



The State Bar of California

**ATILS AGENDA ITEM B.3.
11-06-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Staff (includes October materials from Bridget Gramme and Mark Tuft)
Date: November 6, 2019
Re: B.3. Recommendation 2.0: Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

Meeting Plan:

For the November 6th meeting, there will not be any subcommittee break-out sessions. The Task Force will meet as a whole to discuss the various recommendations under the Task Force's two broad concepts for regulatory reform. An outline of the plan is provided below and is consistent with the meeting agenda.

1. UPL Exceptions (Agenda Item B)
(Recommendations: 1.0; 1.1; 2.0; 2.1; 2.2; 2.3; 2.4 and 2.5)
 - Exceptions for Individuals
 - Exceptions for Entities/Organizations
2. Fee Sharing/Non-lawyer Ownership (Agenda Item C)
(Recommendations: 3.1; 3.2; and 3.3)
 - Compensation for Referrals, Including "Running and Capping" (CRPC 5.4 & 7.2(b))
 - Passive Investment
 - Protecting Independent Professional Judgment, Including Lawyer Majority Ownership (CRPC 5.4)
 - Provision of Law Related Services (ABA Model Rule 5.7)
3. Other Proposals (Agenda Item D)
(Recommendations: 1.2; 1.3; 2.6; 3.0; and 3.4)
 - Findings re Proposing Definitions of "AI" and the "Practice of Law"
 - Funding of Regulatory Programs and Data Collection/Success Metrics
 - Technology Competence (CRPC 1.1)
 - Advertising and Solicitation Rule Revisions (CRPC 7.1 – 7.5)

Recommendation 2.0:

Recommendation 2.0 will be discussed with other related UPL exception proposals. Recommendation 2.0 has received a total of approximately 610 written comments, 506 in opposition, 94 in support, and 10 with no stated position. Staff has completed processing of all written comments received and the public hearing testimony. Updated public comment synopsis tables and the full text of public comments are available at the ATILS DropBox.

Some of the general themes derived from the written public comments, the public hearing testimony, various articles, podcasts, social media posts and the oral input conveyed at the bar association Town Hall Outreach meetings include the following:

- Changing UPL protections will erode the legal profession and cause a loss of jobs for attorneys.
- Paying off law school debt is already a challenge for many lawyers and it will become an even greater problem with the introduction of cheaper nonlawyer providers competing in the legal services market.
- Nonlawyer advice and advocacy will harm an already overburdened court system by facilitating frivolous and incompetent claims.
- Consumers will receive negligent services, or will be outright defrauded, and become victims of irreparable harm, such as deportation for persons who receive incompetent immigration services.
- How can confidentiality and privilege be assured if nonlawyers or technology are interfacing with clients?
- Professional conduct rules and the civil standard of care do not extend to nonlawyers or entities.
- The practice of law by nonlawyer corporations and insurance companies will lead to corruption.
- Allowing persons other than lawyers who have successfully completed law school, passed the bar examination, and cleared a moral character investigation will cheapen the value of a law degree and diminish trust and confidence in the legal profession.
- There's no clear picture of how the competence of nonlawyer provided services will be assured.
- Other initiatives for improving access to justice that are less riskier than changing UPL are not being adequately considered.
- Precluding professionals other than lawyers from providing legal advice and legal services increases the costs to the client and is inefficient.
- The legal profession is not serving the needs of the vast majority of people with legal problems and this reaches far up the income scale to the middle-class and even to small businesses.
- Nonlawyer practice of law has precedents in other jurisdictions (such as the Washington State LLLT program) and this concept is analogous to the various categories of non-physician medical service providers in the medical industry (such a nurse practitioner or a paramedic).
- Regulation of individuals other than persons who have passed the California bar examination can be patterned on the existing regulation of multijurisdictional practice of law, and special admissions categories, such as certified law students and registered foreign legal consultants.

Percentages showing categories of commenters and the relative positions expressed by those commenters is summarized in the table provided below.

Proposal 2.0	Total	Support	Oppose	SNP
Lawyer	67%	5%	94%	1%
Public Member	3%	76%	18%	6%
Lawyer Organization (bar association, law firm, legal aid)	10%	17%	77%	6%
Public Organization (insurance companies, non and for profit nonlawyer organization)	1%	50%	50%	0%
Unknown (not enough information)	19%	40%	60%	0%
Total	100%	15%	83%	2%

For the October meeting, the Task Force member(s) assigned to Recommendation 2.0 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 2.0. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (4)	Support (4)	Support if Modified (3)	Support if Nonprofit (4)	Support if Sandbox/Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (1)	Other Reform (4)
de Lira, Matthew [536i]	LACBA SFSP (Furman) [909e]	California Lawyers Association (Rosing) [1363b]	Association of Discipline Defense Counsel (Lear) [1364e]	Passmore, Crispin [1031]	Los Angeles County Bar Association (Brot) [1355e]	Orange County Bar Association [1134b]
Morrison Foerster LLP (Hendricks) [1188a]	MyShingle.com (Elefant) [1202a]	The Court Buddy Company (McGlone) [774f]	Consumer Attorneys Association of Los Angeles (Zanville) [1339b]			California Women Lawyers (Ashjian) [1338]
Public Law Center (Ferrin) [1233a]	State Bar of California COPRAC (Bomse) [1229h]	Responsive Law (Gordon) [1197c]	Consumer Attorneys of California (Serna) [1097e]			Judicial Council of California [1386]
Becerra, Alejandro [964b]	Moore, Jennifer [761b]		OneJustice (Wilson) [1227b]			Bazikyan, Armine [606e]

The recurring points table circulated at the October meeting has been updated to accept the proposed responses provided by the members assigned to this recommendation. Any new recurring points found in public comments that were not considered at the October meeting have been added.

Recommendation 2.0 (UPL Exception for Nonlawyers) [ABS/MDP]	
Recurring Point	Possible Response
This will result in erosion of the legal profession loss of jobs for attorneys.	<p>U.S. Census data suggests that there are segments of the people-law sector that are presently underserved by traditional law firm providers.</p> <p>The Henderson Study found that access to legal services in California may be greatly improved by entering the "gig economy." Innovation through collaboration with nonlawyers has the potential for creating opportunities for lawyers, including recent law school graduates, to practice law in new delivery systems, such as online matching services for limited scope representation that might be developed and operated by nonlawyers.</p> <p>Underserved consumers might benefit from the provision of limited, specified legal services rendered by regulated nonlawyer providers. Prof. Stephen Gillers submitted comment to ATILS that: "For example, in Washington State, LLLTs charge substantially less than lawyers for the services they are authorized to perform, about \$60 to \$120 hourly according to a 2018 article in the Seattle Times quoting a Washington State Bar officer.</p>
Lawyers have incurred substantial law school-related debt, student loans.	<p>The Henderson Study found that access to legal services in California may be greatly improved by entering the "gig economy." Innovation has the potential for creating opportunities for lawyers, including recent law school graduates, to practice law in new delivery systems, such as online matching services for limited scope representation.</p> <p>This recommendation is not intended to replace legal services provided by lawyers and law firms.</p>
An already overburdened Court/Judicial system will be further overwhelmed (by frivolous actions and incompetence).	<p>The "appropriately regulated" language in the recommendation envisions a proactive risk-based regulation of the competence of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may help prevent frivolous actions.</p>

Recommendation 2.0 (UPL Exception for Nonlawyers) [ABS/MDP]	
Recurring Point	Possible Response
Non-lawyers do not have the requisite education to give legal advice (potential for malpractice)	<p>Regarding UPL exceptions for regulated individual nonlawyers, the “appropriately regulated” language in this recommendation envisions that eligibility requirements would be established and met before nonlawyers would be authorized to deliver the specific legal services defined under the regulatory scheme.</p> <p>The implementation of this recommendation could also require specified disclosures in this context with respect the scope of the authorized legal advice and services so that consumers may make an informed decision about the services they are seeking.</p>
Non-lawyers will offer subpar services resulting in public confusion, fraud by con artists and irreparable public harm.	<p>Eligibility standards, proactive risk-based regulation and a broad public education strategy can address public confusion and help avoid public harm.</p> <p>[Same comment as above]</p>
Non-lawyers will not adhere to the ethical standards of a lawyer (increase in Runners/Cappers).	<p>Amendments to the fee sharing rule (5.4) and the advertising rules (7.1 – 7.5) are only conceptual proposals. In The “appropriately regulated” language in this recommendation envisions that nonlawyers will be required to adhere to certain ethical standards commensurate with the scope of services provided. =In addition, an implementation body could consider certain limitations that would preserve the statutory prohibitions against running and capping.</p>
The legal system already utilizes the services of non-lawyers (document processors, immigration consultants, etc. . .).	<p>The existing system is simply not meeting the needs of individual consumers. The public is not being adequately protected when 70% of Californians are not receiving the legal services they need to address a civil legal problem. [CITE TO HENDERSON OR MOST RECENT JUSTICE GAP SURVEY].</p> <p>There are individuals outside these specific regulated functions that are not being regulated at all. This recommendation envisions the regulation of nonlawyers in a way that serves and protects the public while balancing the need to expand the range of legal services currently offered to individuals.</p>

Recommendation 2.0 (UPL Exception for Nonlawyers) [ABS/MDP]	
Recurring Point	Possible Response
Large non-legal corporations and insurance companies will corrupt the legal profession.	This recommendation currently does not specify the specific setting under which individual nonlawyers would be authorized to deliver limited legal services with appropriate regulation. Under this recommendation, individual nonlawyers would be subject to the same regulatory framework regardless of practice setting, and would include appropriate ethical standards to guard against corruption and conflicts of interest.
What happens to Attorney-Client privilege?	<p>This proposal does not envision a change in the attorney client privilege, and the privilege would remain intact.</p> <p>Similar to California’s experience in enacting an evidentiary privilege for certified lawyer referral service communications (Evid. Code § 965, et. seq.), a change in the law can be considered for instituting confidentiality and privilege for communications with a regulated nonlawyer provider of legal services.</p> <p>In any event, appropriate disclosure and informed client consent could be included in the regulatory framework to ensure that clients understand the limitations of engaging with a nonlawyer.</p>
Non-lawyers cannot be effectively regulated by the State Bar.	<p>This Recommendation does not address which entity will regulate the nonlawyers, and does not predetermine whether the State Bar or another regulatory agency will be the regulator.</p> <p>The “appropriately regulated” language of the recommendation envisions the proactive, risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement, which may be an effective public protection system for the State Bar or another regulator of nonlawyer providers.</p>

Recommendation 2.0 (UPL Exception for Nonlawyers) [ABS/MDP]	
Recurring Point	Possible Response
Rather than permit nonlawyer providers, consider the following reforms: mandatory pro bono hours for licensed attorneys (with MCLE); making law school more affordable; requiring pro bono for law school grads; increasing financial support to nonprofit legal foundations; and increasing educational requirements for paralegals.	The Task Force was given a specific charge to study AI, technology and online delivery systems with the dual goals of increased access to legal services and public protection. A list of other potential different initiatives will be compiled as an appendix to the Task Force's final report.
Before implementation of the Task Force recommendations, exceptional care should be taken including: further study, full vetting of complex issues and implementation of pilot programs.	The Task Force is considering concepts for regulatory reform and implementation will require further study and work to develop actual proposed changes to laws. A pilot program or a regulatory sandbox are possible methods for carefully considering implementation with appropriate regulation.
The California Bar Exam is so challenging that pass rates are currently at record lows. By permitting non-lawyers, the wrong message is sent that anybody can give legal advice. Why would anyone go to law school, and pass the bar exam?	<p>The Task Force's message is not deregulation that would permit any person to give legal advice. Regarding UPL exceptions for regulated individual nonlawyers, the "appropriately regulated" language in this recommendation envisions that eligibility requirements would be established and met before nonlawyers would be authorized to deliver the specific legal services defined under the regulatory scheme.</p> <p>The implementation of this recommendation could also require specified disclosures in this context with respect the scope of the authorized legal advice and services so that consumers may make an informed decision about the services they are seeking.</p> <p>Unlike the concept of nonlawyer providers of limited specified services (such as LLLTs), a person who successfully becomes licensed as a lawyer will be authorized to render the full panoply of legal services, including representation of a client before a tribunal.</p>

Recommendation 2.0 (UPL Exception for Nonlawyers) [ABS/MDP]	
Recurring Point	Possible Response
The solutions proposed by the Task Force fail to address the legal services access problems identified in the cited study provided by Professor Rebecca Sandefur: cost is not the primary impediment to access, but rather the belief that legal advice was not needed or would not be of meaningful benefit.	<p>The Task Force appreciates and has been informed by both Professor Sandefur's study, and the in-person presentation she provided to the Task Force. Indeed, many of the Task Force's proposed recommendations have been developed following information provided by Professor Sandefur. That being said, not all of the proposed recommendations are limited to information provided by Professor Sandefur.</p> <p>The existing system is simply not meeting the needs of individual consumers in a variety of ways. The public is not being adequately protected when 70% of Californians are not receiving the legal services they need to address a civil legal problem. [CITE TO HENDERSON OR MOST RECENT JUSTICE GAP SURVEY].</p>
Similar reforms in Immigration law have resulted in Immigration Consultants and the unauthorized practice by local internet facilitate "notarios" preying on vulnerable communities.	Unscrupulous individuals operating outside existing laws seek to avoid any regulation. The Task Force's concept envisions eligibility standards, proactive risk-based regulation and a broad public education strategy can address public confusion and help avoid public harm.
Proposals such as these demonstrate that the State Bar is not concerned about protecting the interest of California licensed attorneys.	The protection of the public is the State Bar's mission.
Allowing non-lawyers to offer limited legal services is a valuable method for increasing access to justice. California is encouraged to follow Washington, Utah, Arizona and British Columbia). Paraprofessionals are common in other professions (i.e. nurse practitioners, physician assistant, dental hygienists, IRS enrolled agents). On Financial terms there is ample work for all. Not all healthcare visits require a doctor, and not all legal issues require a lawyer. LLLTs can take some of the burden from lawyers.	<p>The Task Force agrees with this comment.</p> <p>U.S. Census data suggests that there are segments of the people-law sector that are presently underserved by traditional law firm providers. The cost of traditional services appears to be a main factor. These consumers might benefit from the provision of limited, specified legal services rendered by regulated nonlawyer providers. Prof. Stephen Gillers submitted comment to ATILS that: "For example, in Washington State, LLLTs charge substantially less than lawyers for the services they are authorized to perform, about \$60 to \$120 hourly according to a 2018 article in the Seattle Times quoting a Washington State Bar officer.</p>