

# **OPEN SESSION AGENDA ITEM**

**701 SEPTEMBER 2018**

**DATE:** September 6, 2018

**TO:** **Members, Board of Trustees**

**FROM:** Randall Difuntorum, Program Manager, Professional Competence

**SUBJECT:** Tech + Law: State Bar Study of Online Delivery of Legal Services -  
Recommendation for Task Force Charter and Composition

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## **EXECUTIVE SUMMARY**

At the July 20, 2018 meeting, the Board of Trustees ("Board") received a consultant's Legal Market Landscape Report and authorized formation of a Task Force to explore possible regulatory reforms to increase access and improve public protection in the growing field of the online delivery of legal services. Staff was directed to draft a Task Force charter and a recommendation for the categories of expertise that the members to be appointed to the Task Force should possess. This agenda presents staff's recommendations.

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## **BACKGROUND**

The State Bar's 2017-2022 Strategic Plan sets forth among the goals and objectives of the Bar, the following:

Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

Professor William Henderson was retained to prepare a [Legal Market Landscape Report](#) and this report observes that "ethics rules...and the unauthorized practice of law... are the primary determinants of how the current legal market is structured....¶ Under ethics rules, any business engaged in the practice of law must be owned and controlled by lawyers. This prohibition limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market." (Legal Market Landscape Report, at p. 21.) The report's conclusion states: "By modifying the ethics rules to facilitate this close collaboration [of lawyers and nonlawyers], the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability

and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.” (Legal Market Landscape Report, at p. 27.)

## DISCUSSION

Staff reviewed selected committees formed by the American Bar Association (“ABA”), other jurisdictions and California’s own prior committees on similar subjects.<sup>1</sup> Staff considered the charters and committee member rosters for these groups and consulted with the Chair and Vice-Chair of the Programs Committee in preparing the recommendations set forth below.<sup>2</sup>

### Proposed Task Force Charter

Staff recommends the following charter.

The Task Force on Access Through Innovation of Legal Services (“ATILS”) is 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. A Task Force report setting forth recommendations will be submitted to the Board of Trustees no later than December 31, 2019. Each Task Force recommendation should include an explanatory rationale that reflects a balance of the dual goals of public protection and increased access to justice.

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<sup>1</sup> This included: the State Bar’s 2001 Task Force on Multidisciplinary Practice; the California Supreme Court’s 2004 Multijurisdictional Practice Implementation Committee; the ABA’s 2016 Commission on the Future of Legal Services; the Minnesota State Bar’s 2017 Alternative Legal Models Task Force; and the Oregon State Bar’s 2017 Futures Task Force.

<sup>2</sup> Staff’s recommendations include technical terms and concepts that may be unfamiliar. Any person interested in the proposed work of the task force is encouraged to consult the following online information for background.

Video on the present and future use of artificial intelligence in the delivery of legal services:  
<https://www.lsc.gov/media-center/multimedia-gallery/innovations-conference-2018-emerging-technologies-harnessing>

Article on the ethics and UPL implications of artificial intelligence in the delivery of legal services:  
<https://umbergzipser.com/wp-content/uploads/2017/10/OC-Lawyer-Oct-2017-Garner-lo-res.pdf>

Article on the cessation of Avvo legal services:  
<https://www.hinshawlaw.com/newsroom-updates-avvo-shuts-down-its-legal-services-product-in-wake-of-ethics-opinions-warning-attorneys-not-to-participate.html>

Article on bifurcated regulation of lawyers and the legal industry:  
<https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/amp/>

Article on emerging trends in corporate counsel’s use of accounting firms for overseas corporate legal work:  
<https://www.law.com/therecorder/2018/08/09/gcs-are-flirting-with-the-big-four-but-they-remain-wary-403-19850/>

In carrying out this assignment, the Task Force should do the following:

- 1) Review the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology-driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;
- 2) Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need; and
- 3) With a focus on preserving the client protection afforded by the legal profession's core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non-lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.

### **Appointment Process and Proposed Composition of the Task Force**

The Task Force should be appointed by the Board, in consultation with the Supreme Court.<sup>3</sup> The Assembly and Senate Judiciary Committees should each be invited to nominate an appointee to the Task Force. The candidates should be required to complete an appointment application form.

The Task Force should have fifteen members, including a chair and a vice-chair. The members may be judges, lawyers and non-lawyers, including law students. At the Board's July 20, 2018, meeting, there were two public comments presented and both advocated for a non-lawyer majority for the membership of this task force.<sup>4</sup> Staff agrees that there should be a non-lawyer majority, if possible. The term of the appointments should expire on January 1, 2020, unless

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<sup>3</sup> See Board Book Tab 2.6, Article 1, Section 3(b)(1) which in part provides that: "Authorization for the creation of any ad hoc committee must be sought and obtained by the Chair either from the Board as a whole or from the Board Executive Committee."

<sup>4</sup> Comments were submitted by Claudia Mascari on behalf of the Center for Public Interest Law and Tom Gordon on behalf of Responsive Law. The former stated that "most importantly, we believe the majority of its members must be non-lawyers" and the latter said "we strongly urge the Board to require a majority of the Task Force members to be non-lawyers." (Copies of these comments are on file with the Office of Professional Competence.)

extended by the Board. The Chair should be authorized to designate subcommittees and subcommittee chairs to strategically organize the completion of the Task Force's work.

### **Subject Matter Expertise Desired**

The selection of appointees should strive to include the expertise listed below. This is a non-exclusive list as other experience and expertise may also be relevant.

- Emerging technologies and data systems (including Artificial Intelligence and Blockchain), Legal/Economic Futurist (including the “gig economy”)
- Consumers of Legal Services (especially individuals and small businesses impacted by inability to afford legal services but who do not qualify for legal aid services), Consumer Protection Advocates
- Legal Aid/Services Providers
- Legal Ethicists, State Bar Disciplinary and Regulatory Lawyers
- Lawyer Referral Services, Matching Services, Online Legal Directories, Group Legal Plans, Prepaid Legal Plans and Plans of Legal Services Insurance
- Legal Technicians, Paralegal Services, and Document Preparation Services

If the Board adopts the foregoing approach, the next steps will be to conduct outreach and implement a formal appointment application process with a goal of completing the appointments in time to conduct an orientation meeting of the Task Force in early November.

### **FISCAL/PERSONNEL IMPACT**

Task Force activities in 2018 will be limited and will be absorbed by the Office of Professional Competence's committee and commission budgets. Activities in 2019 will be provided for in the State Bar's 2019 budget.

### **RULE AMENDMENTS**

None

### **BOARD BOOK AMENDMENTS**

None

### **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

## **RECOMMENDATION**

Staff recommends that the Board of Trustees approve the following resolution:

**RESOLVED**, that the Board of Trustees adopts the charter for the Task Force on Access Through Innovation of Legal Services in the form attached to these minutes; and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to carry out a Task Force appointment outreach and application process to be completed in time for the appointment of the Task Force at the Board's October 19, 2018 meeting.

## **ATTACHMENT(S) LIST**

None