



Los Angeles County Bar Association

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Re: Los Angeles County Bar Association Response to Report of State Bar Task Force on Access Through Innovation of Legal Services

The Los Angeles County Bar Association (LACBA) offers the following comments to the Report of the State Bar Task Force on Access Through Innovation of Legal Services (ATILS). LACBA has informed our members of the nature and extent of the State Bar proposals, and has solicited the response of our broad constituency throughout Los Angeles County, including through a Survey which generated a substantial response. The response of our membership is reflected in the following comments.

In representing a clear majority of our member constituency, except where indicated below, LACBA emphatically disapproves of the substantial changes delineated by ATILS. Our members are concerned that the ATILS proposals are a radical change in the delivery of legal services in California, in large part are not likely to achieve the stated purpose, and fail to consider the likely significant detriment such radical changes could cause.

While this letter reflects the official position of the Los Angeles County Bar Association, our Sections and Committees are free to offer their independent views in their own name, and we understand that at least two have chosen to do so. In addition, our members, regardless of position, are free to participate in the public comment process in their own name.

General Recommendation

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

The ATILS Report reviewed the case law defining the parameters of the practice of law in California prohibited by Business and Professions Code section 6125 and determined that it was unnecessary to provide a

definition of the practice of law, to consider whether to authorize non-attorneys or computer programs employing AI to engage in the provision of legal services.

There is nothing in this recommendation to oppose. The case law concerning UPL is sufficient to determine the types of activities which constitute the practice of law in California.

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

LACBA does not support the proposal. The “con” argument in the report states: “Absent a thoughtful or directed regulatory framework, it is not clear that legal technology innovations developed in the for-profit sector would have a significant benefit to those impacted most by the justice gap.” This is right. The general recommendation identifies allowing for-profit corporations to practice law as a way to solve the access to justice concerns of the middle class. Then the report argues that since there already are providers like LegalZoom in operation, expanding the array of services these on-line entities can perform with additional regulation will further the interests of justice. There is no evidence to support this is the case.

There is a significant difference between authorizing non-profit corporations to provide legal services to underserved communities and for-profit corporations to provide legal services in general. The advent of LegalZoom and other online programs to provide document preparation services to the public has not closed the justice gap. There is no reason to believe that innovation in the form of allowing for-profit corporations to practice law will improve access to justice for the poor. Those consumers who use LegalZoom or other platforms lose many of the protections afforded to clients of attorneys, who are prevented by the Rules of Professional Conduct to prospectively limit their liability.

LACBA supports relaxing requirements for non-profit entities where appropriate. The current structure which requires certification for for-profit activities related to the practice of law performed by non-lawyers, and not for the non-profit entities makes sense. The reason for the different treatment is that relaxing the requirements on non-profit entities has already proven to help close the justice gap by making more legal services available in underserved communities.

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 non-lawyers.

This proposal basically states that lawyers who practice under a current model of the delivery of legal services by attorneys will be allowed to continue to practice law, so long as they don't stand in the way of the extension of the practice of law to for-profit corporations, non-attorneys and online computer platforms. The proposal states:

“This recommendation complements consideration of any potential reforms that might involve new regulatory models, such as an entity regulation model where a corporation or other organization, rather than an individual, is authorized to practice law under adequate public protection requirements, with the goal to increase access to justice.”

LACBA does not support this proposal because it assumes that non-lawyers and corporations will be the model for delivery of legal services going forward. There is nothing which shows that the proposed changes to the provision of legal services will increase access or even lower costs. The proposal seeks to give consumers the option to obtain “legal and law-related services governed by the core principals [sic] of confidentiality, the attorney-client privilege, loyalty, competence, and independence of professional judgment.” (ATILS Report, p. 9). The “con” argument to allowing traditional practice of law in tandem with these new innovations is that changing the Rules of Professional Conduct is a slow process which does not foster innovation. There is a reason changes move at a glacial pace – since so many competing interests must be considered prior to the adoption of any change.

In contrast, the general proposals in the ATILS Report have afforded little time for consideration or comment, and seek to wholly upend an entire profession which is intended to serve the public. While consumers need to be protected from “bad lawyers,” they need lawyers to seek redress for their legal problems. This proposal to allow the continued practice of law by attorneys is ominous, since it basically presupposes that non-lawyers and corporations going forward will be the model for the delivery of legal services to the general public.

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.

LACBA supports this proposal to measure any progress made by the proposals from the Task Force which are implemented on the delivery of legal services, especially to underserved communities, makes sense. The proposals; adjusted, should first be tested in a limited market.

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

This proposal provides several different options to having nonlawyers provide legal services directly to the public, either through a regulated entity, a hybrid regulatory scheme where both the entity and non-attorneys are regulated, or by certification of non-attorney legal technicians. The idea is to increase the supply of those authorized to provide legal services with the aim of decreasing the cost to the consumer. The

contemplated entity or legal technician regulation will be through the State Bar or another regulatory agency.

The areas of practice being considered for those certified as legal technicians are housing, health and social services, domestic relations and domestic violence. LACBA supports connection with authorizing entity regulation for non-profits to allow non-profits to provide these limited types of legal services to underserved communities. Allowing non-profits to provide services on a sliding scale to consumers in these areas should positively impact the justice gap. This would not require creating a new regulatory scheme for non-attorney technicians. Limited entity regulation of non-profits should maintain the core values of the provision of legal services, confidentiality, loyalty, competence and independence of professional judgment.

- 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.

LACBA does not support this proposal and urges a pilot program for a limited time. This proposal suggests many different types of entity structures to foster innovation in the provision of legal services. It contemplates a pilot project to see what structures work to deliver legal services to underserved communities. The Washington Legal Technician program limits the program to providing limited family law services. If this proposal is adopted then California should consider a pilot program for a limited time period for a specific practice area to see if the proposals, including entity regulation of non-profits, can help bridge the justice gap. Before the wholesale authorization of for-profit corporations to practice law, a stepped approach to first authorize non-profit entity regulation makes sense. Regulating non-profits to provide low or no cost legal services to underserved communities and the middle class on a sliding scale may be all that is needed to address the growing number of litigants who cannot find representation for their legal matters.

- 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.

LACBA does not support this proposal. This proposal will create a carve out from the UPL statute for nonlawyer regulated entities that use technology to innovate and expand the delivery of legal services. There is no limit as to practice area or type of legal services which could potentially be provided by the entities who will be authorized to practice law through an online platform. This proposal does not limit ownership of the entities which provide the online legal services to lawyers. LACBA may support this proposal on condition that an attorney is ultimately responsible for the legal advice provided through the program, and the attorney and entity are required to maintain client confidentiality, minimum competence, loyalty and independent professional judgment. The idea fostered by the Task Force is to allow "one to many" provision of legal services, which is

much less expensive than "one to one" legal services. For some routine legal matters, this type of online program might work, with appropriate regulation, but should include attorney oversight and responsibility.

LACBA proposes this type of entity regulation be considered first as a limited pilot project. The entities must be required to adopt all of the public protection aspects of the Rules of Professional Conduct, including the prohibition to prospectively limiting liability to the client. The regulation of non-profit entities poses much less public protection danger than the regulation of for-profit corporations, so the pilot project should start with the certification of non-profit entities to practice in limited areas of the law which especially need to address the problem of *pro per* litigants such as family law.

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.

The Task Force determined that defining AI would not help them determine the best use of technology-driven innovation in the legal field. LACBA agrees that the concept of AI is evolving and need not be defined for purposes of the Task Force's work.

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.

LACBA supports the adoption of ethical standards so long as they offer the same protection as now provided by current standards. Any entities which are authorized to provide legal services under these proposals should be required to comply with ethical standards developed to ensure public protection, which include the core values of the attorney client relationship of confidentiality, loyalty and independence of professional judgment. This proposal "protects the public by requiring equivalent protections across all legal services, whether delivered by technology or human effort." (ATILS Report, p. 16) The example cited in the "con" section of allowing adverse parties to both use the online platform, so that the program could design a "mediated settlement" is dangerous, since the potential for a conflict of interest is high. If an online platform is certified for the delivery of legal services there must be safeguards to protect client personal information, and ensure that conflicts are avoided. The Rules of Professional Conduct are specifically designed to protect consumers of legal services. Any new legal service providers need to comply with all of the Rules to ensure the public receives adequate protection.

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.

LACBA does not support the relaxation of ethical standards. UPL rules to authorize the many to one possibilities of providing legal services through an online platform need to protect the legal consumer by providing both confidentiality of the client communications and an evidentiary privilege similar to the privilege extended for consumer communications with a lawyer referral service under Evidence Code sections 965 through 968.

The “con” argument highlights why this requirement is necessary: “Extending protections like privilege to communications with technology providers engaging in practice of law activities may impose additional costs or restrict available technology architectures.” LACBA agrees. The purpose of the proposed innovations is to deliver quality legal services to bridge the justice gap, not to sanction technology companies to deliver substandard legal services without the protections consumers rightfully expect to come with the legal advice they receive. A client needs to be able to be fully candid with the lawyer (or online platform) from which the client seeks legal services in order to obtain competent legal advice.

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.

LACBA supports the proposal that new entity regulation should be wholly funded by the newly regulated entities. The concept of having the new entities regulated by the State Bar (or other regulatory agency) fund the enforcement of the new regulations makes sense. LACBA further supports the proposal that those entities providing low or no cost options to the public to address the justice gap should pay less on a sliding scale. In keeping with the proposal for a pilot project, LACBA supports authorizing on a pilot basis regulation of non-profit entities engaging in the practice of law in a specified area of practice for limited representations. The regulation of these non-profit entities should be funded by those entities who enter the project, so that the project is self-supporting.

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.

LACBA supports this proposal. However, LACBA does not support requiring lawyers to use technology. Where and which technology to use should be entirely within the discretion of the attorney. Case law already recognizes an attorney’s obligation to remain up to date on best practices, including technological advances. Irrespective of all of the proposals put forth by the Task Force, adding the suggested comment to Rule of Professional Conduct 1.1 is supported.

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 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 share legal fees with a nonlawyer and 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.

LACBA supports authorizing non-profits to share court awarded fees. The alternative proposals in 3.1 and 3.2 (discussed below) are the heart of the Task Force's recommendations. LACBA supports the first suggested change to Rule of Professional Conduct 5.4 to authorize non-profits to share fees with attorneys who recommend them or otherwise facilitate their employment. Currently, these non-profits can only share court awarded fees. To tackle the justice gap head on, greatly expanding the reach of Legal Aid and Neighborhood Legal Services, so that these non-profits and others like them can provide legal services to underserved communities is the answer.

LACBA does not support for-profit entities to share fees with non-lawyers. The second part of this proposal seeks to allow fee sharing with non-attorneys under specified conditions. In Attachment J to the ATILS Report, the Task Force recommended the following new language as part of the revised Rule of Professional Conduct 5.4:

(b) A lawyer shall not practice law in a law firm in which individual nonlawyers in that firm hold a financial interest unless each of the following requirements is satisfied:

- (1) the firm's sole purpose is providing legal services to clients;
- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;\
- (3) the nonlawyers have no power to direct or control the professional judgment of a lawyer;
- (4) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct, the State Bar Act and other laws regulating lawyer conduct and agree in writing to undertake to conform their conduct to the Rules, the State Bar Act and other laws regulating lawyer conduct;

(5) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under rule 5.1;

(6) compliance with the foregoing conditions is set forth in writing.

This carve out to Rule 5.4 seeks to incentivize non-attorneys to invest capital in law firms to increase the use of technology, while taking steps to ensure that the professional judgment of the attorney is not compromised, and the public is protected. LACBA questions whether this is sufficient to protect claims where significant financial awards are at stake.

If this rule change is adopted, it should be solely on a pilot project basis, after new regulations are adopted to ensure that these law firms with non-attorney partial ownership comply with the new rule's requirements.

3.2 Adoption of an 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 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.

LACBA does not support this proposal. This proposal will wholly supplant the professional judgment of the attorney in providing legal services to the consumer. The whole reason for prohibiting attorneys to share fees with a non-attorney is to prevent motives other than providing the best legal services to the client from becoming the purpose of the representation.

There is no reason to believe allowing non-attorneys in general to share fees with attorneys will do anything to bridge the justice gap. This proposal is certain to undermine the independent professional judgment of the attorney. This type of conduct has led to the disbarment of many former attorneys, and in most instances the cappers or non-attorneys are the ones who made the lion's share of the profits of the ill-fated enterprise. In all of those cases the clients received either no or substandard legal services. Allowing non-attorneys to share fees will result in other interests separate and apart from the clients' interests to shape the course of the clients' legal matters. This will not likely result in lower overall attorney fees, but it is sure to mean much lower quality legal services for consumers.

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.

LACBA does not support this proposal. There is no reason to consider adopting a version of ABA Model Rule 5.7. California case law already provides the parameters of when an attorney providing non-legal services to a client may be subject to the Rules of Professional Conduct. The Rules Revisions Committee only recently rejected a proposed new Rule patterned after Rule 5.7. There is also no stated (or actual) nexus between limiting an attorney's liability for providing non-legal services to a client and bridging the justice gap.

Far from preventing consumer confusion as to when the consumer can reasonably expect the lawyer to have to comply with the ethical requirements of the Rules of Professional Conduct, the proposed new rule actually limits the attorney's liability when providing non-legal services to a client, contravening established precedent.

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.

LACBA does not support this proposal. The main point in considering changes the recently adopted advertising rules is to allow what would otherwise be prohibited as improper solicitation under Rule of Professional Conduct 7.3, i.e., text messages or emails directed to those seeking legal services.

Current Rule of Professional Conduct 7.3(b) provides:

(a) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.

The proposed new language for Rule 7.3 would allow attorneys and non-attorney entities who will be authorized to practice law to send unsolicited emails and text messages advertising legal services. The proposed new Rule of Professional Conduct 7.3 provides:

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the

lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

Whether or not this type of attorney (or non-attorney) advertising will somehow help bridge the justice gap is questionable.

Thank you for your attention,

A handwritten signature in black ink, appearing to read 'RFBrot', with a long horizontal stroke extending to the right.

Ronald F. Brot
President
Los Angeles County Bar Association