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ISBA Leadership Continues Association's Opposition to Greater Non-Lawyer Involvement in Delivery of Legal Services

BY RICHARD L. THIES & JOHN E. THIES

Aside from being two halves of the first and only parent/child combination of Illinois State Bar Association presidents (Dick in 1986-87 and John in 2012-13), another trait we have in common from our bar leadership is the respective roles we have played in continuing the ISBA's tradition of opposing greater non-lawyer involvement in the delivery of legal service. With this background, we were heartened to see the strong position taken by our current ISBA president, Dennis J. Orsey, and the Board of Governors against the Report of the Chicago Bar Association/ Chicago Bar Foundation's Task Force on the Sustainable Practice of Law & Innovation. This report included a number of recommendations that, if enacted, would be detrimental to the client interest and a threat to lawyers everywhere who, day in and day out, engage in the ethical practice of law to the great benefit of our smooth flowing justice system.

The report proposes radical, across-the-board change inconsistent with ISBA policy. Changes to our ethics rules can have broad consequences for the entire profession, including the portions which are operating productively, serving many clients and lawyers well.

Our ethics rules apply to all Illinois lawyers, no matter what type of practice they have. When it comes to these rules, one size needs to fit all.

The proposals that trouble us the most are those that come right out of the playbook of those whose main interest is the *bottom line*, without systems of ethics remotely similar to our own, with little care about the client interest or *truly* expanding access to justice. Let us be clear: we are not saying that this is the motivation of the leadership of CBA/CBF; but there's no question that these proposals track what we've seen from the legal service "profiteers" who really don't care about access to justice and the client interest. That tells us something.

Changes to Rule 5.4. Our Association has strongly opposed changes to Rule 5.4 that would permit non-lawyer ownership of law firms or relax fee-splitting rules, both of which would enable greater influence by non-lawyers in the operation of law firms, or in the handling of particular client matters. We need to be wary of threats to lawyer independence, including proposals that run the risk of damaging the viability of large and small firms alike. Yet, the CBA/CBF report states that restrictions on non-lawyer ownership should be reconsidered, including the prospect that lawyers and other professionals would be able to be "equal" partners. This is a redux of the Multi-Disciplinary Practice (MDP) proposals resoundingly rejected years ago.

Recognizing a new licensed paralegal model. This CBA/CBF proposal would allow paralegals to go to court by themselves in a number of areas including "family law, evictions and consumer debt matters below a certain threshold"—for "routine preliminary court appearances." That's defined to include all matters occurring before the matter goes to trial. To us, this idea falls far short of the standard that any reforms should help meet client needs while protecting the client interest. For example, most lawyers would not want to allow a paralegal to argue a 2-615 or summary judgment motion (think of the malpractice concerns). And, even if they did, it's hard to imagine clients benefiting given the complexity of these areas of the law where so much is often at stake. These clients need real lawyers!

Frankly, we think this proposal is simply an attempt to soften the widely scorned (unsupervised) limited license legal technician (LLLT) model we discuss below. To the report's credit, it does

note that, in the case of the LLLT idea, "[t]here has been scant data to support the proposition that the creation of a new independent categories of providers in some other jurisdictions have had a meaningful impact on addressing the access to justice issue."

Adopting a clearer practice of law definition. The report includes a revised definition of the practice of law. While we are not opposed to reviewing the definition of the practice of law, we are concerned that any changes to the status quo may result in an increased threat to the client interest. There are certainly those outside our profession that would like to see the definition of the practice of law narrowed as much as possible such that their influence and control over the delivery of legal service may be expanded (to the benefit of their bottom lines, but to the harm of clients and the legal profession). Accordingly, any review of this question should be systematic and involve input from all corners of our profession.

Establishing approved (or certified) legal technology providers. Founded in part on the recommendations to eliminate the prohibition on fee sharing with nonlawyers is the proposed establishment of "Approved (or Certified) Legal Technology Providers." Such providers are envisioned to provide "one too many" legal products and services. This recommended concept—characterized as a form of limited scope representation—has broad significance and has the potential to substantially alter the provision of legal services and the practice of law. The concept is not well defined, including the recommendation that the details of regulating such providers be deferred to an unspecified board (presumably, although not expressly stated, echoing the "regulatory sandboxes" of Utah and Arizona). We are highly suspicious of this approach, particularly in the absence of more specific analysis and discussion. It has the potential to greatly consolidate the providers of legal services—this is a problem on a lot of fronts (it will eliminate lots of traditional providers; the anticipated "warnings" to consumers won't save this misguided concept).

The ISBA's response. As has been the case with past ISBA Boards and Assemblies, it falls to the current crop of leaders to be educated about these points, and to think strategically about the best way to represent the interest of ISBA members and achieve the great mission of the Association. We are pleased to see that this is what our ISBA leaders are doing.

The CBA/CBF Task Force Report was presented to the Illinois Supreme Court in early October 2020. But, thanks to the hard work of ISBA officers, the Board of Governors and numerous section councils that had vetted an earlier draft, the supreme court did not receive it in a vacuum. The product of our Association's thorough review was President Orsey's strong communication to task force leaders—also provided to the court, which left no doubt as to the serious problems with a number of the report's recommendations. President Orsey noted that, while the ISBA "shares the Task Force's goals of working toward a more sustainable legal profession, a better and more accessible justice system, and improved system of access to legal help for low- and moderate-income consumers and small businesses—the express focus of the Report . . . [it] does not support the overwhelming majority of the recommendations set forth in the Report. The ISBA considers the recommendations to be flawed in many respects and, if adopted, will be ultimately harmful to the public and the profession."

In general terms, President Orsey noted the absence of data supporting the Task Force's recommendations, the lack of meaningful detail and the inclusion of overbroad recommendations. He called attention to the potential for harm to the public and profession that could follow, and identified available information that should have been considered, but which was omitted. He then reviewed each of the particular recommendations, noting specific comments generated by various ISBA member groups and other leaders.

The ISBA as a leader in these areas. To be sure, the ISBA has been at the forefront of exploring innovations to better meet legal needs. First, responsible bar leaders should *always* be open to exploring innovations in the practice of law which lead to improving our ability to meet legal needs. We ***all*** care about the sustainability of the practice of law, not as an end to itself, but as a *means* to an end—the end being the ethical and effective delivery of legal service to the public. The client interest is paramount. We don't think it's an overstatement to say that a commitment to this is engrained in the DNA of ISBA members.

There is a long list of measures the ISBA has undertaken which have made it easier for lawyers to practice cost-effectively and which have broadened access to justice. We can always do more, but there is a reason why the ISBA is one of the preeminent state bar associations in the country. We haven't *just* been protecting the interest of lawyers; but also, the interest of clients.

As leaders in the profession, it has always been important to ensure that the innovations we consider—especially when they involve changes to our Rules of Professional Conduct—are both:

- likely to achieve what they are *trying* to achieve; and
- likely to avoid unintended consequences such as threatening the independence of the legal profession, or compromising client protection.

We should also be cautious about change that's rooted in dubious predicates, such as:

- the notion that lawyers could serve a broader client base and get more referrals *if only* they had more capital from non-lawyers; or *if only* they could simply advertise more through the help of non-lawyers who demand a big cut of the fee; or
- this is all about "access to justice"; or
- doing *anything* is better than doing *nothing*.

While the ISBA and its friends have led in technological and other innovations that have resulted in huge positives for lawyers and clients,[1] the ISBA also has a track record of successfully *opposing* change that fails to meet the tests of efficacy and client protection. It's fair to say that our Association has been a national leader in doing so.

Examples include:

- Defeating efforts to allow multi-disciplinary practice in the early 2000s, which would have given enormous power to mega-consulting

companies that sought to dominate the legal market. This occurred when Dick was Illinois State Delegate to the ABA House of Delegates.

- Gaining the removal of non-lawyer ownership and fee splitting proposals from the ABA Ethics 2020 Commission recommendations—something we were very involved with as members of the ABA House (and while Dick was chair of the ABA Senior Lawyers Division and John was president of both the ISBA and the National Caucus of State Bar Associations). This succeeded because of the work of a broad coalition across the country the ISBA helped lead, including ABA groups such as the Women's Bar Caucus, Senior Lawyers, the Young Lawyer Division, and numerous other state bars.
- Being a part of a coalition in February, 2020 that sent a strong message within the ABA House that future proposals to revise Rule 5.4 to allow non-lawyer ownership of law firms would go now where.

In our experience, we've never had any doubt that the ISBA has been on the right side of these issues. For example, some may recall when, in 2015, our Assembly had a presentation by the executive director of the Washington State Bar Association encouraging us to get behind the LLLT program which allowed unsupervised non-lawyer technicians to perform significant legal services for clients. Members of our Assembly voiced strong opposition to this on the grounds that it was not good for clients, and simply wasn't a good way to bridge the access to justice gap. That LLLT program in Washington has since been terminated, with its supreme court concluding that it was *not* an effective way to meet legal needs.

Congratulations to President Orsey and other ISBA leaders for continuing the Association's vigilance on matters such as these which are of great importance to Illinois lawyers and the clients they serve.■

Richard L. Thies is a past president of the Illinois State Bar Association (ISBA) and is the senior shareholder with the Champaign-Urbana law firm, Webber & Thies, P.C. where he can be reached at rthies@webberthies.com. He has held numerous bar related positions. Within the American Bar Association, a partial list includes: Illinois State Delegate, member of the Board of Governors and House of Delegates, Chair of the Senior Lawyers Division and Chair of the Fellows of the American Bar Foundation.

John E. Thies is a past president of the Illinois State Bar Association (ISBA) and practices with the Champaign-Urbana law firm, Webber & Thies P.C. concentrating in the areas of general litigation and business representation where he can be reached at jthies@webberthies.com. He is the immediate past president of Land of Lincoln Legal Aid, which serves low income individuals and seniors in the southern 65 counties in Illinois. He served as a member of the CBA/CBF Task force discussed in this article and his objections thereto were submitted and attached to the final report. Within the American Bar Association, he is past president of the National Caucus of State Bar Associations; he continues to represent the ISBA in the ABA House of Delegates.

1. These initiatives include, e.g., the ISBA Mutual, Illinois Lawyer Finder, Free on-line CLE, EClips, the LawEd Series, Mandatory CLE, Free Fast Case on-line research, IICLE, ATG, Illinois Legal Aid On Line, etc.