



The State Bar *of California*

**ATILS AGENDA ITEM B.1.
12-12-19 MEETING**

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: State Bar Staff
Date: December 3, 2019
Re: B.1. Recommendations Issued for Public Comment Concerning Exceptions to the
Unauthorized Practice of Law, including Consideration of Concepts for Regulation

Attached you will find the following agenda items:

- Illustration Draft of a Revised Recommendation for the Authorized Practice of Law by Individual Nonlawyers (prepared by Joyce Raby and Tara Burd)
- Accessibility Recommendation (prepared by Dan Rubins)



To: ATILS Task Force
From: Joyce Raby and Tara Burd
Date: December 2, 2019
Re: Illustration Draft of a Revised Recommendation for the Authorized Practice of Law by Individual Nonlawyers

Below please find our revised draft of the recommendation language provided by Randy. Please note at the very end that both Tara and I think the full task force should consider this language in light of additional concepts and ideas that were "parked in the garage" during our last meeting. We both believe additions to this draft recommendation may result from that further discussion and consideration.

Illustration Draft of a Revised Recommendation for the Authorized Practice of Law by Individual Nonlawyers:

The Task Force does not recommend developing a brand new certification program or licensing model but rather, in an effort to streamline and stay in alignment with current regulatory frameworks, recommends taking advantage of existing educational programs and certifications that exist including paralegals, document preparers, and law schools.

The Task Force recommends expanding these programs and certifications to include additional activities. The Task Force envisions a tiered system based on the level of legal advice and likelihood of irreparable harm. For example, Tier 1 activities may include:

- Helping the consumer to Identify their type of legal problem;
- Identify and articulate options (route to appropriate area of law);
- Connect to resources; and
- Navigate the legal system, including the anticipated processes.

It is anticipated that the foregoing activities would not include attorney supervision.

As a further example, Tier 2 activities may include legal advice that is, perhaps, limited to the areas of need identified by the California Justice Gap Study. These activities may include providing legal advice (applying the law to an individual's facts).

Tier 1 and Tier 2 activities would be delivered by individuals or entities that represent groups of such individuals (allowing for a combination of lawyers, paralegals and document preparers).

Tier 3 activities would be those delivered by technology and could include any of the foregoing activities. For purposes of this discussion “delivery by technology” will mean an online system that uses a dynamic, interactive interview process involving an expert system which intakes and analyzes specific end user information, and reviews potential and available legal options applicable to the end user’s stated needs. The system could include creating an end product - for example, file-able documents - for the consumer that is specific to their needs. The requirements and restrictions for Tier 3 providers should be discussed further by the Task Force.

Regulatory Requirements/Concepts. In designing such a program, the following specific regulatory concepts should be considered:

- (1) eligibility criteria such as age, education, experience, testing, and completion of background checks;
- (2) a financial responsibility requirement;
- (3) imposition of ethical standards, including confidentiality and privilege;
- (4) continuing education requirements; and
- (5) compliance enforcement, including annual reporting, auditing, financial penalties including fines and restrictions on, or forfeiture of profits or ownership interests, and license suspension and revocation.
- (6) incorporation into this expanded area of practice individuals with existing experience and education such as; those with a JD but not licensed to practice (but not disbarred or suspended), out of state attorneys, and/or paralegals.

The Task Force further recommends that an implementation study should consider the areas of greatest need identified in the 2019 California Justice Gap Survey. The purpose of such a study should be to identify priorities for implementation but not necessarily as a way to limit the areas that could be considered. In other words, the Task Force is keenly aware that the Justice Gap affects a broad spectrum of income levels who may have different types of legal problems.

NB:

Tara and Joyce say that the Task Force should also consider this language in light of items parked in the “garage” at the last meeting:

- What are the harms we need to protect people from?
- 508 compliance
- Legal information vs. advice

- Law students who didn't pass the bar can still provide legal services [with appropriate supervision or acquisition of relevant certification]
- How a tech company gets certified



To: ATILS Task Force
From: Dan Rubins
Date: December 3, 2019
Re: Accessibility Recommendation

Recommendation

Technology providers engaging in authorized practice of law activities must comply with both existing law and best practices regarding accessibility and usability. Technology providers must work to mitigate or eliminate bias and other negative effects when deploying algorithmic systems.

Accessibility standards

Just as a physical law office, courthouse, or legal clinic must be located in an accessible building, technology providers must meet technical accessibility standards, like WCAG 2.0 Level AA. The specific standard(s) required may be changed by the regulator as standards and technologies change.

User experience

Technology standards cover only some accessibility issues, like compatibility with screen reader software, avoidance of small fonts, or inadequate color contrast. Adherence to technology standards alone is not sufficient to provide a broadly usable legal service with the same flexibility and responsiveness to diverse human conditions as a lawyer would provide. To avoid creating a two-tiered legal system in which part of the population cannot access potentially more efficient or less expensive legal services, technology providers delivering legal services must ensure that their technology meets or exceeds the utility of human-provided legal services.

Accessible language and design

One of the most essential functions that lawyers in our society perform is the ability to translate complicated and dense legal language and convoluted legal processes into language and discrete instructions that the public can use and understand. When technology providers deliver a legal service to the public, they should use plain language and accessible design patterns where possible.

Avoidance of dark patterns

"Dark Patterns" are a broad class of technology design choices that coerce people into actions against their will or self-interest, add unnecessary products or services, or have other sneaky or negative effects. These dark patterns have "the purpose or substantial effect of subverting or impairing user autonomy,

decision-making, or choice, or of cultivating compulsive usage.”¹ Examples include double-speak on opt-out screens, hidden cancellation buttons, so-called “confirm-shaming,” false-urgency notifications (i.e. “38 people are looking at this flight”), more visible color choice for a less desirable option, intentional mismatch between written instructions and available actions. In California, many dark patterns from previous eras are already banned by laws like the Consumers Legal Remedies Act, Automatic Renewal Law, California Consumer Privacy Act, the Unfair Competition Law, and at the Federal level, the Federal Trade Commission Act, Fair Credit Reporting Act, Truth in Lending Act, Restore Online Shoppers’ Confidence Act, and Fair Debt Collection Practices Act. That so many consumer protection laws have been required illustrates the tech industry’s creativity in developing dark patterns to increase profitability. Technology providers engaging in authorized practice of law activities must avoid employing dark patterns in their products (perhaps a ban on such behavior should include lawyers as well). To aid technology providers, the regulator should publish, partner to distribute, or otherwise encourage education on dark patterns.

Similar remedies to “regular” legal practice

Forced arbitration is an example of a legal dark pattern that is commonly used to lower transaction and insurance costs of mass-market technology products and services. However, it is not in the public interest to allow technology providers to provide the public with a lower level of accountability and recourse than their licensed attorney counterparts. Therefore, technology providers engaging in authorized practice of law activities must not be permitted to include forced arbitration clauses in their terms or contracts for legal services. Similarly, caps on liability and other limitations on client recourse must not be permitted. While such limitations will increase the exposure -- and therefore the cost -- of insuring technology providers engaging in authorized practice of law activities, it is critical that clients have the same remedies when using a technology-provided legal service as they currently do when using human-provided legal services.

Just as lawyers in California must disclose when they do not carry malpractice insurance, technology providers delivering legal services must disclose to their clients if they do not carry General Liability and Errors & Omissions insurance, with limits to be set by the Regulator.

Careful implementation of algorithmic systems

Technology may help provide a wider array of legal services in more languages and situations than lawyers currently deliver. The effect of these advances on Access to Justice should not be understated. However, many algorithmic systems are, by definition, only a model of the situation. As an example, automated translation systems have readily apparent defects, often providing a *translationese* that is clearly a different product than that of a native speaker. In high-stakes legal situations, the effect of such algorithmic defects could be dire. Accordingly, both technology provider and regulator should carefully weigh the risks and benefits of the proposed service. Legal situations with potential for irreversible harm

¹ Deceptive Experiences To Online Users Reduction Act, S. 1084, 116th Cong. (2019)

(many criminal matters, some immigration issues involving asylum or deportation, etc) may not be a good fit for algorithmic systems and should be approached with the utmost care, if at all.

Regulatory authority

The regulator should have the authority to reject, hold, or cancel a technology provider's certification/license/approval to operate products or services engaging in the practice of law that violate these principles, subject to administrative appeal. Technology providers that continue to operate would no longer be eligible for the proposed safe harbor and would therefore be subject to existing rules and statutes regarding Unauthorized Practice of Law, including criminal prosecution.