



The State Bar of California

ACTION SUMMARY

Task Force on Access Through Innovation of Legal Services
Subcommittee on Unauthorized Practice of Law / Artificial Intelligence
June 7, 2019
11:00 a.m. – 5:00 p.m.

The State Bar of California
State Bar of California
845 S. Figueroa Street, Room 2A, Los Angeles, CA 90017
180 Howard Street, Room 8B, San Francisco, CA 94105
Video Conference - Los Angeles/San Francisco, CA
(213) 765-1000

Members Present: Abhijeet Chavan (Chair), Hon. Wendy Chang (Vice-Chair), Heather Morse, Daniel Rubins, and Joshua Walker.

Not Present: Simon Boehme and Margie Estrada.

Others Present: Brady Dewar (State Bar staff), Randall Difuntorum (State Bar staff), Mimi Lee (State Bar staff), Lauren McCurdy (State Bar staff).

ACTION SUMMARY

A. CHAIR'S REPORT

1. **Roll Call**

The Chair called the meeting to order and asked staff to take a roll call of the subcommittee members. A quorum was present.

2. **Call for Public Comment**

The Chair inquired but there was no one present who wished to provide public comment.

3. **Chair's Report**

The Chair summarized the accomplishments of the last meeting, and summarized the agenda for the current meeting.

4. **Staff Report**

Brady Dewar discussed the tasks the subcommittee must complete prior to the end of the June 28 meeting of the full Task Force.

5. **Approval of Action Summary from the May 13, 2019 Meeting**
The Action Summary from the May 13, 2019 meeting was approved unanimously (moved by Daniel Rubins; seconded by Wendy Chang).

B. **ACTION/REPORT AND RECOMMENDATION**

1. **Discussions and approvals of recommendations and background language for submission to full Task Force**

The following background language for public comment for previously approved recommendations was discussed and approved for submission to the full Task Force:

- a. Recommendation previously approved by the Task Force: The Task Force does not recommend defining the practice of law.

Background: California Business and Professions Code § 6125 prohibits the unauthorized practice of law in California. The statutory scheme, however, does not define "practice of law". The common definition of the term can be originally found in *People v. Merchants Protective Corp.* (1922) 189 Cal. 531 as "the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure" and has been understood in practice to include legal advice and transactional legal services as well. *Birbower, Montalbano, Condon & Frank v. Sup. Ct.* (1998) 17 Cal.4th 119, 128. This definition has been applied in an individualized fact specific manner, giving it sufficient agility to address the numerous, and oftentimes ever changing, factual circumstances where attempts to bypass the UPL rules have resulted in actual harm, or the substantial potential for harm, to members of the California public.

The Task Force, in reviewing the above, agrees that the current approach is sound and in the public interest. Thus, the Task Force's recommendations do not involve a change to existing rules or statutes as to the definition of UPL.

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: This approach seeks to continue the current common law approach evidenced through a large body of case law going back almost a century, which demonstrate that protection of the public requires an agile definition to address numerous ways for actual and potential harm from UPL practitioners. Other attempts to codify the definition of the practice of law have not been successful. Attempting to codify the definition of the practice of law is not necessary to accomplish the Task Force's goals.

Cons: The fact specific approach against a broadly interpreted definition creates uncertainty for anyone operating in factual scenarios that have not been interpreted by existing law to either constitute UPL or not. However, the safe harbor recommendation provides certainty for those meeting the criteria of the safe harbor.

(Approved unanimously; moved by Wendy Chang; seconded by Abhijeet Chavan.)

- b. Recommendation previously approved by the Task Force: Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven delivery systems to engage in authorized practice of law activities.

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: There are several pros to this approach. 1) Members of the public have a way to identify providers who have been vetted by the regulating entity, removing their uncertainty in provider selection. 2) Providing an exception to the UPL statute or rules will provide commercial certainty, thereby incentivizing innovation to increase and improve services to clients who fall within the access to justice gap. 3) As proposed, this program will be self-funded and voluntary - thus, those who do not wish to participate and are comfortable operating under the existing definition of UPL without the safe harbor can continue to do so.

Cons: As with all technology, a new regulatory scheme will require development of new skill sets by the regulating entity that it may not currently possess, which will take time and money. The program will also require an initial set of seed funding in order to get the program up and running, so that the Bar is ready to go when the first wave of applicants submit their products.

(Approved unanimously; moved by Wendy Chang; seconded by Daniel Rubins.)

The following recommendations, with accompanying background language for public comment, were discussed and approved for submission to the full Task Force:

- c. Recommendation: The Regulator of State-certified/registered/approved entities must establish adequate

ethical standards that regulate both the provider and the technology itself.

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: This recommendation protects the public by requiring equivalent protections across all legal services, whether delivered by technology or human. These ethical standards should enable exploration of technologies in all areas of law, with case-by-case review by an expert panel. The Regulator will be required to provide information and guidance to technology providers. Ethical uniformity of the standards will also avoid favoritism of one type of provider over another.

Cons: Establishing ethical standards may limit technology architectures and design patterns available to technology providers. (For example, a service could receive data from two parties in a matter who are adverse to each other and merge that data to create a mediation settlement. However, that utility would likely be precluded by the duty of loyalty to each party.) Additionally, these standards may also impose significant regulatory costs. Overregulation may stifle innovation. While the public protection functions remain paramount, due care should be given for reasonably applying these ethical duties to technology providers.

(Approved unanimously; moved by Wendy Chang; seconded by Daniel Rubins.)

- d. Recommendation: Communications under an approved program should receive the same or equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality.

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: Imposing privilege will promote candor in legal communications with these programs thereby increasing the competency of the legal service provided. Creating privilege encourages the use of the technology. By building in these protections, the end-user cannot waive the privilege, except as specified by law, thereby protecting the user.

Cons: None.

(Approved unanimously; moved by Wendy Chang; seconded by Heather Morse.)

- e. Recommendation: Regulated entities should be required to provide enhanced privacy and data security protections, scalable to consumer risk. At a minimum, they should also be required to comply with the equivalent ethical standards required of lawyers.

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: Requiring enhanced privacy and data security protections protects the public from risks concentrated to technology providers. Requiring compliance with equivalent ethical standards required of lawyers at a minimum ensures users will receive the same protections they would get from a lawyer. By doing so, it also enhances the confidence and trust in the administration of justice.

Cons: Application of these principles will increase the barriers to entry for technological providers, perhaps substantially. This would reduce consumer access to services. The certifying entity will have to ensure that the standards and protocols are not unduly burdensome as a matter of practice, and that it is straightforward and adoptable by a large number of entities. It may impose significant costs on technology providers to meet minimum security requirements and that cost may be passed on to the consumer.

(Approved unanimously; moved by Wendy Chang; seconded by Joshua Walker.)

- f. Recommendation: The regulatory process contemplated by recommendations __, __, and __ should be funded by application and renewal fees. The fee structure should be scaled based on factors such as non-profit status, revenues/profits, and/or how much the product addresses the access to justice gap. (Note: The " __ " will be substituted with specific recommendation numbers once finalized.)

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: This approach would eliminate or reduce cost barriers for provision of low- or no-cost services to the public, and allow funding of the regulatory process on an equitable basis. Allowing

scaled fees based upon how much the product addresses the access to justice gap incentivizes innovation that specifically addresses the need, and provides a potential alternative avenue for large revenue/profit companies who may balk at the scaled fee structure.

Cons: Disparity in the fee structure may seem unfair by those on the higher end of the fee spectrum. Close qualitative distinctions on fee thresholds may be difficult to administer.

(Approved unanimously; moved by Wendy Chang; seconded by Joshua Walker.)

The following recommendation and accompanying background language for public comment was discussed. The subcommittee agreed to table this recommendation and discuss it further at the June 28, 2019 subcommittee meeting. Subcommittee members Dan Rubins and Josh Walker were assigned to develop proposed revisions to the recommendation including a possible limitation for regulated entities based on a definition of “legal technology.”

- g. Recommendation: Regulated entities should not be limited or restrained by any concept or definition of “artificial intelligence.”

How the Recommendation Relates to the Charter: [TO BE COMPLETED BY STAFF]

Pros: AI is a rapidly evolving field without a specific definition or delineation. The term "AI" is often used as an umbrella/placeholder term in common usage further blurring its meaning. AI-driven systems may also incorporate human input or judgement. Defining AI for the recommendations could lead to unclear applicability as new technologies emerge and evolve. There is no logical reason to exclude technology solutions that may not be “AI driven.”

Cons: By not limiting this program to solutions that are “AI driven,” there are no limits to the types of solutions that might apply for certification.

ADJOURN

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