory reform of the legal profession, a movement now reaching across multiple states, is driven by the need for a more sustainable model of practice for lawyers, but it is also driven by a recognition that the American legal system faces a severe, even existential, threat: public dissatisfaction and disengagement.

The United States ranks 99th out of 126 countries for accessibility to legal services,⁴ and the problem reaches far up the income scale. It is not only the poorest who lack access to legal services, it is also the middle class and small businesses. People want legal help, and they are not getting the help they need.⁵ When “equality under the law” collides with such a reality, the sustainability of the legal system is threatened.

Whether by choice or by circumstance, the American public is increasingly turning away from the legal system. Americans seek lawyers for help or consider doing so for only 16 percent of the civil justice situations they encounter, and 76 percent of cases in state courts involve at least one self-represented party.⁶ According to the American Bar Association, in some jurisdictions over 80 percent of the civil legal needs of lower-to-middle income individuals are unmet.⁷

What do these statistics actually mean? They mean that many people face major challenges to their financial security, living security, and their physical and mental health without any assistance, and, consequently, they often suffer significant adverse impacts on their lives. Evidence shows us that those forced to deal with issues such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases without legal help face disproportionately adverse outcomes.⁸

⁴ RULE OF LAW INDEX 2019, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>.

⁵ In 2016, IAALS conducted its Cases Without Counsel study, focused on the experience of self-representation in family court, where the majority of Americans will be involved with our courts over the course of their lives. More than 85 percent of the people we talked to in that study wanted legal advice or representation, but they could not get the help they needed because the cost was too high and they were unclear on where to find the right resources. NATALIE ANN KNOWLTON, LOGAN CORNETT, CORINA D. GERETY, & JANET DROBINSKE, CASES WITHOUT COUNSEL, RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 12 (May 2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

⁶ See Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. B. FOUND. 14 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf, and Civil Justice Initiative, *The Landscape of Civil Litigation in State Courts*, NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE, p. iv (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>, respectively.

⁷ Victor Li & James Podgers, *Can the access-to-justice gap be closed? These recommendations might make it possible*, ABA JOURNAL (Aug. 6, 2016), http://www.abajournal.com/news/article/aba_commission_future_legal_services_report_access_to_justice.

⁸ As just one example, renters in Colorado who lacked legal representation were evicted 68 percent of the time from private housing and 43 percent of the time from public housing, while those who were represented by counsel kept their private housing 94 percent of the time and public housing 80 percent of the time. Aubrey Hasvold & Jack Regenbogen, *Facing Eviction Alone: A Study of Evictions, Denver, CO, 2014–2016*, COLORADO COALITION FOR THE HOMELESS 2, 8 (September 11, 2017), http://cclponline.org/wp-content/uploads/2017/10/Facing-Eviction-Alone-9-11-17_revised.pdf.

Lawyers, through pro bono and legal aid services, have worked to close part of the justice gap. But the need is just too great. An attorney’s average hourly rate is approximately \$250, much more than most people can afford or want to pay, whichever the case may be. Providing one hour of attorney assistance to every household facing a legal problem would require over 200 hours of pro bono work per year by every lawyer in the country.⁹ The cost of providing legal help under our current rules is too expensive for lawyers to provide legal assistance at the scale needed to solve the problem. This is because our current rules require lawyers, and lawyers alone, to bear all the risk and all the responsibility of law practice.

Emphasizing the point, ABA President Judy Perry Martinez recently stated, “We need new ideas. We are one-fifth into the 21st century, yet we continue to rely on 20th-century processes, procedures and regulations.”¹⁰ Under today’s regulatory system, in most jurisdictions, anyone other than a lawyer providing legal services would be seen as engaging in the unauthorized practice of law and can be subject to sanction—even if those services were actually helping, not harming, consumers. Most jurisdictions prevent lawyers from sharing fees or ownership interest with any other professional. The D.C. Bar, of course, has long allowed lawyers to partner with others, but the rule is still highly restrictive, forbidding corporate or equity investors and limiting services only to legal practice. Expanding Rule 5.4 to permit outside investment and/or multi-professional business models would foster innovation in a sector deeply in need of innovative thinking and benefit a customer base that is deeply in need of legal services.

Indeed, U.S. Supreme Court Justice Neil Gorsuch also addressed this issue recently in his book “A Republic, If You Can Keep It.” Citing data from an experiment analyzing ABS six years after permitting multidisciplinary firms and non-lawyer investment in England and Wales, Justice Gorsuch writes:

[W]hile these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market – suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably too, almost one-third of the ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms – more than 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it’s no surprise that some U.S. Jurisdictions have appointed committees to study reforms just along these lines.¹¹

⁹ See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access to Justice, Innovation, and the Quality of Legal Services*, 67 HASTINGS L.J. 1191, 1193 (June 2016).

¹⁰ Judy Perry Martinez, *We Must Not Squander the Future of Legal Services*, A.B.A. J.(Feb. 1, 2020), <https://www.abajournal.com/magazine/article/we-must-not-squander-the-future-of-legal-services>.

¹¹ NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 259 (Random House 2019).



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of the AMERICAN LEGAL SYSTEM



The crisis we face demands action. Our *Unlocking Legal Regulation* project is about taking a bold step towards laying the foundation for a consumer-centered regulatory system that will ensure access to a well-developed, high-quality, innovative, and competitive market for legal services. Our vision is a legal system that works for all people by being accessible, fair, reliable, efficient, and accountable: a system that earns trust, because a trusted and trustworthy legal system is essential to our democracy, our economy, and our freedom. That is why we support expanding Rule 5.4, and we urge the District of Columbia Bar Global Legal Practice Committee recommend doing so.

Sincerely,

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