



Episode 68 - California Leading Change - ATILS Public Comment is Coming

Introduction: This is Lawyers Gone Ethical. Straight talk about legal ethics. Here's your host, Megan Zavieh.

Megan Zavieh: Hi, everyone. Welcome back to another episode of Lawyers Gone Ethical. This is episode 68 coming to you just after the 4th of July holiday weekend. So hopefully everyone spent Monday recovering and you're ready to hit the week kind of running on Tuesday. It was tough for me. It was a four-day weekend. It was really easy to be away and hard to come back, but that happens. Hopefully everyone had a great Fourth.

So this episode is going to be a bit unlike most of my episodes. I really try in this show to talk about topics that are sort of evergreen. You know, you could come back two years from now, go back to episode one and get a lot of useful content that's very directed to

your practice and it doesn't really matter that some time has passed. I hope that today's episode a year from now or two years from now is a relic that you'll go back and see that we even put it out there and say, oh my gosh remember when we were actually debating whether people who don't hold licenses to practice law could have an ownership interest in a law firm?

Oh my gosh remember that? That was so funny. I can't believe we ever had to debate it. That's my wish this episode. But the only way that is actually going to be true is if we have a lot of participation from around the profession and from the public in processes designed to bring about significant regulatory change to our profession. We aren't going to get massive shifts in thinking and in change from regulators if we are all sitting silent waiting to see what edict comes down from on high.

So today we're going to talk about the task force on Access Through Innovation of Legal Services which is a mouthful. I know from the state bar of California, this task force has been watched closely by regulators, lawyers, people without law licenses. And I'm just going to say non-lawyers. Okay. I don't have a better term. I've been part of the Twitter debate on this to non-lawyers, tech companies, all kinds of people around the country have been watching very closely what's going on in this task force, and if you haven't been watching, let this episode be an introduction to the fact that this task force has

been going on, studying ideas for changes to our regulations. How can we open up the profession to better serve our market? And our markets - really everyone, right? It really is. And if you follow any of the discussion about access to justice, you'll see crazy statistics. I mean, some of them are just appallingly high, these rates at which people who need legal services don't actually get any professional help. Then there are debates over whether those numbers are real or are they skewed? You know what? None of that debate really matters. The fact is there's no doubt that people who could benefit significantly from legal services can't always get them. Whether they don't know they exist, they can't afford them, they're not available in their area, whatever the reason, we think that we're fighting tooth and nail for clients. No. The truth is, there's a ton of work out there that is never getting done. So, the task force set out to figure out what can we do differently in how we regulate the profession to open up services to a wider range of people of - you know all kinds of things within their means or practice areas. I mean, there is a lot of need that's going unmet.

So the task force has been super creative. They went off on subcommittees and then had meetings. I've got to tell you, I personally know a couple of the members and it is amazing how much time and effort - all volunteer, of course - has gone into the work of this task force. So coming out of it are some recommendations that soon will be open for public comment. And my purpose in this episode is really to get you interested and

see that these recommendations are far reaching. They are, as I said, very creative and they need our input as the State Bar of California. And it doesn't matter if you're in California or not. This is for everyone. They need your input to be able to act on these recommendations and the recommendations and the actions they take from them are without a doubt going to have an impact across the country. This isn't just, oh, what happens in California tends to trickle across. Although, hey, that's a whole debate. I grew up in California and went to law school in Connecticut and, oh my gosh, I have my eyes open to the view that some - not everyone - think that California is the breeding ground of all great ideas, but there is no doubt that California is one of the largest bars and it is being watched. So even if you're in, you know, Iowa or Ohio or Florida, there is no doubt that what's happening in California will have an impact nationwide on how regulators perceive some of these issues. Just like we've allowed non lawyer ownership in law firms in other countries, the UK, Australia come to mind immediately. We watch that, right? All across the country in the United States, we watch that. We said, oh, okay. Their whole system didn't fall apart. Maybe we should consider this. Well, California's changes are going to have similar impact. Whatever comes of these recommendations is going to seed some more ideas and some more thinking across the country. So, I would like to talk a little bit about, in general, these different recommendations.

They should be up for public comment soon. The board of trustees of the State Bar will be looking at these recommendations in the coming week and then putting them out for public comment if they approve of them. That will be our opportunity to jump in formally. Public comment does not have to be scary. Public comment does not necessarily mean flying to a meeting and standing up with your microphone. It also does not have to mean formal brief writing or written correspondence where you're making sure everything is perfect. It can be an email to the board of trustees. The email address will be on the materials for public comment. These show notes for this episode will be updated as we have more links where you can start to provide public comment. Just know that when I say, hey, get out there and have your voice heard, I don't mean go suck up eight hours to write a tome on how this one particular recommendation is going to impact you. It can really be as simple as a two paragraph email, hey, this is who I am. This is the recommendation I want to talk about. This is what I think of it. These are my concerns. I mean it can be really easy, so don't shy away from this process. Now when I say these recommendations are really important - I think as we talk about some of them, you'll see that they are - so the task force was divided into subcommittees which helped narrow how many people were in the room trying to talk about these at a time and focus attention on different aspects of potential change in regulation. So, one of the subcommittees was called the unauthorized practice of law/artificial intelligence subcommittee. Now if you've dealt at all with UPL (Unauthorized Practice of Law) issues,

you may know that it's not all that clear what the practice of law actually is. Ask someone to define what the practice of law is and you'll find, well, lots of hemming and hawing, shoulder shrugging, hand raising, you know, just, I don't really know. It's really hard to define because there's not just one sentence out there that encapsulates the practice of law. And in fact there are things that when done by a lawyer are the practice of law and when done by someone who's not a lawyer are not the practice of law, like how confusing is that? Is it or isn't it? Not that clear. Case law is actually used to define the practice of law and usually it's this case by case analysis when someone's in some kind of trouble, whether they're being accused of UPL or being held back from being admitted to the state bar based upon an allegation that perhaps they engaged in UPL before they were licensed. Then they're out there defending themselves, that whatever they did doesn't fall within the definition based on their circumstances. It's extremely confusing. So I was actually a little surprised to see that this particular subcommittee has a recommendation out there not to define the practice of law. My first thought when I saw it was like "What?!" And my notes next to that recommendation had little abbreviations for certain profanities because I didn't understand why in the world that would be. I mean I find it incredibly frustrating that I have to talk to clients and say, well whether you were or weren't isn't all that clear and they just looked at me like, are you crazy? This is your area of law. How do you not know? But the idea behind this recommendation is that there's some benefit in agility in

terms of defining it to be able to work on a case by case basis. I think that recommendation should get some public comment. I'd be very curious to hear what others have to say and I'll be reading the public comments. But also coming out of that subcommittee is to allow some regulation as an exception to the ban on UPL for legal tech entities, and those entities would need to have some ethics rules applying to them, such as, if you're communicating with a tech company that's providing legal services under an exception to the ban on UPL, are your communications privileged and confidential? It seems like they should be, but that's part of the recommendation, that we talk about having ethics rules applying to legal tech companies. Definitely one that I think will lead to some interesting conversations at you know, ABA Tech Show and Clio Con type events. I think there's a lot to be said there. Also talking about enhanced privacy and security measures for these companies to have to put into place. So I think that could be particularly interesting, talking about this privacy and security measures. It's hard to get lawyers to even, you know, encrypt an email or use a secure client portal. Heck to even have a security certificate on their website is difficult to convince some lawyers. But legal tech companies you would hope would be a little more working towards privacy and security. So that would actually be potentially part of new regulation.

And then there's some discussion in these recommendations of having funds that come in to the Bar from regulation of these entities go back into the regulating structure. And so this whole thing would be self-funded, which if you are a member of the state bar of California, you may be aware that there are proposals to up our annual dues like \$800 next year. So annual dues are certainly a problem. Financial side of state bar regulation, definitely an issue. So any of these recommendations that come with more regulation, we're going to be concerned about the funding for them. So I thought that that was an interesting one on the tech side.

Also I thought was pretty interesting, they have a recommendation in here not to try and define artificial intelligence and not to use that term in the regulation because that's a very broad term and not nearly technical enough to utilize in regulation, but they do want to use legal tech.

So that'll be interesting to me. I mean we're talking about an entity that I have personal concerns over whether they really even have the knowledge to regulate tech the way that some of these proposals are referring to. I mean this is an entity where you go to register for state bar ethics school and you fill out an online form, receive a confirmation email, print the email and mail it in with a check. That's the registration process for state bar ethics school. They don't have online registration. I have online registration for a

consultation with me. Everywhere I look is online registration and we haven't figured this out with the state bar. And there are other much more egregious examples which I won't get into of the state bar implementing technology. And so this concerns me a bit, that that becomes the entity regulating these tech companies.

So again, subject for public comment. I'll be interested to see what others say and as these recommendations are issued for public comment, of course you should be reading them in detail. I'm giving a brief overview to give you some idea of what kind of things they're talking about, but then of course if you're going to comment, you've got to read these things carefully and see all of the little details of them. Like I said, there are different subcommittees. That was the UPL and AI subcommittee recommendations there, but then there's also a rules and ethics opinions subcommittee, which deals with more of the things that we tend to talk about when we're going, hey, how are these rules out of date? If you go back, I have an episode with Eric Cooperstein a while back where we did that. We were like this rule and that rule, we don't like this rule.

Well, this is the subcommittee dealing with those things. So one of the things that they proposed is adopting the comment to the model rules about tech competence. We talked about this before, widely reported by Bob Ambrogi how each state has been adopting it one by one. I think at one point his article started at like 15 states have adopted it and now it's up to like 36 states. The comment about tech competence

simply says that in order to perform competently, we must keep abreast of changes in technology and that's fair. I think it's a perfectly reasonable comment. I also think it doesn't have a lot of teeth because I truly believe that in order to perform competently, we already need to keep abreast of technology. We don't need to comment to our ethics rules that say, so if you don't know how to use email, if you don't know how to redact a document that doesn't end up on Twitter with your redaction removed, you're failing to perform competently and I don't care if the rule says it includes technology or not.

Those are basic tools of our trade at this point. But anyway, California would be the what, 30 whatever-th state at this point to adopt that comment.

Far more interesting, in my opinion, are two alternative changes to rule 5.4. Rule 5.4 is the fee sharing rule that basically says we can't share our fees with those who are not lawyers. Now Rule 5.4 is widely impugned as you know, holding us back from innovating. Lawyers have to self-fund or fund through loans or fund through other lawyers, projects that really could make a difference in our profession. You look at platforms like Hello Divorce or oh gosh, there's so many out there. Um, now of course I'm blanking. Hello Divorce is my favorite, so that's the one I tend to look at the most, is a DIY platform created by an incredibly creative lawyer who said, I'm going to find a new way to deliver an old service, a service that thousands and thousands of people go

through all the time. This is legal services surrounding divorce and custody and we are going to lower the cost and make this completely different. Right. And Erin Levine founded and created this. She has done an amazing job with it and you know what? She could not take outside funding for that. No non-lawyer funding for ventures like this. That's just a huge stifling effect on the legal profession. We look outside of law. Any of the tech products that you use, if you're a runner, you probably use something like Run Keeper. If you're a sports fanatic, you probably have an app for your fantasy football league. If you do almost anything, you're going to have an app for that, right? Hey, there's an app for that and there's an app for that. Well, those aren't created just by the person with the idea coming up with money out of their pocket. There's funding for things like that. There's investors. People want to make money off of those products. People want to invest. Why can't we take outside funding, right? 5.4 is that big barrier that we all suffer from, so California is making a couple of proposals. One is just to eliminate Rule 5.4. That would be a tremendous change. The other is to loosen it. Obviously in our incrementally changing profession you can see which one I think is more likely to succeed. But I love the idea of just removing it all together. Now under the loosening, there are some different proposals and definitely read these carefully if this is an area you're interested in because I think that the nuances are going to be very important. If we aren't careful, we can have a headline making change where rule 5.4 is amended or altered or revised, to make us think that, wow, this is big change.

And then if you read the nuances it could end up not being nearly the game changer we hope for. So please, if this is an area of interest to you, read the recommendations really carefully when they're available for public comment so that you can really hit on the points that you see. I think this is one of those areas where the collective mind is going to be really important because different people in different roles in this profession are going to have different insights. So one of the proposals, for example, is to allow sharing of fees with nonprofit organizations. Even if they're not fees that are awarded by the court, currently under the rules you can do such a split if the court orders the fees but not if they're just paid or collected some way that's not under court order. So like there are, okay, that's important. I think that matters. But is that really a sea change? I don't think that it is, but it is an important change. Another change is to allow non-lawyers to have an ownership interest in law firms and then to collect some of the fees. That's a much bigger change. Right. That's really more like following the UK and Australia. So one that we definitely want to be looking at and I have a feeling a lot of my colleagues out there are going to have a lot to say about that.

Another proposal coming out of the Rules and Ethics Opinions Subcommittee is to adopt model Rule 5.7 or some variation of it. That has to do with lawyers providing not legal services but law related services. So things like accounting services come to mind. Currently under California's rules, there's sort of a brief mention that the rules of

professional conduct might apply even if you're doing something that's not legal services, but it's not really super clear. They are talking about making it more clear, and then if lawyers want to somehow come out from under the rules when providing other services, there'd have to be a lot of disclosures to clients, I guess is the general thrust of that? And I definitely know a lot of lawyers with other careers as well, so this might be important to a contingent of our colleagues. There's also a proposal to add some comments, make some changes based upon the ABA's recent changes to the advertising rules. The California rules were amended last November and the ABA model rules were also recently amended on advertising. They don't really go together, so there's some proposal to change some of California's rules to come in line with the revisions to the ABA model rules on advertising. Now, it won't be surprising to realize that these subcommittees had some overlap in some of the things they were talking about.

The third subcommittee is actually called Approval of Alternative Business Structures/Multidisciplinary Practice subcommittee and you can see that that would naturally include some non-lawyer ownership issues which were also addressed by the rules subcommittee. But again, not surprising, I mean major, major lightning rod when it comes to talking about regulatory change. So this subcommittee came out with some recommendations that would allow entities comprised of either lawyers or non-lawyers or a combination of both to exist. And they do talk about the need to regulate these

entities that would be owned by either a mix of lawyers and non-lawyers or by non-lawyers exclusively. And I think we're going to have to get really deep into these nuances as well. Obviously, this is not a completely new idea. Other states have started dabbling. We have a different form of non-lawyer professionals like in Washington with legal technicians. We have in Washington, D.C., non-lawyer ownership of firms.

So there are some changes going on out there, but you've got to look really carefully at how we nuance these changes because like I said, with the other changes that are particularly large, if we're not careful, it'll sound like a bigger deal than it really is. Also, one of the proposals is to allow non-lawyers to provide legal advice as an exemption to UPL with certain regulation. So again, hearkens back to recommendation from the other subcommittees and also looks a lot like Washington state's legal technicians. And specifically coming out of that subcommittee is a recommendation that we not make a distinction between for profit and nonprofit entities, that these entities, including non-lawyers, be allowed to operate for profit. When I first read that, I thought, are we seriously even having to debate that? But I guess yes, if, apparently yes. Again, noticing that you know, there are a lot of different viewpoints out there. I think that's really important because if we can't be operating these types of legal service entities for profit, you're going to seriously cut back on the interest, particularly from venture capital funding.

So hopefully these have all given you some ideas of what's really going on coming out of this task force and what are some of the things that you might want to comment on.

Again, not trying to be comprehensive in this episode in talking about these proposals, but to give you a sense of what kinds of things they're talking about. I know personally I find it a little overwhelming when there's a Twitter thread and it's, you know, up through 10 - 12 items and here's links and all and I just kind of glaze over. So my goal in this episode is to try and boil it down a little bit so you can see these are the types of things we're talking about.

These are the things that you can all be commenting on and your friends and your family and your clients. Anyone with an interest in a legal profession and legal services, which really should be every single person in this country. They're all welcome to comment. So hopefully we'll get a lot of comments going into California so that the regulators have a lot to work with, a lot of viewpoints, a lot of ideas to work with.

The last thing I want to say is that there's also on the list of recommendations, a call for data to be used to evaluate the effect of these regulatory changes. You may recall Erin Gerstenzang talking about data-driven ethics, which was a project that she and I were working on, trying to gather more data as to access to legal services, the impact of rule changes, that sort of thing, to disseminate to regulators so that when they make recommendations and proposals and actual changes to the regulations in their states,

they have something to go on besides that gut feel of like, I *think* we need to protect the public. You know, I *think* that the public will be harmed by this point and having actual data will be wonderful. So there's actually a formal call for this in the recommendations, talking about the need for data. So I thought that was a wonderful thing. So, like I said, we will update the show notes to have links. You can also follow on the state bar's website. If you just go on their website, you will see information on public comment, anything related to the board of trustees or the task force will all be on there. You'll have an opportunity to email or mail in any of your comments. I hope you will all participate. We'll see you next time.