



The State Bar of California

**ATILS AGENDA ITEM B.7.
11-06-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Staff (includes October materials from Dan Rubins)
Date: November 6, 2019
Re: B.7. 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.

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 2.4:

Recommendation 2.4 will be discussed with other related UPL exception proposals. Recommendation 2.4 has received a total of approximately 93 written comments, 59 in opposition, 33 in support, and 1 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:

- Regulation should be the same as, or substantively similar to, the ethical standards imposed on lawyers.
- Imposing standards for the ethical use of technology (including data security) must be a part of any implementation plan.

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

Proposal 2.4	Total	Support	Oppose	SNP
Lawyer	63%	25%	75%	0%
Public Member	1%	100%	0%	0%
Lawyer Organization (bar association, law firm, legal aid)	18%	41%	59%	0%
Public Organization (insurance companies, non and for profit nonlawyer organization)	1%	0%	100%	0%
Unknown (not enough information)	16%	67%	27%	7%
Total	100%	35%	63%	1%

For the October meeting, the Task Force member(s) assigned to Recommendation 2.4 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 2.4. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (1)	Support (8)	Support if Modified (4)	Support if Nonprofit (0)	Support if Sandbox/Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (0)
The Court Buddy Company (McGlone) [774j]	Los Angeles County Bar Association (Brot) [1355i]	Orange County Bar Association [1134f]		Passmore, Crispin [1031]		
	Association of Discipline Defense Counsel (Lear) [1364i]	California Lawyers Association (Rosing) [1363h]				

Oppose (1)	Support (8)	Support if Modified (4)	Support if Nonprofit (0)	Support if Sandbox/Pilot Program (1)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (0)
	Consumer Attorneys Association of Los Angeles (Zanville) [1339d]	LACBA PREC (Krueger) [1063d]				
	Consumer Attorneys of California (Serna) [1097i]	Responsive Law (Gordon) [1197a]				
	LACBA SFSP (Furman) [909i]					
	Multiple San Diego Attorneys (McIntyre) [1062e]					
	MyShingle.com (Elefant) [1202a]					
	Moores Jennifer [761f]					

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 2.4 (Regulator to Establish Standards for Provider and Tech Itself)[UPL/AI]	
Recurring Point	Possible Response
I support this because it is critical for regulated entities and the technology they develop abide the same standards as the legal profession to ensure integrity. Entities should not be allowed to provide legal services if they are not complying with adequate standards. [NOTE: this comment is in support.]	The Task Force agrees that potential UPL regulatory reforms should involve the imposition of ethical standards on technology and nonlawyer providers, including nonlawyers that use technology-driven delivery systems.

Recommendation 2.4 (Regulator to Establish Standards for Provider and Tech Itself)[UPL/AI]	
Recurring Point	Possible Response
It's absolutely vital to have strong regulations both regarding ethics & regarding the special issues related to protection & security of information when using technology. Regulations should definitely clearly indicate that they apply to both the provider & the technology. [NOTE: this comment is in support.]	The Task Force agrees that potential UPL regulatory reforms should involve the imposition of ethical standards on technology and nonlawyer providers, including nonlawyers that use technology-driven delivery systems.
It is a good initiative so that the legal aspect is better, implementing technology is positive and it is better that these reforms seek to improve the legal aspect. Legal services can currently be improved and these reforms confirm this and I hope that the goal for legal services can be achieved. [NOTE: this comment is in support.]	The Task Force believes that competent use of technology in the practice of law can create efficiencies and lower costs of legal services.
The practice of law is a profession. Legal advice should be delivered by people who have studied not only black letter law but have learned to evaluate various scenarios, weigh pros and cons and give an informed opinion. The practice of law is NOT a check the box profession.	<p>Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring of the provider and the provider's technology, rather 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.</p> <p>In addition, imposing robust eligibility requirements on individual nonlawyers can address issues of competence. 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>
The problem with access to legal services and justice is not the number of practitioners, but the lack of capacity of the courts and the ability of the courts to develop self-help projects to serve a wider public. What's needed is adequate court funding, restoration of the deep cuts made in the last decade and increased funding in addition	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.

Recommendation 2.4 (Regulator to Establish Standards for Provider and Tech Itself)[UPL/AI]	
Recurring Point	Possible Response
UPL not currently being enforced by law enforcement. That will not change and this problem will be exacerbated by allowing additional market participants who may confuse consumers into believing they are entitled to offer legal services	If nonlawyer provider concepts are implemented, then consideration of appropriate eligibility standards, rigorous proactive risk-based regulation and a broad public education strategy may address public confusion and help avoid public harm.
I support this reform as it would help low income/underserved communities who may not be able to hire an attorney due to the high cost. [NOTE: this comment is in support.]	The Task Force agrees that competent use of technology in the practice of law can create efficiencies and lower costs of legal services.
As an attorney shouldering an insanely large student loan debt, you will instantaneously devalue the education so many of us have worked so hard to get, only to find our job prospects and income potential to be FAR below what was promised us, while simultaneously exposing the public to incredible danger.	The Henderson Study found that access to legal services in California may be greatly improved by entering the "gig economy." Innovation through collaboration with nonlawyer providers 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. In addition, proactive risk-based regulation of the competence of technology and nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may mitigate or prevent harm.
These 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.	Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring of the provider and the provider's technology, rather 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. (See https://www.courts.ca.gov/documents/appendix_c.pdf .)

Recommendation 2.4 (Regulator to Establish Standards for Provider and Tech Itself)[UPL/AI]	
Recurring Point	Possible Response
<p>We agree that any entities that are authorized to provide legal services under these proposals should be required to comply with ethical standards developed to ensure public protection, which include the core values of the attorney-client relationship of confidentiality, loyalty and independence of professional judgment. Would the technology company be responsible for malpractice? What concerns us is just how the public would ensure that a new regulator would be able to properly regulate the tech-driven systems. If the State Bar gives up this authority to an outside agency like the Department of Consumer Affairs, how would they ensure that tech firms are not surpassing their authority? Again, we stress that a limited pilot project exploring a select few areas that can be evaluated after a short period of time is the best approach.</p>	<p>Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring of the provider and the provider's technology, rather 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>