

## **NEW MEANS OF FINANCING TORT LAWSUITS AND LAW FIRMS: PRESENTATION OF JAMES FISCHER\***

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*[Speaker's Note: This presentation was made with a PowerPoint presentation. Rather than replicating the slides, I will describe them in the text.]*

JAMES FISCHER:

Thank you very much. It's a pleasure to be here. The topic today is new means of funding litigation, but I am going to talk a little bit more about new ways of practicing law.

*[The First Slide Depicts Burford, a Litigation Financing Company.]*

We have all heard about Burford, they are a litigation funder. To make it simple, litigation funders invest in lawsuits, they treat lawsuits like an asset, an asset to be exploited. You have heard enough about that from other speakers. That is all I have to say on traditional litigation financing.

*[The Second Slide Depicts ROSS Intelligence.]*

You hear a lot about artificial intelligence today. In the legal field, artificial intelligence involves the application of software to traditional legal tasks. Document review and E-Discovery are probably the most common and well-known applications of artificial intelligence to legal practice. ROSS Intelligence takes it to a new level. ROSS Intelligence uses computer

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software, artificial intelligence, to replicate lawyer tasks.<sup>1</sup> We have all heard about Big Blue competing on Jeopardy and defeating all human competitors. Artificial intelligence has similarly outwitted humans on a game called Go, which is a game I have never played, but I understand it is more difficult than chess. Think of Big Blue versus Perry Mason. This is what we are dealing with in this context. This is actually thinking like a lawyer, but at a level far beyond what humans can do at least in terms of linear thinking.

*[The Third Slide Depicts the British Columbia Civil Resolution Tribunal.]*

I confess I do not know how far artificial intelligence will take us in the field of law. At the present time, artificial intelligence is being used primarily within law firms. But here's something you may or may not have heard about. It's the Civil Resolution Tribunal, which was instituted in British Columbia, a number of years ago. All disputes of less than \$5,000, all motor vehicle accidents below \$50,000, all condominium disputes, and all societies and cooperative associations disputes must be adjudicated before the Civil Resolution Tribunal.<sup>2</sup> The system is administered by civil managers who are not lawyers. In a sense, lawyers have been entirely taken out of dispute resolution for these types of claims in British Columbia. Thomas Moore once identified Utopia as a place where there are no lawyers. Welcome to British Columbia, the new Utopia. If lawyers can be removed from the dispute resolution system, perhaps the next step is to remove humans and simply automate dispute resolution!

*[The Fourth Slide Depicts a Walmart Store.]*

We all know Walmart. Next to appliances, there's a lawyer. There actually are about a dozen Walmart stores in the United States that have onsite lawyer offices. Missouri, I think, is the primary state that has them. There are a few stores in Atlanta, Georgia, and a few stores in Texas. We are looking at the movement of lawyers out of traditional law offices and into places where they can more easily intersect with the average everyday client.

*[The Fifth Slide Depicts the California State Bar Task Force on Access to*

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1. ROSS, <https://www.rossintelligence.com> (last visited Oct. 24, 2020).

2. CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca> (last visited Oct. 23, 2020).

*Justice.]*<sup>3</sup>

All right, so what does this all mean for us here in California? As some of you may know, there is a Task Force that has proposed a number of changes to the California Rules of Professional Conduct. And to put this all in context, I thought I might spend a moment talking about the California State Bar and the Task Force. The current California Bar Board of Trustees is not your parents' board of trustees. To borrow from Abraham Lincoln, when I became a lawyer in the 1970s, it was a government of lawyers, by lawyers, for lawyers. All members of the board of trustees were elected by lawyers, by geographic location.

The current composition of the State Bar Board is that there are thirteen members (Trustees), seven of whom are lawyers and six of whom are public members (non-lawyers).<sup>4</sup> Insofar as the lawyer members are concerned, they are all appointed. And they are appointed by the California Supreme Court, the Governor, the Speaker of California assembly, and the Senate Rules Committee. And again, the lawyers are not the traditional lawyers who served on the board in the past. When I was a young lawyer, State Bar Board membership was composed of lawyers who were, within the legal community, well respected trial practitioners and transactional lawyers. Today, board membership is reserved for those lawyers who have come to the attention of politicians; not surprisingly, these lawyer board members tend to be politically active. Of course, this is a generalization, but not one I think is wide of the mark. But, if I am correct, rather than as in the past when board membership percolated up from within the community of lawyers, Board membership now is crammed down from the state political community.

The Task Force is composed of ten public members, nine lawyers, and two judges. What I thought was very interesting, the non-lawyer majority exists to ensure that the Task Force focuses on protecting the interest of the public. Now think of that. The State Bar says we need non-lawyers to protect the interests of the public. Traditionally, lawyers were thought, at least by lawyers, to be able to do that. Of course, not everyone thought lawyers were capable of doing that. The difference is that the view that lawyers cannot protect the public interest is the new normal. So, when you

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3. For further information regarding the Task Force's purpose, see THE STATE BAR OF CALIFORNIA, *Task Force on Access Through Innovation of Legal Services*, <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Oct. 23, 2020).

4. See *2020-21 Board of Trustees: Roster*, THE STATE BAR OF CALIFORNIA, <https://www.calbar.ca.gov/About-Us/Who-We-Are/Board-of-Trustees/Roster> (last visited Oct. 23, 2020).

look at the likelihood that proposals could come down that will be inconsistent with the traditional interests of the bar, look at who is going to be making the decisions. The State Bar Board of Trustees has only a slight majority of lawyer members and lawyers are a minority among the Task Force members.

Another panel member mentioned the overwhelming negative response to the proposals that were put out to the Task Force. That overwhelming negative response was by lawyers, not members of the general public. So the question is: how influential are these negative comments going to be when you are dealing with a Task Force and a State Bar Board of Trustees that is not looking out for the interest of lawyers, but is looking out for the interests of the public, as defined by the member of the Task Force and the Board?

*[The Sixth Slide Outlines a Task Force Proposal Regarding Law Firm Ownership]*

Here is the first Task Force proposal that I'm going to talk about. This proposal deals with professional rules governing who can own a law firm in California. The traditional rule was that only lawyers could own law firms.<sup>5</sup> Alternative One is modeled on a proposal that was made by the ABA Commission on Ethics 20/20. The Ethics 20/20 proposal would have allowed limited non-lawyers ownership of law firms.<sup>6</sup> The Ethics 20/20 proposal on this topic went nowhere;<sup>7</sup> it was not even proposed to the House of Delegates for consideration. The stated reason given was that the Commission had done some research and the Commission did not think the time was ready. What that really meant was there was a negative response from the lawyers, who comprise the House of Delegates and if the proposal for non-lawyer ownership was tendered, it would be defeated. So, the Commission made a tactical decision to go with proposals they thought would win, and dump those that would not be well received by the lawyers who comprised the House of Delegates.

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5. See MODEL RULES OF PROF'L CONDUCT r. 5.4(d) (AM. BAR ASS'N 2018); see also CAL. RULES OF PROF'L CONDUCT r. 5.4 (2018).

6. See Comm'n on Ethics 20/20, *For Comment: Discussion Paper on Alternative Law Practice Structures*, ABA (Dec. 2, 2011), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-ethics2020-discussion\\_draft-alps.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf) (discussing proposals to liberalize profit-sharing arrangements between lawyers and nonlawyers).

7. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, ABA JOURNAL: ETHICS (June 1, 2012 7:50 AM), [https://www.abajournal.com/magazine/article/summer\\_job\\_ethics\\_20\\_20\\_commission\\_shelves\\_nonlawyer\\_ownership](https://www.abajournal.com/magazine/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership).

So what does Alternative One provide? The proposed Rule first says a law firm's sole purpose must be to provide legal service to clients.<sup>8</sup> This is designed to dampen the fear that if law firms were opened up to non-lawyer ownership, all lawyers would soon be governed by the big accounting firms. So, law firms in California still must be devoted to providing legal services, not what is euphemistically referred to as providing a "multi-disciplinary practice." The non-lawyer owners must provide services that assist the lawyer in providing legal services; the non-lawyer owners must have no power to direct or control the professional judgment of the lawyer.<sup>9</sup>

The non-lawyer owners must state in writing that they have read and understand the Rules of Professional Conduct and other laws, and agree in writing to undertake to conform their conduct to the rules.<sup>10</sup> I see out on the floor a number of former students in my Legal Professions class, who stayed with me for about forty-two hours of instruction, took a couple of exams, and they can all attest that they all now understand the Rules of Professional Conduct. I say this facetiously because my students understand that the Rules of Professional Conduct constitute an area of legal complexity that is difficult for lawyers to master. It is simply nonsensical to require non-lawyers to certify to what most lawyers could not certify to—understanding the Rules of Professional Conduct.

So, what is the purpose of this proposed rule? The primary purpose of this rule is to allow organizations like Legal Zoom and Rocket Lawyer to be able to practice in the state of California by partnering with lawyers in firms that provide legal assistance to prospective clients. Note, there is no requirement in the proposed rule that lawyers be of majority ownership of the law firm. So, you could have 99% ownership by non-lawyers and token ownership by the lawyer, and you would be able to provide legal services in California under this proposed rule.

*[The Seventh Slide is a Variation of the Non-Lawyer Ownership Proposal.]*

I am not quite sure why the Task Force came up with two different proposals and framed them as Alternatives. The Task Force presents these proposals as alternatives, but it seems to me that you can have both. And it may turn out that we'll have both. The Task Force was supposed to prepare a report to the State Bar Board by December 3, 2019, but the report was

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8. Task Force on Access Through Innovation of Legal Services—Subcommittee on Rules and Ethics Opinions, *Adoption of Proposed Rule 5.4 [Alternative 1]*, The State Bar of California (June 18, 2019).

9. *Id.*

10. *Id.*

deferred, and the report is not going to come from the Task Force until March 31, 2020. This proposal (Alternative Two) would pretty much abolish the ban on fee-splitting in California.<sup>11</sup> This proposal would allow a lawyer or a law firm to agree to share a fee with any person or organization not authorized to practice law. Any fee split would be subject to the requirement that the client has to give informed consent in writing.<sup>12</sup>

What I find interesting about this proposal is that if there is a fee-split, the client has to give informed consent, but if we have non-lawyer ownership of the firm, the client can be kept completely in the dark about the arrangement. I am not sure why, from the client's point of view, it would be different if you have a non-lawyer owner, or you are splitting the fee with a non-lawyer. It seems to me ultimately that the non-lawyer is going to realize a portion of the fee in either case. So again, I do not know if this is simply because the Task Force's proposals are following in the steps of the traditional rules where in dealing with fee splitting among lawyers there is an informed consent requirement that was simply carried forward. On the other hand, with respect to non-lawyer ownership, that was simply forbidden, so there was no "informed consent" requirement to carry forward. We really have little detail as to the internal thinking of the Task Force as to the proposal, so, I confess, this is raw speculation on my part as to the absence of the "informed consent" requirement with respect to non-lawyer ownership.

So, what this proposal essentially would do is allow open-ended fee-splitting. How far it would go is a little bit unclear. It would clearly enable an alternative business provider to partner with a lawyer and actually directly allocate the fee. Burford, or any litigation finance company, could advance fees to a lawyer or law firm and take a portion of the fee as compensation for the advancement.

What is the concern here? Why are lawyers almost in unanimous opposition to the proposed rule? Traditionally, these ideas of non-lawyer ownership and fee-splitting have been thought to be harmful to the ability of the lawyer to provide independent professional judgment to the client. If you think about it, it is a form of protection against conflicts of interests. Most conflicts of interests under the Rules of Professional Conduct, deal with conflicts that are subject to waiver by the client.<sup>13</sup> These types of

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11. Task Force on Access Through Innovation of Legal Services—Subcommittee on Rules and Ethics Opinions, *Adoption of Proposed Rule 5.4 [Alternative 2]*, The State Bar of California (June 19, 2019).

12. *Id.*

13. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT r. 1.7(b), 1.8.1, 1.8.6 (2018).

conflicts, non-lawyer ownership,<sup>14</sup> fee-splitting with non-lawyers,<sup>15</sup> have essentially been thought of by the bar as so onerous, so detrimental to the ability of the lawyer to represent a client, that in fact we have to create a *cordon sanitaire* around the lawyer, so that no one, not even the client, can agree to permit it.

Thank you.

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14. CAL. RULES OF PROF'L CONDUCT r. 5.4(d) (2018).

15. *Id.* r. 5.4(a).