



The State Bar of California

**ATILS AGENDA ITEM B.8.
11-06-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Staff (includes October materials from Abhijeet Chavan and Heather Morse)
Date: November 6, 2019
Re: B.8. 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.

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 2.5:

Recommendation 2.5 will be discussed with other related UPL exception proposals. Recommendation 2.5 has received a total of approximately 82 written comments, 51 in opposition, 29 in support, and 2 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:

- It is not clear how a new privilege for legal services provided through technology would actually work because access and user interfaces might not occur in the traditional ways that offer an expectation of privacy, such as a technology that provides crowdsourced legal advice through a social media platform.
- It might be more likely that innovative delivery systems will rely on the crutch of having clients waive privilege and confidentiality rather than taking the extraordinary steps needed to protect it.
- Privilege and confidentiality exists for good reasons and all clients deserve to repose absolute trust when candidly conveying secrets or other embarrassing or inculpatory information to a provider of legal advice.
- Similar to the privilege enacted for communications with a certified lawyer referral service, new laws could be enacted for technology-driven innovative delivery systems.

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

Proposal 2.5	Total	Support	Oppose	SNP
Lawyer	61%	28%	68%	4%
Public Member	2%	100%	0%	0%
Lawyer Organization (bar association, law firm, legal aid)	20%	25%	75%	0%
Public Organization (insurance companies, non and for profit nonlawyer organization)	1%	100%	0%	0%
Unknown (not enough information)	16%	62%	38%	0%
Total	100%	35%	62%	2%

For the October meeting, the Task Force member(s) assigned to Recommendation 2.5 identified certain public comments for discussion. These comments are listed below together with each commenter's position on Recommendation 2.5. In addition to these public comments, staff has identified additional public comments and these are also included in the table below.

Oppose (0)	Support (6)	Support if Modified (5)	Support if Nonprofit (0)	Support if Sandbox/Pilot Program (0)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (1)
	Los Angeles County Bar Association (Brot) [1355]	Orange County Bar Association [1134g]				MyShingle.com (Elefant) [1202a]

Oppose (0)	Support (6)	Support if Modified (5)	Support if Nonprofit (0)	Support if Sandbox/Pilot Program (0)	Support if Nonprofit Sandbox/Pilot Program (0)	Other Reform (1)
	Association of Discipline Defense Counsel (Lear) [1364j]	California Lawyers Association (Rosing) [1363h]				
	Consumer Attorneys Association of Los Angeles (Zanville) [1339a]	Consumer Attorneys of California (Serna) [1097i]				
	LACBA SFSP (Furman) [909j]	The Court Buddy Company (McGlone) [774k]				
	Multiple San Diego Attorneys (McIntyre) [1062f]	Responsive Law (Gordon) [1197a]				
	Moore's, Jennifer [761g]					

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 2.5 (Equivalent Protection of Confidentiality & Privilege)[UPL/AI]	
Recurring Point	Possible Response
The attorney-client privilege is just that: between an attorney and a client. AI is not an attorney, therefore, it should not be afforded the protections of the a/c privilege.	The Task Force believes that potential UPL regulatory reforms should involve the extension of ethical standards to nonlawyer providers, including those that use technology-driven delivery systems in order to afford the same protections to the client. This includes a recognition that communications with nonlawyers or technology call for special confidentiality laws. There is precedent for this in the statutory privilege for a client's communications with a certified lawyer referral service. (See Evid. Code §§ 965-968.)

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<p>The State Bar has not been successful in regulating non-lawyers. Immigration consultants are an example. That law allows immigration consultants to do certain non-legal work while prohibiting them from giving advice to clients. The original purpose of the Immigration Consultant statute was to regulate notarios to prevent them from harming the public. However, there has been no enforcement of the statute against the immigration consultants.</p>	<p>The State Bar is not an agency that registers immigration consultants or monitors compliance with regulatory requirements. (For example, it is the Secretary of State that verifies whether an immigration consultant is in compliance with the statutory bonding requirement.) However, in general the State Bar receives and processes UPL complaints and has partnered with public prosecutors in the enforcement of the UPL. The State Bar has an online UPL complaint portal (in six languages). The State Bar also has utilized its statutory authority to assume jurisdiction of a business engaging in UPL. (See: https://www.recordnet.com/news/20180222/state-bar-seizes-stockton-immigration-law-practice.)</p> <p>Regarding notarios, the State Bar offers online educational information in Spanish. (See: http://www.calbar.ca.gov/Public/More-Languages/En-Espa%C3%B1ol/Folleto-Sobre-Notarios.) In addition, the State Bar has conducted community outreach by:</p> <ul style="list-style-type: none"> ▪ sending Enforcement staff to immigration detentions center to talk about immigration fraud and non-attorney fraud in order to help prevent harm to these vulnerable persons ▪ providing more than 20,000 informational posters about how to file a complaint against an attorney and the unauthorized practice of law to consulates, Centro Legal de la Raza, the ACLU, Public Defender's offices, United Farm Workers, the California Immigrant Policy Center, California Rural Legal Assistance, and other legal aid organizations. ▪ issuing immigration fraud alerts and press releases on nonlawyer UPL matters and attorney discipline matters involving aiding in UPL licensees.
<p>Client communication should not be done via non-lawyer technologies as this would result in a loss of the atty-client privilege.</p>	<p>The Task Force believes that potential UPL regulatory reforms should involve the imposition extension of ethical standards to nonlawyer providers, including those that use technology-driven delivery systems in order to afford the same protections to the client. Use of technology in</p>

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	innovative delivery systems, including those involving nonlawyer providers, may create efficiencies and lower the cost of legal services, thereby aiding in the access crisis. There is precedent for this in the statutory privilege for a client's communications with a certified lawyer referral service. (See Evid. Code §§ 965 – 968.)
Extremely important to use the same standards for attorney-client privilege & confidentiality, particularly confidentiality issues related to technology (such as protection from hacking.) [NOTE: this comment is in support.]	The Task Force agrees that confidentiality and privilege help promote the level of trust necessary for a provider to obtain a client's sensitive information and to render competent legal services. There is precedent for special categories of evidentiary privileges in the statutory privilege for a client's communications with a certified lawyer referral service. (See Evid. Code §§ 965 – 968.)
[1059c, Sedy, Margaret (9-19-19) Employees of technology companies have live access to communications between users of any platform. There is no way to create any confidentiality here. There is an infinitive number of people, third party applications and the like that will have live and archived access to all such communications. And the client, the person/entity we have the utmost duty to protect, will be unaware of this. So will most attorneys that interact with such technology.	Why we selected this: Argues that tech companies will not be able to provide protections because they employ non-lawyers with access to communications. Response: But current law firms and general counsel office also employ non-lawyers with access to communications.
[1212h, Murphy, Donald (9-22-19)] I own a small business - a contingent fee based personal injury law firm that exclusively represents injured people and their families. I am entirely opposed to the present options being considered by the State Bar due to the lack of any empirical data to support or explain how these recommendations may impact small law firms like my own. I envision the entire bodily injury legal landscape will be taken over by large corporations and Wall Street types who will control legal advertising with "big money." I provide good paying jobs for seven individuals and their families, including health Insurance benefits. If the present recommendations are approved, I see these jobs going away. I also expect I will have no choice but to sell out to	Why we selected this: Argues that this will result in loss of jobs. Response: But could create new or different jobs while expanding market and addressing access to justice gap.

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some large corporation, or close my doors And take a job with some insurance company.	
<p>[761g, Moores, Jennifer (9-12-19)] When an industry doesn't keep up with technology, they fall behind other industries, and put a burden on clients to pay more than needed because of a lack of innovation, which displays a lack of customer focus (that is a client focus). Technologically speaking many aspects of the legal industry are behind when it comes to technology. The most probable reason for this lag is based on Rule 5.4, and in some ways Rule 5.5 which prohibits non-lawyers from becoming business partners with lawyers, and thus keeps many advances in technology and industry from benefiting the law industry, and the clients that firms would be better able to serve. I am writing to urge the State Bar of California to approve the proposed changes and amend Rule 5.4 to include the technological advances that partnerships with innovators outside the legal industry can provide by allowing non-lawyers to own parts of a law firm; to share legal fees with non-lawyers; and for non-lawyers to provide legal advice within the constraints to be provided by the State Bar of California.</p>	<p>We agree. We cannot hope that technology will not impact this sector. It will. We need to be prepared for it.</p>
<p>Over my years of helping hundreds of consumers deal with debt collection lawsuits and unpaid credit card debts, which began during the downturn known as the "Great Recession," I have found that in almost all cases, consumers are not equipped to deal with court procedures and may often end up owing more than they would have had to pay in a default judgment by fighting a case in pro per. If the bar rules are changed as proposed, then (even if given "written disclosures") most Consumers will not be aware that they need an attorney to represent them, if the case goes to trial or their are any motions. I oppose changing the definition of the practice of law. I oppose the other changes by this task force. Certainly, I oppose it in conjunction with the other proposed changes to turn the practice of law into a "legal marketplace" to be leveraged</p>	<p>Why we selected this: Argues that this will cause people not to use a lawyer.</p> <p>Response: This is already happening with 75% of civil cases in courts having at least one self-represented litigant.</p>

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<p>by venture capitalists. Using “legal technicians” to try to help consumers in this state, in my opinion, turns the practice of law into a "Legal Zoom," "Court Buddy," or some other catchy website name and interface or an 800 phone number that poorly trained, unsupervised "non-lawyers" answer 24/7. After which, consumers will be under the mistaken belief that they don't need a live attorney, because they are getting "certified" "legal assistance" when really they are getting computer-generated forms. I predict that these proposals will result in more consumers losing their cases and possibly having their wages garnished and a lien against their homes for the other side's costs and perhaps attorney's fees. I oppose these changes. I also object to the way in which these massive changes to the practice of law have not been adequately disclosed to the public and to members of the Bar and the short time that they have been made known to us. I also object that filing objections requires the user to respond to each of the proposals and there is not a way to object to all of these related proposals.</p>	
<p>I agree, but I am concerned with how this would be enforced. All persons and entities providing legal service should abide by the same professional and ethical requirements required of any lawyer.</p> <p>As a practical matter, it is beyond the State Bar's ability to [regulate] Facebook, Amazon, Google, and other technology businesses are built on consumer data. These companies for years have failed to disclose how the data is used, and quite frankly, the FCC and FTC does not have the capacity to understand their systems, and the Bar would be so grossly mismatched that it would be comical.</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>