



# The State Bar of California

**ATILS AGENDA ITEM C.1.  
10-07-19 MEETING**

## Task Force on Access Through Innovation of Legal Services

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To: ATILS Task Force  
From: Allen Rodriguez  
Date: October 7, 2019  
Re: C.1. Recommendation 3.0: Adoption of a new Comment [1] to rule 1.1 "Competence" stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

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*Recommendation 3.0 has received a total of approx. 75 comments, 48 in opposition, 25 in support, and 2 with no stated position.*

### **Public Comments for Discussion**

- **De Lira, Matthew (536H)**
- **Los Angeles County Bar Association, Small Firm and Sole Practitioner Section (909I)**
- **Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (1063F)**

<b>Recommendation 3.0 (Rule 1.1 Competence Rule Tech Comment)[Rules/Ethics Opns]</b>	
<b>Recurring Point</b>	<b>Possible Response</b>
Too busy keeping up with developments in the law to keep abreast of all the “latest and greatest” technology. This obligation would unfairly “handicap” senior attorneys.	<p>The inclusion of this concept in the comment to rule 1.1 is consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.) It is also consistent with the comments to ABA Model Rule 3.0 as adopted by a majority of U.S. jurisdictions.</p> <p>(See: <a href="https://www.lawsitesblog.com/tech-competence">https://www.lawsitesblog.com/tech-competence</a>)</p> <p>The Task Force is not aware of any disparate impact on senior attorneys.</p>
Technology is constantly changing. Because of this, there is no way to ensure that any person is fully up to date with all changes that might possibly be relevant at all times.	The inclusion of this concept in the comment to rule 1.1 does not establish a disciplinable duty independent of the professional responsibilities imposed by the terms of the rule. Rule 1.1 only prohibits a lawyer from “intentionally, recklessly, with gross negligence, or repeatedly” failing to perform legal services with competence. This would appear to be a reasonable minimum public protection standard for a lawyer’s familiarity with technology used in the practice of law.
Given how quickly technology is changing, attorneys should keep up to date with how it affects legal practice. [NOTE: this comment is in support.]	The Task Force agrees that competent use of technology in the practice of law should be encouraged as it can promote new efficiencies that improve the client experience and lower the cost of legal services.
Implementing technology is of the utmost importance when it comes to the justice system. I believe evolution in tech will help cases become shut easier and waste less tax dollars. [NOTE: this comment is in support.]	The Task Force agrees that competent use of technology in the practice of law should be encouraged as it can promote new efficiencies that improve the client experience and lower the costs of legal services.
<p>Case law already recognizes an attorney’s obligation to remain up to date on best practices, including technological advances.</p> <p>Adding the suggested comment to Rule of Professional Conduct 1.1 may be appropriate. [NOTE: this comment is in support.]</p>	The Task Force agrees that adding the new comment is appropriate.

## ATILS - Public Comment Form

Commenting on behalf of an organization	No
Name	Matthew de Lira
City	Solana Beach
State	California
Email address	<a href="mailto:matt@phillipspelly.com">matt@phillipspelly.com</a>
Select the reform option you would like to comment on from the list below:	3.0 - Adopt a New Comment to Rule 1.1 Stating that Competence Includes a Duty to Keep Abreast of Changes in the Law and Technology
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

This is just an ethical rule to make lawyers buy technology, who businesses can make money. This is clearly written by someone who does not practice law, because are retained to achieve an outcome - and the path to that outcome is part of a lawyer's professional judgment. Serious strategy and negotiation exist in legal disputes and lawyers cannot have that freedom to represent the client conflicted by technological constraints.

This is something for the Legislature to consider. The California Constitution mandates a workers compensation system, an administrative law system which administers benefits and rulings. Why can't this be done with landlord-tenants? Why do lawyers need to be lessened when a distinct system can be created to facilitate the access to justice? This is just a get-rich scheme from Silicon Valley businessmen trying to delude ethical standards of lawyers.

We need lawyers. Why? Because lawyers become judges and judges make up the third branch of our democratic republic. When you destroy the legal profession, you're upending American democracy, which has always placed stability in lifetime appointments of persons who wisdom and training give peace and predictability to our society.

This rule waters down actual legal services. The process of obtaining a juris doctor eliminates people unfit to be lawyers, and now this rules would simply allow unfit persons to service the public and cheapen the value of real lawyers. This rule is based on an ideology that everything is better in a free-market business, which unfortunately only benefits certain people at the expense of even more people.

William D. Henderson's report is bias and a scam legal writing. He represents a drop in legal services of People Law from 2007-2011, which everyone knows was the Great

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Recession. He might as well have present data from 1929-1932 - the Great Depression in case anyone missed it. His report is just trash and lacks real legal analysis and fails to HONESTLY depict the state of legal services. He is bias because his report supports his own financial interests - just read his biography. How the State Bar even commissioned this guy is beyond me.

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## ATILS - Public Comment Form

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Bar Association Small Firm and Sole Practitioner Section
Name	Joshua R. Furman
City	Encino
State	California
Email address	<a href="mailto:jrf@furmanlawyers.com">jrf@furmanlawyers.com</a>
Select the reform option you would like to comment on from the list below:	3.0 - Adopt a New Comment to Rule 1.1 Stating that Competence Includes a Duty to Keep Abreast of Changes in the Law and Technology
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
<b>ATTACHMENTS</b> You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<a href="#">LACBA-SFSP-Section-Comments.pdf (400k)</a>



LOS ANGELES COUNTY BAR ASSOCIATION  
**SMALL FIRM AND SOLE PRACTITIONER SECTION**

September 18, 2019

**VIA EMAIL & ATILS PUBLIC COMMENT FORM**

Angela Marlaud  
Office of Professional Competence, Planning and Development  
STATE BAR OF CALIFORNIA  
180 Howard Street  
San Francisco, CA 94105  
*angela.marlaud@calbar.ca.gov*

**RE: Comments of the Small Firm and Sole Practitioner Section of the Los Angeles County Bar Association Concerning Request for Public Comment on Options for Regulatory Reforms to Promote Access to Justice**

Dear Ms. Marlaud, Chair Jason P. Lee, and the Trustees of the State Bar of California:

We write on behalf of the members of the Small Firm and Sole Practitioner Section of the Los Angeles County Bar Association (the “Section”) in response to the request for comment on the recommendations of the Task Force on Access Through Innovation of Legal Services (“ATILS”). The views expressed are solely those of the Section as expressed by its leadership, and are not submitted on behalf of Los Angeles County Bar Association (“LACBA”). LACBA will forward separate comments on behalf of the entire LACBA membership.

With over 10,000 members, LACBA is one of the largest voluntary bar associations in the United States. Its membership and section membership represent the tremendous diversity of the legal profession, both in terms of practice areas and practice environments, and in terms of the clients we represent and the circumstances under which we represent those clients. By some estimates, a significant majority of attorneys practicing in Los Angeles County are small firms and sole practitioners, and the Section is the fastest growing among paid section membership within LACBA. Our membership includes practitioners representing clients at every point in the economic spectrum—from indigent refugees to multinational conglomerates—and we are united in our deep respect and care for the rule of law and the ethical conduct of our profession.

The recommendations of the ATILS task force have been a subject of intense discussion among members of our Section from the time they were first made public. In particular, our Section maintains an active email listserv for discussion of legal issues and policy matters impacting Section members. Without exception, the members of the Section have expressed strong opposition to the recommendations. This letter addresses some of the most serious concerns of our Section membership.

We view the task force recommendations as, at a minimum, highly problematic for protecting the public and the public's confidence in the legal profession; and at the worst, threatening to eviscerate the crucial fiduciary and competency cornerstones of the practice of law.<sup>1</sup> These recommendations appear to have given short shrift to the ethical and public protection mandates of the State Bar. Instead, the ATILS task force has proposed sweeping changes solely to facilitate the entry of large technology firms, venture capital firms, and accounting firms into the legal market. These broad changes—with only a nod to the concept of providing enhanced access to justice through changes to the unauthorized practice of law rules—are extreme, perilous for the public, and apparently exceptional in the United States. As more specifically stated below, we oppose the ATILS recommendations because changing the practice of law into a mass market consumer service is incompatible with the duties of competence, confidentiality, and loyalty so necessary to protect our clients and future clients from harm.

In providing these comments, our broadest concerns are the ATILS task force's lack of concern for the seriousness of the client problems that lawyers face, the implication that legal services can easily be commodified without eroding the quality of practice and the public confidence in the law, and the lack of any recommendations aimed at closing the real access to justice gap in our court system. We encourage the Board to reject the ATILS recommendations because they are not couched in an ethical framework, they will damage public confidence in the law, and they will do nothing to help those in greatest need of legal services. Instead, we see the bulk of these recommendations as little more than cynical deregulation that will further profiteering with no concern for ramifications for the law or legal consumers.

## **1.0 The Task Force does not recommend defining the practice of law.**

While there is no affirmative proposal to respond to here, and we appreciate the continued reliance on case law to define the practice of law, the other ATILS recommendations would allow what has been defined as “the practice of law” by non-licensed practitioners. This engenders a lack of clarity in the law because it fails to consider what the regulatory framework would look like for non-licensed practitioners. Faced with a monumental change in what the practice of law means, prior case law decided in a different historical context is of limited guidance. Any proposal allowing non-licensed persons to do what the courts have called the practice of law must come with clear definitions about which service providers may perform which services.

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<sup>1</sup> Without substantively commenting here, we also raise concerns about the recent changes to the structure of the State Bar, including the rule changes eliminating trustee elections and relegating attorney members to so-called licensees in violation of Cal. Const., art. VI, § 9.



## **1.1 The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.**

We continue to support the *Tenderloin*-oriented practice rule<sup>2</sup> that nonprofits providing legal services to indigent clients should be exempt. However, once the profit motive enters into this calculation, the public policy justification for non-licensed practice of law evaporates. We oppose allowing for-profit individuals and entities to engage in the unauthorized practice of law.

The report correctly points out: “Absent a thoughtful or directed regulatory framework, it is not clear that legal technology innovations developed in the for-profit sector would have a significant benefit to those impacted most by the justice gap.” The ATILS recommendations only emphasize this point by not addressing access to justice problems for underserved litigants in court. Instead, we are repeatedly informed by ATILS task force members that the recommendations will have nothing to do with representing people in court or other forums. The recommendations provide no specific ideas for improving access to justice for underserved litigants.

What the ATILS recommendations and their proponents appear to endorse is the expansion of businesses like LegalZoom, which have been operating on the fringes of the unauthorized practice of law statutes for some time. LegalZoom and similar businesses appear to have powerful monied lobbies, but there is no evidence to suggest that they have improved the access to justice gap, or that they have provided quality “non-legal” legal services for consumers. Anecdotal evidence throughout the profession is uniform that when a client uses a company like LegalZoom for a business solution, the product very often causes more problems than it solves and hurts the legal position of the client. Actual attorneys then have to solve the problems caused by the less-than-rigorous advice from LegalZoom and similar providers if they can—at great expense and risk to the client.

More critically, the economic power imbalance between big tech firms like LegalZoom and consumers allows for unfair contracts of adhesion for services these providers perform. For example, LegalZoom terms of use limit liability to the consumer, impose limited scope representation terms without informed consent, disclaim an attorney-client relationship, mandate arbitration of disputes with a class action waiver, and purport to waive warranties on the services. It is fallacious to suggest that a company that refuses to take substantive responsibility for the consequences of its services is providing access to justice. Indeed, these terms of use would not be enforceable in an attorney representation agreement. Any for-profit entity providing legal services without the strictures of our ethical rules would be obligated to its shareholders to leverage the innate power imbalance in consumer services to refuse to do so. There is inherent dissonance between the concept of making money in mass consumer services and being a fiduciary like an attorney. A proposal that abandons our ethical obligations in favor

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<sup>2</sup> In *Frye v. Tenderloin Housing Clinic, Inc.*, (2006) 38 Cal.4th 23, the California Supreme Court held that a nonprofit providing legal services to the indigent need not be registered with the State Bar.

of allowing big tech market entrants to “disrupt” the legal profession does nothing to serve the public.<sup>3</sup>

The ATILS task force recommendations omit any examination of these problems and fail to balance the recommendation for exempting for-profit non-licensed firms with an ethical framework—suggesting only that regulations should be considered. However, the task force does propose at Attachment J rules that closely mirror the rules in place in the District of Columbia for nonlawyer firm ownership. (Dist. of Columbia Rules Prof. Conduct, rule 5.4(b)(2).) While we are wary that recommendation 1.1 does not explicitly discuss Attachment J, adoption of the proposed changes to Rule 5.4 would at least alleviate some of these concerns. However, there is no apparent justification for these changes in the name of access to justice.<sup>4</sup>

Separately, though Alternative Legal Service Providers (“ALSPs”) will not provide any benefit to the people of California, we believe that ALSPs must, at a minimum, be required to carry insurance for errors and omissions with limits commensurate with the volume of business conducted and the scope of services provided and be subject to, and abide by, the full panoply of ethical rules and duties that any other lawyer must adhere to—including the duty of competence. In the absence of a specific recommendation from the ATILS task force on how to regulate ALSPs, the baseline must provide certainty that consumers engaging these firms are protected to the full extent of any injury they may suffer due to misconduct, breaches of confidence, or negligent services from ALSPs.

**1.2 Lawyers in traditional practice and law firms may perform legal and law related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.**

This recommendation is both ambiguous and apparently ignorant of the state of practice. Most attorneys leverage technology to increase efficiencies and reduce costs every day. Attorneys have been clamoring for improvements in the systems they work in, such as electronic court filing, and have taken full advantage where these technological improvements are adopted. The pervasive underfunding of the courts in the State of California has been no help in this effort. Further, as with similar elements of the recommendations, there are no grounds for the

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<sup>3</sup> Additional problems are presented by the multinational nature of these businesses.

LegalZoom’s terms of use for the United Kingdom, for example, allows it to subcontract its services to American attorneys.

<sup>4</sup> The comments to District of Columbia Rule 5.4 make it clear that there is no access to justice purpose behind liberalizing firm ownership rules (*see*, Comment 7). Moreover, Rule 5.4, first proposed by the Kutak Commission in 1983, has had no effect on access to justice for low-to-moderate-income litigants in the District. To the contrary, a comprehensive study by the District of Columbia Access to Justice Commission published in 2008 found that, for example, over 97 percent of all domestic violence litigants were pro se, and while over 99 percent of filers for domestic and child support were represented by counsel, over 98 percent of respondents were pro se; the study also found that over 50 percent of civil defendants (excluding tax liens) were pro se, while over 21 percent of civil plaintiffs were pro se.

broadly pitched conclusion that “modifications in relationships with nonlawyers” will have any positive effect on the access to justice.

The recommendation then conflates the false notion that lawyers do not use technology with the idea that technology necessarily includes ALSPs. The recommendation does not connect the dots between these two concepts and it is difficult to perceive the task force’s point here—other than continuing to advocate for allowing nonlawyers to provide legal services. Moreover, nothing in the current ethics regime prevents technology firms from licensing their products to law firms, so long as the firms comply with applicable ethics rules.

The task force’s solution in search of a problem cites no evidence that mandating investment in technology will reduce costs or enhance access for clients. It reiterates the substance of recommendation 1.1, and posits in the abstract that for-profit companies could provide cheaper legal services. No jurisdiction has ever attempted this, and consumer experience provides every reason to think it will not only fail, but hurt consumers and confidence in the law. In an era when big tech is under constant investigation for antitrust violations and privacy abuses, the idea that companies like AT&T, Facebook, Google, or Equifax could do an equal or better job of providing legal services than a licensed lawyer with fiduciary duties to the client is implausible.

**1.3 The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.**

While we view any changes in the law concerning ALSPs or other unlicensed practice of law as unhelpful and harmful to the public, we do not oppose monitoring of the effect of any such change. However, the emphasis on metrics and data-driven analysis is oversimplified and short-sighted. The emphasis must be on ensuring that the system of providing legal services is structurally sound and adheres to the values of client loyalty, confidentiality, competence, and integrity. As with any analytic problem outside of mass market business, numbers only tell part of the story. Any monitoring regime must include qualitative evaluation of the conduct of and work product created by ALSPs, jointly owned firms, or any other resulting implementation.

**2.0 Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.**

Again, we continue to support *Tenderloin*-oriented legal services organizations and take no issue with nonprofits providing legal services as a general matter. We further would support a carefully regulated limited technician or practice paralegal licensing classification. Any system that enhances access to the courts while ensuring that clients are not victimized by unethical or incompetent services would be invaluable to Californians.

We do not discern a practical difference for consumers between Option 2 and Option 3, but emphatically oppose an entity regulation model. Entity-only regulation is untested in the

professional license world and leaves too much unaccountability and the opportunity for corruption where large business interests maintain a licensure for all of its paraprofessionals. Nonetheless, we find that exemptions to UPL will have no effect on closing the access to justice gap.<sup>5</sup>

While this recommendation appears to at least invoke the concept of assisting people in court, it does not explicitly say so. However, the recommendation cites specifically to the LLLT system in Washington State, which provides services for litigants in family court. We also note the LPP system in Utah. Both the LLLT and LPP systems limit the subject matter of the disputes that may be handled and the scope of services that may be provided. However, both are specifically geared towards handling disputes—not transactional matters. Further, both LPPs and LLLTs are individually licensed—LPPs by the Utah State Bar, and LLLTs by the LLLT Board of the Washington State Supreme Court operated by the Washington State Bar Association. Because of the mixed results of these experiments, there are lessons to be learned that could develop an improved system, but any non-lawyer law practitioner system that departs from an individual licensing scheme would be dangerous.<sup>6</sup>

There may be some arguable successes in Washington State and Utah, but also cautionary tales. Justice González of the Washington State Supreme Court wrote earlier this year: “It did not take long to realize that the business model adopted by the LLLT program was incompatible with meeting the needs of low-income individuals . . . . Without any evidence of success, the program has begun expanding the scope of legal services that LLLTs are allowed to provide.” Justice González also doubted that “the program can be sustainable without harm to the public,” and found it was “not justified without a showing that there exists a sustainable business plan allowing LLLTs to meet the population’s unmet legal needs.” (*In re Matter of Proposed Amendments, etc.* (Wash. S. Ct. May 1, 2019) No. 25700-A-1258.) These less-than-enthusiastic comments by a jurist with a front-row seat to UPL exemptions should give pause to any jurisdiction considering them.

We believe that we must gather more information about the impact of UPL exemptions in smaller jurisdictions such as Washington and Utah before unleashing an untested and unproven remedy for access to justice in one of the largest legal markets in the world here in California.

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<sup>5</sup> There does not appear to be a shortage of lawyers in California. We acknowledge that many litigants go to court pro se, but there appears to be no solid information on the reasons why. The assumption that these litigants cannot afford a lawyer is not unreasonable, but there are better options for dealing with efficient unaided litigation. For example, the State Bar could and should endorse to the legislature a substantial increase in the jurisdictional limits for small claims and limited jurisdiction courts, which handle litigated civil matters with much greater efficiency and use of accessible technology.

<sup>6</sup> The numbers for the LLLT program are not encouraging. As of September 13, 2019, seven years after Washington initiated the LLLT program, there are a total of **43 (forty-three)** active LLLT licensees—compared to 52,885 licensed attorneys. For fiscal year 2019, the Washington State Bar Association LLLT Board Annual Report states a total of six people applied for LLLT licensure. The first LPP examinations in Utah were offered spring 2019 and no information on the number of licensed LPPs could be found publicly available at this time.

Opening the courthouse doors for more litigants is attractive, but the optimal implementation is far from certain.

In the absence of adequate funding within the courthouse, there can be no benefit to opening its doors. One of the greatest access to justice challenges in California is its inadequate funding for its courts. Matters languish for years before overburdened benches. Motion hearings do not occur for months after the motions are filed in many California courts, and trials can be delayed for additional months just trying to find an open courtroom. It makes no sense to concentrate on only one part of the formula—the barrier to justice presented by costly attorneys—without addressing the systematic dismantling of the judiciary by legislative inaction. The State Bar should be spending money on getting the legislature to restore court funding before it takes a flyer on an MBA student’s pet project for “disrupting” the legal “industry.”

## **2.1 Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.**

The only jurisdiction that has made this work is the District of Columbia, which requires nonlawyer firm owners to adhere to the Rules of Professional Conduct.

However, there is no justification here for changing the rules to allow nonlawyers to own an interest in a law firm. The only “pro” cited by the ATILS task force is that modified business structures will allow venture capital firms to invest in technology that provides, or is used to provide, legal services. There is zero evidence or explanation of how that will possibly close the access to justice gap. As explained above, liberalizing firm ownership in the District of Columbia has had no impact on access to justice, and the profit motive in mass consumer services tramples on the fiduciary obligations necessary for the practice of law. The State Bar should not facilitate the whimsy of speculators. Companies looking to make money in legal services will not provide services needed by underserved clients because there is no money to be made in serving these clients—that is why their needs are unmet today. Again, the Washington State LLLT and District of Columbia experiments are informative because they failed to serve low income litigants.

## **2.2 Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.**

Whether utilizing as-yet undisclosed technology or otherwise, the invitation to turn the practice of law into yet another mass market service commodity will erode the rights of the public and confidence in the law and the legal system. There is no way to ensure the public is protected while giving business the room to play with legal systems without significant capital risk. Either companies have to accept risk and be responsible for the consequences of bad legal advice, mistakes, and negligence, or the consumer’s rights are sold down the river. While using technology itself is not problematic for anyone, if a lawyer is not making the ultimate legal decisions about a matter, the client will lose—not only because the training and experience of an

attorney is critical to the act of providing legal advice, but because the consumer will have limited recourse if something goes wrong. We reiterate our opposition to any proposal allowing a non-fiduciary without a duty of competence to provide legal services.

**2.3 State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of “artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.**

This recommendation is too ambiguous and malformed to act upon. No technology performs the analytical functions of an attorney. The State Bar should not even consider the form of a technological solution until ethical rules are established, or it commits to holding any firm engaged in providing legal services to the full weight of the Rules of Professional Conduct and establishes that it is capable of disciplinary regulation of such firms.

**2.4 The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.**

We agree. But the ethical standards are already established. They are embodied in the Rules of Professional Conduct, the Business & Professions Code for attorneys, and the case law and ethics opinions construing these rules and statutes. Any departure from these established ethical standards in the name of innovation or disruption betrays the public that the State Bar is supposed to protect and indicates that a motive other than benefiting the people of California is behind these recommendations.

**2.5 Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.**

We agree. There is no need for additional regulation because anyone and anything providing legal services (or “practice of law activities”) must be subject to the Rules of Professional Conduct, the Business & Professions Code for attorneys, and the case law and ethics opinions construing these rules and statutes. Anything less is unjustifiable and harms consumers.

Unfortunately, the term “data breach” is today virtually synonymous with consumer technology services. Even companies like Equifax and the largest banks, entrusted with the most sensitive of consumer data, have lost millions of consumers’ confidential data to hackers. In conformity with State Bar Formal Opinion 2010-179, anyone providing legal services must ensure that any technology employed is secure and confidential and that consumer information obtained through legal services is not monetized.

**2.6 The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.**

We take no position on how the State Bar tends to its fiscal business other than to be sure that any new programs are, at a minimum, cost neutral. If any new program causes the State Bar to incur additional costs or deficits, its already limited budget for discipline would be further strained and the State Bar would be forced to retreat yet further from its consumer protection mission.

The State Bar would also do well to heed the caution of Washington State Supreme Court Justice González (cited above), who wrote of concerns about the “significant financial burden of the LLLT program on the Washington State Bar Association,” and “I have serious doubts that the LLLT program is financially sustainable for the Bar ... .”<sup>7</sup> There must be significant study of the financial viability of any additional regulatory burden, whether for the State Bar or a new regulatory agency. None is provided by the ATILS task force.

**3.0 Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.**

It is difficult to perceive the point of this recommendation. The duty of competence already establishes that attorney must be familiar with changes in the law. Separately, attorneys are already charged with being familiar with the technology they employ. (E.g., State Bar Formal Opinion 2010-179, cited above, and the other Opinions cited in the recommendation.) While the recommendation seems largely benign, the term “keep abreast” as applied to technology is not defined and there is no guidance as to what this means. Does it mean that attorneys must buy a new computer or new cell phone regularly? If so, how often? Does it mean that attorneys must communicate with clients via PGP protocols and encrypted sim cards? Does the inherent vulnerability of the Windows operating system require that all law firms use custom Linux flavors? The State Bar should not simply dip its toes in the technology waters without a thorough, informed, and vetted evaluation of its efforts.

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<sup>7</sup> For each of the last two years, the Washington State LLLT Board has operated at a loss of approximately \$240,000 on revenues of approximately \$8,400. (See, <https://www.wsba.org/docs/default-source/about-wsba/finance/fy-2019-budget.pdf>.)

**3.1 Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may share legal fees with a nonlawyer and may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.**

Setting aside the inconsistency between this recommendation and recommendations 1.1 & 2.1, we again take no issue with *Tenderloin*-oriented practices, including fee-splitting for nonprofits. However, the same concerns that apply to nonlawyer ownership interest in firms apply here. At a minimum, there must be a compelling, evidence-based justification for these changes beyond the buzzwords of innovation and disruption. Disruption means risk for clients. That is anathema to the mission of the State Bar and attorneys’ duties to clients. If the State Bar is to adopt one alternative recommendation (3.1 or 3.2), 3.1 is preferable. But neither should be considered unless a finding can be made that justifies the change.

**3.2 Adoption of an amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.**

This recommendation presents an unacceptable risk of harm for clients and the public and prioritizes the mass market profit motive above any duty to clients by eliminating entirely the overriding judgment of the attorney. The judgment of an attorney working in this environment will be constrained by business concerns of the firm even at the expense of client needs. We are distressed that the State Bar would be asked to condone conduct that has resulted in so many attorney disciplinary actions. As California lawyers, we have long rejected the fundamentally unethical practice of capping, and always regarded the duty to clients as one of ultimate fidelity that cannot, by its fiduciary nature, be compromised by the attorney’s own desire to make money. It defies reason to suggest that encouraging the worst of self-interest by those providing legal services will lead to greater access to justice.



**3.3 Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.**

The State of California differs from many jurisdictions because it has well-developed law on attorney ethics and attorney duties. Existing law provides superior nuance and analysis that a new rule would throw into question. While the ATILS task force does not make a recommendation here, we oppose reconsidering adoption of any version of ABA Model Rule 5.7.

**3.4 Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.**

We perceive no reason to revisit these rules. Attorney marketing opportunities through technology are not limited by existing rules, other than restrictions on unsolicited robocalls, spam email and texts, and other repugnant forms of mass communication. There is no reason to expect that allowing more marketing opportunities for attorneys will close the access to justice gap. We do not think that associating lawyers with universally reviled spam will do anything to enhance the public confidence in the law. Only the opposite can be true.

\* \* \*

We thank the Trustees for the opportunity to comment on these recommendations. We cannot support the sweeping changes suggested by the ATILS task force, and we have serious concerns about both the makeup of the task force and the industry sectors providing financial or political support for these recommendations. At a minimum, if the State Bar is to protect the public by enhancing access to justice, it cannot do so by weakening the foundational elements of the practice of law.

The State Bar's overriding concern must be the integrity of the law and the legal system. Even if it is possible to reconcile the capital protection required to encourage investment with the fiduciary obligations of the practice of law, and even if the ATILS task force is aware of unstated evidence that shows allowing these new forms of practice would close the access to justice gap, the ALSPs must meet the same stringent requirements of competency and be licensed to practice law, just as lawyers who want to make money in the legal system have to follow the rules designed to protect the public. The recommendations as written will not enhance access to justice, but create chaos and more harm to the public.

The State Bar must approach any attempt to dismantle the fiduciary obligations of those who provide legal services with extraordinary caution. Our system of justice, cornerstone of our democracy, deserves no less.

Respectfully submitted,

*Executive Committee of the Small Firm and Sole Practitioner Section of the Los Angeles County Bar Association*



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**Introduction:**

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on the tentative recommendations developed by the Task Force on Access Through Innovation of Legal Services (the “Task Force”). PREC is a Committee of the Los Angeles County Bar Association and is submitting the comment on its own behalf and not on behalf of LACBA as a whole. LACBA will forward separate comments on behalf of the entire LACBA membership. The Task Force’s work caused a lot of discussion within our Committee, and we commend the Task Force for taking on this difficult work and for pushing for a solution to the access to justice problem.

Due to timing constraints in this fast-moving comment process and the challenges of obtaining Committee approval for this comment letter, our Committee wants to be clear that any silence as to a particular recommendation should not be interpreted as support or lack of concern. It may well be that the Committee was simply unable to achieve sufficient unity of purpose as to any particular recommendation not commented upon in this letter.

While our Committee agrees that access to justice is an important issue that needs to be addressed, we have concerns and comments to specific portions of the Task Force’s Report, as set forth below. Our overriding concern is that enacting the tentative recommendations could lead to unintended consequences including public harm, and this is a common thread in many of our comments. These proposals, if enacted, will drastically reshape the practice of law. Accordingly, while we are supportive of deliberation and an open exchange of ideas as to the implications flowing from the adoption of the Task Force’s recommendations, the impact of the Task Force’s recommendations are likely to be far-reaching. It is difficult to fully appreciate or predict that impact because of the continuing evolution of technology and the expansiveness of the practice of law. Nevertheless, we believe that the possibility of public harm makes it especially important for the Task Force to evaluate further the likelihood that these options will result in increased access to justice, and not just a shifting of professional duties to nonlawyers and technology companies.

In addition to our specific comments, we would encourage the Task Force to consider other resolutions to the access to justice problem, which include simplifying court procedures, increasing the number of judges, encouraging pro bono services through student loan forgiveness, providing State-sponsored educational programs to low or moderate income communities that are believed to be lacking in access, providing State-sponsored education to lawyers about accessing communities that are in need of legal services. Some of these avenues are the subject of AB 330, which has been chaptered by the California Secretary of State as of September 4, 2019. What seems to be certain is that any material increase in access to justice would cripple the court system without significant court changes and increased funding. The Task Force's Report does not address these consequences of the changes for which it aims.

If nonlawyers and technology companies are permitted to practice law, and appropriate regulation and training are put into place, this likely will have a significant fiscal impact, and we would suggest that fiscal impact be quantified and compared with other methods to increase access to justice. If the proposals are to move forward, there should be evidence that it will increase access to justice, and that these proposals are the best options considering the fiscal impact.

**Tentative Recommendation 1.1:**

**"The models being proposed would include individuals and entities working for profit and would not be limited to not for profits."**

Our Committee questions whether for-profit corporations, whose primary obligation is to maximize returns for investors or shareholders, can be uniformly trusted to put a legal client's interests first, as would any lawyer acting in accord with his or her fiduciary duties. We question whether -- and how -- for-profit corporations can be incentivized to do so. As we mention below with respect to Tentative Recommendation 2.4, we do not see any way to assure this other than to impose all of the duties of lawyers on any person practicing law. It remains unclear to us whether for-profit corporations, if allowed to deliver legal services, can fill the need of those clients who are currently underserved rather than those who can otherwise afford such services -- and, again how to incentivize corporations to do so.

**Tentative Recommendation 2.2:**

**"Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities."**

Our Committee respectfully offers several concerns that it believes the Task Force should consider in evaluating this recommendation further. First, our Committee believes that any technology-driven entity must have a licensed, trained lawyer either supervising or guaranteeing the competence and quality of the services delivered. The Committee

foresees a potential for abuse with the corporate form. Specifically, unscrupulous actors might launch and then abandon technology service corporations in an effort to defraud unwitting clients, avoid regulation, or avoid disciplinary measures. Likewise, the relative ease with which for-profit corporations can be formed, dismantled, and sold could leave clients without either a dependable source of continued services or legal recourse in the event of harm caused by a corporation to which the client had looked for assistance.

There is another competence issue if nonlawyers are permitted to provide some defined legal services to clients. Artificial intelligence presumably would be programmed to provide the correct answer to a particular legal need, but the practice of law is governed by the principle that there rarely is a correct answer. Lawyers are obligated to advise clients of the pros and cons of a proposed course of action, and of reasonably available alternatives, because without in this way obtaining a client's informed consent the lawyer violates not just the duty of competence but also the fiduciary duty of undivided loyalty. See *Anderson v. Eaton*, 211 Cal. 113 (1930). Any consideration of direct legal services by nonlawyers must address the potential resulting disparity between the standards applicable to lawyers and to nonlawyers.

Finally, we see it as an open question whether the State Bar of California has the capacity, resources, or technological expertise to serve as a regulator for for-profit technology service corporations and, if not, which agency can fill that role. We would suggest the Task Force consider the capabilities that would be needed of any regulator and how that would be achievable.

### **Tentative Recommendation 2.3:**

**"State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of 'artificial intelligence.' Instead, regulation should be limited to technologies that perform the analytical functions of an attorney."**

An essential requirement is the ability to define the services that would be permitted to avoid UPL liability. Recommendation 2.3 speaks of "technology-driven legal services delivery systems." Unless this general concept is defined effectively, the UPL exemption will be exploited. It should be recognized that there are many nonlawyers who attempt to provide legal services, such as notarios who have been a major target of law enforcement, and it is essential that unintended persons be excluded. It is necessary to define that conceptual recommendation, but we are unable to locate any definition in the Report. The Task Force recommends that Artificial Intelligence not be defined because it is a rapidly evolving field, but then it becomes even more important to define the types of services that can be provided and by whom. The discussion on Report p. 15 suggests this would be deferred to a regulatory agency but without any suggestion about how the regulatory agency would go about deciding which nonlawyer organizations would qualify and what types of services they may provide.

#### **Tentative Recommendation 2.4:**

**“The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.”**

There must be a careful and client-protective definition of the standards that would govern the nonlawyer organizations. The Report at p. 16 speaks of “requiring standards similar to the legal profession’s core values of confidentiality, loyalty, and independence of professional judgment.” We reject the idea that the legal profession has certain core values, a phrase implying that others are trivial and can be ignored. The Report’s listing of so-called core values ignores competence (rule 1.1), the client’s control over substantive decisions (rule 1.2(a)), the lawyer’s obligation to permit only reasonable limitations on the scope of a representation (rule 1.2(b)), diligence (rule 1.3), effective communication (rule 1.4), fee limitations (rule 1.5), conflicts of interest (at least rules 1.7, 1.8, and 1.9), organizational client obligations (rule 1.13), trust account obligations for unearned fees (rule 1.15), and the obligation to return client materials and unearned fees (rule 1.16(e)). These references are to disciplinary rules that state in narrow disciplinary form civil obligations that provide remedies to injured consumers of legal services. In summary, law clients must be entitled to all of the protections of a lawyer-client relationship including the civil duty of competence measured by the standard applicable to lawyers. In addition, client trust accounts should be interest-bearing IOLTA accounts to the same extent as required for lawyers (see Bus. & Prof. Code § 6211, et seq.), the regulatory agency should have the same investigatory power as does the State Bar (see, e.g., Bus. & Prof. Code § 6168), and the nonlawyer provider should be required to provide the same financial security as law organizations (see, e.g., Corp Code § 16956).

#### **Tentative Recommendation 2.5:**

**“Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.”**

The attorney-client privilege is the oldest of the confidential communication privileges. It is commonly understood that the interests of society are best served by encouraging the client to disclose all relevant facts to his or her attorney and by removing any fear or doubt that the confidential communications made by the client will later be disclosed by the attorney. Recommendation 2.5 seeks to extend, to one degree or another, the attorney-client privilege to client communications to a “technology-driven legal services delivery system.”

Whether or not this recommendation will increase access to justice through technology is unclear. Currently, access to business records are afforded a degree of legal protection which help to ensure that access to business records will be based on a matter of right

under law or through judicial review and intervention. Privacy is a common basis for denial of access to business records. This recommendation seems to proceed on the premise that these existing protections are not enough. That if the technology companies also receive the “equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality,” then access to justice will be expanded.

This contention bears closer examination. First, it is self-evident that the attorney-client privilege assumes that the party receiving the privileged or confidential communication from the client is a licensed attorney. Presumably it is important that this other party has been trained to understand the contours of what amounts to a privileged or confidential communication. Further, this person also understands that keeping client communications confidential or “privileged” goes to the heart of the duties of an attorney and forms a key part of societal understanding of the sanctity of the attorney-client relationship. Can a technology company or more generally, a nonlawyer, easily fill the attorney’s shoes in this regard? Will a technology company have a similar incentive to hold inviolate a client’s communication made in the course of the delivery of legal services?

Second, as already pointed out by the Task Force’s Report, extension of the attorney-client privilege to a “technology-driven legal services delivery system” could frustrate the administration of justice by shielding information from legal proceedings.

Thus, recommendation 2.5 could actually work to hinder public protection. Without a clear answer to either of these points, the Task Force should re-consider before sending forward this recommendation to the Board of Trustees.

### **Tentative Recommendation 3.0:**

**“Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”**

Requiring attorneys to keep abreast of “the benefits and risks associated with relevant technology” will burden attorneys to constantly work to be aware of technological advancement and to cultivate an understanding of technology that far exceeds what would be necessary to utilize the technology.

Also, it is not clear what is meant by “relevant technology.” Who decides what is “relevant?” The ambiguity of this phrase also creates an enforcement problem for the State Bar. Further, it is unclear specifically how the inclusion of this matter to Comment [1] of rule 1.1 will increase the access to justice? After all, the adoption of legal technologies have historically been driven by market forces and it is unclear how the threat of enforcement of rule 1.1 will provide a better catalyst for constructive change.

For example, at one time, legal research was accomplished through digests, key word and phrase indexes and the like. Today, computerized research platforms and internet-

based research software have made legal research far quicker, much easier and more cost-effective. Any attorney who refused to take the time to learn how to utilize these modern technologies found themselves at a stark competitive disadvantage as they were unable to re-coup the time and labor-intensive cost of using the traditional legal research tools. In other words, the market mechanism motivated attorneys to keep up and culled from the marketplace those who refuse to embrace technological advancement. Thus, the wholesale conversion of the entire bar to computerized legal research occurred without the looming threat of misconduct for lack of competence.

In sum, it is the tying of technological awareness to legal competence that is troubling. Besides disproportionately impacting attorneys over the age of 50, it also needlessly burdens all attorneys to keep up or risk prosecution for ethical misconduct. The Task Force instead might consider recommending that the State Bar implement a voluntary training program to educate lawyers about technological advances.

### **Tentative Recommendation 3.1:**

**“Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.”**

The proposal to amend rule 5.4 raises several concerns that the Committee respectfully requests the Task Force consider. First, we are concerned the recommendation to expand the types of fees that a law firm can share to other than those awarded by a tribunal might lead lawyers to the charging of unconscionable fees. Second, the Committee questions whether opening up law firm ownership to nonlawyers will fill the need of clients who are currently underserved, rather than simply serving those clients who are already financially capable of affording such firms’ legal services. The Task Force’s Report does not suggest how nonlawyer ownership of law firms is connected to the access to justice goal. Third, as a practical matter, we believe the Task Force should consider whether having nonlawyers hold financial interests in law firms and precluding such nonlawyers from directing or controlling the professional judgment of the firms’ lawyers can work practically, particularly where the nonlawyer’s financial goals might not coincide with a lawyer’s selected legal strategy for a client.



### **Tentative Recommendation 3.2:**

**“Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.”**

We respectfully offer several concerns with this recommendation. First, while we understand that this recommendation is just that, a recommendation, we note that nowhere does this recommendation appear to provide for mechanisms to ensure that lawyers’ professional judgment is not compromised by those nonlawyers with whom they might share fees. Second, we question whether merely requiring a client’s informed written consent to such arrangements is sufficient. At the risk of generalizing, our Committee doubts whether those underserved clients in most need of legal services have the sophistication to evaluate whether or not to consent to receiving legal services from firms that share fees with nonlawyers and the risks of doing so. Third, PREC believes that any amendment to rule 5.4 should include provisions to ensure that nonlawyers receiving a share of a firm’s fees are doing so in exchange for services that actually reduce the cost of, or increase access to, legal services, rather than just as an investment opportunity.

### **Tentative Recommendation 3.3:**

**“Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.”**

By itself, we have no comment to the addition of rule 5.7 in a form similar to the version in Attachment L to the Task Force’s Report. However, the form rule illustrates the confusion that is likely to arise if entities owned by nonlawyers are permitted to provide legal and nonlegal services. For example, what duties will be owed to a client who obtains legal services from a lawyer and accounting services from the lawyer’s partner, an accountant? What duties will be owed by a nonlawyer who provides legal and nonlegal services? We think clients should be aware of how the duties might differ among service providers within the same firm, and should be informed and consent to any compromise of the duties in the provision of services, such as if the duty of confidentiality will not be maintained firm-wide. While in theory this might seem simple, this could be complicated depending on what activities by nonlawyers and entities are allowed. We think the Task Force should evaluate with each option how clients will be able to evaluate the differences in duties between service providers, if any.

**Tentative Recommendation 3.4:**

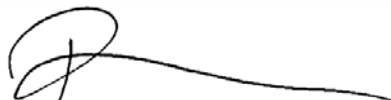
**“Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018, (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules, and (3) advertising rules adopted in other jurisdictions.”**

We appreciate that the proposed form of changes to rule 7.1 through 7.5 in Attachment N would give some clarity to lawyers using online listings or directories to advertise. However, Comment [2] to the proposed rule 7.2 includes group advertisements with online directories. We are concerned that advertisements by a group of attorneys might be viewed as referrals if they do more than just list the lawyers as provided in this comment. We have understood group advertising, which we understand to mean the collective advertising by attorneys, to be permitted and not constrained in the same way as online directories. We request the Task Force consider and clarify whether group advertising will be treated differently.

Comment [5] to rule 7.2 permits lead generation services subject to certain requirements. We believe this provides much needed clarity to lawyers, some of whom already are using lead generation services. It also facilitates potential clients gaining better access to lawyers. The Task Force should consider whether referral services that do not comply with the onerous lawyer referral services rules should be permitted. Of course, the possibility is that referral services will only recommend lawyers who pay a significant amount and that those lawyers might not be best suited for the case, but if the concern is to provide better access, it is likely referral services will find ways to educate consumers about their legal issues and to connect those consumers with lawyers who can assist. The Task Force should consider whether a lawyer referral service that is unregulated and has a profit motive could provide better access without compromising public safety concerns.

Thank you for the opportunity to comment on the tentative recommendations developed by the Task Force on Access Through Innovation of Legal Services.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brandon Niles Krueger', with a long horizontal flourish extending to the right.

Brandon Niles Krueger  
Chair  
Professional Responsibility and Ethics Committee  
Los Angeles County Bar Association