

Comments on: CBA/CBF Task Force Report

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Responsive Law thanks the Task Force for the opportunity to present these comments on its Report. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. While some of the Task Force's recommendations would greatly benefit consumers, others would do little to help them, and some would make their situation worse.

Submitted to the

**CBA/CBF Task Force on
the Sustainable Practice
of Law & Innovation**

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The Good: Streamlining Lawyer Advertising Rules

Consumers face multiple barriers in finding legal help. Often the first barrier they face is recognizing that the problem they're trying to solve has a legal component.

The Task Force, citing Rebecca Sandefur's groundbreaking study, has acknowledged this barrier. It has also drawn the appropriate conclusion—that "[t]he ability for lawyers to advertise to raise awareness and stimulate the market is a crucial part of helping people recognize they have legal problems with potential legal solutions."

The proposed changes to the lawyer advertising rules would simplify them to essentially a prohibition on false or misleading statements and a prohibition on coercion and harassment. This is the essence of consumer protection in lawyer advertising. The rest of the lawyer advertising rules are, at best, a labyrinthine morass of outdated attempts to codify how these principles apply to specific situations.

Streamlining the rules would allow lawyers to spend more energy on reaching consumers in innovative ways and less energy on parsing (for example) whether one needs to place the words "Advertising Material" on a firm website. And consumers would welcome access to previously prohibited information such as a lawyer's areas of expertise.

The Bad: The Task Force Moved Too Timidly with Respect to Restrictions on Law Firm Ownership

A few years ago, when I was in Chicago for a family trip, my wife and I needed a babysitter for our then-toddler. We used an online platform to find a babysitter, whom we left alone with our daughter for the evening. It's likely that a portion of the money we paid the sitter went to the platform, but we didn't worry for a moment that she would put the company's interests ahead of the safety of our daughter. If we're not concerned about corporate pressure on teenage babysitters watching our children, then why should we believe that lawyers—who have been trained in legal ethics and are required by rules of professional conduct to act in their clients' interest—would crumble under the corporate pressure applied by their employer?

The prohibition on fee splitting and non-lawyer ownership serves no consumer protection purpose that is not already accomplished by the other rules that protect a lawyer's professional independence. But it does stifle innovation by requiring lawyers to provide artisanal services in every case, when people often are searching for a mass-market service.

Just this week, the Utah Supreme Court has agreed to implement a regulatory sandbox where innovative companies with non-lawyer ownership will be able to provide services to consumers, with the Court using data from the sandbox to determine how to best adapt regulation of such providers. The Arizona Supreme Court is on the verge of eliminating Rule 5.4 altogether. **At a minimum, the Task Force should have recommended that a committee study *how* to regulate in the absence of Rule 5.4, rather than *whether* to do so.**

The Bad: The Licensed Paralegal Model Would Create A New Licensing Scheme Without Any Consumer Benefit

We dispute the Task Force's premise that allowing more professionals to provide services won't increase access and affordability of those services. This is a simple matter of supply and demand. The cost of legal help is high in large part because there are not enough providers to meet all of the public's legal needs. This is especially true in the areas where most people need help, such as landlord-tenant, family law, and consumer debt. Allowing independent legal providers without a J.D. to provide services in these areas could greatly reduce the cost of those services.

Unfortunately, the proposal to create a licensed paralegal model would provide only a minuscule boost to the supply of legal assistance. Requiring these professionals to work under a lawyer's supervision will have at best a small impact on the cost of these services. Consumers could benefit far more by having access to independent legal service providers,

without having to pay for lawyer to supervise them. **We recommend that the Task Force amend its recommendation to allow professional paralegals meeting the proposed licensing requirements to operate independently of lawyer supervision, with an insurance requirement for the individual service provider sufficient to protect consumers.**

The Ugly: The Proposals For Regulation of Intermediate Entities and Legal Technology Providers Would Make It More Difficult to Use Such Providers

Better use of technology is an important component of increasing access to legal help. However, the Task Force's proposals in this area miss the mark in improving access to legal help through technology.

We appreciate the Task Force's goal of maintaining lawyers' independent judgment in its proposal regarding intermediate entities that connect lawyers with consumers. In particular, we strongly support the proposed Evidence Rule 503, which would ensure that communication with intermediate entities about obtaining legal representation is privileged. We also approve of the proposed Rule 5.4(a)(5), allowing lawyers to share fees with registered intermediate entities as long as they don't engage in behavior that could harm consumers, such as interfering with the lawyer's professional independence of judgment.

There are, unfortunately, two problems with the proposed rule regarding intermediate entities. First, the proposed Legal Technology Regulation Board could potentially consist of a majority of lawyers. Proposed Rule 800 recommends that there be representation by lawyers representing various types of users of legal services. However, the Board would be more representative—and less likely to run afoul of antitrust law under the U.S. Supreme Court's decision in *North Carolina Dental Examiners v. FTC*—if it were composed primarily of those users themselves. **We urge the Task Force to change this proposed rule to prohibit a lawyer majority. The rule should also require that, where feasible, membership on the Board should include low- and middle-income individuals and representatives of small companies, rather than lawyers who have those groups as clients.** Making these changes would ensure sufficient representation of consumer interest on the Board.

More importantly, the language of Proposed Rule 801 appears to require registration of *all* intermediate entities, whether or not they share fees with lawyers. Many business models for attorney-client matching services currently operate legally without registration, and without evidence of consumer harm. Requiring registration for these providers would increase the costs of such services, which would then be passed on to consumers.

Additionally, it is not within the power of the Illinois Supreme Court to regulate a business merely because it provides services to lawyers. **We urge the Task Force to revise this rule so that registration is only required for companies that share fees with lawyers.**

Proposed Rule 802, governing Approved Legal Technology Providers has a nearly identical problem to Proposed Rule 801. Section (a) states, “No individual or entity may offer access to services and products through such systems unless approved and registered under this Rule.” The “systems” covered by the rule include anything from advanced artificial intelligence to a simple fill-in-the-blanks PDF document. The latter is clearly permissible under current interpretation of unauthorized practice restrictions, and even the former is, at a minimum, in a legal gray area.

Given the evolving (and often murky) case law regarding UPL, and the desire to provide additional protection to consumers, **we urge the Task Force to convert this section to a UPL safe harbor**, by changing the last sentence of section (a) to read, “No individual or entity offering access to services and products through such systems shall be considered to be engaging in the unauthorized practice of law if approved and registered under this Rule.”

Conclusion

The Task Force has made some promising recommendations, but has also made some flawed recommendations that need to be fixed so that they don’t constrain access to legal help rather than increase it. We urge the Task Force to make those changes to meet its goal of making legal services more affordable and accessible.