



The State Bar of California

**ATILS AGENDA ITEM B.5.
11-06-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Staff (includes October materials from Simon Boehme and Dan Rubins)
Date: November 6, 2019
Re: B.5. 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.

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 2.2:

Recommendation 2.2 will be discussed with other related UPL exception proposals. Recommendation 2.2 has received a total of approximately 192 written comments, 173 in opposition, 16 in support, and 3 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:

- Technology-driven delivery systems cannot replicate the counseling function performed by a lawyer.
- Artificial Intelligence requires the sharing of data but privilege, confidentiality, and privacy are inherent in the legal industry and are the touchstone of a functional lawyer-client relationship.
- Even with regulation, the public will not be protected because the State Bar lacks the knowledge and resources to adequately evaluate legal technology.
- Consumers will not have the remedy of a malpractice action if negligent services are rendered by technology.
- The practice of the technology industry and many online businesses is to require a consumer to broadly waive rights as a condition of access and use of the business' technology.
- Implementation of technology for consumers must account for issues of bias and accessibility (such as language, cultural and disabled access issues).
- Technology-driven delivery systems will likely oversimplify legal problems and turn a nuanced and complex professional service into a commodity.
- Some consumers, such as indigent persons, do not own devices needed to utilize online technology-driven legal services.
- There are already online technology-driven providers of legal and law related services that are largely unregulated and allowing this trend to continue unchecked is contrary to public protection.
- Artificial Intelligence and technology-driven systems are used and regulated in the medical industry.
- As indicated in the Henderson report, encouraging development of a one-to-many innovation in the delivery of legal services is a strategy for addressing the significant lack of access to legal services in the people-law sector.

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

Proposal 2.2	Total	Support	Oppose	SNP
Lawyer	72%	3%	96%	1%
Public Member	2%	25%	75%	0%
Lawyer Organization (bar association, law firm, legal aid)	10%	30%	65%	5%
Public Organization (insurance companies, non and for profit nonlawyer organization)	1%	100%	0%	0%
Unknown (not enough information)	15%	11%	86%	4%
Total	100%	8%	90%	2%

For the October meeting, the Task Force member(s) assigned to Recommendation 2.2 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 2.2. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (3)	Support (3)	Support if Modified (8)	Support if Nonprofit (1)	Support if Sandbox/Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (2)	Other Reform (0)
de Lira, Matthew [536c]	MyShingle.com (Elefant) [1202a]	Orange County Bar Association [1134d]	OneJustice (Wilson) [1227a]	Passmore, Crispin [1031]	Los Angeles County Bar Association (Brot) [1355g]	
Public Law Center (Ferrin) [1233b]	State Bar of California COPRAC (Bomse) [1229e]	California Lawyers Association (Rosing) [1363h]			Association of Discipline Defense Counsel (Lear) [1364g]	
Bazikyan, Armine [606g]	Moores, Jennifer [761d]	Consumer Attorneys Association of Los Angeles (Zanville) [1339d]				
		Consumer Attorneys of California (Serna) [1097g]				
		LACBA PREC (Krueger) [1063b]				
		LACBA SFSP (Furman) [909g]				
		The Court Buddy Company (McGlone) [774h]				

Oppose (3)	Support (3)	Support if Modified (8)	Support if Nonprofit (1)	Support if Sandbox/Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (2)	Other Reform (0)
		Responsive Law (Gordon) [1197d]				

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 2.2 (UPL Exception for Tech-Driven Entities)[UPL/AI]	
Recurring Point	Possible Response
Technology-driven legal services and lack of established regulation will risk public protection.	<p>Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent consumer harm. In other jurisdictions, regulatory restraints are used to avoid impairing client protection. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and fitness to own scrutiny for nonlawyers (in the U.K.). In addition, by analogy to the medical industry, the FDA has for many years regulated medical devices to assure public health and safety and this recently includes regulatory approval of an AI-driven medical device that uses AI without requiring a clinician to interpret the input (https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-artificial-intelligence-based-device-detect-certain-diabetes-related-eye).</p> <p>Where about 70% of all Californians are not receiving legal services to address a civil justice legal problem, the public is not being adequately protected. The Task Force's ABS reform concepts seek to increase access. For example, one change to current law might be to relax UPL prohibitions to allow regulated entities to use technology-</p>

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	<p>driven innovations to develop new delivery systems. The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such innovation is the specter of UPL prosecution or UPL based civil unfair business practices challenges by other providers. Consumers who are presently underserved by traditional law firm providers might benefit from the provision of limited, specified legal services powered by AI and other innovative technology-driven delivery systems.</p>
<p>Business decisions will control the practice of law. AI is not developed enough to provide legal services. Use of AI will sacrifice quality of service. Nonlawyer ownership or permission to provide legal services will “water down” the legal profession, and general public will not be able to distinguish the difference between lawyer and nonlawyer firms.</p>	<p>Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent misconduct by nonlawyer owners. In other jurisdictions, imposition of regulatory restraints is used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a “fitness to own test” aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms “have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook” and to “identify, monitor and manage risks to compliance.”</p> <p>In addition, by analogy to the medical industry, the FDA has for many years regulated medical devices to assure public health and safety and this recently includes regulatory approval of an AI-driven medical device that uses AI without requiring a</p>

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	<p>clinician to interpret the input (https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-artificial-intelligence-based-device-detect-certain-diabetes-related-eye).</p> <p>A broad public education strategy can be used to address public confusion about different types of providers of legal services.</p>
<p>AI is not yet sophisticated enough to process all the nuances involved in providing legal advice. The potential for incorrect legal advice could be devastating for members of the public and leave them with little recourse. How do you enforce malpractice against an AI driven legal application?</p>	<p>Proactive risk-based regulation of the competence of nonlawyer providers, and the technology itself, that relies on auditing and monitoring rather than complaint-driven enforcement is intended to mitigate or prevent harm.</p> <p>In addition, by analogy to the medical industry, the FDA has for many years regulated medical devices to assure public health and safety and this recently includes regulatory approval of an AI-driven medical device that uses AI without requiring a clinician to interpret the input (https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-artificial-intelligence-based-device-detect-certain-diabetes-related-eye).</p> <p>In other jurisdictions, imposition of regulatory restraints is used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a “fitness to own test” aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms “have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook” and to “identify, monitor and manage risks to compliance.” Ultimately, the concept of a safe harbor from UPL includes the enforcement</p>

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	<p>paradigm of revoking the safe harbor for bad actors.</p> <p>On the specific issue of malpractice liability, the implementation of UPL reforms and ABS could include consideration of whether to impose a financial responsibility requirement on nonlawyer providers such as insurance, bonding, or contribution to a client security fund.</p>
<p>This will promote profit driven option for large businesses; these companies could hire disbarred attorneys.</p>	<p>Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent misconduct by nonlawyer owners. In other jurisdictions, imposition of regulatory restraints is used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a “fitness to own test” aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms “have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook” and to “identify, monitor and manage risks to compliance.”</p> <p>Regarding disbarred persons, an implementation of technology-driven ABS or a fee sharing concepts could include a ban against ownership by, or fee sharing with, a disbarred lawyer. In current rule 5.3.1, there is precedent for imposing special restrictions on a licensed person’s professional association with a disbarred person in a law practice.</p>

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Nonlawyers already take advantage of vulnerable populations in immigration law. It should not be easier for nonlawyers to practice law. AI cannot analyze the “nuanced or complex and culturally diverse set of circumstances.”	<p>In general, proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. In addition, imposing robust eligibility requirements can be considered. In Washington, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law-related work experienced supervised by an attorney.</p> <p>On the specific issue of notario fraud, an implementation of UPL reforms could include consideration of whether certain services and consumer populations (such as immigration services and immigrants at risk of deportation) should be excluded and reserved for possible reform at a future time only after consideration of public protection data gathered through a regulatory sandbox or initial pilot program that does not involve the immigration services to immigrants at risk of deportation.</p>
Tech legal services will not suffice when lay people will not be able to decipher automated legal answers. Instead, lawyers volunteering hours can resolve access to justice problem. Also, State Bar will not have the capacity to regulate big corporations or firms when they enter the legal market.	<p>A regulatory sandbox or initial pilot program can be used to gather empirical data from participants on issues such as the ability of lay people to understand and benefit from technology driven legal services.</p> <p>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 (i.e., not technology-driven initiatives) will be compiled as an appendix to the Task Force’s final report. Enhancing lawyer volunteer hours will be included in this list.</p> <p>In other jurisdictions, regulatory restraints are used to avoid nonlawyer misconduct. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and the</p>

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	<p>system used in the United Kingdom that has two significant regulatory requirements: (i) a nonlawyer owner must pass a “fitness to own test” aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms “have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook” and to “identify, monitor and manage risks to compliance.” Ultimately, the concept of a safe harbor from UPL includes the enforcement paradigm of the designated regulator (the State Bar or another regulator) revoking the safe harbor for any noncompliant persons or entities.</p> <p>There is an important point in the first sentence here. If an automated legal system tells a consumer to “File a petition for a writ of mandamus,” that’s not very helpful as it assumes the language of lawyers. ATILS may want to consider a recommendation that the regulator publish or adopt guidelines that technology driven legal systems provide a comparable or better user experience and user interaction to that of interactions with lawyers, which may include communicating in plain language when possible.</p> <p>To the assertion that “lawyers volunteering hours can resolve access to justice problem,” there have been zero barriers to lawyers doing this for decades upon decades yet the problem has only worsened. However, the Task Force would encourage serious discussion and planning about how lawyers can help close the justice gap through pro-bono work. As mentioned elsewhere, the Task Force’s mandate was to explore how technology can assist in this regard and is certainly not exclusive of other efforts.</p>

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In order for law firms to innovate and become more efficient, they need to have technology tools to help create new models for delivering legal services. [NOTE: this comment is in support.]	The Task Force agrees that creating a regulatory environment that promotes the use of technology and new delivery systems may lead to collaboration, innovation and increased access to legal services.
Access to justice is a huge problem. Lawyers need innovative solutions. [NOTE: this comment is in support.]	The Task Force agrees that creating a regulatory environment that promotes the use of technology and new delivery systems may lead to collaboration, innovation and increased access to legal services.
There are enough licensed attorneys in CA. Unfair for attorneys who invested in schooling and bar admission.	<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 who are having difficulty finding employment in a traditional law practice.</p> <p>The evidence shows that there are not enough licensed attorneys in CA. Irrespective of the market failures at the core of the justice gap and even with full employment of lawyers, there is simply not enough labor capacity to meet the demand for legal services. Moreover, the State Bar does not exclusively serve the interests of attorneys, it serves the interests of all the people of California. If we are to discuss fairness at all, we must consider how fair existing policies are to 70% of the people of California that cannot currently access legal services. The personal and financial investments by the state's law licensees are admirable and will continue to serve society. In fact, as noted above, unemployed or underemployed lawyers will also benefit from structural changes that provide new business models for law and opportunities for licensed attorneys to use their skills in new ways.</p> <p>Again, turning to the medical field as an analogy, machines are certified by the FDA to do everything from take a blood pressure reading to perform surgery when controlled by a surgeon at a remote location. The highest levels of the profession where independent thought and critical judgment are indeed reserved for licensed professionals, but</p>

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	requiring a physician to take a blood pressure reading or start an IV line would be absurd and a waste of our society's limited resources.
Courts need more funding. Nonlawyer entities will further clog the overstrained system.	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 (i.e., not technology-driven initiatives) will be compiled as an appendix to the Task Force's final report. Court reform and court funding will be included in this list.
Although more costly, a consumer may be better served by hiring a lawyer in the first instance as opposed to obtaining inferior services from tech-driven providers.	<p>In general, proactive risk-based regulation of the competence of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may mitigate or prevent consumer harm from negligent services.</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> <p>In the case of individual nonlawyer providers, imposing robust eligibility requirements can help address competence issues. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law-related work experienced supervised by an attorney.</p>
Client confidentiality could be severely compromised. Implementing this change will require increasing security and protecting quality	Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring of the provider and the provider's technology, rather

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while transmitting legal information.	<p>than complaint-driven enforcement, may be an effective public protection system for the State Bar or another regulator of the competence of services provided by nonlawyers. This methodology does not start with a premise that all existing regulation is applicable to new delivery systems. The regulation of Family Law Facilitators and Family Law Information Centers in the Appendix C to the Rules of Court is precedent for strategically aligning duties to a function that is distinct from traditional delivery systems.</p> <p>(See https://www.courts.ca.gov/documents/appendix_c.pdf.)</p> <p>The commenter raises important concerns regarding appropriate regulatory requirements. These critical issues will be considered at the implementation stage, including whether to undertake a sandbox or pilot program regulatory approach.</p>
This change will further promote trust mill and expose vulnerable consumers (i.e. cognitively impaired and elder consumers) to abuse.	<p>Notwithstanding any reforms to permit ABS or fee sharing, a lawyer would remain bound by the duty of competence, the duty to supervise nonlawyers and the conflicts of interest restrictions. Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement would seek to minimize or prevent consumer harm. In other jurisdictions, regulatory restraints are used to avoid impairing client protection. As examples, this includes requirements for lawyer majority ownership of law practices (ABS in Italy) and fitness to own scrutiny for nonlawyers (in the U.K.). In addition, by analogy to the medical industry, the FDA has for many years regulated medical devices to assure public health and safety and this recently includes regulatory approval of an AI-driven medical device that uses AI without requiring a clinician to interpret the input (https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-artificial-intelligence-based-device-detect-certain-diabetes-related-eye).</p> <p>Where about 70% of all Californians are not receiving legal services to address a civil justice</p>

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	<p>legal problem, the public is not being adequately protected. The Task Force's ABS reform concepts seek to increase access. For example, one change to current law might be to relax UPL prohibitions to allow regulated entities to use technology-driven innovations to develop new delivery systems. The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such innovation is the specter of UPL prosecution or UPL based civil unfair business practices challenges by other providers. Consumers who are presently underserved by traditional law firm providers might benefit from the provision of limited, specified legal services powered by AI and other innovative technology-driven delivery systems.</p> <p>The commenter raises important concerns regarding appropriate regulatory requirements. In developing these requirements protections for the user, such as protections against bias and disability, should be addressed. These critical issues will be considered at the implementation stage, including whether to undertake a sandbox or pilot program regulatory approach.</p>