

# Q&A



## LAWYER LIABILITY AND ETHICS

### California Reconsiders Ethical Rules and Legal Business Models



By **Joseph A. Brophy**,  
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In the past, this column has noted that the ethical rules are often an impediment to allowing normal people to get the legal help they need at a price they can

afford. The federal courts' hostility to attorneys ghostwriting for pro se litigants, and the prohibition on fee splitting, which, in turn, prevents attorneys from providing services to clients through online legal marketplaces are just two examples. However, California is taking a hard look at the issue of access to justice as it relates to the delivery of legal services, with potentially important ethical ramifications. For better or worse, California's ideas have a way of spreading to other states. Attention should be paid.

The Board of Trustees for the State Bar of California asked Professor William Henderson of Indiana University to conduct a landscape analysis of the current state of the legal services market, including new technologies and business models used to deliver those services. Released in July 2018, the report's (and the Trustees') purpose was to aid in enhancing access to justice with an eye towards making regulatory changes to allow new business models for delivering legal services.

The legal profession is divided into two segments, one serving individuals and the other serving corporations. Professor Henderson shows that individuals spent \$7 billion less on legal services in 2012 compared to 2007, which is part of an overall decrease that began back in the 1970s. The decrease is the result of the individuals' decision to represent themselves or forego legal remedies altogether. The decrease in revenue noted by Professor Henderson is bad for the legal profession, particularly solo practitioners and smaller firms who are more likely to represent individuals. Pro se litigants are bad for everyone, especially pro se litigants. And having large numbers of injured people who evidently feel (in many cases probably correctly) that they have no recourse reflects poorly on the justice system.

Professor Henderson believes that the reason for the decline in the individual client market is lagging legal productivity. As society becomes wealthier through better and cheaper good and services, human-intensive fields such as law become relatively

more expensive. The legal market, however, is constrained by the ethics rules with regard to non-lawyer ownership of law firms, the unauthorized practice of law, and the prohibition on fee splitting. Solo practitioners and partners at smaller law firms, for example, spend significant amounts of time on business development and administration, which in turn drives up their hourly rate in order to allow them to cover their overhead. A 2017 study by Clio estimated that small firm lawyers spend only 2.6 hours per day on billable work. Avvo and LegalZoom have marketing services for lawyers that provide a potential solution to this problem, but those services run the risk of violating the prohibition of fee splitting. Thus, as a sizable portion of the public struggles to afford a lawyer, and a sizable portion of the bar struggles to find sufficient fee-paying client work.

Professor Henderson recommends that legal regulators need to seriously evaluate whether the consumer protection benefits of these ethics rules are worth the cost. As an example, Avvo and LegalZoom have had a number of run-ins with state regulators and practicing lawyers regarding allegations of the unauthorized practice of law (Rule 5.5, LegalZoom), impermissible fee-splitting (Rule 5.4, LegalZoom and Avvo) and payment of improper referral fees (Rules 7.2-7.3, Avvo). What all of these opinions have in common is a careful textual reading of the ethical rules that cautions against activities that could be construed as a violation of the existing language. What is missing, according to Professor Henderson, is consideration of whether consumers are made better or worse off by technical readings of the rules, or how the current legal market is serving consumers. While it is potentially harmful for a lawyer's professional judgment to be affected by a fee splitting arrangement, there is also very serious harm in having ordinary citizens increasingly unable to afford traditional legal services.

In response to Professor Henderson's report, the State Bar of California formed a task force to examine the issues raised by the report, including but not limited to allowing outside ownership of law firms. The task force's work is not expected to be concluded until 2020. ■

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### Judge Joseph C. Welty Appointed Presiding Judge for Maricopa County



**Joseph C. Welty**

The Arizona Supreme Court appointed Judge Joseph C. Welty to the post of Presiding Judge of the Judicial Branch in Maricopa County, the fourth largest trial court in the United States. The appointment is expected to take effect on August 29, 2019 – the date current Presiding Judge Janet Barton has announced for her retirement. Judge Barton has served as Maricopa County's Presiding Judge since July of 2015. The Presiding Judge has administrative authority over all courts, judicial officers, and court employees in Maricopa County.

Judge Welty has served the Superior Court in Maricopa County since his appointment to the bench in 2007, where he has overseen cases in the family, criminal, juvenile, and civil case types. In 2012, Judge Welty was appointed as the Presiding Criminal Department Judge in Maricopa County, where he oversaw the work of more than 50 judges and commissioners. This role likewise involved a justice system liaison function with law enforcement, prosecutors, and defense counsel, the Clerk of Court and addition to court staff. Judge Welty has served as Associate Presiding Judge of the Judicial Branch in Maricopa County since 2015, working closely with the Presiding Judge on matters of court management. Once his term takes effect, Judge Welty will serve as Presiding Judge until June 30, 2022.

"It's an honor to be selected as the next Presiding Judge for the fourth largest trial court in the Country," Judge Welty said. "The Judicial Branch in Maricopa County is known throughout the country as a center of innovation in justice. Couple that with the more than 3,000 dedicated judicial officers, administration and probation departments,

and it's truly humbling to have the opportunity to lead the Branch in our constant pursuit of award-winning advancements in service to the citizens of Maricopa County."

Presiding Judges in Arizona take on extra duties and serve as the chief executive officer of the courts in the county, overseeing all aspects of court business, including financial management. The Presiding Judge oversees case assignments and helps set the court's strategic agenda. They also monitor the performance of the courts to ensure that cases are processed in a timely manner. Judge Welty will receive no additional compensation for his duties and responsibilities as Presiding Judge.

Before joining the Superior Court, Judge Welty served 16 years as an Assistant United States Attorney in Phoenix. In his federal practice, Judge Welty managed the work of numerous lawyers and office staff as both the head of the Violent Crime Section and as the Chief of the National Security Section.

Since joining the bench, Judge Welty has contributed in numerous court leadership and educational roles. Judge Welty chaired the Task Force that restyled the entire Criminal Rules of Procedure in 2017 and currently chairs the Task Force reviewing Criminal Rule 32 on postconviction relief. Judge Welty co-chaired the Supreme Court's New Judge Orientation program for General Jurisdiction Courts for three years, and has taught criminal law in that program for several years. Judge Welty's other committee work includes the Committee on Victims in the Court, the Capital Case Review Committee, the Commission on Technology, and the Committee on Superior Court.

Judge Welty graduated from Georgetown University Law Center and received his undergraduate degree from Loyola Marymount University. ■

**Lawyer Coach Pat Snyder from Ohio presented on the importance of self-compassion. She reminded us that it is vital to cut yourself some slack every once in a while, which will only help you long term in high-stress work environments.**



**Hera Hub offered meditation with Toni Brucato-Kobet after the CLE.**

## MARCH CALENDAR

Check out [maricopabar.org/events](http://maricopabar.org/events) and watch your inbox for the latest updates on dates, times, and locations for events and meetings.