



The State Bar of California

OPEN SESSION AGENDA ITEM 703 MAY 2020

DATE: May 14, 2020

TO: Members, Board of Trustees

FROM: Donna S. Hershkowitz, Interim Executive Director

SUBJECT: Approval of Final Recommendations of the Task Force on Access Through Innovation of Legal Services (ATILS)

EXECUTIVE SUMMARY

At the meeting of the Board of Trustees on March 12, 2020, the Board received the final report and recommendations of the Task Force on Access Through Innovation of Legal Services (ATILS).¹ ATILS' recommendations for amendments to rules 1.1 and 5.4 of the California Rules of Professional Conduct² were authorized for a 60-day public comment period on these ATILS proposals. The Board also approved a recommendation to refer ATILS' nonlawyer paraprofessional regulatory principles to the then anticipated Paraprofessional Working Group. Action on the remaining recommendations, specifically those related to the establishment of the working group to explore development of a "regulatory sandbox," was deferred until the Board's May 14, 2020 meeting, to provide Board leadership the opportunity to engage further with key stakeholders. Following that input, this agenda item presents the Board with three possible options as to how to proceed.

BACKGROUND

The Board established ATILS in July 2018 and charged it with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. To carry out its assignment ATILS prepared 16 options for regulatory reform that the Board authorized for a 60-

¹ The Final Report is provided as Attachment A.

² Unless otherwise indicated all rule references are to the California Rules of Professional Conduct.

day comment period that ended on September 23, 2019. In the final report, these innovative ideas were narrowed and refined.

At the March 12 meeting, the Board discussed the final report. Following discussion, ATILS' proposals for amendments to rules 1.1 and 5.4 were authorized to circulate for a 60-day public comment period. This public comment period is scheduled to end on May 18, 2020. The Board also approved a recommendation to refer ATILS' nonlawyer paraprofessional regulatory principles to the then anticipated Paraprofessional Working Group.

DISCUSSION

The ATILS recommendations postponed to the May Board meeting were generally described as follows in the March report to the Board:

1. Form and appoint a new working group to explore the development of a regulatory sandbox that can provide data on any potential benefits to access to legal services as well as the potential for consumer harm if prohibitions on unauthorized practice of law, fee sharing, nonlawyer ownership, and other legal restrictions are modified or completely suspended for authorized sandbox participants.

To balance the twin goals of public protection and enhanced access to legal services the Board should establish a working group to explore development of a regulatory sandbox as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal services delivery systems, including: (1) consumer facing technology that provides legal advice and services directly to clients at all income levels; and (2) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. In this context, a sandbox is similar to pilot program methodology that makes temporary changes in laws, or the enforcement of laws, to establish a regulatory framework allowing legal services delivery systems that would otherwise be prohibited. The state of Utah has established [a similar sandbox](#) effort. A [report](#) of an Arizona Task Force on Delivery of Legal Services also considers the regulatory sandbox methodology. The working group would also consider amendments to Rule 5.4 regarding fee sharing.

2. Issue for public comment a new rule 5.7 addressing the delivery of nonlegal services provided by lawyers and businesses owned or affiliated with lawyers.

ABA Model Rule 5.7 addresses a lawyer's provision of nonlegal services. It describes when a lawyer's provision of such services is subject to the rules and when it is not. California does not have a version of this rule but the issue is addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, lawyers may be uncertain about their duties and reluctant to explore innovative delivery systems for nonlegal services as well as combined nonlegal

and legal services. A new rule, rule 5.7 would provide greater clarity about those duties and alleviate the obstacle of the uncertainty.

3. Consider recommendations for amendments to the Certified Lawyer Referral Service statutes and Rules of the State Bar together with relevant rules to ensure that they properly balance public protection and innovation in light of access to justice needs and with a particular emphasis on ascertaining if existing laws impose unnecessary barriers to referral modalities (such as automated referrals or online matching services) that are in the public interest.

Current rules restrict a lawyer's ability to compensate a nonlawyer for referring a client (see rules 5.4 and 7.2). Lawyer referral services certified by the State Bar in accordance with applicable statutory law fall under an express exception to the prohibitions on compensation for referrals (see Bus. & Prof. Code § 6155 et seq., and rules 5.4(a)(4) and 7.2(b)(2)). Innovative referral activity carries the potential of enhancing the ability of consumers to consult with a qualified lawyer, particularly on the basic issue of whether a consumer is facing a civil justice legal problem, and that existing laws should be reviewed for possible revisions that are in the public interest.

4. Consider recommendations for amendments to the rules governing advertising and solicitation informed by the current American Bar Association Model Rules of Professional Conduct and the proposed advertising and solicitation rules developed by the Association of Professional Responsibility Lawyers.

Lawyer advertising rules place restrictions on information regarding the marketing of legal services to protect consumers from lawyer communications that use false, deceptive, misleading or intrusive methods. The Association of Professional Responsibility Lawyers (APRL) and the ABA Standing Committee on Professional Responsibility (SCEPR) conducted studies of advertising rules and found that some of the rules were outdated and overly restrictive; and that a lack of uniformity and inconsistent enforcement was restricting the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet, including social media, and other forms of electronic media. For example, California's existing advertising rules designate "real-time electronic contact" as a form of prohibited solicitation and the APRL and SCEPR reports support repeal of this restriction. The advertising and solicitation rules should be reviewed for possible revisions informed by the APRL and SCEPR reports.

Options For Moving Forward

Following discussions with State Bar stakeholders, the following three alternatives are put forward for the Board's consideration. The alternatives all envision the formation of a working group to consider some or all of the foregoing proposals and provide recommendations to the Board for its consideration. The options all have the following elements in common:

- Formation of a working group charged with the twin goals of public protection and enhanced access to legal services;

- The working group will be expected to develop methods to increase access to legal services, including through innovative reforms and legal services delivery systems, focusing on closing the justice gap identified in the Justice Gap Study; and
- The working group will evaluate the existing lawyer advertising and solicitation rules, as well as the Lawyer Referral Service rules, to determine whether and the extent to which the rules inhibit innovation and access to justice, and make appropriate recommendations for revisions.

The options differ in the breadth of the charge of the working group, as described below.

Option 1 (the ATILS proposal):

- The working group will explore the development of a *regulatory sandbox* to evaluate possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems such as consumer facing technology that provides legal advice and services directly to clients at all income levels; and other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others. The working group may consider relaxation of rules and laws regarding unauthorized practice of law, fee sharing, and nonlawyer ownership;
- The working group will explore whether to recommend amendments to rule 5.4 regarding fee sharing; and
- The working group will explore whether to recommend amendments to rule 5.7 regarding the delivery of nonlegal services by lawyers and businesses owned or affiliated with lawyers.

Option 2:

- The same as option 1, except that the working group will focus on closing the justice gap identified in the Justice Gap Study, including through the use of consumer-facing technology, without consideration of relaxing of rules and laws regarding nonlawyer ownership of traditional law firms, nor will it be considering recommendations to amend Rule 5.7 of the Rules of Professional Conduct.

Option 3:

- The working group's charge to identify methods to increase access to legal services, including through innovative reforms and legal services delivery systems will not include the exploration of a regulatory sandbox; nor changes to traditional regulatory principles restricting the unauthorized practice of law, fee sharing with nonlawyers, or prohibiting nonlawyer ownership of, or investment in, a traditional law practice;
- The working group will delve deeply into the extensive data set developed in conducting the California Justice Gap Study to inform its recommendations.

Option 1, the ATILS recommendation for exploring a regulatory sandbox is fully described in the final report. As explained by ATILS, the sandbox, or other pilot program methodology, would likely involve temporary changes to unauthorized practice of law, fee sharing restrictions, and the prohibition against nonlawyer ownership, but in a limited and controlled setting. It is envisioned that the working group would engage in vigorous debate about whether, and if so,

the extent to which such restrictions should be relaxed. The working group would be expected to identify parameters for applicants that may enter a sandbox (should the Board adopt that approach), including the level or proof required of applicants, as a condition of approval of a proposal, to demonstrate that the proposal would increase access to justice and not create consumer harm. The working group would also need to recommend a regulatory structure for this new model.

Option 2 responds to the concerns raised by some opponents to relaxation of rules regarding nonlawyer ownership of traditional law firms, asserting that ATILS had not sufficiently demonstrated the need to reconsider nonlawyer ownership restrictions. Traditionally, nonlawyer ownership arrangements have been viewed as potentially undermining lawyers' independent professional judgment and the duty of loyalty, with adverse consequences to clients. Under Option 2, the working group would still be charged with exploring the development of a regulatory sandbox by relaxing rules that inhibit the development of innovative legal service delivery systems, particularly consumer facing technology that provides legal advice and services directly to clients at all income levels; and other new delivery systems. The working group would explore regulatory reforms related to changes to the prohibitions on the unauthorized practice of law, fee sharing, and other related regulatory reforms, but not the nonlawyer ownership of traditional law firms.

Option 3 responds to concerns voiced by some opponents about relaxation of rules related not only to nonlawyer ownership, but also unauthorized practice of law and fee sharing. Option 3 nonetheless is designed to harness the innovation of a working group to identify measures to address access to justice issues. The working group's work will be focused on addressing issues identified in the recently published California Justice Gap Study, which found 85 percent of civil legal problems experienced by Californians – across all income levels – receive either no legal help or inadequate legal help. The study finds that the most common types of civil legal problems experienced by Californians, regardless of income level, relate to health, finance, and employment. The study highlighted the types of problems Californians found most significant and the ones for which they sought legal help. The data set is rich, and further mining of the data would help to identify creative, targeted solutions to address the significant access needs in California. ATILS' final report identifies a few types of issues that could be considered by such a working group, including, for example, enhancing court-connected self-help programs, including new and expanded online and technology based services and promoting greater pro bono services by establishing student loan forgiveness programs that offer forgiveness as an incentive for rendering such services.

FISCAL/PERSONNEL IMPACT

The new working group would be staffed and funded with existing resources. The extent to which supporting this working group would impact other State Bar priorities would depend on the size of the working group and the scope and timeline for completion of its work.

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 4. Support access to legal services for low-and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: d. Commencing in 2018 and concluding no later than March 31, 2020, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

RECOMMENDATIONS

(1) Should the Board agree with Working Group Option 1, it is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees directs staff to form the Working Group on Closing the Justice Gap to explore the development of a regulatory sandbox (as described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A) as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems, including: (1) consumer facing technology that provides legal advice and services directly to clients at all income levels; and (2) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. The working group will examine the propriety of relaxing rules regarding the unauthorized practice of law, fee sharing, and nonlawyer ownership among other issues; and it is

FURTHER RESOLVED, that staff is directed to prepare a proposed charter for the working group that emphasizes as twin goals of the working group public protection and enhanced access to legal services, and, in addition to the above, may include: (1) examination of amendments to rule 5.4 and rule 5.7 of the California Rules of Professional Conduct; (2) exploration of amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation; and (3) evaluation of amendments to the statutes and Rules of the State Bar governing Certified Lawyer Referral Services as described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A.

(2) Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees directs staff to form the Working Group on Closing the Justice Gap to explore the development of a regulatory sandbox (similar to that described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A) as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems, particularly: (1) consumer facing technology that provides legal advice and services directly to clients at all income levels; and (2) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. The working group shall explore regulatory reforms related to changes to the prohibitions on the unauthorized practice of law and other related regulatory reforms, with the exception of nonlawyer ownership of traditional law firms; and it is

FURTHER RESOLVED, that staff is directed to prepare a proposed charter for the working group that emphasizes as twin goals of the working group public protection and enhanced access to legal services, and, in addition to the above, may include: (1) exploration of amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation; (2) consideration of amendments to rule 5.4 of the California Rules of Professional Conduct short of proposing nonlawyer ownership of traditional law firms; and (3) evaluation of amendments to the statutes and Rules of the State Bar governing Certified Lawyer Referral Services as described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A.

(3) Should the Board agree with Working Group Option 3, it is recommended that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees directs staff to form the Working Group on Closing the Justice Gap to develop methods to increase access to legal services, including through innovative reforms and legal services delivery systems to improve access to justice without material changes to current

attorney regulatory principles restricting fee sharing with nonlawyers and prohibiting nonlawyer ownership of, or investment in, a traditional law firm; and it is

FURTHER RESOLVED, that staff is directed to prepare a proposed charter for the working group that emphasizes as twin goals for the working group ensuring public protection and enhancing access to legal services, that includes: (1) in depth analysis of the data from the Justice Gap Study to refine the analysis of access needs across the state and across income levels; and (2) examination the amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation and amendments to State Bar Rules regarding Certified Lawyer Referral Services.

ATTACHMENT LIST

- A.** Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services.



The State Bar *of California*

Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services



The State Bar *of California*

STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES

FINAL REPORT AND RECOMMENDATIONS

March 6, 2020

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I. EXECUTIVE SUMMARY

The Task Force on Access Through Innovation of Legal Services (ATILS) was assigned to study possible regulatory changes for enhancing the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. The work of ATILS was animated by the inescapable conclusion that nearly all Californians are facing severe challenges in obtaining access to legal services for commonly encountered legal problems. As one speaker¹ at the ATILS public hearing observed:

People will suggest we just need more pro bono work, we need increased funding for civil legal aid, or we need Civil Gideon rights. These are all terrific strategies, important strategies. But we all know they have been tried for decades, while the situation is growing direr. We need new strategies. We need to unlock new forms of legal services delivery, both by lawyers and other kinds of legal professionals if we hope to address the problems that exist.²

The ATILS effort was grounded in an extensive body of research and feedback including a legal market landscape analysis, the Justice Gap Report, and presentations from experts on regulatory reform, including Rebecca Sandefur who presented her 2019 report,³ *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies*. Other presentations addressed artificial intelligence and legal services programs that are experimenting with technology driven delivery systems.

In July 2019, the State Bar Board of Trustees issued for public comment the 16 options for innovation in the delivery of legal services that had been developed by ATILS. The purpose of soliciting comment on these options at the mid-point of ATILS' work was to seek broad public input to inform the Task Force's development of final recommendations. Over 2,800 public comments were received in response to the circulated options. In addition, the Task Force sought and received further input through public hearings, town hall meetings, and moderated stakeholder discussions.

¹ Testimony of Dean Andrew Pearlman, Suffolk University Law School, Prior Chief Reporter for ABA Commission on the Future of Legal Services and Inaugural chair of the ABA Center For Innovation.

² Regarding increased pro bono services by lawyers as a strategy for addressing the justice gap, the 2019 California Justice Gap Study Executive Report (Justice Gap Report) estimated that "an additional 8,961 full-time attorneys would be needed to resolve all the civil legal problems experienced each year by low-income Californians." The Justice Gap Report explained that: "Estimating the funding required at \$100,000 per year per attorney, inclusive of salary and administrative costs, an additional \$900 million in legal aid funding would be required each year to meet the legal needs of low-income Californians eligible for legal aid. For comparison, the State Bar-funded legal aid organizations cumulatively employed approximately 1,500 attorneys in 2018, and leveraged 16,000 pro bono attorneys to provide services," or the equivalent of another 1500 full time equivalents. (Justice Gap Report, at p. 14.)

³ The report is posted online at: http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf.

This report presents seven recommendations that are informed by this substantial input considered by the Task Force and which reflect the goals of the ATILS charter. The recommendations include proposals for: (1) issuance of amendments to the Rules of Professional Conduct for public comment;⁴ (2) formation of a new State Bar working group to explore development of a regulatory sandbox to test innovative delivery systems; and (3) key public protection, access, and regulatory principles for transmission to the State Bar's soon to be formed Paraprofessional Working Group. The recommendations also include proposals for studies of the regulation of Certified Lawyer Referral Services and of the rules governing lawyer advertising and solicitation in light of the changes made by the American Bar Association (ABA) to the Model Rules of Professional Conduct. The seven recommendations are set forth below.

ATILS recommends that the Board:

1. Issue for public comment an amended Rule of Professional Conduct 5.4 to expand the existing exception for fee sharing arrangements with a nonprofit organization, and continue to study other possible revisions to the rule.
2. Issue for public comment an amended Rule of Professional Conduct 1.1 that would add a new comment providing that a lawyer's duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology.
3. Issue for public comment a new Rule of Professional Conduct 5.7 addressing the delivery of law related services provided by lawyers and businesses owned or affiliated with lawyers.
4. Direct the anticipated State Bar Paraprofessional Working Group to consider the key principles of a licensing program that authorizes eligible nonlawyers to provide limited legal services developed by the Task Force.
5. Form and appoint a new working group to explore the development of a regulatory sandbox that can provide data on any potential benefits to access to legal services as well as the potential for consumer harm if prohibitions on unauthorized practice of law, fee sharing, nonlawyer ownership, and other legal restrictions are modified or completely suspended for authorized sandbox participants.
6. Consider recommendations for amendments to the Certified Lawyer Referral Service rules and statutes with relevant Rules of Professional Conduct to ensure that they properly balance public protection and innovation in light of access to justice concerns and with a particular emphasis on ascertaining if existing laws impose unnecessary barriers to referral modalities (such as automated referrals or online matching services) that are in the public interest.

⁴ Unless otherwise noted all references are to the California Rules of Professional Conduct.

7. Consider recommendations for amendments to the Rules of Professional Conduct governing advertising and solicitation informed by the current American Bar Association Model Rules of Professional Conduct and the proposed advertising and solicitation rules developed by the Association of Professional Responsibility Lawyers.

Among these recommendations are proposals that narrow and refine some of the 16 options for regulatory reform that were issued for public comment. Other recommendations are intended to generate additional data and empirical evidence to enable the State Bar to continue the effort to evaluate regulatory reform options. To better understand the general scope and substance of the ATILS recommendations, two key questions and answers are set forth below.

1. Do the recommendations modify existing prohibitions against the unauthorized practice of law (UPL) by nonlawyers?

ANSWER: ATILS studied the issue of whether nonlawyer providers in the legal services market might enhance access to legal services and developed two recommendations that address this question, with neither suggesting that immediate changes to UPL restrictions are warranted.

First, as a short term objective, the Task Force agrees with the Board of Trustees' (Board) current steps to consider implementation of a new paraprofessional licensing program (such as a Limited License Legal Technicians program) that would allow nonlawyer individuals to render specified limited legal advice and services. To assist that initiative, the Task Force has articulated key public protection, access, and regulatory principles and recommends that these be conveyed to the State Bar's new paraprofessional working group. The principles include among others: (1) confidentiality/privilege protections for communications with nonlawyer licensees; (2) financial responsibility requirements; (3) and certification requirements, including background checks.

Second, as a longer term objective, the Task Force believes that beneficial UPL reforms might ultimately include changes to permit practice of law by entities using technology driven delivery systems. However, due to the unprecedented nature of such systems in the practice of law, the Task Force recommends that the Board explore the development of a regulatory sandbox or pilot program to evaluate these delivery systems. By creating a controlled regulatory environment that allows innovators to test these systems and demonstrate that access to legal services benefits substantially outweigh potential risks of consumer harm, the State Bar can secure experiential data upon which to base an informed decision as to whether, and if so, how permanent changes to UPL prohibitions should be pursued. The Task Force believes that a one-to-many model for delivery of legal services, a model made possible only through leveraging technology, poses a greater likelihood of increasing access than any options which rely on the traditional mode of one lawyer servicing one client to resolve one legal problem.

2. Do the recommendations modify restrictions on attorney fee sharing with nonlawyers and nonlawyer ownership of law practices?

ANSWER: The Task Force’s fee sharing recommendations are structured as short and long term proposals; in the immediate term, only fee sharing with non-profits is addressed.

As a short term objective, the Task Force has drafted a proposed amendment to rule 5.4, the lawyer disciplinary rule that restricts attorney fee sharing with a nonlawyer. The Task Force’s amendment would expand the existing exception for lawyers to share fees with certain nonprofit organizations. Currently, the exception only allows for the sharing of court awarded fees. The Task Force’s recommended revision would allow fee sharing with a nonprofit in the case of an out-of-court settlement or other resolution that does not involve court action to award attorney fees. If ultimately adopted by the Board and approved by the Supreme Court, this rule change would provide greater opportunities for legal services organizations to fund their programs through fee sharing arrangements with participating lawyers.

As a longer term objective, the Task Force recommends ongoing study of further revisions to rule 5.4. If, following study, a regulatory sandbox is developed, it is anticipated that applications for participation would be encouraged from law firms and from alternative legal services providers (ALSP) such as nonlawyer owned and operated technology firms, and business collaborations of lawyers and nonlawyers. On the one hand, the Task Force is well aware from public comments received and other input that the longstanding restrictions on fee sharing and nonlawyer ownership serve to protect an attorney’s exercise of independent professional judgment in providing legal advice and services. On the other hand, the Task Force regards rule 5.4 as central to advancing innovation in the delivery of legal services and has heard from technologists and others that this rule is a significant inhibitor of new delivery systems that might otherwise be brought to market by nonlawyer entities or co-owned collaborations of lawyers and nonlawyers. Once deployed, the data from sandbox trials, which would be conducted pursuant to Task Force recommendation #5 could inform whether, and to what extent compliance enforcement standards and risk based proactive auditing by a regulatory oversight body could balance consumer protection and access goals in the absence of a prophylactic ban on fee sharing and nonlawyer ownership. It is notable that the high value placed by ATILS on supporting innovation, including through the efforts of ALSPs, is mirrored in studies and reforms occurring in other U.S. jurisdictions and by recent resolutions of the ABA⁵ and the Conference of Chief Justices⁶ that focus on innovation as a strategy to increase access.

⁵ On February 17, 2020, the ABA House of Delegates passed Resolution 115 that encourages state regulators and state bar associations to explore regulatory innovations that could improve access to legal services, and to collect data on those programs. The is posted online at: <https://www.americanbar.org/content/dam/aba/administrative/news/2020/02/midyear2020resolutions/115.pdf>.

⁶ At its Midyear Meeting on February 5, 2020, the Conference of Chief Justices’ (CCJ) adopted Resolution 2 that “urges its members to consider regulatory innovations that have the potential to improve the accessibility, affordability and quality of civil legal services, while ensuring necessary and appropriate protections for the public.” The resolution is posted online at:

II. BACKGROUND AND PURPOSE OF THE TASK FORCE

The 2017-2022 State Bar Strategic Plan: The State Bar’s mission is to protect the public and includes the primary functions of licensing, regulation, and discipline of attorneys; the advancement of the ethical and competent practice of law; and support of efforts for greater access to, and inclusion in, the legal system. The State Bar operates under a five year strategic plan. Goal 4 of the strategic plan is to: “Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state’s population.” Objective d, of this goal provides that: “Commencing in 2018 and concluding no later than March 31, 2020, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.”

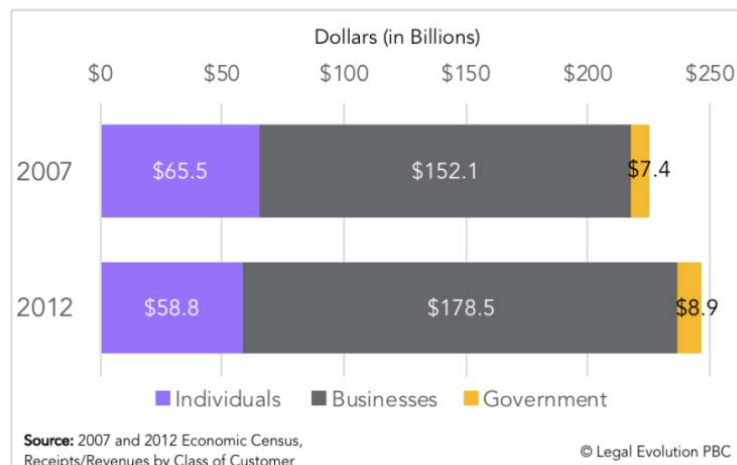
To advance this objective the State Bar commissioned Professor William Henderson,⁷ a national expert in the analysis of the legal profession, to conduct a legal market landscape report outlining the current availability and impact of online legal service delivery models.

Legal Market Landscape Report: The Board received Professor Henderson’s *Legal Market Landscape Report* (the Henderson Report) at its July 20, 2018, meeting. The Henderson Report surveys the landscape of the current and evolving state of the legal services market and identifies new business models developed for delivering legal services using methods that are distinct from traditional delivery systems, including online delivery systems. The report describes the two primary sectors of the market served by lawyers: the PeopleLaw sector in which lawyers serve individual clients; and the Organizational Client sector in which lawyers are focused on serving corporate clients. One key finding of the report is a growth trend in the Organizational Client sector and a sharp decline in the PeopleLaw sector. Professor Henderson provides a comparative analysis of the dollars spent on legal services by type of client for the years 2007 and 2012 and observes the most striking feature is that “over a five-year span, the total dollar amount for individual clients (PeopleLaw sector) declined by nearly \$7 billion. During the same time, the amount allocated to businesses (Organizational Client sector) increased by more than \$26 billion.”

<https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02052020-Urging-Consideration-Regulatory-Innovations.ashx>.

⁷ Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession. Prof. Henderson focuses primarily on the empirical analysis of the legal profession and his work has appeared in leading legal journals, publications, and the mainstream press. Based on his research and public speaking, Prof. Henderson was included on the National Law Journal’s list of The 100 Most Influential Lawyers in America. In 2015 and 2016, he was named the Most Influential Person in Legal Education by The National Jurist magazine. In 2010, Prof. Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

Figure 5. Dollars Spent on Legal Services, 2007 and 2012, by Type of Client



Professor Henderson also explains that substitution is occurring in the market. He finds that: “The PeopleLaw sector is increasingly served by legal publishers such as LegalZoom, Rocket Lawyer and many others that provide access to tech-enabled forms. In effect, this creates a consumer DIY culture where it is difficult to combine high-quality, low-cost forms with legal advice.”

On the key issue of regulation, the Henderson Report ultimately finds that “ethics rules . . . and the unauthorized practice of law... are the primary determinants of how the current legal market is structured” Under ethics rules, any business engaged in the practice of law must be owned and controlled by lawyers. This prohibition limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market.” Ultimately, the report’s conclusion states: “By modifying the ethics rules to facilitate this close collaboration [of lawyers and nonlawyers], the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.” The full text of the Henderson Report is posted at: <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf>.

Following discussion of Professor Henderson’s report and presentation at the July 20, 2018, meeting, the Board adopted a resolution to form ATILS stating: “the Board of Trustees authorizes the formation of a Task Force to analyze the landscape report and conduct a study of possible regulatory reforms, including but not limited to the online delivery of legal services, that balance the State Bar’s dual goals of public protection and increased access to justice.” The Board’s action also directed staff to work with the Chair and Vice-Chair of the Programs Committee to draft a proposed Task Force charter.

The following ATILS charter was approved by the Board at its meeting on September 14, 2018:⁸

The Task Force on Access Through Innovation of Legal Services (ATILS) is charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. A Task Force report setting forth recommendations will be submitted to the Board of Trustees no later than December 31, 2019. Each Task Force recommendation should include an explanatory rationale that reflects a balance of the dual goals of public protection and increased access to justice.

In carrying out this assignment, the Task Force should do the following:

1. Review the current consumer protection purposes of the prohibitions against unauthorized practice of law (UPL) as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;
2. Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with nonlawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need; and
3. With a focus on preserving the client protection afforded by the legal profession's core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting nonlawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.

(See Board Open Session Action Agenda Item No. [701 SEPTEMBER 2018](#).)

III. OVERVIEW OF THE WORK OF THE TASK FORCE

Members of the Task Force: ATILS was appointed as a twenty-three member Task Force that included 11 public members; ten lawyers; and 2 judges. Collectively, the expertise on ATILS

⁸ Subsequently, the charter was amended to extend the deadline for submission of a final report to March 31, 2020.

included knowledge and experience in: (1) legal services programs; (2) artificial intelligence and “big data;” (3) attorney professional responsibility and UPL; (4) lawyer referral services; (5) information technology and data security/privacy; (6) online provision of legal information, document preparation and law-related services; (7) paralegal and law office legal support services; (8) and online dispute resolution. Three officers were appointed: the Chair, the Honorable Lee Edmon, Presiding Justice, California Court of Appeal, Second Appellate District, Division 3; and two Co-Vice-Chairs, Toby Rothschild, Of Counsel, OneJustice, and Joyce Raby, Executive Director, Florida Justice Technology Center. A roster of the current Task Force members is provided as Appendix 1.⁹ Two members of the Task Force were appointees nominated by the Legislature. Additionally, liaisons from the staff of the Supreme Court of California regularly attended ATILS meetings. State Bar assistance was provided by staff from the Office of Access & Inclusion, the Office of Chief Trial Counsel, the Office of General Counsel, and the Office of Professional Competence.

Meetings of the Task Force: To carry out its assignment ATILS held eleven meetings.¹⁰ Consistent with the charter’s 3 enumerated assignments, ATILS formed 3 subcommittees: (1) Unauthorized Practice of Law-Artificial Intelligence subcommittee (UPL/AI subcommittee); (2) Rules and Ethics Opinions subcommittee (Rules subcommittee); and, (3) Alternative Business Structures-Multidisciplinary Practice subcommittee (ABS/MDP subcommittee). These subcommittees held several meetings separate from the plenary sessions of the Task Force. A schedule of the meetings held, including additional subcommittee meetings, is provided as Appendix 2.

Expert and Practitioner Input

At several meetings, ATILS received presentations from persons knowledgeable in legal technology and access to justice.¹¹

SPEAKER	BRIEF BIOGRAPHICAL INFORMATION	MEETING DATE
IV Ashton	Founder and president of Houston AI	12/5/2018
William D. Henderson	Professor of law, editor of Legal Evolution, author of the Legal Market Landscape Report presented to the Board on July 20, 2018	12/5/2018

⁹ Over the course of the task force’s work, there were some member resignations that were filled by alternate nominees. This is indicated in the provided roster.

¹⁰ The ATILS meetings were webcast, including presentations of speakers, and the archived streams are available at [the State Bar website](#).

¹¹ During the opportunity for public comment at the ATILS’ meetings the following persons appeared and provided oral comments: Drew Amerson and Jason Richmond (2/28/19 meeting); Mr. Kabateck, Ms. Shining, Mr. Bojeaux, Ms. Jensen, Ms. Sirkin, Mr. Losh, Mr. Seo, Mr. Cohen, Mr. Taillieu, Ms. Dijvre, Mr. Grinwald, Mr. Saadian, Mr. Kunstler, and Ms. Joyce (10/7/19 Meeting); Jason Solomon, Carolyn Shining, Grant Kennedy, and Andrew Sizer (11/6/19 Meeting); Ian Duncan, Jim Wilroy, Carolyn Shining, and Mark Lester (2/4/20); and, Christopher Sanchez and Brian Pangrle (2/24/20 meeting)

SPEAKER	BRIEF BIOGRAPHICAL INFORMATION	MEETING DATE
Kevin E. Mohr	Professor of law, former COPRAC Chair, former Rules Revision Commission consultant, member of ATILS	12/5/2018
Rebecca L. Sandefur	Faculty fellow and founder of the Access to Justice Initiative at the American Bar Foundation	4/8/2019
Alison Paul and Angie Wagenhals	Executive Director and Pro Bono Director, Montana Legal Services Association, LSC grant recipient for technology in legal aid	5/13/2019
Colleen Cotter	Legal Aid Society of Cleveland, LSC grant recipient for technology in legal aid	8/9/2019
Gillian Hadfield	Professor of Law and Professor of Strategic Management, University of Toronto	8/9/2019
Margaret Hagan	Director of the Legal Design Lab and a lecturer at Stanford University Institute of Design	8/9/2019

In addition, the Task Force was briefed on several occasions about the findings of the [Justice Gap Report](#) described below.

2019 California Justice Gap Study: Technical results from the 2019 California Justice Gap Study were issued in September of 2019. Modeled on the Legal Services Corporation 2017 study, *“Measuring the Civil Legal Needs of Low-income Americans,”* the California Justice Gap Study measured the extent to which all Californians encounter and address civil legal problems. The study included a survey of nearly 4,000 Californians by NORC at the University of Chicago. Respondents were asked about the civil legal problems they faced in the past year and whether they sought legal help for those problems.¹² The survey also included questions about the kinds of help respondents received or why they chose not to seek help, and the respondents’ attitudes about the status or resolution of their legal issues. Based on this survey, the Study generally finds that: “Many Californians, regardless of income, are navigating critical civil legal issues without legal representation or meaningful legal assistance.” Specifically, the data reveals that:

- 55 percent of Californians regardless of income experience at least one civil legal problem in their household each year. Among Californians with low incomes, 60 percent experienced these problems.
- Californians received no or inadequate legal help for 85 percent of their problems. This is due in part to the fact that they seek help for fewer than one in three legal problems.

¹² The NORC survey posed questions about respondents experience with problems that have a civil legal remedy. It is important to note that respondents were not asked to identify if they experienced “legal problems.” Respondents merely identified the existence of a problem and NORC identified the problem as being a legal problem.

- Failure to access legal services is a result of both a service gap (supply) and a knowledge gap (demand); the primary reason Californians do not seek legal help is that they are unsure that the problem they are experiencing is a legal one.
- When Californians seek legal help for their problems, they get that help both offline and online.



Public Comment and Other Outreach Activity

Public Comment

At its July 11, 2019, meeting, the Board of Trustees authorized a 60-day public comment period for the 16 options for regulatory reform that had been identified by ATILS. These options included: (1) general concepts regarding the advisability of defining “the practice of law” and “artificial intelligence;” (2) potential exceptions to UPL for both individual nonlawyers and technology driven delivery systems; (3) and concepts for amendments to the rules restricting fee sharing with nonlawyers and nonlawyer ownership of a law practice. A list of the 16 concept options for regulatory reform is provided as Appendix 3.

The public comment request, including an explanatory infographic, was posted at the State Bar’s website in English, Spanish, Chinese, and Tagalog. The public comment notice and materials are posted at: <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2019-Public-Comment/Options-for-Regulatory-Reforms-to-Promote-Access-to-Justice>. To facilitate participation in the public comment process by stakeholders who might offer a consumer perspective, staff emailed invitations for comment to the following organizations and agencies:

- Northern and Southern California Association of Law Libraries
- National Consumer Law Center

- National Association of Consumer Advocates
- Consumer Federation of California
- State Department of Justice, Office of the Attorney General, Anti-trust Unit
- Federal Trade Commission
- Inequality.org

In addition, the consumer protection units of various news agencies were contacted and informed about the request for public comment.

A total of approximately 2,865 comments from over 1,300 distinct individuals or organizations were received. About 73 percent of the comments indicated a position opposed to one or more of the proposals. About 18 percent of the comments indicated a position in support of one or more of the proposals. The remaining comments either stated no preference or did not indicate a position.

The proposal that received the most comments was the concept of an exception to UPL for regulated individual nonlawyers to provide specified legal services. This proposal received about 610 comments with 506 of those opposed. None of the individual proposals received a majority of comments in support.

Many of the comments identified risks associated with the options for regulatory reform. The major themes of these comments include the following:

- There are insufficient limits on scope, regulation, or enforcement mechanisms for the provision of legal services by nonlawyers.
- There is no clear picture of how the competence of nonlawyer provided services will be assured – great risk of consumer fraud/harm.
- Nonlawyer ownership and fee sharing threaten the independence of professional judgment in the delivery of legal services – profit motives may overwhelm compliance with fiduciary duties.
- Other less radical initiatives for improving access to justice are preferred (such as more funding for legal services programs), but are not being adequately explored.

There were fewer comments expressing support. Some of the themes of supportive comments include the following:

- Other countries have already adopted similar reforms to the delivery of legal services without demonstrated harm to consumers of legal services.

- While more funding for pro bono work and civil legal aid are important strategies, they have been tried for decades and the access crisis continues to grow—new strategies are needed.
- The one-lawyer, one-client, one-case paradigm will continue to restrict access in the people-law sector until innovation is fostered in a way that produces a one-to-many delivery system.
- When such a high percentage of consumers do not have access to legal services, the goal of public protection is not met.

A table showing the distribution of comments received for each public comment option is provided as Appendix 4. The full text of the public comments is available at the ATILS DropBox at: <http://bit.ly/ATILSDropBox>. A report tallying the comments for each concept option is provided as Appendix 5.

Public Hearing

There were 21 speakers at the ATILS public hearing held on August 10 to coincide with the ABA Annual Meeting being held in San Francisco. The transcript of the public hearing is posted at: <http://bit.ly/3cGHHdY>. Selected excerpts are provided below.

Ralph Baxter (attorney)

“The rules of our law practice [ownership and UPL prohibitions] in California impede modernization . . . not letting other professionals participate makes legal service more expensive than it needs to be and it really makes the legal service less effective because it eliminates and excludes from the conversation about how to do it best, people with different perspectives, different training, different skills than those of people who went to law school There isn’t a business that’s successful in the United States that doesn’t want a workforce that consist of people with diverse training, diverse expertise, not just supporting the work of the business but doing the work of the business and our rules say we can’t have that. They all have to be from the same narrow training.”

Zachariah DeMeola (current manager at the Institute for the Advancement of the American Legal System (a.k.a., IAALS) and member of the Colorado Bar Association’s Communications & Technology Law Section)

“IAALS is an independent think tank at the University of Denver committed to improving the civil justice system. One of the problems that deeply concerns us is that the legal profession is not serving the needs of the vast majority of people with legal problems. . . The problem reaches far up the income scale. . . it reaches the middle-class and even small businesses Current rules prevent lawyers from sharing fees with others, so people with novel and potentially ground breaking solutions cannot partner directly with lawyers to develop new legal services. Innovators who would otherwise focus on how to meet consumer needs are spending dollars and energy

trying to maneuver around being seen as offering legal services in the first place, or they are just avoiding the market all together. One such entity recently told IAALS: “It’s expensive to operate in the grey. It severely cramps our capacity to innovate and serve the market.” So without change, access to justice is in danger of becoming just a catch phrase that doesn’t have much relevance to most Americans.”

Stephen Gillers (professor of law, New York University School of Law and former chair of the Policy Implementation Committee of the ABA’s Center for Professional Responsibility)

“More important is the fact that a revised rule [5.4 (re fee sharing)], coupled with present and future advances in artificial intelligence, can allow law offices to organize in new ways in order to serve clients who could not afford them, at all or easily. I am thinking of landlord tenant firms, personal injury firms, criminal defense firms, bankruptcy firms, firms representing debtors and consumers, family law firms, and firms that write wills and estate plans. Revising rule 5.4 as proposed in Option 1 can unleash creative approaches that will reduce the cost of legal services in ways we cannot today even imagine, ways that have never been explored, let alone tried, because of the rule’s absolute ban.”

Arthur Lachman (current Co-Chair of the APRL Future of Lawyering Committee and former APRL president)

“Reform is needed now to fill the wide gap in consumer need for legal services We are not just talking about access to courts. We are talking about affordable legal services by consumers at all levels of the income spectrum Many of the rules simply have a chilling effect on undertaking efforts that would aid consumers As shown in Professor Henderson’s report, restrictions on nonlawyer investment tend to discourage innovation.”

Town Hall Meetings with Local Bar Associations

During the public comment period, representatives of ATILS participated in the following five town hall meetings with local bar associations.

- San Diego County Bar Association (August 20, 2019)
- Los Angeles County Bar Association (August 27, 2019)
- Bar Association of San Francisco and the Alameda County Bar Association (co-hosted on September 9, 2019)
- Sacramento County Bar Association (September 10, 2019)
- Orange County Bar Association (September 18, 2019)

While the format and length of individual meetings varied, in general representatives of ATILS began each meeting with a PowerPoint overview describing the work of the Task Force. This was followed by short summaries of some of the major options for reform being studied including UPL exceptions, fee sharing, and ALSPs. Local bar representatives offered commentary followed by a question and answer session with the audience. ATILS representatives urged attendees to submit input regarding the recommendations that had been circulated for public comment using the online submission form. In-person attendance ranged from about ten to forty persons. The San Diego, Los Angeles, and Orange County meetings were live streamed.

Some of the points raised by local bar representatives or audience members include:

- Harm to the immigrant community by “notario” fraud will be exacerbated if nonlawyers are allowed to practice immigration law. Deportation and other irreversible consequences can result from incompetent “cookie cutter” asylum petitions, as just one example.
- Technology solutions must be multilingual and usable by persons who are literacy challenged.
- Estate planning is very complicated and elderly persons are an at risk population when it comes to fraud and trust mills.
- Given the types of legal services that are likely to be rendered by technology and/or nonlawyer providers, there will probably be little or no competition with the services presently provided by any typical large or mid-size law firm.

Moderated Stakeholder Discussion Forums

After the public comment deadline, ATILS outreach continued. Task Force members arranged for informal discussion sessions with various stakeholders. These sessions included a meeting that was conducted by a professional facilitator. Reports on these sessions were provided at ATILS meetings. The sessions held are listed below.

Stakeholder Group	ATILS Participants	MEETING DATE
Consumer Attorneys of California	Bridget Gramme Carl Luna (Facilitator)	1/16/20
Law Enforcement and Legal Services Organization Representatives	Bridget Gramme Toby Rothschild (by phone)	1/27/20
Legal Services Organization Representatives	Toby Rothschild Bridget Gramme (by phone)	2/19/20

Some of the questions or comments raised by stakeholder groups include the following:

- How would a newly created regulatory system for both a paraprofessional licensing program and for entity regulation be funded?
- How can the public be assured of the competence of the new regulators and their ability to weed out and discipline bad actors?
- The proposal would lead to a two-tiered system of justice—lawyers for those who can afford them, and nonlawyers or apps for those who can’t. Everyone deserves a lawyer.
- How will the new regulators assure that services are being competently delivered?

Following the session with legal services organization representatives, held on February 19, 2020, a written comment was submitted to ATILS by the Legal Aid Foundation of Los Angeles. The comment articulates a concern with proposals for technology driven delivery systems related to the potential reliance on machine translations for non-English speaking consumers that would have a discriminatory effect on linguistically marginalized communities. The full text of this comment letter is provided as Appendix 6.

IV. RECOMMENDATIONS

Recommendation No. 1:

Issue for Public Comment an Amended Rule of Professional Conduct 5.4 to Expand the Existing Exception for Fee Sharing Arrangements with a Nonprofit Organization, and Continue to Study other Possible Revisions to the Rule

Discussion: Rule 5.4 generally prohibits fee sharing with a nonlawyer. One current exception, paragraph (a)(5), permits sharing a court awarded fee with a nonprofit organization that employed, retained, or recommended the lawyer’s employment. ATILS’ proposed amended rule would expand the ability of a lawyer to share fees with a nonprofit organization by adding an exception which provides where the legal fee is not court awarded, but arises from a settlement or other resolution of the claim or matter, the lawyer may share or pay the legal fee to the nonprofit organization, provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code. The broad public policy concerning permissible fee sharing with a nonprofit organization is set forth in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]. A specific precedent for this proposed exception is found in the [District of Columbia’s version of rule 5.4](#).¹³ Regarding the comments to the proposed

¹³ D.C. Rule 5.4 includes Comment [11] which provides that:

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or

amended rule, revisions include additional public protection by including a cross-reference to the client communication duty (see proposed Comment [4]) with a statement that in some instances a fee sharing arrangement with a nonprofit organization might constitute a significant development that must be communicated to the client whose representation the nonprofit had recommended or facilitated. A clean version of ATILS' proposed amended rule 5.4 and a redline/strikeout version showing changes to the current rule is provided as Appendix 7.

Further Study. Although ATILS is recommending the above amendment to rule 5.4, ATILS also generally recommends an ongoing study of other amendments to the rule that could promote collaboration, innovation, and investment in new delivery systems that lower costs and increase access to legal services. The members of the ATILS Task Force have identified revisions to rule 5.4 as being central to advancing innovation in the delivery of legal services. Rule 5.4 has been identified as a significant inhibitor of innovation that could be provided by nonlawyer entities, including individuals, organizations, and technologies. While the Task Force only approved a revision to the rule which will allow expanded fee sharing with nonprofit organizations, a substantial majority of the members agree that additional revisions may be warranted, but that further study and data informing the specifics of those revisions is needed. Some believe that, if created, a regulatory sandbox (see Recommendation No. 5) will provide informative data, while others believe that further changes to rule 5.4 may be studied regardless of the creation of a sandbox.

The Task Force members also recommend that the Board consider the experiences of other jurisdictions that are currently considering amendments to rule 5.4. In short, the Task Force encourages ongoing study of other potential changes to rule 5.4 that could facilitate the closure of the gap in legal services provided to individuals.

Relationship to the ATILS Charter: This recommendation responds to the charter by proposing a rule change that is intended to directly impact the ability of a nonprofit legal services organization to expand its activities through sharing in legal fees that are achieved through a settlement. This revision also adds the term “facilitate” to the language of the exception which is intended to address incubator programs and other similar relationships with lawyers who are working through a nonprofit legal services organization administering an incubator or similar program.

Public Comment: This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of one of two possible alternate revisions

part of the lawyer's fees does not inherently compromise the lawyer's professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code.

to rule 5.4. It was issued as an aspect of Recommendation 3.1. However, Recommendation 3.1 included the concept of nonlawyer ownership of a law practice, while the current recommendation does not. Accordingly, most of the public comment on Recommendation 3.1 addresses nonlawyer ownership and is not responsive to the proposal for limited expansion of the existing exception for fee sharing with a nonprofit legal services organization. There were only a few comments that specifically addressed this expansion. One example is the Northern and Southern Chapters of the American Academy of Matrimonial Lawyers comment letter dated September 20, 2019, which states in part:

We fully support the first suggested change to Rule of Professional Conduct 5.4 to authorize nonprofits to share fees with attorneys who recommend them or otherwise facilitate their employment. Currently, these nonprofits can only share court awarded fees. To tackle the justice gap head on, greatly expanding the reach of Public Law Center, Legal Aid, and Neighborhood Legal Services, so that these nonprofits and others like them can provide legal services to underserved communities is the answer.

Conclusion and Next Steps: ATILS believes that the proposed expanded fee sharing exception described above will enhance access to legal services rendered by nonprofit legal services organizations. Should the Board agree with this proposal, it is anticipated that proposed amended rule 5.4 would be issued for a 60-day public comment period. If ultimately adopted by the Board, the proposed amendment would need to be submitted to the California Supreme Court for approval (see Bus. & Prof. Code, §§ 6076 & 6077).

Recommendation No. 2:

Issue for Public Comment an Amended Rule of Professional Conduct 1.1 that Would Add a New Comment Providing that a Lawyer’s Duty of Competence Encompasses a Duty to Keep Abreast of the Changes in the Law and Law Practice, including the Benefits and Risks Associated with Relevant Technology

Discussion: The Task Force recommends that the Board adopt a proposed amended rule 1.1 that would add a new Comment providing that a lawyer’s duty of competence encompasses a duty to keep abreast of the changes in the law and law practice, including the benefits and risks associated with relevant technology. This proposal is a variation of a similar Comment to ABA Model Rule 1.1 that expressly addresses a lawyer’s technology competence.¹⁴ A clean version of ATILS’ proposed amended rule 1.1 and a redline/strikeout version showing changes to the current rule are provided as Appendix 8.

¹⁴ Comment [8] to ABA Model Rule 1.1 provides that: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Relationship to the ATILS Charter: Adding the Task Force’s proposed Comment to the competence rule responds to the charter by clarifying that a lawyer has a responsibility to be familiar with, and competent in, using relevant technology. By expressly addressing technology competence the rule would facilitate a lawyer’s or law firm’s implementation of technology in their practices in a professionally responsible manner. This responsible use of technology could have a beneficial effect on a law practice’s efficiency, which could in turn lead to savings that can be passed on to clients. Although there are State Bar ethics opinions that have already embraced the substance of the proposed Comment, (see, e.g., State Bar Formal Opns. 2016-196; 2015-193; 2013-188; 2012-186; 2012-184; 2010-179), such opinions are merely persuasive while Comments to the rules are Supreme Court approved guidance for “interpreting and practicing in compliance with the rules.” (See rule 1.0(c) regarding the purpose of Comments.) According to one legal journalist, 38 states have adopted a version of the ABA Model Rules Comment on technology competence (see, <https://www.lawsitesblog.com/tech-competence>).

Public Comment: This proposal was included in ATILS’ request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the Rules of Professional Conduct. It was issued as Recommendation 3.0 as set forth below.

Adoption of a new Comment [1] to rule 1.1 “Competence” stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

Recommendation 3.0 received a total of approximately 76 written public comments, 49 in opposition, 25 in support, and two with no stated position. Public comment themes, along with the Task Force’s responses to each, are outlined below.

1. Requiring all lawyers to maintain competence in legal technology may unduly burden certain lawyers, such as elderly lawyers and solo practitioners.

Task Force Response: The inclusion of this concept in the Comment to rule 1.1 is consistent with the Comments to ABA Model Rule 3.0 as adopted by a majority of U.S. jurisdictions. (See: <https://www.lawsitesblog.com/tech-competence>.) It is also consistent with California ethics opinions. (See: State Bar Formal Op. Nos. 2010-179 and 2012-184.) No evidence was presented to the Task Force of any disparate impact on senior attorneys or solo practitioners arising from these existing authorities. Moreover, to the extent the Comment might be viewed as asserting that a lawyer should not be required to become an expert in relevant technology, that is not at all what is intended. The Comment merely recognizes that lawyers have a duty to provide their clients with competent legal services which, in some instances, would call for the lawyer to employ technology in the representation. The lawyer himself or herself would not be required to become expert in the particular technology, but instead might be expected to associate with someone else who is, which rules 1.1(c) and 5.3 explicitly recognize.

2. Given how quickly technology is changing, attorneys should keep up to date with how it affects legal practice.

Task Force Response: The Task Force agrees that competent use of technology in the practice of law should be encouraged as it can promote efficiencies that improve the quality of representation while lowering the cost of legal services.

3. A lawyer should not be disciplined for not understanding the benefits of a particular technology; instead, a lawyer should only be accountable for conduct when actually using technology in a client's representation.

Task Force Response: The inclusion of this concept in the Comment to rule 1.1 does not establish a disciplinable duty independent of the professional responsibilities imposed by the terms of the rule. Rule 1.1 only prohibits a lawyer from "intentionally, recklessly, with gross negligence, or repeatedly" failing to perform legal services with competence. Unless the lawyer's failure was intentional, reckless or grossly negligent, a single failure would not constitute grounds for discipline. This would appear to be a reasonable minimum public protection standard for a lawyer's familiarity with technology used in the practice of law.

Conclusion and Next Steps: ATILS believes that the proposed Comment will help lawyers appreciate the ever-increasing role that technology plays in the practice of law. Should the Board agree with this proposal, it is anticipated that proposed amended rule 1.1 would be issued for a 60-day public comment period. If ultimately adopted by the Board, the proposed amendment would need to be submitted to the California Supreme Court for approval (see Bus. & Prof. Code, §§ 6076 & 6077).

Recommendation No. 3

Issue for Public Comment a New Rule of Professional Conduct 5.7 Addressing the Delivery of Nonlegal Services Provided by Lawyers and Businesses Owned or Affiliated with Lawyers

Summary of the Recommendation: ABA Model Rule 5.7 addresses a lawyer's provision of law-related services. It describes when a lawyer's provision of such services would be subject to the rules and when it would not be. California does not have a version of Model Rule 5.7, but the issue of the Rules' application when lawyers provide nonlegal services has been addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, however, lawyers may be unsure of their duties in such situations and reluctant to explore innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. ATILS recommends issuing a proposed rule 5.7 for public comment. Such a rule would provide greater clarity about those duties and alleviate the obstacle of the uncertainty in the provision of nonlegal services. ATILS received a *Corporate Legal Market Report* finding, in part, that in the corporate sector legal work is being delivered in different ways, by both lawyers and nonlawyers, using new tools, and, in many cases, the work is being provided by entities beyond the scope of traditional lawyer regulation. The *Corporate*

Legal Market Report is posted at: <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000025230.pdf>. As noted in the report, much of this innovative work is facilitated by each jurisdiction's rule 5.3 (Responsibilities Regarding Nonlawyer Assistance), which permits delivery of services by nonlawyers *to organizations* where the organization's lawyer supervises the services. Such an option is not available in the PeopleLaw sector. A California version of ABA Model Rule 5.7, however, might facilitate a similar level of innovative delivery systems in that sector. A clean version of ATILS' proposed new rule 5.7 is provided as Appendix 9.

Discussion: As stated above, proposed rule 5.7 is intended to provide clarity regarding the obligations attorneys owe when providing nonlegal services. Proposed rule 5.7, however, is not intended to change California law on the application of the Rules of Professional Conduct to a lawyer's provision these services, with one possible exception. The exception is that some interpret the case law as standing for the proposition that a lawyer cannot disclaim an attorney-client relationship. While that is generally true and is supported in cases such as *In the Matter of Gordon* (Rev. Dept. 2018) 5 Cal. State Bar Ct. Rptr. __ (2018 WL 5801485), lawyers should be permitted as a matter of public policy to engage in business with nonlawyers in the provision of innovative and cost efficient services to consumers outside the traditional attorney-client relationship where the services themselves are not governed by the Rules of Professional Conduct. Existing policy already permits a lawyer to clarify the scope of the lawyer's duty when the lawyer is engaged in conduct distinct from the practice of law, for example, in situations where a lawyer serves as a mediator or third party neutral. See rule 2.4. There is no reason why lawyers and nonlawyers should not be able to join forces in providing services to consumers outside the traditional attorney-client relationship with adequate notice and disclosures that the services are not legal and the protections of the attorney-client relationship are not available to the consumer. As provided in the proposed rule, lawyers would still continue to be held to a higher standard under the Rules and State Bar Act depending on the nature of the services being provided. Moreover, the rule also recognizes there may be ethical consequences to the lawyer in performing nonlegal services. These issues are appropriately addressed in comments to the rule.

Where a Lawyer's Provision of Nonlegal Services is governed by the Rules of Professional Conduct and the State Bar Act

Rule 5.7 is not intended to exclude a lawyer's conduct from the application of the Rules or the State Bar Act in circumstances that are not distinct from the lawyer or law firm's provision of legal services to clients. (Paragraph (a)(1)). Thus, a lawyer would still be subject to the rules and the State Bar Act where a lawyer or the lawyer's firm renders legal and nonlegal services to the same client or in the same matter, even if the nonlegal services might otherwise be performed by nonlawyers. *Layton v. State Bar* (1990) 50 Cal.3d 889, 904: "Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them;" *Alkow v. State Bar* (1952) 38 Cal. 2d 257, 263 – attorney provided collection services; *Libarian v. State Bar* (1944) 25 Cal. 2d 314, 317-18 – attorney provided services as tax preparer, notary and lawyer. See also proposed rule 5.7,

Comment [2]. (A summary of other relevant case law concerning the provision of nonlegal services is provided as Appendix 10.)

Where Lawyers May Otherwise Be Subject to Discipline in the Provision of Nonlegal Services

The question of whether a lawyer's conduct in rendering nonlegal services is governed by the rules is distinct from the question of whether the lawyer may be subject to discipline in performing nonlegal services. Lawyers are subject to discipline for conduct outside the practice of law even where the conduct is not governed by the Rules of Professional Conduct. Rule 1.0, Comment [2] – "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity;" and see rule 8.4(b) and (c) and Comment [1]. The same is true with respect to certain provisions of the State Bar Act (e.g., Bus. & Prof. Code, § 6106 – acts involving moral turpitude, dishonesty or corruption). State Bar Formal Opinions 1995-141, 1999-154.

Proposed rule 5.7 is not intended to change the law in these contexts and a comment to the rule is recommended to make this point clear. See proposed rule 5.7, Comment [3].

Other Consequences For Lawyers Providing Nonlegal Services to Clients and Other Persons

Lawyers may encounter conflicts of interest and other ethical consequences as a result of providing nonlegal services in a law firm or in an organization that is owned and operated with nonlawyers. Rule 5.7 is not intended to immunize lawyers from these consequences. A comment to this effect is included in the rule (see proposed rule 5.7, Comment [6]).

Relationship to the ATILS Charter: As explained above, this recommendation responds to the charter by proposing a new rule that would clarify a lawyer's duties in the provision of nonlegal services. California does not have a version of ABA Model Rule 5.7 and this may be a cause of uncertainty and reluctance for lawyers who might be interested in exploring innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. The PeopleLaw sector would likely benefit from such innovation.

Public Comment: This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the Rules of Professional Conduct. It was issued as Recommendation 3.3 as set forth below.

Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.¹⁵

¹⁵ Recommendation 3.3 did not include proposed rule language but was presented as a concept for public consideration and comment.

Recommendation 3.3 received a total of approximately 98 written public comments, 89 in opposition, five in support, and four with no stated position. Public comment themes, along with the Task Force’s responses to each, are outlined below.

1. The need for this new Rule of Professional Conduct is unclear because the provision of law related services, including dual profession services, in the context of an attorney-client representation is already addressed in California case law and ethics opinions, and these authorities appear to offer better client protection than the terms of Model Rule 5.7.

Task Force Response: Case law and ethics opinions are not as accessible as the rules. As discussed above, a new rule offers the appeal of greater clarity in a lawyer’s duties and could facilitate innovative delivery of law related services.

2. Adding this new rule would encourage the provision of law related services and give law firms options to lower costs or provide added value.

Task Force Response: The Task Force agrees and has prepared a proposed rule that is recommended for public comment distribution by the Board.

Conclusion and Next Steps: Should the Board agree with this proposal, it is anticipated that the proposed new rule 5.7 would be issued for a 60-day public comment period. If ultimately adopted by the Board, the proposed amendment would need to be submitted to the California Supreme Court for approval (see Bus. & Prof. Code, §§ 6076 & 6077).

Recommendation No. 4

Commend to the Anticipated State Bar Paraprofessional Working Group the Key Principles Identified by ATILS in Studying the Concept of a Licensing Program that Authorizes Eligible Nonlawyers to Provide Limited Legal Services

Summary of the Recommendation: With limited exceptions, existing California law restricts the practice of law to lawyers who are active licensees of the State Bar. Practice of law by nonlawyers is subject to prosecution for UPL. Other jurisdictions have implemented, or are studying, programs that authorize limited practice of law by nonlawyer paraprofessionals. The goal of these programs is to provide consumers with enhanced access to legal services. In studying innovative legal services delivery systems, ATILS received presentations from experts that included an observation that a paraprofessional program could serve as a component of a broader unauthorized practice of law reform that would serve the public interest. In discussing the regulatory issues presented by a paraprofessional program, ATILS has identified key principles and recommends that these principles be referred for consideration by the anticipated State Bar paraprofessional working group.

Discussion: At its meeting on January 24, 2020, the Board adopted the following resolution regarding consideration of a paraprofessional program similar to existing Limited Licensed Legal Technician (LLLT) programs in other jurisdictions.

RESOLVED, that the Board of Trustees directs staff, in consultation with the Board's Access Liaisons, to take the following steps to form a working group to develop recommendations to the Board by the end of 2020 for a paraprofessional program (e.g., LLLT) in California:

- Develop a draft charter
- Identify the appropriate size and composition of the working group
- Solicit interest in participation in the working group

It is anticipated that the Board will adopt a working group charter and appoint members at its March meeting.

Based on the Task Force's discussions about a new UPL exception for a regulated nonlawyer provider, including consideration of public input and information learned from stakeholder outreach meetings, there are several key principles that the Task Force believes warrant further study by the new working group in developing an implementation plan. Included in these key principles are regulatory considerations that should have a significant positive impact on public protection. The key principles are listed below but they should not be regarded as a comprehensive list of all possible implementation issues and regulatory considerations.

1. Leveraging the Population of Existing Providers and Other Persons Who Have Relevant Education as Applicants for a Paraprofessional License

Existing providers include: paralegals; legal document assistants; unlawful detainer assistants; and immigration consultants. A comparison table showing the components of the respective licensing programs for these professionals is provided as Appendix 11. Other persons who have relevant education include: applicants possessing a juris doctorate degree or other law degree (but not yet admitted in any jurisdiction); law students at an ABA or State Bar-accredited law school who did not graduate and were not admitted in any jurisdiction; and law students who completed one year of law school at a State Bar-unaccredited registered law school or who attempted to learn the law through the Law Office Study Program, but did not complete their studies and did not become admitted, but in that process did successfully pass the First Year Law Student's Examination.¹⁶

Each of these categories of persons should be considered as potential applicants who could demonstrate knowledge and experience that might serve as a basis for modifying or waiving otherwise applicable eligibility criteria that would be developed for the

¹⁶ The Task Force discussed the issue of whether former lawyers (e.g., disbarred lawyers or lawyers who have resigned with disciplinary charges pending or have been placed on involuntary inactive status) should be eligible to apply to participate in the new program. This is an issue for the new paraprofessional working group to consider with input from the Office of the Chief Trial Counsel. ATILS does not take a position but offers the observation that the Rules of Professional Conduct (rule 5.3.1) and case law (e.g., *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 [38 Cal.Rptr.3d 759]) impose special restrictions on former lawyers.

application process. The general principle here is that there should be flexibility in determining applicant eligibility and in assessing how an applicant satisfies education, experience, and other application requirements. For example, an applicant who holds a juris doctorate degree, has completed a professional responsibility course, and has passed the multistate professional responsibility examination, might be deemed as satisfying an otherwise applicable requirement to complete a course or training on legal ethics. In contrast, an applicant who is an experienced Legal Document Assistant but who has never had education or training in legal ethics would not be exempted from that application requirement.

2. Consumer Understanding and Outreach

Consumer understanding and outreach includes determining an appropriate name for the new providers, consideration of mandatory disclosures or a possible informed consent requirement, and the regulator's responsibility to educate the public regarding the availability and authority of the new class of licensees.

3. Protections Similar to those Afforded in an Attorney-Client Relationship

These protections would include concepts of confidentiality and privilege. An evidentiary privilege similar to the statutory privilege for communications with a Certified Lawyer Referral Service may also be considered. In addition, these protections should include compliance with anti-bias and anti-discrimination standards.

4. Selection of Areas of Law and Specific Legal Services/Tasks

Data from the Justice Gap Study and the California Attorney Practice Analysis (CAPA) study¹⁷ should be used to identify permissible practice areas and suitable tasks.¹⁸ In addition, another source would be the California Court's online Self-Help Center. This online information offers extensive user-friendly self-help information and guidance on use of approved forms by pro per litigants, such as a pro per litigant seeking a change in child support. The most frequently accessed pages at the Self-Help Center might help identify those areas of greatest need that could be appropriate for the contemplated paraprofessional program.

The paraprofessional working group should consider the possibility that areas of law not identified by any of the resources outlined above might also be areas of law in high

¹⁷ The CAPA study includes data on: the kinds of tasks performed and the depth of knowledge required for the proper performance of those tasks; the level of complexity of any given task; and the levels of criticality for the kinds of tasks performed by attorneys, as determined by the degree of potential harm to the client if the task is performed incorrectly. The CAPA fact sheet is posted online at: http://www.calbar.ca.gov/Portals/0/documents/Practice_Analysis_Fact_Sheet.pdf. See also CAPA EMS Survey Results posted at: <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000024865.pdf>.

¹⁸ In addition, the application process might require each applicant to specify the areas of law and/or specific tasks that they are seeking to be licensed to render to consumers.

demand by low income or otherwise vulnerable populations and are encouraged not to create an exclusive list. There are potentially areas not typically identified as critical access to justice issues which might – nevertheless – serve serious needs. For example, the transgender community suffers significant risk of harassment, violence, and even murder when government issued identification documents do not accurately reflect name and gender identity. Therefore, legal services that support streamlined and accurate name and gender changes are critically important for this community. However, given the relatively small population of the transgender community, a traditional approach to the identification of subject areas appropriate for inclusion in the paraprofessional program might overlook this type of service.

5. Background Check

Because the Task Force received public comment about nonlawyer fraud in connection with immigration services provided by nonlawyers (a.k.a., notario fraud), a background check that could involve a fingerprinting requirement for all applicants should be considered.

6. Financial Responsibility

Program participants might be required to carry professional liability insurance, maintain a bond, or otherwise comply with a financial responsibility requirement. Although attorneys generally are not required to carry professional liability insurance, they are required to contribute to a Client Security Fund. A similar requirement for program participants is also an option that could be studied.

7. Continuing Education

Program participants should be required to meet continuing legal education requirements, which might include a minimum number of legal ethics credits. Traditional paralegals who work under the supervision of a lawyer must complete continuing education (including legal ethics units). A similar requirement for paraprofessionals not under the direct supervision of a lawyer should also be a part of the regulatory framework.

8. Revisions to the California Rules of Professional Conduct

Clarification regarding fee sharing between lawyers and the new nonlawyer providers are among some of the Rule of Professional Conduct issues that would need to be considered.¹⁹ Additional revisions to the Rules of Professional Conduct and other

¹⁹ For example, the [Utah Rules of Professional Conduct](#) (as revised effective May 1, 2019) include a terminology rule clarifying that a “Legal Professional” in Utah includes nonlawyers who are authorized providers of legal services. See Utah rule 1.0 that in part provides:

(h) “Legal Professional” includes a lawyer and a licensed paralegal practitioner.

ancillary rules governing the provision of legal services beyond those delineated here should be considered by the paraprofessional working group.

9. Ethical Standards for Program Participants

Other jurisdictions that have allowed nonlawyers to provide legal services (e.g., Utah’s Licensed Paralegal Practitioner program) require compliance with specially designed ethical conduct standards. For example, the issue of prohibiting “running” and “capping” can be addressed in these new conduct standards developed for the program. Provisions for safekeeping of funds and property entrusted by clients and others should also be developed.

10. [Risk-Based Proactive Regulation](#)

Auditing and other mandatory reporting should be explored as a means to reduce the cost of regulation and to ensure that the regulator’s compliance activities are tailored to specific program risks and potential harms.

11. Compliance Enforcement

Although a new risk-based proactive system can be used to identify situations that would prompt the regulator to act to ensure compliance, ATILS believes that a traditional complaint driven system should also be implemented as an option for consumers. Both a risk-based system and a complaint driven system can lead to potential consequences such as license suspension/revocation, fines, civil liability, and criminal prosecution.

12. Cost of Regulation

It is very important that any regulatory framework have appropriate resources to enable the auditing/enforcement mechanisms that typically serve as key public protections. The Task Force recommends that the paraprofessional working group identify sources of program funding including application fees, continuing education fees, and potentially, grant funding.

13. Startup Costs of Establishing the Program

Additionally, the Task Force is aware that startup costs for establishing this paraprofessional program may be substantial. The Task Force discussed the possibility of exploring grant funding as one method for meeting startup costs. The following sources of grant funding have not been contacted by the Task Force but are listed below as examples of the types of grants that could be explored.

(i) “Licensed Paralegal Practitioner” denotes a person authorized by the Utah Supreme Court to provide legal representation under Rule 15-701 of the Supreme Court Rules of Professional Practice.

- National Center for State Courts – NCSC is contributing staff time to the creation of a regulatory body in Utah and may be willing to provide similar services to California.
- State Justice Institute – SJI is also a funding source for the creation of the Utah regulatory body.
- Public Welfare Foundation – PWF funded (in partnership with NCSC) a Justice for All initiative which demonstrates the foundation’s interest in creative ways to increase access to justice.
- Pew Charitable Trusts – recently launched a Civil Legal System Modernization project.
- Gates Foundation, Google.org, Chan Zuckerberg Initiative – While these organizations do not have civil justice specific grant making goals it is recommended that the paraprofessional working group explore potential funding opportunities with them.

14. Outreach

The Task Force recommends that the paraprofessional working group reach out to and engage with several existing educational resources and trade associations and secure input from these organizations as part of the development of this new program including:

- Educational resources – paralegal certification programs (at traditional colleges and universities, law schools, and community colleges).
- Trade Associations – California Alliance of Paralegal Associations, California Association of Legal Document Assistants, National Association of Immigration Consultants, and others as identified.

Relationship to the ATILS Charter: This recommendation responds to the charter as it is a proposal for a new exception to existing UPL restrictions. The purpose of the new exception is to increase effective and meaningful access to the justice system through greatly expanded resources. By expanding the pool of available legal expertise and at a cost presumably less than a fully licensed attorney, many more Californians in need of legal advice and assistance may be in a better position to secure that assistance.

In part, the progress and acceptance of limited scope legal services by attorneys has motivated the Task Force’s consideration of this concept. Under Rule of Professional Conduct 1.2(b), attorneys are able to unbundle any client case or matter provided it is reasonable under the circumstances, not otherwise prohibited by law, and the client gives informed consent.²⁰ The

²⁰ Another existing practice that informs this recommendation, in particular the key consideration of ethical standards for the licensees, is the provision of law related services by [court-connected family law facilitators](#). The

Task Force believes limited scope legal services by attorneys is helping address the access crisis and this recommendation would extend this practice to qualified nonlawyers who could be monitored by risk based proactive regulation.

Public Comment: A proposal to authorize nonlawyers to engage in limited practice of law was included in ATILS' request for public comment on various options for regulatory reform as set forth below. It was issued as Recommendation 2.0 as set forth below.

Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

In response to this specific public comment proposal, a total of approximately 610 written public comments, 506 in opposition, 94 in support, and 10 with no stated position were received.

Public comment themes, along with the Task Force's responses to each, are outlined below.

1. Changing UPL protections will erode the legal profession and cause a loss of jobs for attorneys.

Task Force Response: Data from the Justice Gap Report makes clear that the existing system is not meeting the needs of individual consumers. The public is not being adequately protected when 70 percent of Californians are not receiving the legal services they need to address a civil legal problem. Consumers could benefit from the provision of limited, specified legal services rendered by regulated nonlawyer providers. In support of his public hearing testimony, Professor Stephen Gillers submitted a written comment to ATILS explaining 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." Lawyers also would have enhanced opportunities to structure the provision of discrete services by collaborating with the new authorized nonlawyer providers. This approach might render it possible for lawyers to serve clients who cannot afford to hire a lawyer for all aspects of their case.

2. Consumers will receive negligent services, or will be outright defrauded, and become victims of irreparable harm, such as deportation for persons who receive incompetent immigration services.

Task Force Response: This is not a deregulation proposal. As indicated by the key principles identified by the Task Force, regulation of the new nonlawyer providers will

attorney and nonattorney staff of these self-help centers do not represent pro se litigants and do not give legal advice but they do provide guidance on procedures and assist persons in completing and processing forms. Even though they do not represent parties as advocates before a tribunal and do not give legal advice, they must still comply with certain conduct standards. See: the ["Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices"](#) (Appendix C of the California Rules of Court).

be implemented to protect against consumer harm. Education criteria, financial responsibility requirements, and background checks are among the regulatory concepts that must be considered. In addition, risk based proactive regulation should be explored to use reporting and auditing as tools for identifying and addressing a potential for consumer harm.

3. How can confidentiality and privilege be assured if nonlawyers or technology are interfacing with clients?

Task Force Response: Similar to California’s experience in enacting an evidentiary privilege for certified lawyer referral service communications (Evid. Code § 965, et seq.), a change in the law can be considered for instituting confidentiality and privilege for communications with a regulated nonlawyer provider of legal services.

Conclusion and Next Steps: ATILS supports the State Bar’s effort to explore a paraprofessional licensing program as a UPL exception that balances public protection and enhanced access to legal services. Should the Board agree with this recommendation, it is anticipated that the key principles identified by ATILS will be referred to the State Bar’s new paraprofessional working group for due consideration and action.

Recommendation No. 5

Form and Appoint a New Working Group to Explore Development of a Regulatory Sandbox that Can Provide Data on Any Potential Benefits to Access to Legal Services and Any Possible Consumer Harm if Prohibitions on Unauthorized Practice of Law, Fee Sharing, Nonlawyer Ownership, and other Legal Restrictions are Relaxed or Completely Suspended for Authorized Sandbox Participants

Summary of the Recommendation:

To balance the twin goals of public protection and enhanced access to legal services, the Task Force recommends that the Board establish a working group to explore development of a regulatory sandbox as a means for evaluating changes to existing laws and rules that otherwise inhibit the development of innovative legal services delivery systems, including: (i) consumer facing technology that provides legal advice and services directly to clients at all income levels; and (ii) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. A primary function of the sandbox would be to gather data on any potential benefits to accessing legal services, and any possible consumer harm when existing restrictions on the unauthorized practice of law (UPL), fee sharing with nonlawyers, and partnerships with nonlawyers are temporarily modified or suspended for sandbox participants. A key feature of the sandbox would be to give each applicant an opportunity at the outset to present a proposal for a new delivery system that demonstrates to the sandbox regulator that the proposal would satisfy the applicant’s burden of proof that the benefits of anticipated access to legal services are likely to substantially outweigh the potential risks of harm. If admitted into the program,

sandbox participants would be authorized to offer their new delivery system in a controlled environment in which the regulator collects data and monitors the new services to ensure that consumers are protected.

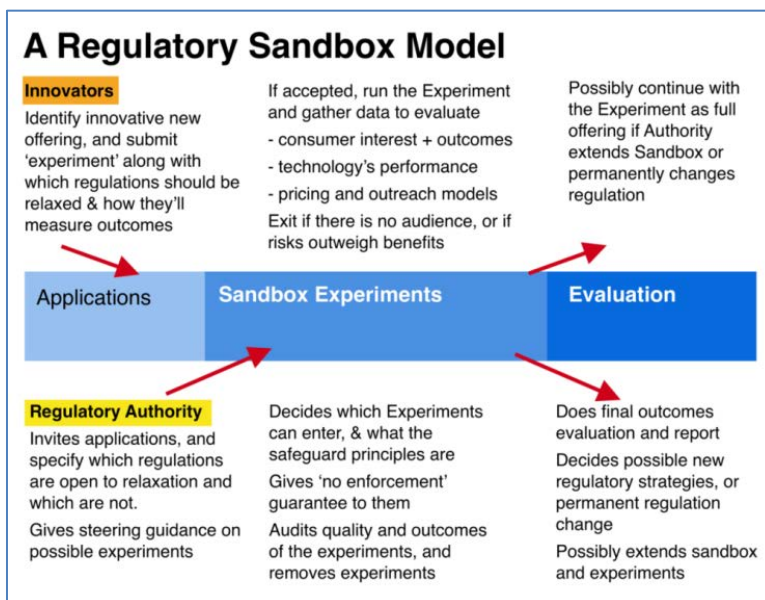
The Task Force's recommendation to explore development of a sandbox is grounded in a strong belief that the current regulatory framework impedes innovations that could meaningfully increase access to legal services. It is, of course, difficult to find examples of legal services and entity structures that are currently prohibited by the Rules of Professional Conduct and statutes because of those very prohibitions discouraging entry into the market. However, it is well documented that relaxing of nonlawyer ownership and fee sharing provisions in other markets (e.g. the United Kingdom (UK) and Australia) has not had any identifiable detrimental impact on consumers. In fact, since the UK began allowing nonlawyer ownership and fee sharing, the number of complaints against lawyers has actually decreased. Because the UK and Australia models were designed to increase competition in the legal services market, and were not specifically animated by a goal of increasing access to affordable legal services, there are no meaningful data regarding the impact of regulatory reform in those jurisdictions on this particular issue. If implemented, the California sandbox proposal, by contrast, is envisioned to ensure that the data needed to evaluate this critical access question is collected and analyzed from the outset. Despite the challenge of identifying examples that could positively impact access to legal services but are prevented from doing so under the current regulatory scheme, provided at Appendix 12 are examples of barriers to entry compiled by the Task Force.

The recommended new working group will have an opportunity to further consider the UK and Australian models, but if a sandbox is created then the ultimate goal is for the sandbox data to be collected and analyzed as the best evidence for evaluating potential benefits and risks. When the sandbox period of experimentation ends, if the regulator determines that the benefits of increased access to legal services afforded by the new delivery model substantially outweigh any identified harm, then the Task Force believes that permanent changes to existing law should be explored at that time. Under these circumstances, sandbox participants would be authorized to continue offering their new delivery systems, and the opportunity for other providers to enter to the legal services market by offering services using the same or a substantially similar delivery systems would be expanded.

Discussion: What is a Sandbox? A regulatory sandbox is a framework set up by a regulator that allows participants to test innovative business models or offer products and services in a controlled environment under a regulator's supervision. The sandbox model allows for the gathering of data to assess impact and protect against consumer harm. If the data is promising, changes to rules and statutes can then be considered more generally. Specific objective factors could be developed to guide the regulator's evaluation of risks.²¹

²¹ Utah's regulatory sandbox for considering possible regulatory reform in the delivery of legal services includes the following specific examples of factors to consider when assessing the experience of a new delivery system in the sandbox:

A regulatory sandbox could be designed to provide a regulatory platform to encourage innovation to enhance the delivery of, and access to, legal services through the use of technology, online legal service delivery models, and entities not currently allowed under the existing Rules of Professional Conduct and UPL statutes in California. A graphic model of the sandbox derived from the August 2019 Utah report is provided below:



I. Example of a Proposed California Sandbox Composition, Scope and Process

Among the issues to be explored is the possible use of rule-making power by the California State Bar and/or the California Supreme Court, in coordination with the California Legislature,²² to create an oversight body with regulatory authority. The regulatory authority over the

- What evidence do we see of consumer harm caused by improper influence by nonlawyer owners over legal decisions? What steps can we take to mitigate these risks in the market?
- What do the data tell us about the risks of consumer harm from software-enabled legal assistance in an area such as will writing? Are the actual risks of harm more likely or more significant than the risks of a consumer acting on their own or through a lawyer? How can the risks be mitigated?
- What do the data indicate about the risk of consumer harm from nonlawyers providing legal advice in the area of eviction defense? Is the risk of these kinds of harm more significant than the harm we currently see for pro se defendants? What steps should be required to ensure and maintain quality service?
- What are the data on the risks of cyber and data security to consumers of legal services? Where is the impact most likely and greatest, and what regulatory resources should be brought to bear?

(See, Utah's sandbox description on pages 16 – 17 of its report posted at: <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.)

²² California's Unauthorized Practice of Law statute, Business and Professions Code § 6125 et seq., would likely need amendments to reflect entities/services operating within a sandbox.

sandbox could include the ability to certify and decertify each entity/service and to impose the necessary certification and data collection requirements. The oversight body could have the authority to determine whether a proposed service/entity is currently allowed by existing laws and rules, or if admission into, and approval within, the sandbox is necessary to operate. The oversight body could also have the power of enforcement against entities on evidence of material consumer harm.

A. Oversight Body Composition and Functions

The appointed volunteer oversight body created under this proposal is another issue to explore. This body could operate as other professional licensing boards function, with the assistance of full time staff to support its work. The body should be limited in size as appropriate and should include, but not be limited to, the following types of individuals: (1) consumer representative; (2) economist; (3) legal ethics expert; (4) technology expert; (5) legal services organization administrator; (6) trial court judge; (7) court administrator; and (8) an academic with regulatory reform expertise.

1. Antitrust Considerations

When establishing the final composition and function of the oversight body, it is important that state and federal antitrust laws be considered. *See, North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015).²³ Such considerations include the Supreme Court's role in overseeing the sandbox, and whether or not the members of the oversight body might be considered active market participants in the delivery of legal services.²⁴

2. Additional Measures to Safeguard Consumer Protection within the Sandbox

Additional consumer protection measures should be considered as part of the exploration of the establishment of an oversight body. For example, in the United Kingdom, the Legal Services Act of 2007 established a Legal Services Consumer Panel, an independent arm of the Legal Services Board, comprised of eight nonlawyers appointed by the government.²⁵ The panel provides evidenced-based advice to the Legal Services Board, in order to help them make decisions that are shaped around the needs of users. Consideration of such a model could be very useful to the oversight body in evaluating the utility and harm of the entities applying for and operating in the sandbox.

²³ *See also* the Federal Trade Commission's Staff Guidance on Active Supervision of State Regulatory Board Controlled by Active Market Participants, https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

²⁴ Some jurisdictions view this concern as a basis for considering an "independent regulator." But this is not regarded as independence from the authority of the state supreme court over the practice of law. *See* August 2019 Report and Recommendation of the Utah Work Group on Regulatory Reform, p. 21 at footnote no. 58.

<https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>

²⁵ <https://www.legalservicesconsumerpanel.org.uk/about-us>

3. Duty of Regulator to Provide Guidance

To promote access to legal services to those who are under-served by the legal system, the working group might conclude that an oversight body that should collaborate with technologists, people with disabilities, lawyers, language access advocates, low-income individuals and other stakeholders to provide guidance on technology and usability for technology-delivered legal services models.²⁶ 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 legal services technology providers understand how to implement the regulations.

In addition to providing guidance to technology delivered legal service providers, the regulator should support an access incubator/accelerator (a formalized network of funders, technologists, strategy, business, and marketing advisors that brings in classes each year to help them refine a concept and launch it). This could be a program run independently from the regulator, perhaps in partnership with universities.

B. Scope

A regulatory sandbox envisions that a business model, service, or product that cannot be offered under the current rules and statutes for providing legal services would be able to apply to and be considered by the oversight body. For the most part, if a service or entity cannot operate under the current rules and statutes then approval would be needed by the oversight body through the regulatory sandbox process. Actively licensed attorneys or law firms partnering with, contracting with, or employed by entities approved by the oversight body would not need to take any separate action for approval. However, those licensed attorneys who partner with nonapproved entities would need to seek approval by the oversight body with respect to that arrangement.

The following provides further detail and examples as to the types of services and entities that are likely to fall both outside and within a regulatory sandbox:

1. Entities and Services Outside of a Regulatory Sandbox

(a) Conventional, 100 percent lawyer-owned, managed, and financed law partnerships, professional law corporations, legal services nonprofits, or individual lawyers with an active California State Bar license:

(i) offering traditional legal services as permitted under the Rules of Professional Conduct and applicable statutes;

²⁶ 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.

- (ii) offering nonlegal services as permitted under the Rules of Professional Conduct and applicable statutes;

- (iii) entering into employment, contract for services, joint venture, or other (fee-sharing) partnership with a nonlawyer-owned entity authorized or licensed to provide legal services by the sandbox oversight body.

- (b) Services performed by nonlawyers that do not constitute the practice of law including do-it-yourself consumer facing technology.²⁷

2. Entities and Services Requiring Sandbox Approval

- (a) Conventional, 100 percent lawyer-owned, managed, and financed law partnerships, professional law corporations, legal services nonprofits, or individual lawyers with an active California State Bar license:

- (i) offering legal services whether directly or by joint venture, subsidiary, or other corporate structure, not authorized under the Rules of Professional Conduct or applicable statutes; or

- (ii) partnering (fee-sharing) with a nonlawyer-owned entity not authorized or licensed to offer legal services by the sandbox oversight body.

- (b) Conventional law partnership or professional law corporation with less than 100 percent lawyer ownership, management, or financing.

- (c) Nonlawyer-owned legal services provider (for profit or nonprofit):

- (i) offering legal service options whether directly or by joint venture, subsidiary, or other corporate structure, not authorized under the Rules of Professional Conduct or applicable statutes; or

- (ii) practicing law through technology platforms or lawyer or nonlawyer staff or through purchase of a law firm.

C. Process and Participant Requirements

If an entity/service cannot provide legal services under the current rules and statutes, or if there is a material question as to whether the entity/service would be allowed, an application would be made to the oversight body for registration. The application process would provide an opportunity at the outset to present a proposal for a new delivery system that demonstrates to the sandbox regulator that the proposal would satisfy the applicant's burden of proof that anticipated access to legal services benefits are likely to substantially outweigh the potential

²⁷ Such entities and services would include websites where consumers can access legal information, forms, statutes, and/or template contracts.

risks of harm. Upon receipt of the application the oversight body could review the applicant's proposal and set requirements upon the applicant as deemed appropriate if the applicant is admitted to the sandbox. This is not intended to be a rigid or technical approach since objective-based regulation is meant to be flexible and responsive to evidence of risk. These and other process and participant requirements may be explored by the working group.

The oversight body should consider giving priority and a reduced fee structure to nonprofits as well as for-profit entities that propose providing services specifically designed to address areas of most need as identified by the 2019 California Justice Gap Report.

With an effort to ensure that the regulatory burdens are not too onerous, the working group might explore requirements for participation in the sandbox including, but not limited to, the following:

- Disclosure to consumers that the entity/service is part of the sandbox and referring consumers to the oversight body where they can learn more and provide feedback or complaints;
- Where applicable, informed consent by consumer acknowledging that service is not provided by a licensed attorney;
- Confidentiality, which shall include a prohibition against regulated entities sharing disaggregated consumer data with any outside third parties other than the oversight body;
- Data collection and reporting to the oversight body to determine if the entity/service is performing and being used by the public, as well as the scope of the impact on providing legal services to the public and whether there are unexpected harms (see below);
- Transparency, including credentials of service providers, and identification of individuals with more than a 10 percent ownership interest in the entity/service;
- Compliance with accessibility and usability standards to be set by the oversight body;
- Corporate entities and LLCs must be either a California entity or a registered foreign entity, requiring an annual statement of information that identifies officers and directors and registered agent for service of process. Partnerships would provide partner information and registered agent to the oversight body;
- Liability and Errors & Omissions insurance at levels to be set by the oversight body;
- Prohibit arbitration clauses or limitations of liability in the terms of service that will preclude consumer access to the oversight body's complaint and remedy system; and
- Training requirements to be determined by the oversight body.

D. Recommended Special Considerations for an Applicant’s Proposed Technology Driven Delivery System that Could be Explored by the Working Group

1. Legal service technology accessibility standards

Technology services 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 oversight body as standards and technologies change.

2. Augmenting the user experience through accessible language and design

Legal services technology providers (LSTPs) must ensure that their technology meets or exceeds the utility of human-provided legal services. When technology providers 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. Legal service technology providers engaging in authorized practice of law activities within the sandbox must avoid employing dark patterns in their products (perhaps a ban on such behavior should include lawyers as well). To aid technology providers, the oversight body should publish, partner to distribute, or otherwise encourage education on dark patterns.

4. Careful implementation of algorithmic systems

LSTPs would be expected to take reasonable steps to identify and mitigate bias and other harmful effects of their technologies. If such effects cannot be mitigated with existing techniques, the technology should not be provided to the public.

E. Data Requirements and Analysis

The regulatory strategy of the sandbox oversight body should assess, at a minimum, the risk of three possible harms to consumers of the legal services provided by sandbox participants. The burden should be on an applicant to show that the benefit of its proposal substantially outweighs the potential harm, thereby causing an applicant to consider potential harms and build mechanisms to address those harms in its application materials. A risk assessment matrix should be adopted and used by the oversight body to facilitate this analysis.

The harms include:

- Receiving inaccurate or inappropriate legal services.

- Failing to exercise legal rights through ignorance or bad advice.
- Purchasing unnecessary or inappropriate legal services.

The oversight body would need several kinds of data on legal outcomes to assess the likelihood of consumers experiencing these harms. Sandbox participants could therefore raise their chances of approval and registration by providing as much of the required data as possible. A partial but suggestive list of data collection strategies and data sets include:

- Consumer complaints and corresponding resolution or disposition
- User surveys
- Rate of service error fixes
- Types/level/rates of services provided
- Legal and financial outcome data

Although the sandbox oversight body would likely be interested in the absolute absence of consumer harms by a sandbox participant, the Task Force has concluded that the more important criterion is the relative rate or risk of harm compared to the experience a consumer would have received absent the legal services provided. To make that comparison, information must be known about the consumers of the legal services provided by the sandbox participants. Some possible useful data for this purpose might include:

- Income level
- Education level
- Geographic location
- Race/ethnicity

While the oversight body would negotiate the actual data collection requirements individually with each sandbox participant, it should attempt to establish and maintain data sets consistent with the guidance above to the greatest extent possible.

No data provided by sandbox participants should be shared with any other organizations for any reason. Data provided by sandbox participants should be anonymized before submission to the sandbox oversight body. Data provided should be kept confidentially and deleted from the oversight body's databases after analysis, unless otherwise required by California law. The oversight body may choose to share provided data with independent evaluators of the sandbox after receiving permission by the data provider; if so, such evaluators should be contractually required to also keep the data confidential and delete it after the analysis is complete.

F. Removal from Sandbox

If an entity fails to comply with the requirements set by the oversight body, including a failure to provide appropriate supporting data with respect to the services provided, it would be subject to removal from the sandbox. If removed, an entity would lose its authority to operate with the protections of the sandbox rendering it subject to all existing rules and statutes regulating the practice of law. However, when possible, the entity should be given an opportunity to cure the issue of concern and become fully compliant.

G. Post Sandbox Activity

A sandbox is not set up as a permanent regulatory structure. It is intended to be a multi-year program (e.g., 2–3 years) through which evidence and data can be gathered to determine the appropriateness of changing rules and statutes that would otherwise prohibit the entities and services allowed by the sandbox. At the end of the sandbox period, there should be an opportunity for an entity to seek an extension.²⁸

The Task Force recognizes that any entity willing to participate in a sandbox might reasonably expect the sandbox to be structured and administered in a manner that facilitates a transition to a more permanent model under the oversight body, so long as it is performing as intended and not harming the public. While the mere fact of participation in the sandbox cannot be regarded as a guarantee of any permanent authority to operate it is understood that meaningful post sandbox protections are necessary to encourage interest and applications.

H. Funding

It is critically important to consumer protection that the administrator of the sandbox be appropriately resourced to effectively manage the applications, screen to ensure all requirements are met, monitor the progress and risks of harm, and remove any participant from the sandbox that is causing consumer harm as identified by the administrator. Ultimately this program would be funded by application and licensing fees each applicant pays to enter

²⁸ The Wyoming Medical Digital Innovation Sandbox Act (posted at: <https://www.wyoleg.gov/Legislation/2019/SF0156>) addresses this regulatory issue as follows:

40-28-107. Extension of sandbox period.

(a) A person granted authorization under W.S. 40-28-103(f) may apply for an extension of the initial sandbox period for not more than twelve (12) additional months. An application for an extension shall be made not later than sixty (60) days before the conclusion of the initial sandbox period specified by the department. The department shall approve or deny the application for extension in writing not later than thirty-five (35) days before the conclusion of the initial sandbox period. An application for extension by a person shall cite one (1) of the following reasons as the basis for the application and provide all relevant supporting information that:

(i) Statutory or rule amendments are necessary to conduct business in Wyoming on a permanent basis;

(ii) An application for a license or other authorization required to conduct business in Wyoming on a permanent basis has been filed with the appropriate office and approval is currently pending.

and maintain practice within the sandbox. In the United Kingdom, for example, licensing fees of regulated entities (there, “Alternative Business Structures,”) are calculated as a percentage of their total annual revenue. The oversight body is encouraged to consider a fee structure that takes into account similar revenue considerations while also incentivizing innovation in particular areas of need.

In order to establish a well-resourced regulatory structure from inception, however, grant funding will likely be needed. In Utah, for example, funds to start up and establish the sandbox have come from the Administrative Office of the Courts (via court staff time), the National Center for State Courts, and the Institute for the Advancement of the American Legal System. The Task Force recommends that the State Bar convene a funder’s summit to explore the feasibility of philanthropic start-up funding as well as to advocate for a streamlined and coordinated grant application and reporting process.

I. Reciprocity

It is anticipated that California’s regulatory sandbox for legal services will allow for reciprocity with other state, federal, and foreign jurisdictions to allow a product or service to be made available simultaneously in each jurisdiction.

A number of other jurisdictions, including Arizona, Utah, Wyoming, the United Kingdom and Singapore operate similar regulatory sandboxes. The oversight body in California should coordinate oversight with other jurisdictions to ensure an efficient regulatory approach.

Relationship to the ATILS Charter:

This recommendation responds to the charter as it is a proposal for exploring a regulation reform methodology that would allow the State Bar to evaluate potential new exceptions to existing UPL restrictions. A sandbox could, for example, serve as the testing ground for an exception to UPL for the provision of legal advice and other limited specified legal services by a technology driven delivery system owned and operated by a nonlawyer entity. ATILS believes that this regulatory sandbox proposal fulfills its charge to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others, and effectively balances our dual goals of consumer protection and increased access to legal services.

Public Comment: The concept of a regulatory sandbox was not presented among the recommendations that went out for public comment. However, many concerns raised during the public comment period with respect to allowing nonattorney ownership, fee sharing, and alternative business structures (ABS) can be addressed by using the regulatory sandbox approach to ensure that consumer protection is maintained and effectiveness is determined before adopting permanent changes to the Rules of Professional Conduct and UPL statutes.

One relevant comment received was from the Association of Discipline Defense Counsel (ADDC). Due to concerns about lack of professionalism and profit-driven motives of nonattorneys, ADDC commented to ATILS that California should consider a pilot program for a limited time period in order to test what impact the proposals will have to help bridge the

justice gap. In particular the ADDC recognized the potential value of providing one-to-many legal services via technology and online platforms. However, the ADDC believed the program should be limited to nonprofit entities. The ATILS Task Force discussed this issue extensively, and it was generally agreed that requiring nonprofit status would severely limit the ability to bring in needed capital and innovation. Furthermore, while lawyers similarly argued against the introduction of ABS in England claiming that only lawyers could be trusted to uphold high ethical standards and not be motivated by profit, none of the data gathered since ABS has been adopted has proven out this assertion. In fact, the data presented by Crispin Passmore on England and Wales specifically indicates that these concerns have not been borne out in practice. Instead, alternative business structures have proven to be more innovative, have dealt more effectively with complaints, and do not have regulatory action taken against them any more frequently than traditional lawyer-only practices.

Another example of a sandbox-related comment was that submitted by the Los Angeles County Bar Association (LACBA). LACBA was not in support of immediate changes to the regulations for many of the same reasons identified by ADDC and other lawyer commenters. Nevertheless, LACBA did express support for measuring and testing progress in the delivery of legal services, especially to underserved communities, under the ATILS' proposals in a limited market. LACBA also supported the idea of a pilot program for a limited time which would allow alternative business structures and technology based one-to-many services, including a stepped approach that begins with nonprofit entities before allowing for-profit entities to provide legal services in this manner.

Conclusion and Next Steps: The Task Force recognizes that sweeping regulatory reform is likely needed to see a significant reduction in the access to legal services gap. However, data, experience, and evidence should inform these reforms. Exploration of the development of a regulatory sandbox proposal could provide just that. A sandbox could provide information based on actual testing of new delivery systems in California. To generate the most helpful and persuasive sandbox data, an implementation study is needed that can focus on the data gathering and metrics used in foreign jurisdictions that have experience with permissive ALSP and fee sharing regulations. Evaluations of these other jurisdictions reviewed by ATILS appeared to be inconclusive in the short time that ATILS had to consider a sandbox concept. By conducting a focused implementation study, a California sandbox will be positioned to gather data that should answer key questions about the benefits and harms of contemplated reforms. Should the Board agree with this recommendation, it is anticipated that the Board would direct staff to form a working group to explore the development of a regulatory sandbox proposal as described in this report.

Recommendation No. 6

Consider Authorizing a Study of Potential Amendments to the Certified Lawyer Referral Service Rules and Statutes, and Amendments to Relevant Rules of Professional Conduct to Ensure that Together They Properly Balance Public Protection and Innovation in Light of Access to Justice Concerns and with a Particular Emphasis on Ascertaining if Existing Laws Impose Unnecessary Barriers to Referral Modalities (including Online Matching Services) that are in the Public Interest

Discussion: ATILS recommends that the Board consider authorizing a study of potential amendments to Certified Lawyer Referral Service (LRS) rules and statutes in light of a recent case²⁹ that has clarified the scope of what is considered to be referral activity. In addition, lawyer referral services regulations and advertising rules limiting compensation for referrals may not reflect modern expectations for how consumers will find a lawyer. Social media, search engines, and other technology-based marketing needs to be accounted for to avoid an unintended chilling effect on a lawyer's use of technology to provide information about the availability of legal services.

As the provisions of the rules governing lawyer advertising and compensation for referrals are related standards, they should also be addressed. Consideration of the LRS rules and statutes arose as a subtopic of the Task Force's discussion of possible lawyer advertising and solicitation amendments. The regulation of lawyer advertising and solicitation in the rules includes the issue of compensation paid by a lawyer for a client referral. Rule 7.2 in part provides that:

(b) A lawyer shall not compensate, promise or give anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

* * * * *

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;

Rule 5.4 in part provides that:

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

* * * * *

²⁹ See, *Jackson v. Legalmatch.com* (2019) 42 Cal.App.5th 760 [255 Cal.Rptr.3d 741].

(4) a lawyer or law firm may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services; or

* * * * *

The foregoing rules establish that a lawyer who pays compensation to an uncertified business or service engaged in a referral activity is subject to discipline. Recently, case law has clarified the scope of what is considered to be referral activity (see *Jackson v. Legalmatch.com* (2019) 42 Cal.App.5th 760 [255 Cal.Rptr.3d 741], petn. for review pending, petn. filed January 6, 2020). The Task Force believes that innovative referral systems, including online modalities, carry the potential of enhancing the ability of consumers to consult with a qualified lawyer, particularly on the basic issue of whether a consumer is facing a civil legal problem, and that existing laws should be reviewed for possible revisions that are in the public interest.

Relationship to the ATILS Charter:

This recommendation responds to the charter by proposing a study of statutory amendments and rule changes that could enhance access to legal services by expanding permissible lawyer referral activity.

Public Comment: An explicit proposal on LRS regulations was not included in ATILS' request for public comment on various options for regulatory reform.

Conclusion and Next Steps: ATILS recommends that a study of possible amendments to the lawyer referral service statutes and rules be undertaken to ensure there is a proper balance between public protection and innovation in light of access to justice concerns and the need of consumers for qualified legal services and to ascertain if existing law imposes unnecessary barriers to referral modalities including online matching services that are in the public interest. Similar to the Task Force's view of the existing lawyer advertising rules, ATILS believes that a study of the lawyer referral service regulations can lead to revisions that will balance public protection and the free flow of information about the availability of legal services. Should the Board of Trustees agree with this proposal, the next step would be referral of this issue to the anticipated working group that will continue the work of ATILS specifically as related to development of a sandbox proposal. Some members of ATILS believe that LRS reforms could be informed by data generated by the regulatory sandbox because participants could experiment with new delivery systems that might, for example, involve a business offering consumers a combination of online services that include an online matching service. Other members of ATILS believe that sandbox data is not likely to inform LRS reforms because LRS activity ordinarily does not raise UPL or nonlawyer ownership concerns. These differing views seem to presuppose the scope of the sandbox and the kinds of applicants who will be admitted, but these are open issues for the working group. As the precise parameters and timeframe of the anticipated working group have not been set, referring possible LRS changes to that body for consideration is recommended.

Recommendation No. 7

Consider Recommendations for Amendments to the Rules of Professional Conduct on Advertising and Solicitation Informed by the Current American Bar Association Model Rules, the Proposed Advertising and Solicitation Rules Developed by the Association of Professional Responsibility Lawyers, and Recent Amendments to the Advertising Rules in Other Jurisdictions. In Particular a Reconsideration of the Existing Designation of “Real-Time Electronic Contact” as Prohibited Solicitation

Discussion:

The regulation of lawyer advertising has traditionally placed restrictions on information regarding the availability of lawyers and legal services in an effort to protect consumers from lawyers actively soliciting business and promoting litigation, especially when consumers are particularly vulnerable. Based on an empirical study initiated by the Association of Professional Responsibility Lawyers (APRL) in 2014-2016 and a subsequent analysis of APRL’s reports and public hearings conducted by the ABA Standing Committee on Ethics Professional Responsibility (SCEPR), the advertising rules were found to be outdated and overly restrictive;³⁰ and the lack of uniformity and inconsistent enforcement unreasonably restrict the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet and other forms of electronic media.³¹

The recent amendments to the ABA Model Rules on lawyer advertising streamline and simplify³² the rules that enable lawyers to use new technologies that can inform consumers accurately and efficiently about the availability of legal services while maintaining the prohibition against engaging in false or misleading communications and adhering to constitutional limitations on restricting commercial speech.

The advent of the Internet and social media has revolutionized the practice of law, including attorney advertising and client solicitation. The current California rules on lawyer advertising and solicitation were adopted before the recent amendments to the ABA Model Rules. Since then several states have or are in the process of modernizing their advertising rules based on APRL’s two reports and the ABA’s recent amendments. Attorneys are increasingly posting, blogging and tweeting more efficiently at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs expands exponentially each year.³³ Under these recent amendments, the legal profession is better able to reach out to a public that has become savvy

³⁰ Association of Professional Responsibility Lawyers [2015 Report of the Regulation of Lawyer Advertising Committee](#), at pp. 20–25.

³¹ [Id. at p. 27.](#)

³² The ABA Standing Committee on Ethics and Professional Responsibility [Memorandum in Support of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising](#), December 21, 2017, at p. 15.

³³ [Id. at p. 8.](#)

in the use of social media and the Internet and is in greater need of more, and not less, useful information regarding the availability of legal services. These trends suggest that traditional restrictions on the dissemination of accurate information about legal services hinder the public's access to useful information and may constitute an unconstitutional restraint of trade.

The Task Force believes that amending the lawyer advertising rules to conform to the recent amendments to the ABA Model Rules will better serve the public by expanding opportunities for lawyers to use modern communications technology to increase the public's awareness of and access to information about the availability of legal services, and protecting the public by focusing the State Bar's resources on content that is false or misleading. Consideration of such rule revisions would be complemented by the study of the LRS rules and statutes outlined in Recommendation #6 above as the topic of compensation paid for client referrals is included in the advertising rules.

Specific Changes to the Current Rules on Lawyer Advertising and Solicitation

The Task Force recommends that the Board of Trustees task the working group being recommended for establishment as related to the development of a sandbox proposal with a study of recent amendments to ABA Model Rules 7.1, 7.2 and 7.3, APRL's Report of the Regulation of Lawyer Advertising Committee (June 22, 2015) and APRL's Regulation of Lawyer Advertising Committee Supplemental Report (April 26, 2016), the changes to advertising rules currently under consideration by the State of Washington³⁴ and other jurisdictions, as well as the impact of the current advertising rules in Oregon, Virginia and the District of Columbia on access to justice and public protection.

The following issues are specific examples³⁵ of what could be studied:

- Whether provisions on false and misleading communications should be combined into rule 7.1 and its comments, including rule 7.5 [Firm Names and Trade Names] which largely relates to misleading communications.
- Whether specific rules on lawyer advertising should be consolidated into rule 7.2.
- Whether in rule 7.2(c), "office address" should be changed to "contact information" to address technological advances that influence how lawyers may be contacted and how advertising is presented.
- Whether the ban on direct solicitation in rule 7.3 should apply solely to live person-to-person contact, including in person, face-to-face, telephone, and real-time electronic or other communications such as Skype. It is recommended that the rule be changed to no longer prohibit solicitations such as chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

³⁴ See: <https://www.wsba.org/for-legal-professionals/rules-feedback>

³⁵ Additional examples are provided in Appendix 13.

Relationship to the Charter

This recommendation responds to the charter by proposing rule changes that could facilitate enhanced access to legal services by permitting the use of modern communication, including online marketing and social media, to provide truthful and nondeceptive information to consumers regarding the availability of lawyers and law firms to provide legal services. This is especially pertinent to potential innovative online delivery systems that might exclusively use electronic communication for interacting with potential clients.

Public Comment: This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the RPCs. It was issued as Recommendation 3.4 as set forth below.

Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

Recommendation 3.4 received a total of approximately 79 written public comments, 62 in opposition, 11 in support, and six with no stated position. Public comment themes, along with the Task Force's responses to each, are outlined below.

1. The advertising and solicitation rules were revised recently (operative November 1, 2018) and it seems premature to proceed with the implementation of further changes to these rules.

Task Force Response: The changes made by the ABA to the Model Rules that were initiated by the study and report of APRL occurred after the Rules Revision Commission's work on its new and amended advertising rules was completed. Other jurisdictions have or are presently considering the ABA's changes. Particularly in the area of online lawyer advertising and solicitation, uniformity among legal ethics standards in all United States jurisdictions is a meaningful goal that promotes lawyer compliance and public protection.

2. Allowing a lawyer's real-time electronic communication with a prospective client should be permitted, especially in the context of online delivery system.

Task Force Response: The Task Force agrees that the issue of real-time electronic contact with a potential client should be reconsidered. The existing rule's treatment of this conduct as a form of banned solicitation may be overbroad and an obstacle to the legal profession's interest in exploring innovative online delivery systems.

Conclusion and Next Steps: ATILS believes that updates to the lawyer advertising and solicitation rules described above strike the right balance of public protection and the free flow of information about the availability of legal services. This, in turn, can improve consumer

access to legal services as well as understanding about problems such as civil justice legal issues. Some members of ATILS believe that advertising rule amendments might be informed by data generated by a regulatory sandbox because participants could experiment with new marketing and communication methods, especially if a participant is a business that exists exclusively online. Other members of ATILS believe that sandbox data would not inform all of the rule amendments proposed because some changes are completely unrelated, such as the amendment to replace “office address” with “contact information.” However, the precise parameters and timeframe of the anticipated working group have not been set so it is uncertain whether the sandbox effort might inform these rule changes. Should the Board of Trustees consider adoption of these rule amendments, referring these rule amendments to that body for consideration is recommended.

V. REFORM CONCEPTS BEYOND THE SCOPE OF THE TASK FORCE STUDY

Some public comments urged that ATILS consider other initiatives that are not regarded by the opponents as disruptive as the concepts for regulatory reform being study by ATILS. These types of other initiatives recommended by commenters include but are not limited to:

- court reform
- court funding (including adding more judges)
- court-connected self-help programs, including online and technology based services
- increasing the monetary jurisdiction of small claims court
- mandating pro bono services by licensees or recent law school graduates
- promoting greater volunteer pro bono services (for example, by student loan forgiveness programs)
- studying and improving existing access programs rather than exploring new ones (including increasing legal services program funding)
- increasing financial support to nonprofit legal foundations
- providing State-sponsored educational programs to low or moderate income communities that are believed to be lacking in access
- providing State-sponsored education to lawyers about working in communities that are in need of legal services
- enhancing the educational requirements for paralegals
- improving ADR

- expanding services that may be provided by a Legal Document Assistant or an Unlawful Detainer Assistant
- creating a low fee marketplace for legal services by lawyers, like the health insurance exchanges that were envisioned by the Affordable Care Act
- removing barriers to entry to the profession, for example by altering the California Bar Examination (including lowering the passing score) or expanding MJP to implement reciprocity or admission on motion

While helpful, these suggestions do not directly align with the precise assignment to ATILS to explore improving access through innovative technology driven and online delivery systems. Although beyond the scope of the charter, ATILS has highlighted these suggestions to give the Board an opportunity to consider whether any of these suggestions should be referred for study to an appropriate State Bar subentity or office.

VI. CONCLUSION

There is a clear trend to leverage technology and innovative delivery systems to improve access to legal services. Changes to the regulation of the practice of law in other jurisdictions including other states and countries are proceeding. California is regarded as a center for technological innovation and given the critical lack of legal assistance experienced by so many Californians and the strong policy statements in support of innovation recently issued by the ABA and Conference of Chief Justices, California should take its place as a leader in exploring new options for the delivery of legal services including one-to-many models that can be authorized without an undue risk of harm to consumers or the administration of justice.