Reprinted from the January/February 2018 issue of Law Practice

Legal Ethics and Tech Entrepreneurship

By Michael Downey

Many lawyers consider incorporating legal technology into their delivery of legal and law-related services. A law firm may consider adding technologists to their team, perhaps employing coders or app designers. Or a lawyer or law firm may consider partnering with non-lawyer tech entrepreneurs who want to provide law-related services to consumers.

Lawyers often wonder how the ethics rules regulate this intersection of the delivery of legal and law-related services with tech entrepreneurship. This column provides a general analysis of the issues that arise when lawyers work with technology entrepreneurs and technology-based delivery of legal and law-related services. I use the ABA Model Rules of Professional Conduct for my analysis. Every jurisdiction except California uses some version of the Model Rules, but most jurisdictions alter the Rules, so you should consider consulting your own state's ethics rules before proceeding based upon my analysis.

Fully-integrated delivery of legal services. The easiest way to add technology-based legal service delivery is to simply offer the technology system as one way that law firm lawyers deliver services to the firm's clients.

Often this involves using technology to replace another method for performing a function or providing a service. A law firm might use an on-line portal, for example, to gather information from prospects or currents clients or to provide information such a matter updates to clients. The technology replaces the in-person meetings, written client intake forms, and letters or emails providing client updates.

When a law firm integrates technology into its delivery of legal or law-related services, there is really no need for special rules or ethical considerations. The legal ethics rules apply with full force. Lawyers must ensure they are still providing competent representation to the clients, as required under ABA Model Rule of Professional Conduct 1.1. Lawyers must also satisfy the requirements of Rules 1.4 to keep clients reasonably informed, and to protect current, former, and prospective client information in a manner consistent with Rules 1.6, 1.9, and 1.18. Finally, lawyers must satisfy Rule 5.3 by ensuring they have proper systems in place and are properly supervising any non-lawyers involved with developing and implementing the technology at issue. An unhappy client may file a bar complaint or legal malpractice claim.

In my experience advising lawyers, the one area where integrating technology to deliver legal services does raise potential concerns relates to how technologists are paid for developing and maintaining the technology.

How the nonlawyer's compensation is determined cannot violate the general prohibitions against nonlawyers receiving a share of attorney fees or owning a portion of a law firm. Rule 5.4 generally prohibits lawyers from practicing law in a firm that has a non-lawyer owner. Rule 5.4 also generally prevents a law firm from sharing fees on a particular case with a nonlawyer, even a nonlawyer employee. (The District of Columbia serves as a notable exception, as D.C. Rule 5.4 allows nonlawyer ownership of law firms and sharing of fees with nonlawyer firm owners in certain circumstances.)

The Rule 5.4 restriction on sharing fees (in jurisdictions other than DC) generally prevent law firms from paying a nonlawyer employee a share of the fees generated by the technology-based service delivery system. Thus, a law firm cannot give an employee a bonus of, say, $100

for every client who uses an on-line system to complete their immigration or estate-planning documents.

But the Rule 5.4 restriction is generally understood to prevent only a sharing of fees generated on a specific case, not a sharing of firm revenues or profits generated on a larger group of legal matters. *See* ABA Model Rule 5.4(a)(3) (specifically allowing a compensation system that shares profits with nonlawyer employees). Thus, although there is not a lot of clear precedent on the issue, it seems quite possible that a law firm could compensate a technologist by paying a portion of all fees or profits that were generated using a specific technology over a particular period, as long as there were lots of those cases, such that that payment could not be linked to what the firm received from a specific client or on a specific case.

Other than this concern, lawyers can generally retain or employ technologists to develop technologies for the delivery of legal or law-related services, as long as the lawyers ensure all the ordinary obligations – competence, diligence, communication, confidentiality, and absence of conflicts, to name a few – are satisfied.

Note the concern is how the payments are calculated, not how much the nonlawyer may receive as pay. There is nothing that limits a law firm's ability to pay compensation to a nonlawyer employee. A law firm could therefore pay a tech employee a very high salary, even a higher salary than what the lawyers earn. Also, there is no restriction on what a law firm might pay an outside contractor to design a technology (such as an app) for the delivery of legal or law-related services. Both these principles presume, however, that the technology is not merely a dressed-up means of generating client leads for the law firm. If the technology is merely being used to generate leads, the firm may need to comply with Rule 7.2(b).

Separately delivering "law-related" (not) legal services. Lawyers or the technologists helping the lawyers deliver legal or law-related services often want to consider options other than using a technology fully integrated into the law firm. Often the lawyer wants to provide, or the technologist wants to receive, an ownership interest in the technology, or a portion of the fees that the technology generates.

Lawyers seeking to provide ownership or fee-split compensation with nonlawyer technologists often end up trying to create an "ancillary business" or "law-related entity." These ancillary businesses or law-related entities are normally created in a manner to take advantage of the safe harbor for created for such businesses under Rule 5.7.

Rule 5.7 basically tells lawyers that the legal ethics rules permit lawyers to provide "law-related" but not "legal services," and to do so without complying with all the legal ethics requirements (such as Rule 5.4), as long as the person who receives the services can reasonably understand they are receiving services from the law-related entity and not a law firm.

Significantly, most of the services lawyers want to use technology to deliver to clients are more appropriately designated "law-related" services than "legal" services. Rule 5.7(b) defines "law-related services" as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

Often technology-delivered services involve assisting clients in filling out or completing legal pleadings and other documents, such as estate-planning documents and immigration forms. These are perfect examples of "law-related services" as defined by Rule 5.7. Most states allow nonlawyers to help people fill out legal forms. Most jurisdictions also allow nonlawyers to provide general, educational content about how to fill out legal forms. The practice of law – and thus the delivery of "legal" services, for which a lawyer is required – often occurs when advice is given to a specific person about which legal form to use or how to answer a specific question, based upon that person's specific legal circumstances.

This dichotomy creates the grounds where most law-related service providers operate. Online

legal document preparation services (such as LegalZoom or Rocket Lawyer) provide access to fillable forms and guidance about how to complete those forms. Where a person – whom I will call a "customer" to distinguish from a lawyer's "client" – needs specific help with a specific matter, these online document providers often refer the person to a lawyer, whom the customer then pays as a client for those "legal" services.

Many such online document preparation companies are owned entirely or almost entirely by nonlawyers. Rule 5.7(a) provides a safe harbor, however, for lawyers also to be involved in the ownership of law-related service providers who do not need to comply with all the ethics rules, as long as the law-related service provider or "law-related entity" operates totally separate from any law firm.

Specifically, Rule 5.7(a) states:

> A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
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> > (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
> >
> > (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

In saying when the Rules <u>do</u> apply, Rule 5.7(a) permits circumstances when all the rules <u>do not</u> apply: when the delivery is "in circumstances that [are] distinct from the lawyer's provision of legal services to clients" or where the lawyer "[does] take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." Entities that satisfy these distinctness and notice requirements are generally called "ancillary businesses" or "law-related entities."

Law firms that want to establish a law-related entity should typically try to make the law-related entity as separate from the law firm as possible. The name, marketing materials, website, and branding of the law-related entity should be quite distinct from the law firm itself. Also, if a law firm and its related law-related entity operate in similar space, customers of the law-related entity should be carefully warned through disclaimers and disclosure forms that they know and understand they are not clients of the law firm.

When a law firm satisfies the safe-harbor requirements of Rule 5.7, the firm may operate its law-related entity without worrying about satisfying the requirements of most other ethical rules. The law-related entity may have non-lawyer owners and split fees with non-lawyers, without regard for Rule 5.7. The law-related entity also may pay nonlawyers to refer business, and it does not have to comply with all the obligations relating to competence, diligence, communications, confidentiality, and avoidance of conflicts discussed earlier in this article.

Nevertheless, there are at least three areas of legal ethics regulations that remain something of a concern. First, lawyers may face discipline for criminal or deceptive conduct, even in circumstances not involving the practice of law, under Rule 8.4. Thus, lawyers must ensure their law-related entities operate without any deception.

Second, lawyers must be careful to comply with the ethics rules including Rule 7.2(b) when referring work between the law-related entity and a related law firm. Often this involves making clear disclosure of the separate nature of the law-related entity, and ensuring clients understand the referral relationship is not exclusive, that they may use another law-related service provider if they prefer.

Third, lawyers must be mindful of the limitation on doing business with clients under Rule 1.8(a).

This restriction often arises in two settings. First, lawyers often enter business relationships with technologists to whom the lawyers are also providing legal services, either in conjunction with the law-related entity or in other contexts. Second, lawyers often refer law firm clients to their law-related entity, and then enter a business transaction with those clients. In both circumstances, lawyers would be well-advised to comply fully and carefully with the restrictions Rule 1.8(a) imposes on business relationships between lawyers and clients.

Presuming lawyers are comfortable with these limited restrictions, lawyers should feel comfortable working with technology entrepreneurs, and using technology to deliver services either as part of or separate from their law practice.

Michael Downey is a legal ethics lawyer and founder of Downey Law Group LLC, a law firm devoted to legal ethics, law firm risk management, lawyer discipline defense, and the law of lawyering. Michael has taught legal ethics at Washington University and St. Louis University, chaired the ABA Law Practice Division, and testified as an expert witness in Missouri, Illinois, Kansas, and the District of Columbia. Reach Michael at (314) 961-6644 or Mdowney@DowneyLawGroup.com. *All rights reserved.*