



To: ATILS Task Force
From: Dan Rubins, Mark Tuft and Kevin Mohr
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Re: Accessibility Recommendation

Recommendation

Technology providers engaging in authorized practice of law activities ("Legal Service Technology Providers" or "LSTPs") must comply with both existing law and best practices applying to individuals regarding accessibility and usability. LSTPs must make reasonable efforts to mitigate or eliminate bias and other potential negative effects when deploying algorithmic systems. Consumers of services provided by LSTPs should have recourse to remedies comparable to those available to consumers of services provided by individual attorneys.

1. Legal service technology accessibility standards

Just as a physical law office, courthouse, or legal clinic must be located in an accessible building, LSTPs must satisfy technical accessibility standards, such as WCAG 2.0 Level AA, to provide assurance of the widest availability of the services being offered. The specific standard(s) required may be changed by the entity regulating LSTPs as standards and technologies change. These technical accessibility standards would apply to all digital forms, not just websites and Apps. For example, PDF documents would need to be optimized for accessibility; OCR software would have to be used on scanned documents to produce machine-readable text. Images would have to include alternative text with captions or descriptions. Videos would be required to have closed captioning. If LSTPs were to provide legal services through other media forms, including those not yet conceived or widely adopted (e.g. virtual reality), they would also have to be compatible with assistive technologies.

2. Augmenting the user experience through accessible language and design

Compliance with general technology standards covers only some accessibility issues, e.g., ensuring compatibility of technology with screen reader software, avoiding small fonts, and ensuring adequate color contrast. Adherence to technology standards alone will not be 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 legal system in which only part of the population can access effective and less expensive legal services, technology providers delivering legal services must ensure that their technology meets or exceeds the utility of human-provided legal services. 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 understand and use. When LSTPs deliver a legal service to the public, they should use plain language and accessible design patterns. Any technology should be subject to user experience testing before it is offered to the public. The pool of testers should be broad and include disabled people, low-income individuals, and others disparately impacted by the legal system.

3. Prohibition against use of “dark pattern” marketing

"Dark Patterns" are a broad class of technology language and design choices in marketing that when adopted tend to coerce people into actions against their will or self-interest, add unnecessary products or services, or have other 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 the use of double-speak on opt-out screens, hard-to-find or hidden cancellation buttons, so-called “confirm-shaming” (e.g., “No, I don’t want to know the secrets of saving money,” or “I am too well-off to be concerned with discounts,” or “Coupons? I don’t need to save”), false-urgency notifications (e.g., “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. LSTPs 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.

4. LSTP duties and prohibitions should be analogous to duties and prohibition in legal services provided by individuals

Mandatory binding arbitration is an example of a legal dark pattern that is commonly used by providers of goods and services to lower transaction and insurance costs of mass-market technology products and services. It would not be in the public interest to allow LSTPs to provide legal services to the public with a lower level of accountability than licensed individual attorneys. Similarly, consumers of such services should be provided with reasonable recourse to remedies if the services provided by an LSTP is substandard. LSTPs engaging in authorized practice of law activities thus should not be permitted to include mandatory and binding arbitration clauses in their terms or contracts for legal services if the effect of such clauses is to compromise rights and remedies to which a person using the services of an individual attorney would have recourse. In addition, careful study must be given to determine the reasonableness of any caps on liability or other limitations on client recourse that might be otherwise warranted based on the type of service being provided, e.g., where the scope of services is limited to a particular discrete task. While some prohibited practices might increase the exposure of LSTPs to liability - and therefore the cost -- of insuring LSTPs engaging in authorized practice of law activities, it is important that the LSTPs be accountable and clients have remedies when using a technology-provided legal service comparable to those available when using human-provided legal services.

An example of a consumer-protective affirmative duty imposed on lawyers would be the requirement in California that lawyers must disclose when they do not carry malpractice insurance. A similar requirement could be imposed on LSTPs to disclose to their clients if they do not carry General Liability and Errors & Omissions insurance, with limits to be set by the Regulator. Finally, in addition to the foregoing considerations, an additional consumer-protection would be the imposition of a confidentiality duty on the LSTPs. Such a duty, how it is monitored and regulated, will require careful

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

study. At a minimum, however, whatever mechanism to protect LSTP confidentiality should preclude the use of a consumer's information without their consent and provide some mechanism, similar to California mediation confidentiality, that will protect such information from subpoena or discovery.

5. Careful implementation of algorithmic systems

It is possible that legal technology services could 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 apparent defects, often providing a *translationese* that differs substantially from the idiom of a native speaker. In high-stakes legal situations, such algorithmic defects could present unwanted and negative results. Accordingly, both technology provider and Regulator should carefully weigh the risks and benefits of the proposed service. Legal situations with potential for irreversible harm (e.g., criminal matters, immigration issues involving asylum or deportation, etc.) might not be a good fit for algorithmic systems and should be approached with the utmost care, if at all.

The development of bias mitigation techniques is an active area of research that is constantly evolving. LSTPs would be expected to take reasonable steps to identify and mitigate bias and other harmful effects of their technologies. If such effects could not be mitigated with existing techniques, the technology should not be provided to the public.

6. Regulatory authority

The Regulator should have the authority to reject, hold, or cancel an LSTP's certification/license/approval to provide authorized practice of law products and services that violate any of the foregoing principles, subject to administrative appeal. LSTPs 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.

7. Guidance for LSTPs

At present, many software providers do not support assistive technologies, or deliver broadly usable technologies. The Regulator's primary objective would not be to provide education for technologists. However, to promote access to justice to those who are under-served by the legal system, the Regulator should collaborate with technologists, people with disabilities, lawyers, low-income individuals and other stakeholders to provide guidance on technology and usability for LSTPs. For example, in order to further the regulator's goal of public protection and encourage compliance, a collaborative conference or working group could be called or organized by the regulator to produce best-practice guides to ensure that LSTPs understand how to implement the regulations.

As a potential template for the type and structure of materials, the United States Digital Service, or 18F, provides guides on Accessibility, Agile Development, Content, Design Methods, Engineering, and Product Management on its website: 18f.gsa.gov as well as the Digital Services Playbook available at playbook.cio.gov. We do not, however, recommend wholesale adoption of the 18F guides and playbook as there are several assumptions that do not fit the Regulator's mission and regulatory structure:

1. The USDS assumes the obligation for service delivery by the Government rather than by third parties operating within the regulatory purview of the Government.

2. The USDS assumes adoption and official endorsement of services, features, and functionality, rather than regulatory safe zones for third parties like the proposed sandbox.

3. The USDS assumes retention and maintenance of the resulting work product by the Government with much of the work done by contractors that are more skilled in development.

4. The USDS assumes that change is imminent so the Playbook is updated regularly by the Government. The Regulator should recognize the same, but may prefer a different mechanism that incorporates more outreach and collaboration.

Materials produced by the Regulator should be made available to the public under a permissive license to encourage use and adaptation by others.