

ATILS Subcommittee on ABS and MDP - Consensus Points
with Pros and Cons

1) Lawyers in traditional practice and firms stay under the current regulatory framework with a mind towards expanding access to justice through innovation.

Pros: The primacy of the judicial branch's regulation over the practice of law militates in favor of retaining the current regulatory paradigm of a lawyer as an officer of the court with all of the attendant duties and regulatory constraints. Lawyers, both as individuals and as members of traditional law firms, can be encouraged to support access to justice through innovation and technology in the same manner that lawyers and law firms are encouraged to increase access through voluntary pro bono publico services (see Rule of Professional Conduct 1.0, Comment [5]). This would complement consideration of any potential reforms that might involve new regulatory models, such as an entity regulation model where a corporation or other organization, rather than an individual, is authorized to practice law under adequate public protection requirements.

Cons: Traditional lawyer regulation has not proven to foster innovation in the delivery of legal services, especially the types of innovative delivery models that might flow from enhanced competition. The slow evolution of the rules governing lawyer advertising and solicitation are an example of regulatory reforms failing to keep pace with changes in the legal services market, including changes in the market driven by evolving communication technology and related consumer behavior and preferences.

2) We recommend that we widen the scope of our charter to include entities which may or may not have lawyer ownership or operational management and/or control.

Pros: This proposition is an outgrowth of the State Bar's [Legal Services Market Landscape report](#). In that report, Professor William Henderson 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 page 21.) In the report's conclusion, Professor Henderson 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 page 27.)

Provided that an entity authorized to practice law is subject to appropriate regulatory standards and can be held accountable by an effective enforcement system, requiring lawyer ownership or management would not necessarily add additional public protection. In jurisdictions where there are ABS reforms that involve some percentage combination of lawyer and nonlawyer ownership, the subcommittee is not aware of strong empirical evidence that legal tech for consumers has prospered. It might be that lawyer ownership or management requirements in those jurisdictions are hindering the ability of an entity to attract the broadest array of potential innovators and investors. Lastly, even in a 100% nonlawyer owned entity some lawyer participation would most likely be necessary because the entity's business objective is development of legal tech. Those lawyers would be subject to attorney conduct rules and State Bar regulation, including professional conduct rules mandating competence and independence of professional judgment.

Cons: Some percentage of lawyer ownership and management is regarded as a key to assuring a minimum level of competence and independence of professional judgment in any context where legal services are being provided to clients. The demise of MDP proposals after the collapse of Enron and its accounting firm, Arthur Andersen, is a cautionary tale for business structures and government oversight that place limited value on the importance of independent legal advice at the control group level of a for-profit business. Further, in those jurisdictions where nonlawyer ownership and management of law firms is permitted, at least one researcher has found that there is a lack of empirical data indicating that access to justice has demonstrably increased. (See: Study by Jasminka Kalajdzic, Associate Professor, University of Windsor, "[Alternative Business Structures & Access to Justice](#)", Report commissioned by Ontario Trial Lawyers Association (Dec. 1, 2014).)

3) Entities can be composed of lawyers, non-lawyers or a combination of the two however, regulation would be required and may differ depending on the structure of the entity.

Pros: In the legal industry, there is no existing definitive structure that has demonstrated an ability to spark technology-based innovation in delivering legal services to consumers. Experimentation with all options seems important for a thorough assessment, and regulatory reform methods, such as a regulatory sandbox or another controlled environment, may be considered. Different strategies for balancing public protection and innovation should be tailored to different structures. While a tech entity comprised of a majority of lawyer owners might be conducive to modest reforms that are similar to the regulation of a certified professional law corporation, that should not be considered as a "one-size fits all" paradigm for all possible structures and combinations.

Cons: A multiplicity of structures for different new providers that each have their own rules and regulations may result in consumer confusion and stifle consumer adoption of any one of those new market participants. Robust consumer education and outreach would be needed to help consumers, as well as lawyers, understand the new regulatory structures and the public protection consequences of a consumer using, or a lawyer participating in, one or more of the new legal services providers.

4) This new model being proposed would include for-profit entities and would not be limited to not for profits.

Pros: As found in Professor Henderson's report, existing rules and regulations are a disincentive for nonlegal entrepreneurs to enter the legal market. (Legal Market Landscape Report at page 21.) One likely disincentive is the existing California statutory law and case law which is the basis for the prohibition against a corporation (that is not a registered law corporation) operating a business in California to profit from the practice law. Abrogating this restriction also would likely ameliorate the existing law disincentive. Notwithstanding this long standing UPL prohibition, for-profit regulation of the legal industry beyond the controls placed on individual attorney licensees has some limited modern precedence in the regulation of professional law corporations, limited liability partnerships and in the MJP context with regard to for-profit corporations that include out-of-state in-house counsels who are registered with the State Bar but are not full-fledge State Bar licensees. In addition, the subcommittee believes that individuals in the middle class have access to justice concerns that could be addressed by the activities of a new form of for-profit provider. The success of online businesses, such as LegalZoom, provides anecdotal support for this proposition.

Cons: The ultimate strategic objective of the State Bar in conducting a study of regulatory reforms is to use technology to create access to justice for persons who presently cannot afford legal services under the current delivery systems (i.e., the traditional law firm model). Prioritizing legal tech development in the not for profit context would be the most direct route for accomplishing this objective. Moreover, it is not clear that legal tech innovations developed in the for-profit sector would have a significant trickledown benefit to legal services organizations and the persons served by those organizations.