To: Task Force on Access Through Innovation of Legal Services (ATILS)  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
Fr: The Lacuna Consortium  
Re: The Model Rules of Professional Conduct Commentary – The impact of Rule 5.4 and its amendments on the Lacuna Coin Project, and the potential unknown implications for Guarantors that may collect fees if they render legal services.  
Date: May 18, 2020

Dear ATILS Task Force Members,

This comment is submitted by the Lacuna Consortium (“the Consortium”) represented by the Brooklyn Law School Incubator & Policy (BLIP) Clinic to address the impacts of Rule 5.4 on the Lacuna Coin Project. Specifically, the unknown implications for Guarantors, who may collect fees and perform legal services that Lacuna Coin Contractors are unable to fulfill.

At its initial conception, the Consortium was founded to explore the unclear and uncharted waters at the intersection of technology and the law. Etymologically, the word “lacuna” is derived from the Latin phrase “lacuae intra legem,” which translates to the idea that a law may proscribe behaviors and actions, but be silent or unclear (non liquet) when applied to the context of a specific situation. The situation we address herein concerns law school graduates (“graduates”) tokenizing themselves on the Ethereum blockchain and using the purchase of their tokens as consideration for option contracts that include a preferred rate on post bar legal services. Where the preferred rate on the future services are ensured by a Guarantor.

As an entity, the Consortium was born during the height of the novel coronavirus (COVID-19) global pandemic in 2020 at the BLIP Clinic. The BLIP community at large acknowledged the well-recognized and acute plight that graduates would face when exploring ways to cover costs between obtaining their Juris Doctor (JD) or Masters of Law (LLM) and sitting for the bar exam. Accordingly, the BLIP students, authorized to practice law under their supervising attorneys and professors, Jonathan Askin and Lynda Braun, realized that this plight would be exacerbated by the global pandemic, and the ripple effects would change job markets, society, the legal industry, and by extension the relationships between lawyers, graduates, and clients forever.

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1 Guarantors would include professional for-profit or non-profit legal services providers, who would guarantee fulfillment of the contracts described herein if the Contractor is unable to satisfy the contract.  
2 Contractors are law school graduates that are creating option contracts for a preferred rate on future legal services.  
3 Here, tokenization is the process of creating digital assets that represents rights that an individual confers to future token owners: See also Tokens, and Coins vs Tokens, Blockchain & Crypto Vocabulary 101 TryCrypto, https://www.trycrypto.com/blockchain-101/blockchain-crypto-vocabulary-101 (last visited May 18, 2020).
Introduction to the Lacuna Coin Project

As a result of contemplating the plight of graduates during the COVID-19 pandemic, the Consortium developed the Lacuna Coin Project with the aim to provide newly-minted graduates with a tool kit and platform to showcase and promote the knowledge, skills, experience, and overall expertise they have cultivated while earning their legal degree. Accordingly, the Consortium accomplishes the goal of the Lacuna Coin Project by implementing a new framework for tokenization, while affording potential future clients the unique opportunity to purchase the graduates tokens (“Lacuna Coins”).

In the current iteration of the Lacuna Coin Project, graduates would place themselves on the Ethereum blockchain by using the Consortium’s certification marked tool kit as a resource to facilitate the creation of their Lacuna Coins. Ultimately, by providing graduates with this framework, the Consortium would be encouraging the institutionalization of option contracts for a preferred rate on post bar admission legal services, while promoting access to justice and awareness of blockchain and distributed ledger technologies.

Purpose and structure of this Comment

However, despite the positive intentions of the Lacuna Coin Project, the Consortium realizes that the appointment of Guarantors could be threatened by the uncertainty of California ethics Rule 5.4 and its pending amendments. Therefore, the Consortium is submitting this comment to advocate for an amendment, clarification, declaration, or exception to Rule 5.4 that states that Guarantors would be compliant with the professional rules. Accordingly, the comment accomplishes this goal by outlining the need for the Project, exploring the context and structure of the Project, while also addressing the Project’s compliance with Rule 5.4.

The need for the Lacuna Coin Project

The need for projects such as the Lacuna Coin Project becomes evident when viewed through the perspective of access to justice and the needs graduates confront between graduating and taking the bar exam. For example, because of the adverse economic impact of COVID-19, graduates may be forced due to circumstances beyond their control—delay bar admission and/or increase their financial debt.

In order to address these concerns, a new paradigm must be developed and adopted. In a recent ABA article, Teresa J. Schmid, the director of the American Bar Association Center for Professional Responsibility, expressed her view on the need for novel concepts in the legal field.4 Ms. Schmid states:

“...the legal profession is confronting unprecedented barriers to its survival and to its capacity for meeting the dual demands of access to justice and protection of the public. If necessity was once called the mother of invention, that expression insufficiently captures these times. It is now more accurate to say that survival is an insatiable despot that demands continuous innovation as its

tribute. Continuous innovation is a tall order for any community, let alone one whose most influential institutional representative was founded in 1878.\textsuperscript{5}

The Consortium subscribes to Ms. Schmid’s rhetoric regarding the need for novel concepts and solutions in the legal system. Accordingly, the Consortium proposes that it answers Ms. Schmid’s call to action with the implementation of the Lacuna Coin Project.

The Lacuna Coin Project’s structure and implementation

Overall, the untenable paradigm of graduates requires a new, sensible, and workable solution. The Lacuna Coin tool kit would require graduates to inform Lacuna Coin purchasers (“Contractees”) that the digital tokens do not represent an investment, and there is no monetary return or financial gain for purchasers. The purchase of a graduate’s Lacuna Coin would be to strictly provide consideration for the option on preferred pricing for future legal services. Currently the Consortium envisions that the option contract would also govern the type of service to be offered and the reasonable duration for the option to remain open. Through the use of a Lacuna Coin certification mark, graduates that do not adhere to the policies and guidelines of the tool kit would be prohibited from using the Lacuna Coin branding for their tokens. In other words, graduates that conform to the policies and guidelines of the tool kit would be allowed to use the following naming convention for their tokens: “Lacuna Coin: graduates’ first and last name.”

The Consortium also envisions that the Lacuna Coin Project would have a public-facing website where graduates would create profiles that contain basic biographical and contact information, areas of law in which they intend to practice once they have gained admission to their state’s bar association, as well as the graduates various experiences during their law school career.

Contractual concerns: The need for Guarantors

As previously stated, to ensure Contractees have the ability to exercise their future options, the template option contract located in the Lacuna Coin tool kit would require graduates to appoint individual practitioners, law firms, non-profit organizations, or law school clinics as Guarantors for the preferred rate on future legal services. In other words, Guarantors would fulfill the Contractors obligations and step in to provide the legal service at the same rate contemplated between the Contractor and Contractee.

The scenarios in which a Guarantor would need to step in if a Contractor is unable to perform their contractual obligations include but are not limited to:

- The Contractor has secured a job at a law firm or other organization that forbids the Contractor from fulfilling the option contract;
- The Contractor has not passed the bar by the time in which the option could be exercised; or
- The Contractor is incapacitated and cannot practice law or has died.

In addition to the contractual issues, general aspects of the Lacuna Coin project may implicate ethical concerns outlined below.

\textsuperscript{5} Id.
Ethical concerns for the Lacuna Coin Project

The Consortium has structured the Lacuna Coin Project to be in compliance with various ethics rules, court decisions, and regulations. For example, the Lacuna Coin certification mark would prohibit the use of Lacuna Coins in a way that could be interpreted as the unauthorized practice of law. Specifically, Lacuna Coin option contracts would not offer legal services in consideration for the purchase of Lacuna Coins. Rather, they offer a set rate for future legal services. Again, as previously discussed, the consideration here is solely and exclusively for an option to have future legal services at a preferred rate. As per the Lacuna Coin certification mark, Contractors would only engage in the practice of law when they are licensed.

Once Contractors have been admitted to the bar, the certification mark would obligate Contractors to remove themselves from the Lacuna Coin Project website. This would mitigate and limit the ability for licensed Contractors to further sell their Lacuna Coins.

In the future, if Contractees choose to exercise their option, a second contract would be negotiated between the Contractor and the Contractee. The second contract would be a standard retainer agreement between a licensed attorney and a client for the preferred rate upon which they previously agreed. The second contract would clearly articulate the formation of an attorney-client relationship, the scope of the representation, the specific services to be rendered, and all other provisions of standard enforceable retainer agreements. Ultimately, the Consortium would not oversee, manage, or profit from the proceeds of Lacuna Coins purchases or any exercised legal service governed by a separate retainer agreement.

The Lacuna Coin Project’s compliance with California Ethics Rule 5.4

To increase the likelihood of compliance with Rule 5.4, all Contractors displayed on the Lacuna Coin website would negotiate their option contracts with Contractees as independent sole contractors. The Lacuna Coin certification mark would require Contractors to act independently to forbear the interpretation that the Lacuna Coin website constitutes a “law firm,” as the term is understood in professional ethics rules. Moreover, the Consortium would not share or collect in any fees Contractors charge their Contractees. However, regardless of these affirmations, if Guarantors opt to collect the preferred rate upon rendering a legal service, the Consortium is aware that their compliance with Rule 5.4 may not be clear. Below we address the above concerns in detail.

Guarantors collecting fees for rendered services should not implicate a fee-sharing arrangement between Contractors and Guarantors (nonlawyers and lawyers)

The Consortium acknowledges that while a relationship between the Contractor and Guarantor exists insofar as the relationship is formed via contract for such purposes as to serve as a surety, a partnership does not exist as defined by Rule 5.4(b). In its current iteration, Rule 5.4(b) states, “a lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.” Ultimately, there is no partnership or agent relationship established between the Contractor and the Guarantor. The relationship that exists between the parties—if any at all—exists purely through the option contract. Cal. Corp. Code 16101 (9) defines a partnership as “an association of two or more persons to carry on as co-owners in a business for profit.” Here, there would be no
partnership between Contractors and Guarantors as defined by the California corporate code. Accordingly, Guarantors fulfilling a Contractor’s contractual obligation and collecting the fees for services rendered should not constitute a violation of ethics Rule 5.4(b).

In addition to Rule 5.4(b), Rule 5.4(a) states “a lawyer or law firm shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law.” In the case of Chambers v. Kay the court addressed the issue of legal fees and held that legal fees encompass any division of fees where the attorneys working for the client are not partners or associates of each other. Here, there is no division of fees between Contractors and Guarantors. As previously stated, the Lacuna Coin Project includes two separate fee payments. The first fee is consideration for the option contract. In other words, the purchase of Lacuna Coins for a preferred rate on future legal services. This fee is collected solely by the Contractor, a non-lawyer, and would never be seen by the Guarantor. The second fee is paid after the Contractee decides to exercise the option contract. In other words, the second fee is the price the Contractee pays when the legal service is rendered. This fee can only be collected by a licensed lawyer in one of two ways: (i) The licensed attorney is the Contractor fulfilling their contractual obligations for the preferred rate or (ii) the Guarantor, a lawyer, collects the fee because they rendered a service the Contractor was unable to perform. In the latter scenario, any payments or fees collected by the Guarantor would not be shared with the Contractor. Because the legal service fee (the second fee) is not shared with any non-lawyer(s), nor is the fee for the referral of services, and because the fee is separate from the fee that avails the option, such conduct should not violate ethics Rule 5.4. In summary, there is no division in actual legal fees with the non-lawyer if the Guarantor performs the legal service. California ethics Rule 5.4 applies to fee divisions where work for the client is divided. Accordingly, Rule 5.4 should not apply to the conduct envisioned within the Lacuna Coin Project.

Benefits of the Lacuna Coin Project: Transparency

In addition to requesting an affirmation on compliance with the California ethics rules, the Consortium further advocates that the Task Force and the State Bar issues a supplementary amendment, clarification, declaration, or exception to Rule 5.4. The Consortium respectfully request that any additional amendments to Rule 5.4 should address or relate to the structure and/or implementation of the Lacuna Coin Project because of the myriad of benefits the Project provides to graduates, the public, and the legal industry at large.

For example, the Project has the added benefit of increasing trust within the legal industry. The blockchain technology that powers the Lacuna Coin Project relies on the concept of a public transparent ledger. All Lacuna Coins could be tracked on this public ledger while still providing anonymity for the identities of potential future clients. In other words, it is very easy for a third party, like the State Bar, to identify an approximate amount of Lacuna Coins a Contractor has sold without knowing the identity of purchasers. This information could enable the Consortium, the State Bar, and the public at large to understand the level of engagement between graduates and potential future clients. Such information could assist with solving issues of access to justice.

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7 See Id.
Benefit of the Lacuna Coin Project: Access to Justice

As previously stated throughout this comment, graduates are not the sole benefactors of the Lacuna Coin Project. The project benefits the general public because it promotes access to justice. Individuals who normally could not afford legal services from a licensed attorney would now have the option to provide consideration for a preferred rate on services in the future. The public would have the power to choose, acquire, and access rates that they may never had the opportunity to access otherwise. Additionally, given that Guarantors would largely be public service law firms, private firms, and non-profits offering themselves as Guarantors out of a desire to help recent graduates, these Guarantors will undoubtedly drive the types of services considered by the option contracts in virtuous directions. Moreover, Guarantors have the benefit of using the Lacuna Coin Project as another avenue to fulfill pro bono hour requirements when Contractors are unable to fulfill their obligations.

While the Consortium understands that this innovative endeavor may raise alarm or suspicions, it intends to quell and appease such concerns by assuring that parties uphold their contractual duties so that all parties benefit as intended. Furthermore, the Consortium intends to comply with and further achieve ATILS’ Goal 4, Objective d., of the State Bar’s 2017-2022 Strategic Plan which is to “[balance] the dual goals of public protection and increased access to justice.”

Conclusion

In conclusion, the Consortium submits that the Lacuna Coin Project is urgent and timely. In the initial phase of the project, the Consortium will offer Lacuna Coins only to family members and friends. The Consortium believes that the initial phase of the Project would mitigate any concerns legislatures, judges, and ethics committees may have for the risk of harm to the public. However, as the ethical and regulatory landscape evolves, the Consortium fully intends to have graduates use the tool kit to create and offer their Lacuna Coins to the general public.

Ultimately, if the Consortium does not work to shift this paradigm, someone else will. Other jurisdictions are looking towards new models to promote access to justice and the empowerment of young attorneys. These jurisdictions would likely be open to embracing innovative structures like the Lacuna Coin Project. It would be unfortunate if California, a state that pioneers in innovation within all industries, did not serve the function of being a preeminent thought leader during this crucial moment when graduates and society needs these types of innovations desperately.

Accordingly, the Consortium respectfully request for the Task Force and the State Bar to issue an amendment, clarification, declaration, or exception to Rule 5.4 that validates the structure of the Lacuna Coin Project, and clarifies that Guarantors in the form of solo practitioners, law firms, non-profit organizations, or clinics that participate in the Project and offer legal services in the absence of Contractors, would be compliant with Rule 5.4.

Sincerely,

The Lacuna Consortium

“Putting law school grads on the blockchain”

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