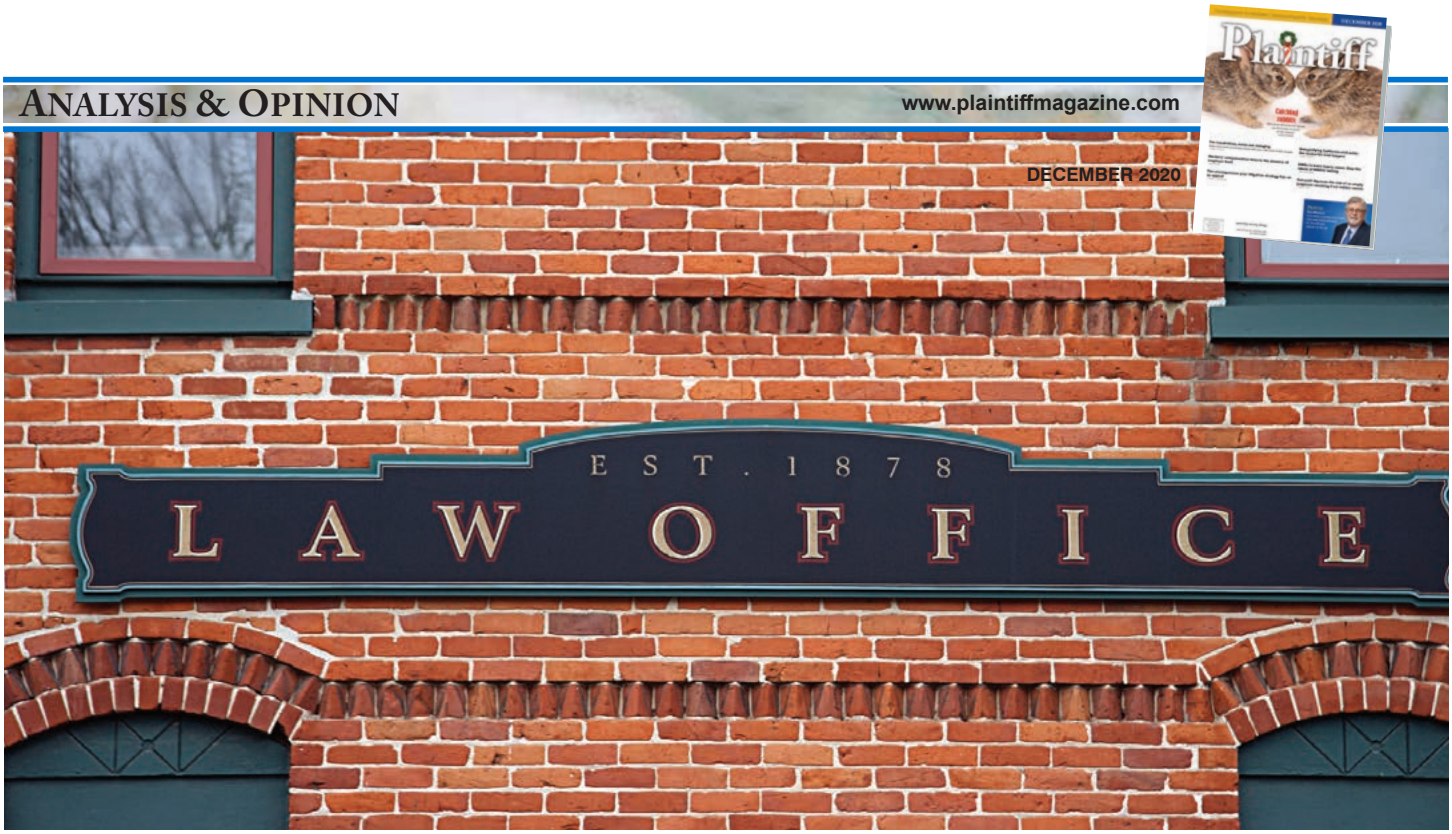

Non-attorneys practicing law: An about-face with no rational basis

The due-process implications of non-lawyer representation and fee sharing in California

By Olivier Taillieu and Jennifer R. Bagosy

For decades, California's statutes, cases, and ethics rules governing the practice of law have prioritized the protection of the public above all else. For example, California law has some of the most stringent attorney-client confidentiality provisions in the United States. Moreover, although California allows non-lawyer professionals to represent clients in workers' compensation cases, the state's experiment with non-attorney fee sharing with such professionals ended in 1991 upon discovery of rampant fraud.

Now, suddenly, the State Bar of California has reversed course. Multiple working groups within the Bar are exploring sweeping changes to law and regulation to open the floodgates to allow non-attorneys to practice law, to invest in law firms, and even to permit artificial intelligence to provide legal advice. The purported goal of these unprecedented changes to California's legal landscape is to improve access to legal services. Yet rather than invest in the expansion of legal-aid networks, or requiring its members to perform a set amount of pro bono work as part of their licensure, the Bar is seeking to destroy the financial and ethical guardrails that protect clients.

These sweeping, radical changes may dilute the quality of legal services to clients and open the door to massive conflicts of interest and ethical violations. In addition, they may affect the due process rights of licensed attorneys, who will see the value of their licenses reduced due to the state's actions. Attorneys who have paid hefty sums to attend law school and study for and take the bar examination will face competition from non-law school-trained professionals who can perform the same tasks at a much lower cost. Attorneys have a constitutionally protectible interest in their professional licenses. Therefore, this article explores the potential substantive and procedural due process violations that could result from the State Bar's plans.

The California Bar's efforts to "remove barriers" to legal services

On July 20, 2018, the State Bar's Board of Trustees directed the formation of the Task Force on Access Through Innovation of Legal Services (ATILS), after considering a report by a prominent advocate of opening legal markets. (See generally, The State Bar of California website, www.calbar.ca.gov; William D. Henderson. "Legal Market Landscape Report," Commissioned by the State Bar

of California, July 2018.) ATILS was "charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models." (See ATILS's website, http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services.) The Henderson report, quoted on ATILS's website, identifies "ethics rules and the unauthorized practice of law" as creating a "prohibition" that "limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market." Thus, the report that led to ATILS's formation advocates "modifying the ethics rules to facilitate this close collaboration" of lawyers and nonlawyers in order to "accelerate the development of one-to-many productized legal solutions…."

ATILS was charged with evaluating and identifying potential changes to: (1) prohibitions against unauthorized practice of law; (2) restrictions on use of technology and artificial intelligence to provide legal services; (3) restrictions on lawyer advertising; (4) rules against fee sharing with nonlawyers – all while still protecting the public. ATILS issued a final report on March 6, 2020, recommending changes to laws and rules and formation of groups to evaluate these. (http://www.calbar.ca.gov/Portals/0/documents/publicComment/ATILS-Final-Report.pdf.)

On January 24, 2020, The State Bar directed the formation of a California Paraprofessional Working Group to make recommendations for a new paraprofessional licensure and certification program. (California Paraprofessional Working Group website, http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/ California-Paraprofessional-Program- Working-Group.) This working group must give its final report by July 31, 2021. It has already had numerous meetings this year, beginning on April 21, 2020, which included the formation of subcommittees to explore paraprofessional certification in the areas of family law, employment law, and consumer debt.

The State Bar Board of Trustees also formed the Closing the Justice Gap Working Group in early 2020 to consider developing a "regulatory sandbox" and to evaluate amendments to California Rules of Professional Conduct Rule 5.4 regarding fee sharing, lawyer advertising and solicitation rules, and ATILS's report. (Closing the Justice Gap Working Group website, http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group.) Although the Closing the Justice Gap Working Group has had no public meetings yet, it is expected to submit its recommendations by September 2022.

The Fourteenth Amendment and substantive due process

Under the Fourteenth Amendment to the United States Constitution, "an individual has a legitimate property interest in his or her professional license." (*Gallo v. United States Dist. Court* (9th Cir. 2003) 349 F.3d 1169, 1179.) "[A] professional license, once conferred, constitutes an entitlement subject to constitutional protection." (*Id.* at 1179.) The federal Constitutional provision that provides this protection is the Due Process Clause of the Fourteenth Amendment. There are two types of due process: procedural and substantive. Substantive due process prevents the government from interfering with rights "implicit in the concept of ordered liberty…." (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 458.) Procedural due process means that government action affecting an individual's rights "must still be implemented in a fair manner." (*Ibid.*)

States have the power to legislate changes to licensing requirements and to revoke the licenses of professionals who fail to follow them. (See, e.g., *Dittman v. California* (9th Cir. 1999) 191 F.3d 1020, 1030-31.) But a California professional whose license is impacted by the law may challenge it on substantive due process grounds. The Ninth Circuit has held "that a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis." (*Engquist v. Oregon Dept. of Agriculture* (9th Cir. 2007) 478 F.3d 985.) "Substantive due process protects a liberty or property interest in pursuing the 'common occupations or professions of life.'" (*Lebbos v. Judges of Superior Court, Santa Clara County* (9th Cir. 1989) 883 F.2d 810,)

There are levels of substantive due process review that correspond to the importance of the right at issue. While the Ninth Circuit recognizes a right to occupational liberty, that right is not a "fundamental" one. (*Lupert v. California State Bar* (9th Cir. 1985) 761 F.2d 1325, 1328.) As such, "rational basis review" applies to licensing-related substantive due process claims. (See *Cornwell v. Hamilton* (S.D. Cal. 1999) 80 F. Supp. 2d 1101, 1105.) *Cornwell*, 80 F.Supp.2d at 1105.)

The rational-basis test asks two questions: (1) Is there a legitimate government interest? (2) Is the action taken by the government rationally related to that legitimate interest? (*Cornwell* 80 F. Supp. 2d at 1105.) "Generally, the constitutional guaranty of substantive due process protects against arbitrary legislative action; it requires legislation not to be unreasonable, arbitrary or capricious but to have a real and substantial relation to the object sought to be attained…." (*Barri*, 28 Cal.App.5th at 458.)

Professional licensing and rational basis review

Rational-basis review gives great deference to governments and their interests. "There is a 'long-standing rule' in the Ninth Circuit that 'any conceivable basis' will justify the constitutionality of a licensing scheme not affecting fundamental rights." (*West v. Bailey*, No. 11CV1760-MMA(POR), 2012 WL 9993301, at *4 (Mar. 23, 2012) (quoting *Gallo v. U.S. Dist. Court For Dist. of Arizona* (9th Cir. 2003) 349 F.3d 1169, 1179).

However, due process cases pertaining to professional licenses typically assert that the licensing rules are *too stringent* and thus effectively bar them from pursuing their occupation. Such cases face an uphill battle because "[a] state can require *high standards* of qualification when regulating a profession, but any qualification *must have a rational connection with the applicant's fitness or capacity* to engage in the chosen profession." (See, e.g., *Cornwell*, 80 F. Supp.2d at 1105 (emphasis added).)

Indeed, "courts throughout the country consistently uphold the constitutionality of statutes that withhold or revoke occupational licenses for failure to meet or comply with conditions imposed by the state *for societal protection*." (*West*, 2012 WL 9993301, at *5 (S.D. Cal. Mar. 23, 2012) (emphasis added) citing, e.g., *Dittman v. California* (9th Cir. 1999) 191 F.3d 1020, 1030-31); *Abramson v. Gonzalez* (11th Cir. 1992) 949 F.2d 1567, 1580-81 [upholding statute requiring professionals to have state license before holding themselves out as psychologists].) Statutes that require or allow revocation of professional licenses after a licensee has been convicted of a crime routinely pass constitutional muster. (See, e.g., *Hawker v. New York* (1898) 170 U.S. 189, 18 S.Ct. 573, [upholding statute forbidding felons from practicing medicine after discussing general power of states to regulate professions, including requiring good character and determining what evidences a lack of good character].)

The current situation appears to be unique because the Bar is contemplating a wholesale *relaxing* of standards, rather than tightening them. California attorneys have a property interest in their Bar licenses, so whether they can successfully claim that that interest has been harmed will depend largely upon the nature of the changes to law and rules that the state ultimately enacts.

Can the California Bar's reversal of priorities be a "legitimate government interest"?

California laws and rules governing the practice of law have, historically, been fiercely protective of clients. California's attorney-client confidentiality rules are among the most stringent in the country. (See San Diego County Bar Association, "Ethics in Brief." January 16, 2017; *see also* California Rule of Professional Conduct Rule 1.6; California Business & Professions Code § 6068, subd. (e).

California attorneys may not share fees with non-lawyers except in very specific circumstances (e.g., payments after an attorneys' death and retirement plans). (California Rule of Professional Conduct Rule 1-320.) At one time, the state did allow fee-sharing with non-attorneys as to unlicensed representatives who represented workers before the Workers' Compensation Appeals Board. Although unlicensed persons had been allowed to appear before the WCAB since 1917, in 1991, the legislature amended the Labor Code to forbid the WCAB to award attorney fees to lay representatives, although they were allowed to continue representing workers. (*Longval v. Workers' Comp. Appeals Bd*. (1996) 51 Cal.App.4th 792, 798, citing Labor Code, §§ 4903, subd. (a), 5710, subd. (b)(4).) The court rejected a substantive due process challenge, finding that the law was rationally related to the state's legitimate interest in preventing fraud.

Removing barriers to legal services

Now, the California Bar has decided that decades of prioritizing client protection should go by the wayside, and the ethical and financial safeguards to the integrity of the legal profession are "barriers" to be "removed," purportedly to allow more people to access legal services. However, the public statements regarding these goals have at least given lip service to the need to maintain the quality of legal services for clients.

Any rational-basis review would therefore need to start by asking, what are the government's interests? The primary stated interest is to expand the public's access to legal services. The secondary stated interest is to do so while maintaining public protections. (See, e.g., California Paraprofessional Program Working Group website, *supra* ["In carrying out this charge, the working group will balance the dual goals of ensuring public protection and increasing access to legal services"].)

Because the second is already an established legitimate government interest, the question then becomes, is the primary goal of expanding access to legal services legitimate? Any challenger would face an uphill battle here, as governments are afforded significant deference in determining what constitutes a legitimate interest. Moreover, it would be hard to argue that "improving access to justice," at least in the abstract, is not legitimate.

The plan to "remove barriers" to unlicensed law practice

Is California's plan to "remove barriers" to unlicensed law practice, fee-sharing with non-attorneys, and artificial intelligence giving legal advice "rationally related" to the interest of expanding access to legal services?

The more interesting question is whether the State Bar's action items are "reasonably related" to the stated interests. That will likely be a closer question, although it will depend on what changes are ultimately implemented. Substantive due process "'requires legislation not to be 'unreasonable, arbitrary or capricious' but to have 'a real and substantial relation to the object sought to be attained.'" (*Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 800.)

Here, if the purported goal is *solely* to expand access to legal services, the paraprofessional program and the

planned removal of rules against fee-sharing might accomplish that goal. It is worth noting, however, that the only other state to try a paraprofessional program similar to the one California is considering, Washington, phased out their program in August 2020 due to high cost and limited interest. (See Washington State Bar Association's website for Limited License Legal Technicians, https://wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians.) In light of that, a question a court might have to decide is whether attempting the same type of program is "unreasonable, arbitrary, or capricious" – or merely unlikely to succeed.

However, if the government interest is a dual one – to increase access to legal services *while* ensuring client protection and preserving the integrity of the profession – the equation changes. Historically, rules and laws strengthening the prohibitions on fee-sharing with non-lawyers have resisted substantive due process challenges precisely because these strict rules bear a reasonable relationship to the legitimate interests of protecting clients and the profession. Dismantling these requirements, therefore, cannot reasonably be expected to serve the same interest.

Again, however, the likelihood of success of a substantive due process challenge brought by an attorney whose professional license is in danger of becoming devalued would depend upon the specifics of the new laws and rules once they are enacted.

Procedural due process?

If these radical changes are enacted during the COVID-19 pandemic, is there a lack of procedural due process? A final avenue for attorneys to challenge the impending changes may be to invoke the *procedural* due process protections of the Fourteenth Amendment. As members of the California State Bar, attorneys are entitled to participate in a meaningful way by attending meetings and commenting on the new proposed rules. According to *Barri*, 28 Cal.App.5th at 465-66, "what due process requires under specific circumstances varies, as not every context to which the right []…. applies requires the same procedure. The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner."

Here, the final ATILS report was issued on March 6, 2020, approximately two weeks before state and local COVID-19 lockdowns began. Since then, the Paraprofessional Working Group has had numerous meetings discussing the parameters of expanding the practice of law to nonlawyer professionals. It appears the majority of their meetings have been available to view via Zoom and public comment has been received online. This method of communication is adequate for many, but it may not be for all attorneys in all parts of the state, if, for example, they had insufficient network access during part or all of the pandemic to participate.

Moreover, the world, and particularly the United States, has been in the throes of an unprecedented global pandemic for the last nine months. Everyone has been affected. As such, this is not a "meaningful time" to ensure attorneys' procedural due process rights to a hearing. Millions of Americans have had the Coronavirus, including more than 800,000 Californians as of the beginning of October. Over 200,000 lives have been lost, and many more lives have been upended, including through COVID itself, the resulting unemployment, or the unexpected homeschooling of children. This is a time when lawyers are reinventing staples of the profession, conducting virtual mediations and depositions, and working to turn physical offices into paperless, remote ones. There is no currently known endpoint to this upheaval. As a result, if the Paraprofessional Working Group completes its work by the middle of next year, attorneys and the public may have been deprived of their due process right to be heard, by virtue of the entire process taking place during the COVID-19 pandemic.

Ironically, it appears that the Bar's new focus is to dilute its members' economic interests at a time when thousands of its members are finding themselves unemployed. Regardless of the constitutionality of its newfound pursuit, promoted and encouraged by the technology industry, this new direction is simply unwise and in bad taste. The Bar would be wise to remember that technology companies – whose business models of "moving fast and breaking things" rely on violating California law (see, Uber, Lyft, Facebook, etc.) – have never had their consumers' best interests in mind. In that world, only market share and money talk; clients come second. That is fundamentally at odds with the practice of law and the types of arrangements the Bar is currently contemplating should be fought by it, not invited through the front door.


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