Los Angeles County Bar Association
1055 West 7th Street, Suite 2700 | Los Angeles, CA 90017-2553
Telephone: 213.627.2727 | www.lacba.org

Introduction:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on the tentative recommendations developed by the Task Force on Access Through Innovation of Legal Services (the "Task Force"). PREC is a Committee of the Los Angeles County Bar Association and is submitting the comment on its own behalf and not on behalf of LACBA as a whole. LACBA will forward separate comments on behalf of the entire LACBA membership. The Task Force's work caused a lot of discussion within our Committee, and we commend the Task Force for taking on this difficult work and for pushing for a solution to the access to justice problem.

Due to timing constraints in this fast-moving comment process and the challenges of obtaining Committee approval for this comment letter, our Committee wants to be clear that any silence as to a particular recommendation should not be interpreted as support or lack of concern. It may well be that the Committee was simply unable to achieve sufficient unity of purpose as to any particular recommendation not commented upon in this letter.

While our Committee agrees that access to justice is an important issue that needs to be addressed, we have concerns and comments to specific portions of the Task Force's Report, as set forth below. Our overriding concern is that enacting the tentative recommendations could lead to unintended consequences including public harm, and this is a common thread in many of our comments. These proposals, if enacted, will drastically reshape the practice of law. Accordingly, while we are supportive of deliberation and an open exchange of ideas as to the implications flowing from the adoption of the Task Force's recommendations, the impact of the Task Force's recommendations are likely to be far-reaching. It is difficult to fully appreciate or predict that impact because of the continuing evolution of technology and the expansiveness of the practice of law. Nevertheless, we believe that the possibility of public harm makes it especially important for the Task Force to evaluate further the likelihood that these options will result in increased access to justice, and not just a shifting of professional duties to nonlawyers and technology companies.

In addition to our specific comments, we would encourage the Task Force to consider other resolutions to the access to justice problem, which include simplifying court procedures, increasing the number of judges, encouraging pro bono services through student loan forgiveness, 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 accessing communities that are in need of legal services. Some of these avenues are the subject of AB 330, which has been chaptered by the California Secretary of State as of September 4, 2019. What seems to be certain is that any material increase in access to justice would cripple the court system without significant court changes and increased funding. The Task Force's Report does not address these consequences of the changes for which it aims.

If nonlawyers and technology companies are permitted to practice law, and appropriate regulation and training are put into place, this likely will have a significant fiscal impact, and we would suggest that fiscal impact be quantified and compared with other methods to increase access to justice. If the proposals are to move forward, there should be evidence that it will increase access to justice, and that these proposals are the best options considering the fiscal impact.

Tentative Recommendation 1.1:

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

Our Committee questions whether for-profit corporations, whose primary obligation is to maximize returns for investors or shareholders, can be uniformly trusted to put a legal client's interests first, as would any lawyer acting in accord with his or her fiduciary duties. We question whether -- and how -- for-profit corporations can be incentivized to do so. As we mention below with respect to Tentative Recommendation 2.4, we do not see any way to assure this other than to impose all of the duties of lawyers on any person practicing law. It remains unclear to us whether for-profit corporations, if allowed to deliver legal services, can fill the need of those clients who are currently underserved rather than those who can otherwise afford such services -- and, again how to incentivize corporations to do so.

Tentative Recommendation 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."

Our Committee respectfully offers several concerns that it believes the Task Force should consider in evaluating this recommendation further. First, our Committee believes that any technology-driven entity must have a licensed, trained lawyer either supervising or guaranteeing the competence and quality of the services delivered. The Committee

foresees a potential for abuse with the corporate form. Specifically, unscrupulous actors might launch and then abandon technology service corporations in an effort to defraud unwitting clients, avoid regulation, or avoid disciplinary measures. Likewise, the relative ease with which for-profit corporations can be formed, dismantled, and sold could leave clients without either a dependable source of continued services or legal recourse in the event of harm caused by a corporation to which the client had looked for assistance.

There is another competence issue if nonlawyers are permitted to provide some defined legal services to clients. Artificial intelligence presumably would be programmed to provide the correct answer to a particular legal need, but the practice of law is governed by the principle that there rarely is a correct answer. Lawyers are obligated to advise clients of the pros and cons of a proposed course of action, and of reasonably available alternatives, because without in this way obtaining a client's informed consent the lawyer violates not just the duty of competence but also the fiduciary duty of undivided loyalty. See *Anderson v. Eaton*, 211 Cal. 113 (1930). Any consideration of direct legal services by nonlawyers must address the potential resulting disparity between the standards applicable to lawyers and to nonlawyers.

Finally, we see it as an open question whether the State Bar of California has the capacity, resources, or technological expertise to serve as a regulator for for-profit technology service corporations and, if not, which agency can fill that role. We would suggest the Task Force consider the capabilities that would be needed of any regulator and how that would be achievable.

Tentative Recommendation 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."

An essential requirement is the ability to define the services that would be permitted to avoid UPL liability. Recommendation 2.3 speaks of "technology-driven legal services delivery systems." Unless this general concept is defined effectively, the UPL exemption will be exploited. It should be recognized that there are many nonlawyers who attempt to provide legal services, such as notarios who have been a major target of law enforcement, and it is essential that unintended persons be excluded. It is necessary to define that conceptual recommendation, but we are unable to locate any definition in the Report. The Task Force recommends that Artificial Intelligence not be defined because it is a rapidly evolving field, but then it becomes even more important to define the types of services that can be provided and by whom. The discussion on Report p. 15 suggests this would be deferred to a regulatory agency but without any suggestion about how the regulatory agency would go about deciding which nonlawyer organizations would qualify and what types of services they may provide.

Tentative Recommendation 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."

There must be a careful and client-protective definition of the standards that would govern the nonlawyer organizations. The Report at p. 16 speaks of "requiring standards similar to the legal profession's core values of confidentiality, loyalty, and independence of professional judgment." We reject the idea that the legal profession has certain core values, a phrase implying that others are trivial and can be ignored. The Report's listing of so-called core values ignores competence (rule 1.1), the client's control over substantive decisions (rule 1.2(a)), the lawyer's obligation to permit only reasonable limitations on the scope of a representation (rule 1.2(b)), diligence (rule 1.3), effective communication (rule 1.4), fee limitations (rule 1.5), conflicts of interest (at least rules 1.7, 1.8, and 1.9), organizational client obligations (rule 1.13), trust account obligations for unearned fees (rule 1.15), and the obligation to return client materials and unearned fees (rule 1.16(e)). These references are to disciplinary rules that state in narrow disciplinary form civil obligations that provide remedies to injured consumers of legal services. In summary, law clients must be entitled to all of the protections of a lawyer-client relationship including the civil duty of competence measured by the standard applicable to lawyers. In addition, client trust accounts should be interest-bearing IOLTA accounts to the same extent as required for lawyers (see Bus. & Prof. Code § 6211, et seq.), the regulatory agency should have the same investigatory power as does the State Bar (see, e.g., Bus. & Prof. Code § 6168), and the nonlawyer provider should be required to provide the same financial security as law organizations (see, e.g., Corp Code § 16956).

Tentative Recommendation 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."

The attorney-client privilege is the oldest of the confidential communication privileges. It is commonly understood that the interests of society are best served by encouraging the client to disclose all relevant facts to his or her attorney and by removing any fear or doubt that the confidential communications made by the client will later be disclosed by the attorney. Recommendation 2.5 seeks to extend, to one degree or another, the attorney-client privilege to client communications to a "technology-driven legal services delivery system."

Whether or not this recommendation will increase access to justice through technology is unclear. Currently, access to business records are afforded a degree of legal protection which help to ensure that access to business records will be based on a matter of right

under law or through judicial review and intervention. Privacy is a common basis for denial of access to business records. This recommendation seems to proceed on the premise that these existing protections are not enough. That if the technology companies also receive the "equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality," then access to justice will be expanded.

This contention bears closer examination. First, it is self-evident that the attorney-client privilege assumes that the party receiving the privileged or confidential communication from the client is a licensed attorney. Presumably it is important that this other party has been trained to understand the contours of what amounts to a privileged or confidential communication. Further, this person also understands that keeping client communications confidential or "privileged" goes to the heart of the duties of an attorney and forms a key part of societal understanding of the sanctity of the attorney-client relationship. Can a technology company or more generally, a nonlawyer, easily fill the attorney's shoes in this regard? Will a technology company have a similar incentive to hold inviolate a client's communication made in the course of the delivery of legal services?

Second, as already pointed out by the Task Force's Report, extension of the attorney-client privilege to a "technology-driven legal services delivery system" could frustrate the administration of justice by shielding information from legal proceedings.

Thus, recommendation 2.5 could actually work to hinder public protection. Without a clear answer to either of these points, the Task Force should re-consider before sending forward this recommendation to the Board of Trustees.

Tentative Recommendation 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."

Requiring attorneys to keep abreast of "the benefits and risks associated with relevant technology" will burden attorneys to constantly work to be aware of technological advancement and to cultivate an understanding of technology that far exceeds what would be necessary to utilize the technology.

Also, it is not clear what is meant by "relevant technology." Who decides what is "relevant?" The ambiguity of this phrase also creates an enforcement problem for the State Bar. Further, it is unclear specifically how the inclusion of this matter to Comment [1] of rule 1.1 will increase the access to justice? After all, the adoption of legal technologies have historically been driven by market forces and it is unclear how the threat of enforcement of rule 1.1 will provide a better catalyst for constructive change.

For example, at one time, legal research was accomplished through digests, key word and phrase indexes and the like. Today, computerized research platforms and internet-

based research software have made legal research far quicker, much easier and more cost-effective. Any attorney who refused to take the time to learn how to utilize these modern technologies found themselves at a stark competitive disadvantage as they were unable to re-coup the time and labor-intensive cost of using the traditional legal research tools. In other words, the market mechanism motivated attorneys to keep up and culled from the marketplace those who refuse to embrace technological advancement. Thus, the wholesale conversion of the entire bar to computerized legal research occurred without the looming threat of misconduct for lack of competence.

In sum, it is the tying of technological awareness to legal competence that is troubling. Besides disproportionally impacting attorneys over the age of 50, it also needlessly burdens all attorneys to keep up or risk prosecution for ethical misconduct. The Task Force instead might consider recommending that the State Bar implement a voluntary training program to educate lawyers about technological advances.

Tentative Recommendation 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 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."

The proposal to amend rule 5.4 raises several concerns that the Committee respectfully requests the Task Force consider. First, we are concerned the recommendation to expand the types of fees that a law firm can share to other than those awarded by a tribunal might lead lawyers to the charging of unconscionable fees. Second, the Committee questions whether opening up law firm ownership to nonlawyers will fill the need of clients who are currently underserved, rather than simply serving those clients who are already financially capable of affording such firms' legal services. The Task Force's Report does not suggest how nonlawyer ownership of law firms is connected to the access to justice goal. Third, as a practical matter, we believe the Task Force should consider whether having nonlawyers hold financial interests in law firms and precluding such nonlawyers from directing or controlling the professional judgment of the firms' lawyers can work practically, particularly where the nonlawyer's financial goals might not coincide with a lawyer's selected legal strategy for a client.

Tentative Recommendation 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."

We respectfully offer several concerns with this recommendation. First, while we understand that this recommendation is just that, a recommendation, we note that nowhere does this recommendation appear to provide for mechanisms to ensure that lawyers' professional judgment is not compromised by those nonlawyers with whom they might share fees. Second, we question whether merely requiring a client's informed written consent to such arrangements is sufficient. At the risk of generalizing, our Committee doubts whether those underserved clients in most need of legal services have the sophistication to evaluate whether or not to consent to receiving legal services from firms that share fees with nonlawyers and the risks of doing so. Third, PREC believes that any amendment to rule 5.4 should include provisions to ensure that nonlawyers receiving a share of a firm's fees are doing so in exchange for services that actually reduce the cost of, or increase access to, legal services, rather than just as an investment opportunity.

Tentative Recommendation 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."

By itself, we have no comment to the addition of rule 5.7 in a form similar to the version in Attachment L to the Task Force's Report. However, the form rule illustrates the confusion that is likely to arise if entities owned by nonlawyers are permitted to provide legal and nonlegal services. For example, what duties will be owed to a client who obtains legal services from a lawyer and accounting services from the lawyer's partner, an accountant? What duties will be owed by a nonlawyer who provides legal and nonlegal services? We think clients should be aware of how the duties might differ among service providers within the same firm, and should be informed and consent to any compromise of the duties in the provision of services, such as if the duty of confidentiality will not be maintained firm-wide. While in theory this might seem simple, this could be complicated depending on what activities by nonlawyers and entities are allowed. We think the Task Force should evaluate with each option how clients will be able to evaluate the differences in duties between service providers, if any.

Tentative Recommendation 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."

We appreciate that the proposed form of changes to rule 7.1 through 7.5 in Attachment N would give some clarity to lawyers using online listings or directories to advertise. However, Comment [2] to the proposed rule 7.2 includes group advertisements with online directories. We are concerned that advertisements by a group of attorneys might be viewed as referrals if they do more than just list the lawyers as provided in this comment. We have understood group advertising, which we understand to mean the collective advertising by attorneys, to be permitted and not constrained in the same way as online directories. We request the Task Force consider and clarify whether group advertising will be treated differently.

Comment [5] to rule 7.2 permits lead generation services subject to certain requirements. We believe this provides much needed clarity to lawyers, some of whom already are using lead generation services. It also facilitates potential clients gaining better access to lawyers. The Task Force should consider whether referral services that do not comply with the onerous lawyer referral services rules should be permitted. Of course, the possibility is that referral services will only recommend lawyers who pay a significant amount and that those lawyers might not be best suited for the case, but if the concern is to provide better access, it is likely referral services will find ways to educate consumers about their legal issues and to connect those consumers with lawyers who can assist. The Task Force should consider whether a lawyer referral service that is unregulated and has a profit motive could provide better access without compromising public safety concerns.

Thank you for the opportunity to comment on the tentative recommendations developed by the Task Force on Access Through Innovation of Legal Services.

Sincerely,

Brandon Niles Krueger
Chair
Professional Responsibility and Ethics Committee
Los Angeles County Bar Association