



**Los Angeles County Bar Association**

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**LACBA Trusts and Estates Section  
Comments Relating to Regulatory Reforms to Promote Access to Justice  
September 10, 2019**

The Trusts and Estates Section is a Section of the Los Angeles County Bar Association, and is submitting the following comments on its own behalf and not on behalf of LACBA as a whole. LACBA will forward separate comments on behalf of the entire LACBA membership.

We have reviewed the limited information provided as it relates to the State Bar's proposed concept options generally relating to:

- Narrowing restrictions on the unauthorized practice of law to allow persons or businesses other than a lawyer or law firm to render legal services, provided they meet appropriate eligibility standards and comply with regulatory requirements;
- Permitting a nonlawyer to own or have a financial interest in a law practice; and
- Permitting lawyers to share fees with nonlawyers under certain circumstances and amending other attorney rules regarding advertising, solicitation, and the duty to competently provide legal services.

Our Section members understand that one of the driving forces behind these concept options is to evolve with the times and new technologies that are constantly being introduced which will, no doubt, affect the practice of law. However, our Section members do not support these proposed concept options as currently framed in large part due to the lack of specificity and skeletal nature of the options provided. Very few details have thus far been provided and, as such, it is difficult to truly assess what proposals are being made. Additionally, concerns have been raised about the use of new technologies – specifically, artificial intelligence and the potential for bias and distribution by AI – if an AI program is given biased information, it will incorporate this input and potentially produce biased results, which can run afoul of rules prohibiting harassment and discrimination.

In general, our Section members have found that nonlawyers engaging in the drafting of wills, trusts, transfers, and entity formations have harmed consumers. Further, even if an individual knowingly engages a nonlawyer to draft one of these documents, the effect it can have on a third party beneficiary of one of these documents can be detrimental to their interest, who will have no recourse. For those Section members who practice wills and trust litigation, they

have come to see that the underlying reason for much of this type of litigation is poorly drafted documents prepared by document preparation companies, i.e., nonlawyers.

## PRACTICE BY NONLAWYERS

The damage to consumers if nonlawyers are not properly regulated will be enormous. However, it is impossible to measure the potential damage at this time because no details have been provided regarding how nonlawyers will be licensed or regulated by the State Bar, or some other form of supervision (i.e., by members of the State Bar).

Further, even in filling out seemingly simple forms, issue spotting across areas of practice, legal research and legal synthesis are not something nonlawyers will easily be able to do without appropriate legal training. This could cause further harm to consumers.

Section Member Lyn Hinojosa comments: “. . . I thought the Bar was to be devoted to improving the level of the practice of law – this will lower the bar to the lowest common denominator of paralegals and lay people which will be a total disaster. I strongly disagree with all of these ridiculous proposals – can you imagine the legislature doing this to the practice of medicine? . . . [T]his will be the first step into the loss of the legal standard and competence. . . .”

The seminal case of Biakanja v. Irving (1958) 49 Cal.2d 647 is illustrative of the harm that could be caused to consumers in the trusts and estates context. In Biakanja, the decedent sought the services of a notary to draft a will leaving his estate to the decedent’s brother. Unfortunately, the notary failed to have the will properly attested, thereby causing the will to be invalid. As a result, the decedent’s brother only received one-eighth of the estate via intestacy laws instead of the entire estate, as he would have been entitled under the will. The Biakanja court stated that the “principal question is whether defendant [notary] was under a duty to exercise due care to protect plaintiff from injury and was liable for damages caused [decedent’s brother] by his negligence even though they were not in privity of contract.” Biakanja, supra, 49 Cal.2d 647, 648. The court ruled as follows:

“The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.

Here, the ‘end and aim’ of the transaction was to provide for the passing of [the decedent’s] estate to plaintiff. Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As [the decedent] died without revoking his will, plaintiff, but for defendant’s negligence, would have received all of the [decedent’s] estate, and the fact that she received only one-eighth of the estate was directly caused by defendant’s conduct.

Defendant undertook to provide for the formal disposition of [the decedent's] estate by drafting and supervising the execution of a will. This was an important transaction requiring specialized skill, and defendant clearly was not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of law, which is a misdemeanor in violation of section 6126 of the Business and Professions Code. Such conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action."

Id., at p. 650 (internal citations omitted).

With all of these potential problems, Section members want to know if nonlawyers will be required to carry malpractice insurance so that consumers have an avenue of recourse if they suffer harm as a result of nonlawyers' actions. Section Member Julia Birkel opines: "If the State Bar's proposals pass, it will just cloak the scammers with an air of legitimacy, and they will get away with even more, with no accountability. What happens if one of these non-lawyers gives legal advice that would subject a Member to legal discipline, disbarment, etc.? There's no such heavy risk of loss to non-lawyers, and no way to monitor them. I think the proposals presume good faith on the part of the non-lawyer advisors, owners, when more probably than not it is going to be the bad element of society that is granted easy access to scam vulnerable people."

Our Section members do not believe that permitting nonlawyers to own or have a financial interest in a law practice is a business model that will succeed. It is unlikely that nonlawyers who contribute capital to law firms will forego the ability to have any control over said law firm, as is understood to be the proposal.

Member Minh T. Nguyen has provided problematic illustrations: (1) an attorney and a tow truck owner team up such that the tow truck owner refers cases stemming from the crashes to which the tow truck owner is called to the lawyer who, in turn, gives some of the legal fees earned to the tow truck owner, who will also receive fees for the towing services provided; (2) an attorney and a doctor team up such that the doctor refers cases from his patients injured in car crashes to the lawyer who, in turn, gives legal fees to the doctor, who will also receive fees for medical services provided; and (3) an attorney and search engine team up so that the search engine directs all inquiries to attorney and they split fees.

Proponents argue that the concept options could increase access to justice for individuals who may struggle to afford lawyers. While it is true that pro per litigants are often at a disadvantage either vis-a-vis represented parties or in articulating their rights in an uncontested proceeding, there are services such as Bet Tzedek's and Public Counsel's self-help centers and clinics and the Los Angeles Superior Court's Court-Appointed Counsel program that serve to decrease the grade on the playing field. Moreover, our judges work enormously hard to give time to the pro pers and hear their arguments. Further, notwithstanding what many may perceive as a genuine concern about access to justice for unrepresented individuals, the proposed regulations are too vague and too rife with the possibility for abuse and may, in some instances, only exacerbate the problems.

## PRACTICE BY TRUST MILLS

Another area of concern is the potential development of trust mills. Over the years, the State Bar and Attorney General's office have undertaken litigation against trust mills that are more designed to sell products to seniors than to produce sound estate plans. Some years ago, the State Bar and the Attorney General's office reached a settlement with Jackson National Life where they were working with law firms producing a large number of trusts that were only nominally supervised by an attorney in order to sell annuities to the clients of the trust mill. These annuities were expensive and largely unneeded by the seniors receiving the services. In the resulting settlement, the Trusts and Estates Section of the State Bar received control of a fund designed to educate seniors receiving estate planning services and the kinds of products that should be avoided in most cases.

If law firms are joined with insurance companies, accounting firms, or investment advisors as owners or partial owners, the chances of abuse may rise substantially as non-legal products are urged on clients who are there to receive estate planning services and documentation. Because of past and continuing abuse, great care will be needed to avoid defrauding seniors by such firms or subjecting them to endless sales pressure to purchase other products.

## CONCLUSION

The responses received from the Section membership were largely opposed to or, at least, skeptical of the proposals by the State Bar. The potential harm to the consumer from poorly drafted documents and from pressure to purchase products other than wills, trusts, and related documents will be substantial. Obviously, the proposals are not detailed and require enormous thought, planning and regulation in order to avoid the worst consequences to the consumer. The likelihood is that the proposals will result in little net benefit to the client and could, in many cases, lead to extremely damaging results.