



Public Input Requested by the Task Force on Access Through Innovation of Legal Services

Under the authority of the Supreme Court of California, the State Bar of California regulates attorneys and the practice of law in California. The State Bar maintains rules of professional conduct for attorneys and enforces those rules as well as coordinates with law enforcement to enforce laws prohibiting those without a law license from providing legal services.

The State Bar is governed by a Board of Trustees. In 2018, the Board received a [Legal Market Landscape Report](#) suggesting that some of the rules and laws governing the legal profession may be hindering innovations that could expand the availability of legal services. The Board appointed a Task Force on Access Through Innovation of Legal Services (ATILS) and assigned it to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others. ATILS was charged with balancing dual goals: consumer protection and increased access to legal services.

ATILS has developed 16 concept options for possible regulatory changes, and the Task Force is now seeking public input to help evaluate these ideas.

The 16 options include some that overlap and some that represent alternative approaches to a particular regulatory change. For example, ATILS is considering two different rule changes addressing whether a lawyer should be allowed to share a fee with a nonlawyer and would like public input on both of them. The key regulatory issues addressed by the options on which ATILS is seeking public comment include:

- Narrowing restrictions on the unauthorized practice of law (UPL) to allow persons or businesses other than a lawyer or law firm to render legal services, provided they meet appropriate eligibility standards and comply with regulatory requirements;
- Permitting a nonlawyer to own or have a financial interest in a law practice; and
- Permitting lawyers to share fees with nonlawyers under certain circumstances and amending other attorney rules regarding advertising, solicitation, and the duty to competently provide legal services.

The potential benefit of these changes could include:

- Improving the ability of new providers to enter the legal services market;
- Creating incentives for innovators to collaborate with lawyers to develop technology-driven solutions; and
- Expanding options for entities and individuals other than lawyers to support and participate in these developments through business ownership and capital investment.

ATILS carefully considered public protection in developing the proposed concept options by:

- Limiting the new UPL exceptions to only those providers who meet eligibility qualifications and become regulated;

- Requiring the establishment of ethical standards comparable to those imposed on lawyers and law firms;
- Conditioning the new system on the establishment of equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality; and
- Including in the revised fee-splitting rule a provision prohibiting interference with a lawyer’s independent professional judgment.

Some of the proposals would require that a subsequent implementation body evaluate and plan implementation strategies and details. Further work might, for example, involve pilot programs or changes in statutory laws with sunset provisions.

After considering any public comment received, the task force will prepare a final report to be submitted to the Board no later than December 31, 2019.

The public comment period is 60-days and ends on Monday, September 23, 2019.

ATILS 16 Concept Options for Possible Regulatory Changes

(General Recommendations)

1.0 - The Task Force does not recommend defining the practice of law.

Objective: In connection with other ATILS proposals for new exceptions to UPL permitting certain activities to promote innovation and new delivery systems, this statement reflects ATILS’ tentative view that changing the existing definition of the practice of law might not be effective in clarifying UPL restrictions and is not necessary for ATILS to consider various options for relaxing UPL laws.

For more information: See page 7 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

1.1 - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

Objective: Existing UPL laws include differences in how for profit and not for profit activities are regulated. For example, some activities by a not for profit corporation do not require certification by the State Bar, but activities by a for profit professional law corporation do require such certification. This statement clarifies that the regulatory options under consideration by ATILS include possible new exceptions to UPL that would permit specified activities by both for profit and not for profit activities.

For more information: See page 8 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

1.2 - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.

Objective: For those lawyers or law firms that might choose not to participate in reforms permitting fee sharing with nonlawyers or new UPL exceptions for regulated entities or individuals, this statement would encourage the use of technology to innovate and reduce costs in traditional law firm contexts that continue to offer consumers the option of obtaining legal and law-related services governed by the core principals of confidentiality, the attorney-client privilege, loyalty, competence, and independence of professional judgement.

For more information: See page 9 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 1.3** - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

Objective: In connection with the goal of increasing access to justice, this statement represents ATILS' strong interest in a deliberate effort to identify and evaluate metrics that can assess the actual impact of the implementation of the ATILS regulatory reform options on consumer access to legal services, including but not limited to, the justice gap.

For more information: See page 10 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

(Recommendations for Exceptions to UPL)

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

Objective: This statement recognizes that authorizing nonlawyers (such as limited license legal technicians) to provide specified legal advice and services is a category of UPL reform that merits exploration and should be considered as means for increasing access even if other options for regulatory changes would provide UPL exceptions for regulated entities or would allow fee sharing among lawyers and nonlawyer.

For more information: See page 11 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.1** - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

Objective: This policy addresses ATILS idea for a potential wide variety of regulated entities that would be permitted to provide specified legal, or law-related, advice and services, without a technology requirement (similar to Recommendation 2.0 that contemplates regulated individuals being permitted to render specified services with a technology requirement), and that the particular regulations imposed would be tailored to the type of entity structure (e.g., lawyer and nonlawyer entity or 100 percent nonlawyer entity).

For more information: See page 14 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.2 -** Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

Objective: This policy would change the laws governing UPL to create a new exception permitting specified legal advice and services to be provided by nonlawyer regulated entities that use technology to innovate and expand the delivery of legal services. Unlike 2.0 and 2.1, this option imposes a necessary condition that the entity's system for delivering legal services is a technology driven system. One example of such a system would be a mobile application powered by artificial intelligence that could interpret a user's facts and render a response indicating that the user does, or does not, have a legal problem for which legal remedies are available.

For more information: See page 15 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.3 -** State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of "artificial intelligence." Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

Objective: In connection with 2.2 above, this statement reflects a tentative view that regulation should not be based on a definition of the term "artificial intelligence" because a definition is not needed and would likely be problematic given the evolving concept of artificial intelligence. However, because 2.2 above imposes a necessary condition that the entity's system for delivering legal services must be a technology driven system, this policy would provide that the concept of a "technology driven" system be generally described as technologies that perform the analytical functions of an attorney. This means that the delivery system would need to involve more than simply an online access point such as a website portal for communicating with the legal services provider.

For more information: See page 15 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.4 -** The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

Objective: In connection with 2.2 above, this policy would require the regulated entities and their technology to abide by specified standards intended to balance public protection, for example, by requiring standards similar to the legal profession's core values of confidentiality, loyalty, and independence of professional judgment.

For more information: See page 16 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.5** - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.

Objective: In connection with 2.2 above, this policy would require changes in the law to ensure that the regulated entities and their technology preserve a client’s information through confidentiality and an evidentiary privilege notwithstanding the fact that communications might be exclusively with nonlawyers.¹

For more information: See page 16 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 2.6** - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Objective: In connection with 2.2 above, this policy would require regulated entities to pay a registration or certification fee to fund the regulatory agency tasked with oversight, including the concept of fee scaling.

For more information: See page 17 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

(Lawyer Disciplinary Rules Recommendations)

- 3.0** - 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.

Objective: To help lawyers be mindful of how technology can enhance the delivery of legal services, this statement contemplates a possible amendment to existing rule 1.1 (Competence) that would add a Comment to the rule stating that attorneys have a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology. ATILS is studying this concept and any rule language provided with ATILS’s request for public input is provided only for discussion purposes and does not represent actual rule revision implementation language. Public input is requested on the concept of this rule change rather than on the illustration language provided for discussion purposes only.

For more information: See page 18 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 3.1** - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a

¹ See the statutory privilege that protects a client’s communications with a certified lawyer referral service, Evidence Code sections 965 – 968.

lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

Objective: With the objective of removing some of the financial barriers to the collaboration of lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this recommendation represents the concept of a possible amendment to rule 5.4 that would expand the exception for fee sharing with a nonprofit organization and would permit a lawyer to practice in a firm in which a nonlawyer holds a financial interest so long as certain requirements are met. ATILS is studying this concept and any rule language provided with ATILS's request for public input is provided only for discussion purposes and does not represent actual rule revision implementation language. Public input is requested on the concept of this rule change rather than on the illustration language provided for discussion purposes only.

For more information: See page 20 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 3.2 -** Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee sharing arrangement with a nonlawyer.

Objective: To promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of legal services through technology or otherwise, this statement contemplates the concept of a possible amendment to rule 5.4 that would permit fee sharing with a nonlawyer, including compensation paid to a nonlawyer for client referrals, so long as the client provides informed written consent. ATILS is studying this concept and any rule language provided with ATILS's request for public input is provided only for discussion purposes and does not represent actual rule revision implementation language. Public input is requested on the concept of this rule change rather than on the illustration language provided for discussion purposes only.

For more information: See page 21 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 3.3** - 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.

Objective: To promote broad flexibility in the financial arrangements among lawyers and nonlawyers in innovating the delivery of law related services through technology or otherwise, this statement contemplates the concept of a possible new rule that would clarify the extent to which a lawyer might not be required to comply with attorney professional responsibility standards in rendering law related services rather than legal services. ATILS is studying this concept and any rule language provided with ATILS's request for public input is provided only for discussion purposes and does not represent actual rule revision implementation language. Public input is requested on the concept of this rule change rather than on the illustration language provided for discussion purposes only.

For more information: See page 23 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701

- 3.4** - 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.

Objective: This statement represents the concept of possible rule revisions that would improve public awareness and understanding of the legal dimensions of various issues, such as common landlord-tenant problems, because the advertising and solicitation rules would be revised in ways that foster innovative online delivery of legal services and the online marketing of such services. ATILS is studying this concept and any rule language provided with ATILS's request for public input is provided only for discussion purposes and does not represent actual rule revision implementation language. Public input is requested on the concept of this rule change rather than on the illustration language provided for discussion purposes only.

For more information: See page 24 of the July 11, 2019 Board of Trustees Open Session Agenda Item 701