State bar proposes revolutionary changes to the legal market

By Ted Brown

After adopting a complete revamp of its Rules of Professional Conduct, effective Nov. 1, 2018, a California State Bar task force has proposed a number of rule changes, intended to increase access to legal services while maintaining consumer protection. Some have called these proposals, if successful, the biggest changes to legal market regulation in American history.

Last month, the State Bar's Board of Trustees sought public comment on the task force proposals, with a Sept. 23, 2019, deadline. The Solicitation, available at: http://www.cal-bar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2019-Public-Comment/Options-for-Regulatory-Reforms-to-Promote-Access-to-Justice, includes links to:

• an overview memo summarizing the proposals;

• the Board of Trustees' Agenda Item 701, laying out the complete proposals;

• a description of the task force's background; and

• a public comment form that can (but need not) be used.

The proposals were developed by the Task Force on Access Through Innovation of Legal Services. The task force was appointed by the State Bar Board of Trustees in 2018 to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others. A majority of the members of the task force were nonlawyers. The task force's objective was to ensure consumer protection while expanding access to legal services in California, particularly through technology-driven delivery of legal services.

Two of the proposed changes are both fundamental to the current structure of the legal profession and likely to be highly controversial:

First, lawyers would be allowed to share ownership with nonlawyers of entities providing legal services; and second, lawyers would be allowed to share fees with nonlawyers. Both of these proposals are intended to encourage new business models and technologies for the delivery of legal services, for example, encouraging investment by nonlawyers in new businesses delivering legal services and promoting combinations of technologists and lawyers to develop technology relevant to the delivery of legal services. Both of these proposals are careful to require that there would be no interference with the lawyer's independent professional judgment or with the lawyer-client relationship.

These, and the other proposals, are intended to encourage the expansion of technology-driven delivery of legal services, especially to the large proportion of the public that essentially do without. The proposals contemplate that state-certified, regulated entities, including entities owned by nonlawyers, would be allowed to provide what would otherwise be the unauthorized practice of law using "relevant technology" and expand attorney-client privilege to cover confidential communications between users and providers of such services. The proposals do not define "relevant technology" so as not to limit the types of technology that could be used or developed to meet the goals of the task force and

the State Bar. Explicitly, "relevant technology" is not "limited to or restrained by any concept or definition of "artificial intelligence." However, the contemplated regulation would be limited to technologies that at least approximate tasks that would otherwise be performed by a lawyer. The attorney-client privilege would be expanded to cover confidential communications between users and providers of such services.

A new comment, similar to ABA Model Rule 1.1, comment [8] (which has been adopted in the majority of states), would explicitly state that a lawyer's duty of competence (under California Rule 1.1) includes a duty to keep abreast of the "benefits and risks assisted with relevant technology." Good arguments can be made that such a duty is already implicit in California's rules, but this added comment may sensitize lawyers to the issues. The risks and benefits, as well as the ethical obligations attendant to the use of technology vary significantly with its complexity. Lawyers should be especially alert to the issues associated with artificial intelligence technologies that utilize "machine learning." Although a recent ABA Science and Technology Report stated that, in the years to come, lawyers who do not adopt AI will be left behind, it also proposed a resolution, passed by the ABA on August 12, that urges lawyers and courts to address, among other issues, the biases, technical explanations, and transparency of automated decisions made by AI, especially "blackbox" AI.

Lawyers would continue to be ultimately responsible for their legal services, but they would be allowed, with appropriate disclosure and disclaimers, to offer non-legal, but law-related services. Lawyers would continue to be required to ensure their own work and advice is competent and their responsibility to ensure that others working with them or performing discrete tasks for them perform competently, will

only increase with the increasing use of "relevant technology."

The future of the task force proposals is far from certain. The task force plans to digest the comments made (hundreds have been submitted thus far — mostly of the simple "support" or "oppose" variety), make any changes warranted, and submit a final package to the State Bar Board of Trustees by the end of the year. In addition to approval by the State Bar, Supreme Court assent and promulgation of potentially extensive regulations will be required. Some of the proposed changes, such as the extension of the attorney-client privilege, may require legislative action. So, while these proposals may not come to fruition until sometime in the future, they are likely to shape they practice of law in California.

Theodore G. Brown *III is senior counsel at Kilpatrick Townsend & Stockton LLP. He focuses his practice on patents in the areas of semiconductor devices and circuits, semiconductor manufacturing, testing and design processes, computer systems and architecture, computer software, and genetic sequencing and (small molecule) pharmaceuticals.*