
September 23, 2019

Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105
E-mail: atils-pc@calbar.ca.gov

**Re: Access Through Innovation of Legal Services**
**Proposed Regulatory Reform Options**
**Comments by Carolyn Elefant, MyShingle.com**

Dear Ms. Marlaud,

My name is Carolyn Elefant. I am a law firm owner and attorney in good standing in Maryland, New York and the District of Columbia. I am also founder and publisher of MyShingle.com. Launched in 2002, MyShingle.com is the longest running and most influential blog on solo and small law firm practice in the 21st century, with approximately 30,000 readers annually and 8500 subscribers. For the past 16 years, MyShingle has tracked and advocated for change in the legal profession, including the development of new business models more aligned with today's consumers, adoption of the cloud and use of online marketing and social media to educate and engage clients and the public.

MyShingle also participated extensively in the ABA Ethics 2020 initiative[1] and has been a vocal critic of onerous ethics regulations that stifle innovation by solo and small law firms. My writing on ethics issues have been featured in the *ABA Journal*[2] and most recently were the subject of my May 2019 talk at the *Future is Now* conference sponsored by the Illinois Supreme Court Commission on Civility.[3] In filing these comments, MyShingle speaks on behalf of solo and small firm lawyers who represent the majority of clients in our legal system and in doing so, bring dedication, passion and a spirit of innovation and resourcefulness to the practice of law.

At the outset, MyShingle thanks the Task Force for broadly publicizing its work so as to attract a broad cross section of views both within and outside of the legal profession. My Shingle also commends Task Force for all of its work. The Task Force's 251-page report (which I actually read) is comprehensive, balanced and serves as a valuable resource for California and other jurisdictions contemplating regulatory change. Moreover, MyShingle appreciates the Task Force's comprehensive vision of long term reform and its ambitious goals of creating categories of professionals who can offer legal advice along with new regulatory bodies to oversee them. Change of any kind is long overdue.

Unfortunately, the Task Force's vision will take years to implement - assuming that it can overcome the knee-jerk opposition from traditionalists. For that reason, MyShingle urges the Task Force not to ignore the many short term reforms and easy fixes that can be adopted immediately -- such as fee-sharing on a case by case basis between lawyers and non-lawyers (while still banning arrangements like runners), ruling clearly that lawyer matching platforms do not constitute "fee-splitting" or referrals and to cede control of regulation of advertising and privacy to the FTC and state attorney generals' office. Even better, these short-term reforms will enable solo and small firm lawyers to access the same markets that the Task Force would open to non-lawyers, thus optimizing choices for consumers and potentially facilitating buy-in from the bar.

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[1] *Ethics 20/20 Matter for Solo & Small Firm Lawyers*, (Nov. 2010); C. Elefant Comments on Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools Issues & Client Confidentiality (Dec. 15, 2010).

[2] *See* Ethics Opinions Have to Reflect the Present & Future - Not the Past *ABA Journal*, (Dec. 1, 2017); The Bar Is Failing to Offer Clear Ethics Guidance, *ABA Journal* (Oct. 14, 2009).

[3] Killing Solo Softly: How Ethics Regulations Threaten Solo & Small Law Firms (May 2019).

## I. SUMMARY OF COMMENTS

The MyShingle Comments are organized as follows:

- General Background: Generally, the Task Force Report along with the Henderson Paper accurately reflect the current state of the legal market, including the urgent problem of access to justice. But neither report offers a full picture of the modern consumers' expectations and habits, which explains why many do not currently engage lawyers and will inform the level of protection necessary in a future regime.

- Recommendation 1.0 (Practice of Law) MyShingle generally agrees with the Task Force Recom not to define the practice of law, but recommends a de minimis exception for any civil matter with a value of $5000 or less;

- Recommendation 1.2 (Innovation Through Technology) MyShingle does not support a duty of technology competence for lawyers because market forces will render obsolete lawyers who do not stay up to speed. Moreover, tech competence is only part of the problem when it comes to making lawyers relevant and expanding access to justice. Absent regulatory reform -- such as elimination of lawyer trust accounts, simplifying ethics rules on flat fees, plainly stating that lawyer matching platforms are not impermissible fee splitting and changing current archaic advertising regulations -- even the best technology in the world will not expand access because consumers will never be able to find lawyers and once they do, they will have to go through an interminable list of disclaimers before they can hire them.

- Recommendation 2.0 MyShingle does not oppose permitting nonlawyers to provide legal advice without running afoul of UPL. MyShingle recommends that any regulations governing licensing for legal technicians or advisors not be overly complicated or onerous.

- Recommendation 2.1 As a broad matter, MyShingle is not averse to allowing outside ownership. In this regard, MyShingle strongly recommends that the Task Force gain a greater understanding of the various business models for outside ownership and formulate rules regarding use of client data even in anonymized format and even, in some circumstances, with client consent. But as the Task Force works towards rules that would allow outside ownership on an entity-level, MyShingle strongly supports

relaxing rules to allow lawyers to joint-venture and partner with non-lawyers on a project, product or service basis to develop innovative packaged services. In addition, MyShingle urges the Task Force to eliminate regulations that prohibit payment or sharing of referral fees to non-lawyers.

- Recommendation 2.2 and 2.3 - Development of artificial intelligence systems and other technology-powered tools to increase access to justice should be strongly encouraged. MyShingle endorses the Task Force's measured approach that would facilitate development of these tools as well as its concern for maintaining confidentiality and other benefits of the attorney-client relationship. MyShingle also endorses algorithmic transparency, particularly for tools used to evaluate the viability of matters to avoid constant rejection of "loser" cases that push the envelope of the law and serve the public interest. *See* C. Elefant, Data Analytics and the Importance of Loser Law.

- Recommendation 3.4 MyShingle disagrees with the Task Force's recommendations to adopt the ABA's recent revisions to the Model Rules. The ABA's proposed changes, which MyShingle has criticized previously,[4] are a pallid, *post hac* ratification of benign conduct like allowing attorneys to give clients gifts or to post an email address rather than a physical address on a website. The proposed regulations punt on more controversial issues like whether a lawyer matching platform constitutes impermissible fee-sharing and therefore, should be disregarded entirely in favor of FTC regulation.

## II. GENERAL BACKGROUND: OTHER FEATURES OF THE LEGAL MARKET LANDSCAPE

Professor Henderson's excellent Legal Market Landscape Report served as the first step in the California Bar's study of delivery of legal services through the use of technology. The Report highlighted the problematic economics of "People Law" (solo and small firms serving consumer interests) and the inability of many consumers to afford attorneys.

MyShingle does not dispute Professor Henderson's research. But we posit that Professor Henderson underestimated the impact that onerous bar regulations have on

[4] Why The ABA Revisions To Advertising Rules Represent Everything Wrong With the ABA, MyShingle.com (August 2018).

solo and small firms' ability to offer innovative and cost-effective legal services in a way that is both convenient and relevant to today's consumers. MyShingle suggests that there is a large swath of consumers who do not seek legal assistance not because it is unaffordable but rather because it is simply too darn inconvenient due to onerous ethics rules.[5]

Consider today's typical client:

> Most likely, within hours of [going online to find an attorney], today's client has tapped the screen on their phone to summon a car from Uber, or careened through the EZ-Pass Lane on the toll road barely slowing down or located a pair of shoes on Amazon Prime while waiting on-line at the grocery store and ordered them for next day delivery. They've arrived home after work, called out to Alexa to turn on the lights, sat down to a healthy dinner prepared from ingredients delivered in a box that shows up on the doorstep three times a week, and then headed out to an evening yoga class that they registered for through the gym's phone app or upstairs to join a remote cycling class on their Peloton bike.[6]

Many of these clients can afford to hire an attorney. They fail to do so not because lawyers are unaffordable but because it is just too much of a hassle to get in touch with one. As a consumer, I use services like Teledoc where I can speak to a doctor online at any hour and obtain prescriptions for mild colds or infections online. I can meet with a therapist weekly from the comfort on my home through apps like Talkspace.com. Yet even as an attorney, I would not know where to turn other than googling a lawyer online to receive quick answers to legal questions. Avvo Answers once offered this service until it was shut down because Avvo retained a percentage of the paltry $39 fee and most regulators ridiculously classified this as unlawful fee-sharing.

The ban on fee-splitting does not protect consumers. Instead, it emboldens sketchy providers with no concern for ethics while deterring those lawyers who actually want to keep their bar license. Consider a recent article at *Above the Law* (September 2019, entitled The California Bar is Still Clamping Down on Fee Splitting. According to the

[5] For more detail on this theory, please view Killing Solo Softly: How Ethics Regulations Threaten Solo & Small Law Firms (May 2019).

[6] Why the Frictionless Client Experience is a Legal Fiction (MyShingle.com Sept. 2017).

article, an attorney rented space and received administrative services from an operation called Alliance Solutions Network. The attorney received an $8000 fee from the client and paid $5500 of it to the Network and was - appropriately - disciplined for fee-splitting. But what kind of attorney would pay nearly 70 percent of fee for office space and administrative services. Why did this Alliance Network take such a substantial mark-up? If the bar relaxed rules on fee-splitting and allowed, for example, an incubator space to take an interest in fees (like Y-Combinator takes equity from businesses), a robust market would evolve and a variety of services would emerge at different price points. With regulation, the market is stifled.

Even when a consumer can find a lawyer who is affordable in theory, the hassles don't end there. Whereas a consumer can push a button and pay a flat fee to Legal Zoom for a document (which can pocket the money right away), lawyers in California who want to use a flat fee must jump through all kinds of hoops to treat a flat fee as earned on receipt - including client consent and disclosure of the right to refund.[7] With all of this trouble, why *would* a lawyer even want to handle a low cost matter for a flat fee when it requires an hour of billable time to put the arrangement in place?

By effectively prohibiting, or inflicting barriers to lawyers to participate in a system of online commerce that the majority of consumers have embraced, lawyers have effectively signed our own death warrants. Lawyers no longer have relevance in consumers' day-to-day lives because it is too difficult for consumers to find and engage us easily.. As the Task Force moves ahead with reforms, it must consider whether keeping not just the law, but also independent lawyers accessible to the public is a goal worth pursuing.[8]

An understanding of today's consumer is important because it goes not just to the types of services that consumers want but also to the level of protection that they require. Most regulators begin with the premise that today's consumers are some type of modern

[7] See M. Zavieh, New Ethics Rules Weigh in on Flat Fees, CEB Blog (September 2018).

[8] On this topic, MyShingle has covered the dangerous implications for our system of justice of losing the independent voice of solo and small practitioners. *See* As Solo Goes, So Goes the Substance and the Spark (MyShingle Aug. 2, 2012); One Thousand Points of Solo (MyShingle Dec. 22, 2016); The Future of Law: Been There, Done That, Let's Do It Better (MyShingle Dec. 31, 2016).

day Rip Van Winkles, who have stumbled into the digital age from the 1700s. Perhaps this is a case of regulators transposing their own lackluster digital skills on consumers but whatever the reason, the notion of consumers as a bunch of dupes vulnerable to the wiles of the internet is belied by the facts.

For example, a whopping 92 percent of consumers will not make an online purchase without reviews or testimonials. Yet despite consumer demand for testimonials, regulators persist in the fictional belief that testimonials are misleading and that consumers must be protected from them. Today's consumers blithely hail cabs from Uber, book reservations on Air BnB and purchase gifts on Etsy without ever believing that the platform is making a "recommendation" that binds them, or without ever viewing the percentage of the fees retained by the platform as anything more than a convenience charge. Yet regulators seem to believe that when consumers use this same type of arrangement to hire a lawyer, that they must be protected from the evils of fee-splitting.[9]

To be sure, there are many disempowered and uneducated clients who are vulnerable to internet schemes. For these clients, however, Legal Aid or other *pro bono* services are often an option and they need not participate in online forums. But as the Task Force fashions protection for other clients, it must apply a "reasonable client" standard circa 2019, not 1819.

## III. COMMENTS

### A. Comment Re: Recommendation 1.0 - DeMinimis Cost Exception to Practice of Law.

The Task Force proposes not to define the practice of law - an approach that MyShingle endorses. Attempting to define the practice of law would result in esoteric debate and analysis that would consign the Task Force's work to a fate of death by committee.

[9] Frankly, that regulators have managed to classify these platforms as fee-sharing arrangements suggests that they attended the Dred Scott School of Result Oriented Lawmaking. The reasoning is that inexplicable. *See also* How Legal Ethics Rules on Fee Splitting Platforms Lead to Unintended Consequences. (MyShingle July 2018). And in the interest of attracting VC, even vendors have succumbed to this nonsense.

That said, failure to define the practice of law at all may have a chilling effect on market entrants. For that reason, the Task Force should adopt a de minimis cost exemption to the practice of law as follows:

*Any matter that involves courts, contracts, wills, advice on rights or obligations that has a value of less than $5000 is not the practice of law. Admission to the bar is not required to represent clients in this category of matters. Nor would payments for these services be required to be placed in a trust account and would be treated as earned on receipt.*

MyShingle previously offered this rationale for the proposal:[10]

> At first glance, my approach seems arbitrary, but here's my thinking. One of the reasons that parties are often underrepresented in certain matters is because lawyers turn down cases that don't make sense from a financial perspective. Most lawyers won't litigate a $500 breach of contract action because from an economic perspective, it doesn't make sense to bill a client 3 hours of time at $300/hour to recover $500 in damage. Given that most lawyers won't take these cases on, are they property characterized as legal matters at all? (yup, I can do circular logic just as well as any regulator!).
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> The same is true for traffic tickets. Many consumers don't bother fighting minor speeding tickets – even if they believe they have grounds to do so. Even if a lawyer were to accept the case for free, it's not worth it for most consumers to have to take an hour out of their day to meet with an attorney, and then a morning off from work to show up at the courthouse – all to avoid a $100 fine. And most lawyers who might accept this kind of case would need to charge a few hundred dollars to make it even remotely economically viable. To be sure, traffic tickets have characteristics of a traditional legal matter – they involve parties rights and require an appearance before the court. But if lawyers aren't willing to take the lower value traffic ticket cases, why bother to characterize them as legal issues?
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> Sure there are exceptions – situations where points apply or a license could be suspended – which ups the value of the matter. But as a general rule of thumb,

[10] These comments are extracted from the original blog post, What About a De Minimis Cost Exception to the Practice of Law? (MyShingle April 3, 2019).

why do we even glorify penny-ante matters that lawyers don't want to handle by suggesting that they're the practice of law?

Think I'm crazy? There's at least some data to back up my hunch. Take a look at the Learned Hands, an online game developed by the Suffolk Lit Lab and Stanford Law's Legal Design Lab that asks users to determine whether a particular question (which are aggregated from Reddit) involves a legal issue, and if so, in what practice area. I played a couple of hours worth of Learned Hands and found that my knee-jerk reaction to most of the questions was "well, maybe there's a contract issue here or a tort issue there, but what lawyers is going to take a case that involves a $200 dry cleaning bill?).

What would be the effect of simply exempting matters smaller than $10k from the definition of the practice of law? For starters, we'd encourage development of more sophisticated AI-powered tools to handle these matters without having the chilling effect of a UPL claim hanging over these companies and investors. Here's a real world example out of Florida which for the past two years has been battling TIKD, a sophisticated app that handles ticket defense for clients in one fell swoop. Clients pay TIKD the citation amount and the company then hires a lawyer to challenge the ticket. If TIKD wins and the ticket is dismissed and points aren't assessed, it keeps the fee. If points are assessed, the consumer receives a refund. Because of data that TIKD aggregates and analyzes on the ticketing process, it pretty much knows in advance how many tickets will be dismissed or how many fines will be reduced, so it can make the numbers work in the way that an individual law firm can't.

In January 2019, a report by a Florida bar referee concluded that TIKD's services did not constitute the practice of law because TIKD did not represent parties in court. But the Florida regulators have challenged the referee report, arguing on brief that TIKD essentially offers legal services – i.e., ticket defense to consumers and therefore is engaged in UPL. And the regulators' brief mentions one case where a consumer's license was at risk of suspension because TIKD did not pay a fine. These kinds of outliers are often used to ban an entire business. By contrast, under my proposed approach, TIKD would continue to be allowed to handle low value cases while more serious cases with economic consequences – such as a license suspension for a consumer who relies on his license a job – would still need to be handled by a lawyer.

> The second benefit to exempting low value cases from the definition of the practice of law is that it would open the door for lawyers to handle these cases. As I mentioned earlier, most lawyers can't make a $500 case economically viable. But there may be ways to do it if lawyers could handle these small matters not only in their local jurisdiction but on a national basis. In addition, there are many lawyers such as military wives or retired lawyers traveling the country who find themselves temporarily in a new jurisdiction where they are not licensed and may even have to take another bar exam to gain admission. Currently, lawyers in this category can take work on a contract basis for as little as $40 or $50/hour. But financially, these lawyers would be just was well off, if not more so, if they could handle a couple of small fry FKA legal matters for two or three hundred dollars a case.
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> Lawyers have been trying to define what constitutes the practice of law for a century or more – and have never gotten much further than the Potter Stewart-esque "I'll know it when I see it" test. But what we do know – or can easily figure out – is the types of cases lawyers take and decline for economic reasons. And since we know that many lawyers won't accept certain matters – like traffic tickets or tiny contract disputes or even uncontested divorces with minimal property or small estates – then why bother to call it the practice of law at all?

Adopting a de minimis cost exception to the practice of law will also give the regulators the opportunity to gather data and evaluate the prospect of harm to consumers in low risk cases where they would not ordinarily have any options. The de minimis cost exception would also encourage development of AI and machine-powered tools to resolve these smaller cases. Best of all, the de minimis exception could be implemented without any additional training programs as would be required for LLTs so it could take effect immediately.

In addition, exempting de minimis matters from trust account requirements would give lawyers incentives to take on small open-and-shut matters which could be paid for up front and completed quickly. Right now, it is a hassle for lawyers to have to deposit a $500 or $1500 payment into a trust account - so much so that some lawyers will simply turn this work away. By eliminating trust account requirements, lawyers could also accept prepayment in bulk (for example, a lawyer could sell 15 $1000 will packages and would receive $15,000 in pocket) and then use the funds to hire a younger or less costly lawyer to

handle the work. This would help make solo and small firm practice more economically sustainable.[11]

## B. Recommendation 1.2 - Innovation Through Technology

MyShingle does not support a duty of technology competence for lawyers. Market forces are sufficient to render obsolete those lawyers who do not stay up to speed on technology. Moreover, a duty of technology competence carries the risk of entrenching lawyers in use of incumbent vendor products like Word or Excel rather than giving them scope to sample other tools. To the extent that the Task Force insists on riding herd and copying the 37 other states in adopting these hollow requirements, regulators should allow lawyers to satisfy these requirements not just through CLE-approved programs but also through the numerous MOOCs and certifications often subscribed by small businesses and tech companies.

Moreover, as we have suggested in Part II and will discuss in greater detail, tech competence is only part of the problem when it comes to making lawyers relevant and expanding access to justice. Absent regulatory reform -- such as elimination of lawyer trust accounts, simplifying ethics rules on flat fees, plainly stating that lawyer matching platforms are not impermissible fee splitting and changing current archaic advertising regulations -- even the best technology in the world will not expand access because consumers will never be able to find lawyers and once they do, they will have to go through an interminable list of disclaimers before they can hire them.

## C. Recommendation 2.0 - NonLawyers Can Provide Legal Advice

As already discussed in Part III.A, MyShingle takes the position that any matter with a value of less than $5000 is not the practice of law - and therefore, a law degree is not a prerequisite for any individual to handle these matters. And MyShingle likewise does not oppose Recommendation 2.0 to permit nonlawyers to provide legal advice without running afoul of UPL. Again, the sole caution here is to avoid creating new and onerous regulations that will only increase the cost of licensing for legal technicians or advisors. Washington State's LLT program seems rather onerous and complex and it would behoove regulators to evaluate the success of Washington State before simply duplicating its approach.

[11] MyShingle supports elimination of trust accounts entirely to reduce the cost of legal services but this is not an option considered by the Task Force. *See* Want to Lower the Cost of Legal Services? Let's Ditch Trust Accounts, (MyShingle.com May 2014).

## D. Recommendation 2.1 - Outside Ownership

### 1. Concerns Regarding Outside Ownership

MyShingle does not oppose allowing outside ownership of law firms. That said, MyShingle would prefer additional research on business models for outside ownership and the degree to which these companies will expand access to justice. That said, in Section D.2 below, MyShingle will propose ways that outside ownership can be implemented immediately, albeit somewhat more modestly. But first, below is a discussion of MyShingle's two concerns regarding large scale, venture-backed outside ownership:

***Entrenchment*** **-** First, there is concern that many of these VC-backed companies do little more than entrench old ways. In recent years, Turbo Tax - the disruptor of CPAs - has been called out for lobbying efforts opposing changes to simplification of the tax code so that it can continue to sell its software. The same can be true for companies that seek to disrupt the legal profession: we must ask if they are actually disrupting or merely "doing with great efficiency that which should not be done at all." (Peter Drucker). MyShingle addressed this concern[12] and incorporates these comments below

> Oh how the mighty have fallen.
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> Recently, there's been a backlash against "disruptive" tax preparation companies like Intuit (which makes TurboTax, a DIY tax prep product) and H&R Block (tax form-fillers) that enable consumers to bypass pricey CPAs to file taxes. The reason? Seems that these companies, which have a vested interest in the tax system remaining complex have been aggressively lobbying against new measures that would simplify tax filing considerably, and potentially eliminate the need for tax prep companies entirely. These stories got me thinking: is the new generation of legal tech merely perpetuating and entrenching old and inefficient ways of providing legal services, and as these companies grow, will they too lobby against adoption of systemic changes.

[12] Does the New Generation of Legal Tech Entrench Old Ways? (MyShingle April 2016).

Take for example the soon-to-be-launched service, Run the Call, a mobile app that helps solo practitioners locate backup attorneys to cover court call recently covered in Chicago Business. As I wrote in an earlier post there's already a proven market for this type of "spot coverage," and while I'm skeptical that this type of service might suit my practice, there are several alternative use cases that I can envision. To be sure, RuntheCall, StandIn and similar services address a real problem for solos: the need to cover multiple and often simultaneously scheduled status calls and scheduling hearings. But is that a problem we ought to be solving? Isn't the real problem the fact that courts continue to require in-person appearances for matters that in most civil cases are relatively trivial and could be handled by phone conference or Skype? [NOTE: status calls in criminal defense are a different animal as even a seemingly minor change might forfeit a defendant's constitutional right to speedy trial – but for this reason, they may not be suitable for an on-demand service at all] In fact, in the federal courts where I primarily practice, scheduling hearings, discovery motions, *in limine* motions and even emergency contempt motions are routinely handled by phone which allows for more flexibility in scheduling and saves clients the cost of attorney travel and waiting time in court.

The same is true with lots of other legal tech. At TechShow, I noticed that many law practice management platforms integrate with LawPay, a company whose unique selling proposition is facilitating attorney acceptance of credit cards by directing payments into the lawyers' trust account rather than operating account (MyCase has taken a different approach, announcing plans to build a credit card payment system directly into the platform ). Again, while Law Pay solves a current problem for some attorneys – the ability to accept credit card payments and avoid chargebacks to trust accounts – hasn't the concept of trust accounts run its course now that most consumers use credit cards which can protect them against attorney non-performance.

Even some of the services offered by companies like LegalZoom and Rocket Lawyer – once embraced as disruptive – are now arguably obsolete, or should be. Consider incorporation services. Back in 2001 when LegalZoom was founded and up until two or three years ago, Legal Zoom's user-friendly online forms made it easier for consumers to self-file incorporations. At that time, many states did not even have downloadable forms for consumers to complete by hand and submit and so Legal Zoom, even with its hefty markups

($359 for an LLC ready to ship in 7-10 days, plus state filing fees) was a deal. But that's all changed. Now many states – at least the District of Columbia and Maryland – have incorporation forms online (along with explanatory information) that consumers can complete entirely on their own, submit through the website with a filing fee and have their incorporation approved within 48 hours. Of course, most people aren't familiar with that option because LegalZoom and Rocket Lawyer have superior SEO to a Secretary of State's office. But it's difficult to understand what value form filling services offer over a government filing system. In many ways, these services are really just solving yesterday's problems.

Probate reform won't come as easily as upgrades to state business divisions because it will require legislative action. For example, many states impose all kinds of signature formalities which could readily be replaced with blockchain technology. If that legislation were to be proposed, however, would companies like LegalZoom and RocketLawyer, with millions of dollars in their coffers and a vested interest in maintaining the status quo oppose it, just as TurboTax and H&R Block are doing now with tax reform.

Honestly, I don't have a dog in the fight here. I'm all for figuring out ways to use technology to develop new products and services to give consumers options – and if those services eliminate the need for lawyers, well so what? If lawyers can't figure out a way to compete against forms, we don't deserve to be in practice. But what does concern me is when we attribute more credit to these new services than they deserve by praising them solving the problem of access to justice when in fact, they simply reinforce the inefficiencies in our judicial system that technology could eliminate all together.

***Privacy Concerns*** MyShingle notes that several of the Task Force's recommendations will address issues such as privacy and confidentiality. Nevertheless, the Task Force should also explore whether a VC-backed company's very business model is incompatible with privacy law or evolving concepts of data ownership. MyShingle addressed this issue recently and incorporates the post below:[13]

Lawyer and legal business consultant Mark Cohen observes that the legal profession is essentially a data wasteland in the digital era , ranking behind all other private industries in utilizing big data and its uptown cousin, artificial

[13] From Whose Data Is It Anyway? (MyShingle June 25, 2019).

intelligence to make decisions and serve clients. Still, both nature – and today's clients – abhor a vacuum and more enterprising companies from outside legal are targeting the legal void.

For example, the same day that Cohen's article ran on Forbes , TechCrunch carried a feature on Atrium Records — the latest release by Justin Kan's on techno-powered #altlaw firm Atrium. As described by the *Techcrunch* article, Atrium records creates a collaborative portal for clients, which aggregates all their business documents in one place, and can generate hiring offers and contracts from forms completed by clients within the site. But what caught my eye about the Atrium service – and what relates it back to Cohen's piece — is the way that the portal leverages data. From the article:

Instead of writing hiring contracts from scratch each time, you fill out a form and use menu selections to set the salary, share count, vesting schedule and offer expiration. Looking across its anonymized data set of contracts, Atrium can recommend the best clauses and most common set ups, like four-year vesting with one-year cliffs. You can see the status of the contracts every step of the way, from drafting and finalizing to getting employees to accept. [Kan says] that Atrium's goal is to continue building on its archive of more than 100,000 legal documents to develop aggregated pools of data clients could opt into. If they're willing to share their salary data, vendor contract pricing and more, they'll get access to that of Atrium's other clients. "You'll be able to see if you're on the high end of being paid by Salesforce for a contract," Kan explains. That's a much more data-driven approach than when most lawyers just think of the last few salaries they saw for that position and give you a rough average.

Atrium's use of business data harvested from law firm clients (with their consent) to help other clients make business decisions about salaries is very different from traditional legal analytics — where firms look at past judicial decisions, results and outcomes to predict what might happen in a future case. With traditional analytics, lawyers rely on data to do what they were hired to do, which is to advise clients about the impact of the law on their intended action so that they can decide how to proceed. In Atrium's case, data gathered during the attorney-client relationship is employed to help other clients – and potentially competitors – make business decisions. And that's what gives me pause.

Here's the thing. We lawyers come into contact with lots of proprietary and personal data in the course of representing clients. In its role representing startups, Atrium is privy to an array of data from vendor costs, executive compensation, companies' source and supply for different products and all kinds of other information. Likewise, lawyers who represent clients in divorce cases or estate planning compile information on their homes, their cars and finances. It's one thing for an attorney to advise a divorce client with a particular financial profile not to fight a $3000/month alimony and custody payment because it's comparable to what the judge awarded in a dozen other cases with clients who had nearly identical financial profiles. It's quite another for lawyers to share the price that Client A was able to get for her house with other clients.

To be clear, I'm not suggesting that Atrium is acting improperly or unethically by collecting and sharing client business data which is anonymized and shared only with their consent. What concerns me is that as attorneys and trusted advisors, we have the kind of special relationship with our clients that invites them to let down their guard and share proprietary and personal information because they know it will never be revealed. Sharing proprietary information gathered during the course of legal representation for purposes other than advising on the law and in a manner that can place clients at a disadvantage, or leveraging that information to market a law firm ("Unlike other firms, we have access to thousands of pieces of proprietary data on startups) makes me uncomfortable.

There's another issue too – just as time is money, so is data. In fact so much so that yesterday, Senators Mark Warner (D-Va.) and Josh Hawley (R-Mo) introduced legislation that would require Facebook, Google, Amazon and other gib platforms to disclose the value of user data. Of course, this legislation wouldn't apply to law firms, but nevertheless, it confirms that data has value and owners of data ought to be compensated for its use.

Nothing in this post should be construed as detracting from the importance of using data analytics to predict legal outcomes. Relying on data to predict outcomes or to test hunches ought to be a no-brainer – unless of course, you practice law in France.. The harder question is whether and to what extent we lawyers can use the non-public data that we come in contact with through our cases for other purposes than just representing clients.

## 2. Ways to Allow for Outside Ownership Immediately

As the Task Force works towards rules that would allow outside ownership on a broad, VC-backed entity-level, MyShingle strongly supports relaxing rules on outside ownership. This is because Rule 5.4 prohibiting outside ownership is also the source of the ban on fee-splitting and payment of referral fees to non-lawyers. With few modifications, Rule 5.4 could be tweaked to allow lawyers to joint-venture and partner with non-lawyers on a project, product or service basis to develop innovative packaged services and share referral fees with non-lawyers. Finally, the Task Force should make clear that lawyer matching platforms and other services where a percentage of the fee is shared with a platform do not fall within the scope of Rule 5.4 at all - and are simply a type of payment mechanism. Details follow:

### a. Platforms are not fee-splitting

The prohibition on fee-splitting with a non-lawyer is to ensure reasonable fees and protect clients from having their attorneys' independent judgment compromised by a non-lawyer or having cases bought and sold for profit. A lawyer sharing platform does not implicate any of these concerns. The platform provides a single location for a client to locate a lawyer. When the client selects the lawyer and pays a fee, the platform retains a percentage for its cost of maintaining the platform - just as a credit card company retains a finance fee when a client uses its to pay a bill. Clients are accustomed to using matching platforms which have given them access to services like taxis and hotels that many clients could not previously afford. Repeat after me - there is nothing sinister or dangerous about platforms. They are not fee-sharing; they are a payment mechanism.

Those jurisdictions that have bought into the ludicrous idea that platforms constitute impermissible lawyer-non-lawyer fee-sharing now feel compelled to open the floodgates on outside investment. And again, MyShingle does not oppose outside investment - but it is an ambitious goal that is at least two years down the road. Meanwhile, the crisis for access to justice and keeping lawyers relevant is now. By simply stating that "lawyer matching platforms that allow clients to find a lawyer with a percentage of a fee going to the platform do not constitute fee-splitting or payment of a referral fee," consumers would immediately have access to these services, end of story. This solution is clean and easy and principled and consistent with the needs and experience of today's consumers.

### b. Fee Splitting and Referral Fees on A Case-By-Case Basis

In preparation of these comments, MyShingle asked participants in a 7000-member Facebook Group for woman-owned solo and small law firms about what types of ethics regulation they would like to see eliminated. The overwhelming majority favored lifting the ban on fee splitting between non-lawyers and lawyers. And no wonder either. Many solo and small law firm owners also operate ancillary or side businesses in real estate, financial planning or related services to ensure a constant stream of revenue. For the sake of expediency, it would be beneficial for solos and smalls to be able to operate multiple businesses under one roof with non-lawyers participating equally in profits.

Other solo and small firm owners explained that without the fee-share ban, they could offer a wider range of integrated services to clients. An environmental attorney explained that offering dual services with engineers would be of great value. And many other lawyers have not even stopped to consider the possibilities of hybrid services -- from family law + therapy, to personal injury + financial planning - the list goes on --simply because that option has not been available.

Moreover, in an age where the law is changing at lightning speed due to technology, facilitating the ability of lawyers to offer hybrid services is more important than ever. As I wrote at Above the Law,[14]

> Increasingly, law is becoming more complicated, necessitating the involvement of non-lawyers — not just as experts — but as an integral part of a legal team. For example, many large firms looking to beef up cybersecurity practices are onboarding non lawyers — such as forensics experts or former CIO's to round out their team. Makes sense — a CIO can undertake a preventative assessment, with the firm making legal recommendations based on the findings. Or, a firm retained in the aftermath of a data breach can advise on liability with the forensic expert can figure out how to plug the holes.
>
> These types of inter-professional partnerships aren't limited to cybersecurity. Family law and estate cases may require the involvement of financial planners and mental health counselors; startups need CPAs and HR experts and marketing or PR. Yet unlike Biglaw, solo and small firms may

[14] Why Solo and Small Law Firms May Need Outside Ownership to Survive (Above the Law October 2017).

> not have the resources to hire these other professionals — which is the easiest way to work together on an ongoing basis. By contrast, if solos could form a partnership with other professionals, the solo wouldn't have to pay the other professional a salary; instead, the professional could share in the profits. The lawyer and professional could also develop uniform service packages for each client and charge one flat rate instead of sending out multiple invoices.
>
> Moreover, as tech becomes more complex, lawyers won't be able to solve legal issues alone but, instead, will need geneticists, engineers, computer scientists and other professionals as part of the team. By eliminating rules on outside ownership and fee splitting, solo and small law firms won't be at a disadvantage to Biglaw in delivering these hybrid services to clients. If we need to change ethics rules to make this happen, let's just do it.

The Task Force could implement fee-sharing on a case-by-case basis by simply taking existing fee-sharing language and disclosures and applying it to lawyer and nonlawyer relationships used in California. A representation agreement would include language that

> The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees between the attorney and [OTHER PROFESSIONAL] will be made and the terms of such division; and (2) The total fee charged by all team members is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

This same provision would also work for payment of referral fees. Rules prohibiting payment for cases and odious, high-pressure tactics like use of runners would continue to be banned.

### E. Recommendation 2.2 and 2.3 Encouraging Development of Artificial Intelligence

Development of artificial intelligence systems and other technology-powered tools to increase access to justice should be strongly encouraged. MyShingle endorses the Task Force's measured approach that would facilitate the development of these tools as well as

its concern for maintaining confidentiality and other benefits of the attorney-client relationship. MyShingle also endorses algorithmic transparency, particularly for tools used to evaluate the viability of matters to avoid constant rejection of "loser" cases that push the envelope of the law and serve the public interest. *See* C. Elefant, Data Analytics and the Importance of Loser Law.

## F. Recommendation 3.4 - Reject Adoption of ABA Revisions to Model Rules

### 1. Do Not Adopt Model Rules

MyShingle disagrees with the Task Force's recommendations to adopt the ABA's recent revisions to the Model Rules. The ABA's proposed changes, which MyShingle has criticized previously, are a pallid, *post hac* ratification of benign conduct like allowing attorneys to give clients gifts or to post an email address rather than a physical address on a website. MyShingle's critique of these regulations from a prior post[15] is below:

> Yesterday on Twitter, I encountered a stream of tweets about the ABA House of Delegates recent amendments to Model Rules 7.1 – 7.5, hailing them as a game-changing, significant update to the existing regulations. Unwilling to rely on tweets as a primary source, I hustled over to pursue the changes which are set out in ABA House of Delegates Resolution 101 .
>
> Immediately, my spirits deflated and that slogan *"my parents went to [exotic destination] and all I got is this lousy t-shirt*" popped into my head. Only here, the line went as follows: "The ABA set out to modernize its ethics rules so that they make sense for today's lawyers and clients…and after TWO YEARS of reports and committees and debates, all we lawyers came away with is a cut-and-paste reorganization of a couple of sections of the rules and a *post hoc* ratification of innocent conduct – like sending thank you gifts to referral sources, listing contact information but not an office address on a website, recognizing that a directory is not a recommendation or engaging with a prospect on Twitter without a 700-word advertising warning tacked on to the 80-character tweet or telling us that — that lawyers have known or been

[15] Why The ABA Revisions To Advertising Rules Represent Everything Wrong With the ABA, MyShingle.com (August 2018).

doing whether or not the rules allowed it because really, who's going to even take the time to enforce this silly minutiae?

Below are the advertising changes adopted by the ABA and some of my brief side-bar comments (in parens):

- Reorganization of regulations (basically, editing that at most, should have taken two days, not two years);
- Change Rule 7.2 to allow lawyers to post "contact information" (such as email or website) rather than a physical office address to reflect technological advances (circa 2000);
- Allow lawyers to provide nominal thank you gifts for referrals (Is there a lawyer on this planet who hasn't treated a colleague to box seats at a sports game, an expensive dinner at a 5-star restaurant or a seat on a corporate board in exchange for business?);
- Allows lawyers to use the term "specialize" (as opposed to being forced to comb the Thesaurus for synonyms like focus exclusively, concentrate, zero in on, handle 24/7, etc…);
- Defines solicitation (is there anyone who didn't know what the term meant?) and continues to prohibit live person-to-person solicitation while allowing solicitation through less immediate forms of communication such as text or email which the recipient can ignore;
- Eliminates the requirement to label targeting mailings as advertising on the theory that today's consumers are sophisticated enough to distinguish an ad from substantive or educational information.

Not only do the changes merely approve conduct that most lawyers have engaged in any way whether formally permitted or not (with the exception of labeling mailings as ads), the rules also state the obvious. The comments to the rules explain that: "Directory listings and group advertisements that list lawyers by 163 practice area, without more, do not constitute impermissible "recommendations." (Resolution 101 at 4:162-163). Seriously, did any lawyer ever believe that procuring a listing in the yellow pages meant that AT&T was recommending the service?

The rules also define a "lawyer referral service" as "any organization that holds itself out to the public as a lawyer referral service." Resolution 101 at 5:202-203. OK – so does that mean that Avvo (or similar platforms) isn't a referral service contrary to what state regulators to date have held? After all,

Avvo characterized itself as a marketplace, not a referral service. Why won't the ABA just resolve these burning questions instead of putting the questions off and letting the uncertainty kill innovation?

Our profession sits at a crossroads. The bar needs leadership and action on these questions, not scriveners to reorganize paragraphs (message to ABA: computers can do that now!). If these tepid rule changes are the best that the ABA can do, then we should just let the organization die on the vine right now, because it simply doesn't have the ability to lead lawyers into the future.

### 2. FTC Regulations

Today's consumers are not morons. Just as they know that Dr. X's ability to cure cancer for Patient 1 does not mean he will succeed with Patient 2, so too, consumers understand that posting about past results does not guarantee the same future results and that generic information on a website is descriptive in purpose and does not constitute advice. Why regulators feel the need to force lawyers to emblazon their marketing materials with this inane list of disclaimers in 2019 defies logic. Moreover, at a time when consumers want testimonials, it makes no sense for regulators to restrict lawyers' ability to provide testimonials at their website free of superfluous disclaimers.

Lawyer regulators need to get out of the advertising regulation game. The rules are more akin to some esoteric and obscure issue spotting frolic on a bar exam than the kinds of serious, clear requirements needed to foster competition and expand access to justice. Even more embarrassing, many bar rules are often inconsistent with FTC and consumer privacy regulations that continue to govern. Many law firm websites include required ethics disclaimers but fail to post required website privacy or GDPR language. It is an embarrassment when lawyers themselves do not comply with the law but who can blame them when regulators lead lawyers to believe that ethics compliance is the only requirement that matters.

Even more importantly, however, regulators cannot protect consumers from the harms they face online. Companies like Amazon and Yelp can hardly police the accuracy of online reviews. It is either laughable or arrogant for regulators to believe that they can do a better job. And new concerns always emerge- from deep fakes to consumer recognition and data collection - all of these issues can potentially cause harm to clients in one way or another. The FTC and states attorneys offices have tools to investigate and enforce online advertising regulations. Disciplinary

committees and courts simply do not have these capabilities and need to cede control.

## IV. CONCLUSION

MyShingle thanks the Task Force for this enormous undertaking and appreciates the opportunity to weigh in with comments. MyShingle is aware of the substantial number of comments from members of the bar who oppose the proposed changes and see them as a threat. But MyShingle assures the committee that a substantial number of solo and small firm lawyers - the silent majority - are on board with the changes and view them as an opportunity rather than a threat. We solos and smalls have always lead the profession in innovation. Today, we recognize that we stand on the cusp of an opportunity to reinvent legal services for today's consumers and achieve the goal of access to justice. Solos and smalls understand and admire the Task Force's long-term vision, but many solos and smalls are ready to start today. And solos and smalls also want the same opportunities for advertising, flat fees and shared referral fees that are available to venture-backed entities to be available to rank and file lawyers as well. For these reasons, MyShingle.com asks that the short-term steps urged in these comments be adopted immediately to pave the foundation for the longer and more challenging road ahead.

Respectfully submitted,

*/s/ Carolyn Elefant*

Carolyn Elefant
MyShingle.com