September 23, 2019

VIA EMAIL

Angela Marlaud
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105
atils-pc@calbar.ca.gov

Re: Tentative Recommendations for Public Comment, State Bar Task Force on Access Through Innovation of Legal Services (ATILS)

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning the Tentative Recommendations for Public Comment from the State Bar Task Force on Access Through Innovation of Legal Services (ATILS). Founded over 100 years ago, the OCBA has over 9,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, government practice, and public interest organizations, with varied civil and criminal practices, of differing ethnic backgrounds and political leanings, has approved these comments. These comments reflect feedback we received in response to a survey of our 9,000 members about the proposed changes, additional comments provided by our members at a September 18, 2019 Task Force Town Hall, as well as the work of the OCBA State Bar Task Force dedicated to reviewing and analyzing the proposed changes on behalf of our members.

Overview: Context and Impact

The law is a service profession. As former Associate Justice of the U.S. Supreme Court Potter Stewart has observed: while "economic motivations" may be "very important" in the legal profession, "what has always differentiated" "the profession of law from a trade or business is that the profession of law is basically a service profession, that your primary satisfactions and gratifications should come from helping your fellow man or woman." Potter Stewart, *Reflections on the Supreme Court*, in Appellate Practice Manual, p. 310 (ABA 1992). Attorneys in California and nationwide make a difference by donating significant hours each year to representing clients pro bono. *See* ABA Standing Committee on Pro Bono & Public Service, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, p. 33 (2018) (attorneys in solo practice to large law firms average significant hours of pro bono work; in 2016, they averaged between 44 and 72 hours of pro bono work per

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

attorney). We are not aware of any other profession that can point to such generosity with their time.

Attorneys therefore have a deep interest in the rule of law, and in providing meaningful access to justice. We applaud the State Bar's interest in improving access to justice for all[1], particularly given its decision last week to jettison the State Bar's decades-old California Commissions on Access to Justice. But we have grave concerns that the State Bar's proposals will upend the profession and expose the public to new dangers without materially expanding access to justice or helping the public. Indeed, the proposed changes will emphasize the business and profit side of the practice of law at the potential expense of the professional and fiduciary obligations of loyalty and confidentiality developed over hundreds of years.

The proposed changes are unprecedented in scope and collectively untested in any one jurisdiction. Moreover, the aim to which they are directed – improving access to justice – has not been shown to be positively impacted by any of the proposed changes when enacted in other jurisdictions; indeed, implementing the changes could adversely impact the availability of pro bono services, overload the courts, entrench the perception of a two-tiered justice system, expose those of limited means to unscrupulous and inadequate assistance with important legal matters while simultaneously compromising the privacy and confidentiality of their legal consultations on these matters, and undermine and impede diversification of the profession (an important part of the State Bar's mission) by compromising the work of solo and small firm practitioners.

We understand that the Legal Aid Association of California (LAAC), which represents the state's public interest organizations, has echoed these concerns, citing the potential for "compound[ing] and exacerbate[ing] access to justice issues" through "dilution of the value and quality of legal services, insufficient regulation, aggressive marketing, bias in artificial intelligence and algorithms, and scams and fraudulent activity." LAAC September 18, 2019 letter, p. 2. LAAC also has expressed concern that "apps and other technologies could function as a lower-cost, lower-quality option, resulting in a class of people who, based on income, are financially excluded from traditional legal services and relegated to only receive services from apps, algorithms, and chat bots, not human beings. Differently put, poor people get apps because they cannot pay for human attorneys, while those with means get humans." LAAC September 18, 2019 letter, p. 4. Strong language, from groups that rely on State Bar funding for their continued survival, and therefore have a strong incentive not to challenge State Bar efforts.

It is a maxim of the entrepreneurial realm, particularly the realm of tech entrepreneurs, to "fail fast," so that technology and products can be iterated and improved quickly and then scaled. But this maxim refers to failing fast while a company is still small, or in a small, limited way if a company is already large. The proposals here encourage failing big AND fast, on an

[1] We do, however, have a concern that ATILS seems to be focused on literal access to the courts- that is, getting more cases into court- without any consideration of what might happen to those cases once they are there. For example, whether the recommendations could ultimately increase costs for those seeking help or result in unnecessary disastrous consequences for clients should be studied; without considering these impacts, it cannot be determined whether the recommendations will provide meaningful access to justice. We support enhancing meaningful access to justice, not just the literal, initial access ATILS seems to be focused on.

extremely broad scale, which is a recipe for disaster for the people of California. California's court system is the largest in the nation and serves a population of more than 39 million people— about 12 percent of the total U.S. population. Washington and Utah, where limited-licensing of nonlawyers has recently been implemented and authorized, have populations of 7.4 million and 3.1 million, respectively. Arizona, which is also considering some of these proposals, has a population of 7 million.

No jurisdiction has simultaneously enacted the full range of proposed changes to the practice of law and delivery of legal services that ATILS and the State Bar are proposing: allowing for the practice of law by both nonlawyers and technology-driven legal systems, nonlawyer ownership of law firms, and broad scale amendments to the ethical rules to foster nonlawyer delivery systems. No studies demonstrate that, collectively, these proposed changes will improve access to justice; indeed, no studies demonstrate that where even a small slice of these proposals has been implemented (such as limited licensing in Washington state), they have made a difference in access to justice. In fact, a recently published study of the U.K.'s Legal Services Act of 2007 reveals that allowing nonlawyers to take an ownership stake in law firms "ha[s] not sufficiently addressed consumer needs or improved access to justice." Aebra Coe, *Like it or Not, Law may open Its Doors to Nonlawyers*, Law 360 (Sept. 22, 2019).

Indeed, recent access to justice studies indicate that these proposals will not resolve the majority of access to justice issues. As the 2017 National Justice Gap survey cited by ATILS noted, 71 percent of indigent persons experienced a broad range of civil legal problems each year and are not getting access to justice. Of these, cost is a barrier to only 15 percent; the other 85 percent cite other reasons, such as fate, an act of God or not being aware that they have a legal problem. According to the 2019 California Justice Gap Study released by ATILS on September 19, 2019, only 9% of low-income Californians who did not receive legal help cited cost as a reason, and only 19% of low-income Californians reported that they "went online" for assistance. There is nothing to suggest that providing limited license attorneys and legal technology services will have any impact on the primary reasons people are choosing not to seek legal assistance.

As RAND, a nonpartisan, objective research institution, noted in a 2011 paper, *Innovations in the Provision of Legal Services in the United States: An Overview for Policymakers*, "there are risks with loosening restrictions on legal services to encourage low-cost options;" before making such changes, "at the very least, we should seriously examine whether innovations in providing legal services. . . could promote more social welfare," and whether "the gains from such innovations outweigh the losses." Since RAND made those observations eight years ago, there have been no such studies addressing the questions raised by RAND in that paper. Our understanding is that RAND would be happy to study the impact of the State Bar's proposed changes, as well as other methods of improving access to justice, and could produce a report on the potential impact of those changes 6-9 months from inception. We strongly urge the State Bar to commission such a report, and to await studies of the experiences with limited licensing in Washington and Utah, before making the proposed sweeping changes.

But we are concerned that all of our comments and suggestions will not be considered at all. In various town halls across the state, members of ATILS indicated that the State Bar was about to move to the implementation stage of these recommendations. In other words, the State Bar apparently plans to skip past the question of whether any of these changes should be made – the very threshold question about which they have asked lawyers and the public to comment – to the implementation phase. It would appear that, despite purportedly seeking comments about whether to proceed, ATILS and the State Bar have already decided to move forward; this comment period is therefore only for show.

Indeed, it appears that ATILS and the State Bar have been hijacked by not only the legal tech industry, but activists, those with a reform agenda, and "true believers" for the practice of law by nonlawyers who have trained their sights on the U.S. market. *See, e.g.,* ATILS member Joanna Mendoza Twitter Account (previously "@calbartrustee," now "@legaldisruptor, and self-proclaimed "advocate for reform of legal regulations"); Crispin Passmore (@crispinpassmore) and Gillian Hadfeld (@gillianhadfeld) Twitter Accounts (detailing and touting their roles in recent access to justice/legal reform initiatives, including Utah and California). Many of these same people, in an effort to make this appear to be an "organic" movement for reform of the practice of law in the name of access to justice, have been behind many of the recent access to justice initiatives in other states, which ATILS is now citing as a reason for California to engage in these reforms. See, e.g., Bill Henderson, *Dropping the Rock: three examples*, available at: https://www.legalevolution.org/2019/09/dropping-the-rock-three-examples-112/ (Sept. 1, 2019) (noting that Professor Gillian Hadfield, "who has relentlessly made the case … that the traditional rules governing the legal profession are bad," was the force behind the Utah Working Group's recent adoption of legal reform proposals; Professor Hadfeld also presented to ATILS); Gillian Hadfeld tweet (@gillianhadfeld), Aug. 26, 2019 ("Utah proves itself a major leader in the regulatory reform we need for #A2J and #legalinnovation. A superb report (if I do say so myself as a contributor)"; Gillian Hadfeld tweet (@gillianhadfeld), Aug. 27, 2019 (retweeting Crispin Passmore tweet about Utah proposals, and noting that Passmore covers what is "critical and radical in the proposals and holding them up as leading not only for the U.S. but also for the far more regulatory savvy U.K. and one hopes the rest of the world too"); *Crispin Passmore, Utah Turns Reform Party into a Carnival*, available at https://www.passmoreconsulting.co.uk/utah-turns-us-reform-party-into-a-carnival (Aug. 27, 2019).

California lawyers who have commented on the proposed changes have almost unanimously raised concerns about them. *See* California State Bar Swamped by Comments Opposing Ethics Rule Changes, Bloomberg Law (Aug. 6, 2019) (noting that in the first two weeks of the public comment period, the Bar had received over 420 comments, 379 of which opposed the changes). In the face of this overwhelmingly negative response from those inside the state, allies of the State Bar have turned to those outside the state and around the world to lend support for reforms that have been called both "radical" and "the biggest changes to legal market regulation in American history." California State Bar Swamped by Comments Opposing Ethics Rule Changes, Bloomberg Law (Aug. 6, 2019); @Crispin Passmore on Twitter (UK consultant and legal reformer, consultant to ATILS members, tweeting out on September 18: "Ok radical reformers around the world. Get online and tell @StateBarCA that their plans are good. Deadline

coming up on Monday.") None of the commentators from outside California, however, will have to live with the fallout from any of the recommendations they have urged or been encouraged to advocate for.

California lawyers who do point out the dangers to the public – as did the public interest, small firm, family law, immigration lawyers, and D.A.'s charged with prosecuting fraud by those unlicensed to practice law, who spoke at the Orange County Town Hall – are ignored, or worse. See Carolyn Shining, *Proposals Could Set Back Women Lawyers*, Daily Journal (Aug, 26, 2019) ("Attorneys who have dared to step up and ask for more studies . . . have been pilloried on social media and in news articles as 'protectionist' . . . and even as greedy"). This is disturbing both from a due process perspective, and from a policymaking perspective; policies are only as strong as the input received in making them. And here, "by design," the tentative recommendations have been issued by a Task Force largely made up of members who are not lawyers, some of whom are apparently located outside the state, and many of whom own or are affiliated with technology companies that stand to directly benefit from a relaxation of the rules. It is no wonder that these technology company representatives – who make up nearly half the Task Force – appear to enthusiastically favor the proposed changes. Indeed, given the makeup of the Task Force, if only one or two non-technology company representatives vote in favor of the proposals, the proposals will pass. This is disturbing, to say the least.

We believe a decision on, and any comment on, potential specific methods of implementation to be premature. Substantial issues exist regarding the wisdom of proceeding with any of these proposals at all, particularly absent further study to address and quantify the public protection cost in relation to any perceived benefits.

Responses to Specific Recommendations

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

Position: Oppose, with the caveat that, if this recommendation is nonetheless implemented, only a limited, closely regulated, pilot program in discrete practice areas be implemented.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.0.

We are concerned about the potential adverse impact of limited license professionals on individual clients and the difficulty in regulating them, as well as their potential for reducing the gap in access to justice.

Allowing non-lawyers, who lack the training necessary to provide competent and ethical legal services, *may* increase some form of access to justice, but at the cost of an unsuspecting and ultimately unprotected pubic receiving legal services from unqualified and potentially unscrupulous actors. A careful balancing of these two goals must be considered, with the emphasis, from our perspective, on public protection.

Recommendation 2.0 also creates an inherent conflict between the dual goals of the State Bar mission "to protect the public . . . and [to] support efforts for greater access to, and inclusion in, the legal system." Recommendation 2.0 may have a negative impact on the number of diverse persons, especially women, entering the legal profession as attorneys. For example, given the high cost of obtaining a legal education, as well as other factors, many women may opt to become limited license technicians and not lawyers, which will decrease their earning power and increase the gender wage gap in the profession. *See* Carolyn Shining, *Proposals could Set Back Women Lawyers*, Daily Journal (Aug. 26, 2019) (expressing concern that ATILS proposals will "set back the efforts of women lawyers to gain income equality," have an "overwhelmingly negative and one-sided impact on women lawyers and lawyers with diverse background," and create a "new 'super paralegal' [role that] will entice and trap women into a newly created 'mommy track' in which they may earn slightly more than a certified paralegal, but clearly never what a lawyer makes"). Indeed, as a 2017 preliminary study of the Washington state experience with limited licensed nonlegal technicians observed, "LLLT's [Limited License Legal Technicians] must discover and attract sufficient numbers of clients and revenue to make an operational profit that provides a livable income and amortize the initial investment" in training for the license; however, most LLLTs were not practicing full-time, "[m]any LLLTs were "unable to attract a sufficient number of clients to run a viable business," and while a "hypothetical business model that charges fees between those of a paralegal and a lawyer seems viable," the "current actual fees [for LLLTs] are mostly the same as a traditional paralegal." *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*, at pp. 10, 12, 13 (March 2017).

Our collective experience with fraud by unlicensed professionals assisting the public with legal problems, and with regulated limited license professionals, demonstrates that meaningful access to justice may not be accomplished through widespread adoption of limited license legal technicians; in fact, they are likely to cause more problems than they solve.

Notario Fraud

Expanding the practice of law to non-lawyers can have devastating effects on the clients we are trying to serve. Clients are often extremely vulnerable when involved in litigation, especially in the areas of immigration, family law, trust and estates, and landlord tenant matters.

The state of California is home to the largest undocumented immigrant population in the United States, housing one-fourth of our nation's undocumented immigrants. Because of its unsurpassed undocumented immigrant population, California is a breeding ground for notario fraud, which is essentially the unauthorized practice of immigration law.

A plan to implement lower cost legal services and combat notario fraud was enacted in 1986 in California in the Immigration Consultants Act. This allowed persons or businesses other than lawyers to render legal services, provided they meet appropriate eligibility standards to become an immigration consultant. An individual must pass a background check administered by the Secretary of State that requires that an applicant not have committed any felonies or certain misdemeanors, such as crimes that demonstrate a lack of trustworthiness. An individual must also

obtain a $100,000 surety bond, create a client trust account, and complete other administrative tasks.

Notwithstanding this plan to combat notario fraud, over thirty years after the law's enactment, notario fraud is still rampant in California. Los Angeles County, which has a high concentration of undocumented immigrants, has experienced the brunt of the harm. The California Department of Consumer Affairs estimates there are approximately 2,500 individuals who unlawfully assist with immigration matters in California, and at least half of those are in the Los Angeles area (although advocates assert the amount is higher). The Los Angeles County District Attorney's Office has a Notario Fraud Unit dedicated solely to this type of fraud, and the ABA and California State Bar have both issued warnings about notario fraud.

Limited License Bankruptcy Professionals

The term "appropriate regulation" in Recommendation 2.0 needs to be fleshed out. There are areas in which non-lawyers are regulated, and still there are substantial problems in the provision of services. For instance, the Bankruptcy Code authorizes non-lawyer Bankruptcy Petition Preparers ("BPPs") who are able to provide limited legal services for a small fee. BPPs are not allowed to give legal advice, but are able to complete legal paperwork and provide legal information. The United States Trustee has authority over the BPPs and regulates them to an extent, but the BPPs are not the United States Trustee's only concern. Furthermore, many of the BPPs use shady sales tactics to convince consumers to sign up with them, and to find ways around the limitation on fees. For instance, one client of the Orange County Public Law Center went to a BPP for assistance with a Chapter 7 case. In the Central District of California, BPPs may not charge more than $250 for preparing the Chapter 7 case. This particular client paid the $250, but then the BPP had her sign up for a "membership" for an additional $500. No regulatory agency is going to be able to monitor non-lawyers closely enough to prevent these types of scams from occurring.

The only study to evaluate the adoption of limited license legal technicians in the state of Washington – the only state in which such a role has been sanctioned for any length of time – is equivocal about both its sustainability and economic feasibility for the technicians it licenses and the meaningful impact these technicians may have on access to justice. Two other states – Illinois and Virginia – have rejected the paraprofessional model because such a program has not been shown to increase access to justice. See Patrick McGlone, *Can Licensed Paraprofessionals Narrow the Access-to-Justice Gap?*, ABA Journal Defending Justice Series (Sept. 6, 2018).

The Preliminary Evaluation of the Washington State Limited License Legal Technician Program, prepared in 2017 by the Public Welfare Foundation, with funds from the American Bar Foundation and the National Center for State Courts, observed that five years into the program only 15 limited license legal technicians existed, 13 of which were practicing, and only 30-60 students were enrolled in law school programs to become technicians. The program itself was not yet self-sustaining and was heavily subsidized by the Bar; while licensed technicians, too, were having trouble making a living from their work and attracting a sufficient number of clients to sustain a viable business. There also was evidence that the amount the technicians would need to

charge to make a sustainable living would not end up serving the low or middle income community and, further, that "clients often did not understand the legal nuances of what tasks a LLLT could perform," and that there is a risk of overstepping their licensed role as a result of client pressure.

There are also significant concerns about extending equivalent protections afforded by the attorney-client privilege to nonlawyers. Even if California amended the Evidence Code to allow for such, there would be no protection to the client if that nonlawyer were compelled to testify in Federal court or in another jurisdiction that does not recognize these protections for nonlawyers, thus placing clients at an unanticipated and unnecessary risk.

For the reasons stated above, and because most of these reasons cannot be solved by detailed regulation, we are unable to agree with Recommendation 2.0 Option 1 (Entity Regulation Only), Option 2 (Hybrid Entity/Individual Regulation), or Option 3 (Certification of Paraprofessionals).

There is an apparent need to expand access to justice in areas such as family law and immigration, but the limited license program is likely not the appropriate avenue to do this. Some other more viable avenues to explore include (1) increasing funding to existing pro bono or low-cost programs staffed by qualified lawyers; (2) expanding self-help centers at courthouses; (3) exploring the use of self-help "guides" or court navigators for self-represented litigants (4) creating and/or expanding incentive programs and funding for lawyers to work in remote rural areas or provide low cost services; and (5) increasing public interest programs in law schools.[2]

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

Position: Oppose.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.1.

[2] Some at the State Bar have suggested that the access to justice gap is so severe that adding new lawyers to public interest firms or otherwise increasing the number of lawyers serving low and middle income clients will not make a dent. If that were true, then allowing some number of limited license practitioners to serve clients would similarly not make a dent. *See* Preliminary Evaluation of the Washington State Limited License Legal Technician Program, at p. 6 (observing that 13 of the 15 then-licensed LLLTs in Washington state were interviewed for the study); Adam Rhodes, *Legal Technicians Step in To Fight Justice Gap*, Law360 (Nov. 28, 2018) (by 2018, there were still only 39 licensed LLLTs in the state, 34 of whom were practicing). Thus, using the State Bar's own logic, we can see no justification for authorizing limited liability practitioners in lieu of providing resources for more lawyers to assist clients in need.

Apart from the impact these sweeping changes to the profession may have on such issues as lawyer independence (which will be threatened by outside ownership of law firms by nonlawyers), fiduciary duties to clients (which may be compromised by ownership by nonlawyers, who do not owe the fiduciary duties to clients that lawyers do), and the attorney-client privilege, there is simply not enough data from the countries that have allowed for non-lawyer law firm ownership, in whole or in part, to determine the possible impact on what is understood to be the impetus behind this proposal – access to justice and narrowing the justice gap. The data that is available shows that non-lawyer-owned firms in these countries concentrate in areas of personal injury and consumer law, areas of law where legal services are readily available on a contingent fee basis, and not necessarily the areas of law where access to justice is most critical. It is not surprising, perhaps, why personal injury and consumer law attract non-lawyer capital as they tend to be more profitable areas of practice. Where the need is the greatest – landlord tenant, immigration, family law, and probate, for example – the profit motive that might otherwise drive capital to law firms is limited, and there is insufficient data to support the proposition that such non-lawyer ownership will result in lower cost to clients. In fact, the usual market conditions that would likely be present would suggest an *increase in costs* as a result of efforts to increase profits.

The tension that exists between the centuries-old concept of lawyering as a profession and the business aspects of lawyering would likely be exacerbated, with greater attention devoted to the business aspects of practicing law in order to satisfy the need to demonstrate appropriate return on capital, and less focus on the profession.

The purported reason to allow non-lawyer ownership is for innovation, which will provide further access to justice. But there is no indication by considered studies that restructuring the legal profession to permit non-lawyer ownership, in whole or in part, of law firms or other legal delivery enterprises is required in order to spark technological innovation. Again, usual market forces at work where free enterprise flourishes would support the development and deployment of such technological advances, which would be utilized by licensed, experienced lawyers (likely much in the same way as lawyers access and utilize electronic legal technology tools today) for the benefit of their clients.

ATILS has repeatedly stated that non-lawyer ownership of law firms is not new – citing countries like the UK, Portugal, and Australia. However, what is not being disclosed is that the primary reason most of these jurisdictions implemented these changes was because of antitrust issues, not access to justice.

Without additional data or even reasoned analysis supporting the notion that non-lawyer ownership of law firms will spark innovation that, in turn, will reduce the access to justice gap, we cannot agree with this proposal. Indeed, the Task Force's own power point slides, used in connection with its bar association Town Halls, showed dozens of new tech companies with law-

related products both established and in the start-up phase; it would seem that, even without any changes in law firm ownership rules, tech innovation in the legal sector is flourishing.

Interestingly, the State Bar Board of Trustees has had available to them since July 11, 2019, information directly on point to this recommendation at Attachment E to the *State Bar Task Force on Access Through Innovation of Legal Services Report: Request to Circulate Tentative Recommendation for Public Comment*: *When Lawyers Don't Get all the Profits*, 29 Georgetown Journal of Legal Ethics 1 (2016) ("Journal").

This article sheds much needed light on the subject. The following excerpts from the Journal merit particular consideration:

(a) "Although the debate between the two competing sides has often been fierce, it has also been almost entirely theoretical with the New York State Bar Association Taskforce on Non-Lawyer Ownership recently noting, 'there simply is a ***lack of meaningful empirical date about non-lawyer ownership***. . .' (partly because of this dearth of data, the Taskforce recommended not allowing outside owners). (ft. nt. 9 – The report continued '. . . we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force's ability to study the issue as it was difficult to assess past experience.'" Journal: 5 (emphasis added).

(b) "Non-lawyer ownership brings the potential for lawyers to be caught in a conflict between their duties to investors and their duties to their clients or the justice system." (citing NYLJ article – ft nt 59). Journal: 13-14.

(c) "In a world on non-lawyer ownership, investors many try to create new demands on a firm, and the lawyers within it, to ***prioritize commercial interests***." Journal: 14 (emphasis added).

(d) "Even though non-lawyer ownership may lead to more innovation in legal services, greater competition, and larger economies of scale there is ***reason to doubt that these changes will lead to significantly more access to legal services for poor and moderate income populations***. Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that rare relatively easy to commoditize and where expected returns are high. However, these lucrative sectors are less likely to have an access need because of long-standing practices like conditional or contingency fees. ***More generally, many areas of legal work may be difficult to scale or commoditize, such as aspects of family or immigration law that require significant tailoring to the specific situation of client, meaning non-lawyer ownership will be less likely to occur in these***

areas or bring unclear access benefits. Even where commoditization is possible, persons with civil legal needs frequently have few resources and complicated legal problems. In this context, non-lawyer ownership is unlikely to provide these persons with significant new legal options, as they will still be unable to afford legal services. Finally, cultural or psychological barriers may cause some persons to resist purchasing some types of legal services. In other words, there may not be as much price elasticity in the market for some legal services as advocates of deregulation suggest." Journal: 15-16 (emphasis added).

(e) "Lawyers may not have an identify as altruistic as that of doctors or the clergy, but ***most lawyers would acknowledge that the pursuit of profit should not be the sole goal of those in the profession*** nor making money the dominant criteria for determining what characterizes a "good lawyer" or a "good law firm." ***Many lawyers value furthering the rule of law, assisting the needy, acting as check on government or corporate power, providing competent assistance, and other social values. Non lawyer ownership, especially that by investors seeking profit, can subvert these public-spirited ideals in at least two ways***.

> First, legal service providers with outside investors are likely to be concerned about the enterprises's reputation within the investor community.
>
> Second, companies that also provide other services may be less likely to offer legal services to publicly unpopular clients out of fear of harming the larger brand of their company." Journal: 48-49 (emphasis added).

(f) "Permitting non-lawyer ownership of legal services is frequently viewed as a relatively inexpensive regulatory intervention to increase access to legal services. Yet, the access benefits of non-lawyer ownership so far seem questionable. At the very least, the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access strategies, like legal aid." Journal: 53 (emphasis added).

(g) "Besides forms of fee shifting and sharing, the two primary alternatives to deregulation to increase access to civil legal services are pro bono and legal aid. Pro bono already plays a vital role in delivering legal services, and should be expanded where possible, but it also has clear constraints both in terms of the amount and type. Pro bono may also come under new pressure in a regulatory regime that allows for non-lawyer ownership, with investor owners influencing lawyers to engage in either less pro bono or less controversial pro bono in order to increase profits. Given these limits of pro bono, increasing legal aid may be the best option to significantly expand access to legal services." Journal: 55.

(h) CONCLUSION: The adoption of non-lawyer ownership of legal services may, in some instances, bring access and other benefits. However, the evidence so far does not indicate that these access gains will be as significant for poor and moderate income populations as some proponents suggest, and ***if non-lawyer ownership is seen as a substitute for other access strategies, like legal aid, such a deregulatory reform strategy could even have a detrimental impact***." Journal: 61-62.[3]

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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 unauthorized practice of law activities.

Position: Oppose, to the extent a lawyer is not involved.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.2.

While we recognize the possibilities that new technologies can bring to serving underserved client populations, we have many concerns that should be considered and addressed before going in this direction. Because the recommendation is so broadly written, it is difficult to take a specific position on it. Nonetheless, we note the following concerns and suggestions.

First, we believe any exceptions to the unauthorized practice of law rules for technology-driven legal services delivery systems carry with them significant risks to client protection. We do not believe it is possible to weigh those risks against any potential gains to access to justice without first identifying the specific technology-driven systems being considered and the specific areas of law (and client bases) to be targeted. Only where the potential gains to access to justice for a particular client population clearly outweigh the risks to client protection (something that has not yet been demonstrated) should this approach be considered and eventually implemented.

For example, litigation (business or personal injury) would not appear to be a good or necessary area for this technology, as the issues are too complex to be handled by clients interacting only with a computer and not with a lawyer. Rather, areas of law where the primary task is forms-related would appear to be the best areas to consider. For example, although there are a number of complex areas in immigration law, there may be certain more routine applications that can be handled by clients with the assistance of a technology system. The same may be true with social security and even certain very limited family law issues. (To be clear, we are not

[3] See also comments to Recommendations 3.1 and 3.2 below relating to the policy reasons for rules against fee sharing with non-lawyers as it related to Rule 5.4.

prejudging whether these areas of law meet the risk vs. benefit test suggested above, but they are provided merely as potential examples).

Even with respect to these more narrow legal tasks, we have concerns. For example, a client's incorrect completion of a form in the immigration area could have dire consequences, including deportation and separation from family members. Even where legal errors early in a legal proceeding can be fixed later, it is often much more expensive to fix them. In addition, a number of clients who believe they have one particular legal issue in fact face a number of more complex issues – issues that can only be identified and addressed by speaking with a lawyer. We have concerns that allowing a client to issue-spot on his or her own will give that client a sense of comfort and confidence that may be unwarranted, risky, and ultimately a detriment to themselves. One specific example of this risk is repeatedly evidenced in the Orange County Collaborative Homeless Court, where the most vulnerable population seeks legal assistance. Public Defenders in this court repeatedly assist clients who have filed on-line for their social security income or disability benefits that they legally deserve, but failed to do it correctly because they did not understand the questions or guidelines. As a result, they are not only denied their benefits but also second-tracked to the appellate process which is exponentially longer and more complex.

These risks make it important that any use of technology systems are targeted to those clients least likely to otherwise obtain legal representation. This would include low income populations without access to pro bono legal services. In particular, we would not want clients who otherwise could afford lawyers or could retain pro bono lawyers to choose instead to use a technology service that likely will be inferior to an actual lawyer for the reasons discussed above.

As to serving the indigent and rural populations, of which both have an increased need for access to justice, many of these individuals do not have access to technology or artificial intelligence. Therefore, no matter how many technology based legal service providers are developed, the justice gap with respect to these individuals will not be served. Moreover, as the Task Force's own Town Hall power point slides revealed, most of those who do not seek to access the courts do not even know their issues are legal ones; if they do not know that, they will not seek out legal assistance at all, whether from an app or from a lawyer.

There are also concerns about the suggested methodology that will be implemented to determine which legal technology systems will be excepted from the unlawful practice of law and receive the "stamp of approval" of the State Bar. It has been suggested on phone calls with representatives of the State Bar and at the various town halls that have been held by members of ATILS that the State Bar will assess each legal technology system for accuracy and viability and determine if it will receive the stamp of approval or safe harbor to operate. This suggested methodology is fraught with problems. First, to the extent the technology involves machine learning, it may not be possible to discern its decision-making process in order to be able to certify the technology; there is simply insufficient transparency in the machine processes to do so. Moreover, the technology may operate one way on the day of certification, but very differently post-certification, after it has received additional input for further machine learning. And if these hurdles were not enough, there are problems of funding, staffing, and expertise within the State Bar itself; among other changes since the split, the State Bar has recently eliminated the vast

majority of attorney volunteers who have historically assisted the State Bar. Accordingly, the accuracy and viability of these legal technology systems is likely to be evaluated and determined without lawyer input.

Whatever reasonable limits ultimately are placed on these technology systems based on concerns about client protection, it is important to note that these limitations should not preclude the introduction of new technologies, including AI-based technologies, in the practice of law. To the extent a lawyer is involved with the delivery of those services (for example, a lawyer hones his or her advice through the use of AI), there would be no UPL issue. And for those technology platforms that ultimately are used by lawyers, there would be no bar to non-lawyer ownership as long as the client's access to the technology is through a lawyer. Lawyer involvement with new technologies could also ensure that public interest lawyers can solve access to justice problems,more efficiently. Technology companies will still have an incentive to innovate; their market would simply be lawyers rather than the broader public.

To be clear, we applaud and embrace the idea of technology and artificial intelligence to the extent a lawyer is involved and it increases the efficiency of attorneys, but oppose such to the extent there is no lawyer involvement.

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.

Position: Oppose for the reasons set forth in response to Recommendation 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.3.

Recommendation 2.3 presupposes that Recommendation 2.2 is implemented. Since we oppose Recommendation 2.2, we oppose Recommendation 2.3. However, if Recommendation 2.2 is implemented, we would support Recommendation 2.3.

Recommendation2.4: 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.

Position: Oppose for the reasons set forth in response to Recommendation 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.4.

Recommendation 2.4 presupposes that Recommendation 2.2 is implemented. Since we oppose Recommendation 2.2, we oppose Recommendation 2.3. However, if Recommendation 2.2 is implemented, we would support Recommendation 2.4 and believe that adequate ethical

standards to regulate the provider and the technology are necessary. We are skeptical as to how this goal can be achieved in a manner that will protect the public.

To the extent the State Bar allows technology companies to interface directly with clients, those companies and their owners need to be regulated and held to ethical standards that match as closely as possible those ethical standards applicable to lawyers. Specifically, if a lawyer owned the technology and used that technology to interface with clients, that lawyer would be subject to the Rules of Professional Conduct in connection with his or her use of the technology, including the duties of competence, loyalty, and confidentiality. As much as possible, a client should be able to expect the same protection whether that technology is owned by a lawyer or non-lawyer. We are skeptical whether this level of protection actually can be achieved, however, particularly because investors will never be subject to the same fiduciary duties as lawyers. To the extent it cannot be, at a minimum all clients should have to acknowledge their understanding that they are giving up these protections. And, if this happens, clients will enter a lower tier of legal assistance, without the equivalent confidentiality and privilege protections afforded those who consult lawyers. Moreover, knowing that the information they share will not be protected, they may share as little information as possible in seeking legal advice; as a result, any "advice" they do get will be incomplete and flawed. We believe risks to public protection outweigh the unknown benefits to be gained by attempting to bridge the justice gap in this manner.

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.

Position: Oppose for the reasons set forth in response to Recommendation 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.5.

Recommendation 2.5 presupposes that Recommendation 2.2 is implemented. Since we oppose Recommendation 2.2, we oppose Recommendation 2.5. However, if Recommendation 2.2 is implemented, we would support Recommendation 2.5 and believe that the protections and confidences should be available. We are skeptical as to how this goal can be achieved in a manner that will protect the public.

To the extent this recommendation is implemented over our and others' objections, we agree that clients should be able to expect that their "communications" with a technology-driven legal services delivery system are confidential, and not subject to access by anyone without the client's consent. Any regulation of these technology entities must ensure this. We do not believe it is logical, however, to amend the Evidence Code to make these communications protected by the attorney-client privilege because, in short, these technology companies and their owners are not attorneys. Moreover, even if California were to amend its Evidence Code to expand the meaning of "attorney-client privilege" beyond that of any other U.S. jurisdiction, we cannot expect other jurisdictions – including federal courts in California – to apply California's novel (and, some

would say, bizarre) approach. That said, at a minimum clients should be compelled to acknowledge that they understand these limitations on their right of privacy and confidentiality. Again, we believe the risks to public protection outweigh the benefits gained in attempting to achieve access to justice.

Recommendation 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.

Position: Oppose for the reasons set forth in response to Recommendation 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 2.6.

Recommendation 2.6 presupposes that Recommendation 2.2 is implemented. Since we oppose Recommendation 2.2, we oppose Recommendation 2.3. However, if Recommendation 2.2 is implemented, we would support Recommendation 2.6 and agree that the regulatory process for technology companies should be funded by application and renewal fees.

We agree that the regulatory process should be funded by applications and renewal fees paid by the technology companies and their owners. We cannot comment on whether the fee structure should be scaled without knowing what "multiple factors" are contemplated.

Proposal 3.0: Adoption of a new Comment [1] to fuel 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.

Position: Agree in concept, but oppose a revision to the Rules of Professional Conduct.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 3.0.

The majority of our members who responded to a survey on this issue agree that lawyers need to understand technology, but do not necessarily agree that there needs to be a discipline rule at this time.

In any event, the new Rules of Professional Conduct were just rolled out this past year. It took approximately 16 years of hard work and critical analysis before these rules were finalized and adopted. Now, less than a year after the new rules were implemented, broad sweeping changes are being proposed. It can be assumed that these suggestions and recommendations were considered and rejected in the adoption of the new rules, and such consideration should stand.

Recommendations 3.1 and 3.2: Adoption of a proposed amended rule 5.4.

Position: Oppose for the reasons set forth in response to Recommendation 2.1

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 3.1 and 3.2.

Recommendations 3.1 and 3.2 presuppose that Recommendation 2.1 is implemented. Since we oppose Recommendation 2.1, we oppose Recommendations 3.1 and 3.2.

We disagree with both Alternative 1 and Alternative 2 to the extent that they permit non-lawyers to have ownership interests in law firms. We do not believe that either alternative will impact the goal of access to justice. We are also concerned about the adverse consequences of non-lawyer ownership of law firms and do not support such measures.

Prohibitions against fee-sharing with non-lawyers have been an accepted and unaltered part of our ethics rules for decades. Commentators have lauded these prohibitions as being necessary to the independence of lawyers, and have noted that fee-sharing arrangements with non-lawyers are unworkable, among other reasons, because lawyers are fiduciaries and non-lawyer investors/referral sources are not. Mark Tuft and Kevin Mohr – both authors of California's leading professional responsibility treatise, and also members of the ATILS task force – explain the rationale for these prohibitions: "Rule 5.4 is designed to (a) protect the integrity of the attorney-client relationship; (b) prevent control over attorney services from shifting to laypersons; and (c) ensure that the client's best interests remain paramount. [Los Angeles Bar Ass'n Form.Opn. 510 (2003) (decided under former rule)]." Tuft, et al., California Practice Guide, Professional Responsibility, § 5:510(TRG).

More specifically Tuft's and Mohr's Treatise states that fee-sharing arrangements with non-lawyers are precluded because of the perceived danger they will:

> • encourage competitive solicitation for attorneys by lay persons;
>
> • tend to increase the total fee charged to the client;
>
> • enable lay persons to interfere or exercise control over the attorney's duty to exercise independent professional judgment on behalf of the client; and
>
> • permit lay persons receiving fee splits to select the most generous rather than the most competent attorneys. [*Gassman v. State Bar* (1976) 18 C3d 125, 132, 132 CR 675, 679—fee-splitting with nonlawyer assistant poses "serious danger to the best interests of [the client], and warrants discipline in and of itself"; see *McIntosh v. Mills* (2004) 121 CA4th 333, 346, 17 CR3d 66, 75 (citing text); and ABA Form.Opn. 95-392—ABA disapproval of fee-sharing between lawyers and nonlawyers is based on desire to prevent lay influence of lawyers' professional judgment]

The concerns and reasons for Rule 5.4 have not changed, yet the State Bar is considering throwing them out the door.

Again, the new Rules of Professional Conduct were just rolled out this past year. It took approximately 16 years of hard work and critical analysis before these rules – including Rule 5.4 – were finalized and adopted. Now, less than a year after the new rules were implemented, broad

sweeping changes are being proposed. It can be assumed that these suggestions and recommendations were considered in the adoption of the new rules, and such consideration should stand.

Additionally, California courts have already seen a marked spike in filings as a result of third party litigation financing. ATILS has not conducted any studies to evaluate the potential impact of increased filings on California courts from allowing non-lawyers to become owners or partners of law firms, or from allowing computers or other non-lawyers to aid clients in filing lawsuits. Nor has ATILS proposed any feasible mechanism for policing corporations and non-lawyers who practice law, and for ensuring they will be held responsible for negligence and wrongful conduct towards their clients.

Recommendation 3 Adoption of Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

Position: Oppose for the reasons set forth in response to Recommendations 2.1 and 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 3.3.

Recommendation 3.3 presuppose that Recommendation 2.1 and 2.2 are implemented. Since we oppose Recommendations 2.1 and 2.2, we oppose Recommendation 3.3.

Again, the new Rules of Professional Conduct were just rolled out this past year. It took approximately 16 years of hard work and critical analysis before these rules were finalized and adopted. Now, less than a year after the new rules were implemented, broad sweeping changes are being proposed. It can be assumed that these suggestions and recommendations were considered in the adoption of the new rules, and such consideration should stand.

Recommendation 3.4: Adoption of revised California Rules of Professional Conduct 7.1 – 7.5.

Position: Oppose for the reasons set forth in response to Recommendations 2.0, 2.1 and 2.2.

The content of the Overview: Context and Impact above are incorporated into this response to Recommendation 3.4.

Recommendation 3.4 presuppose that Recommendations 2.0, 2.1 and 2.2 are implemented. Since we oppose Recommendations 2.0, 2.1 and 2.2, we oppose Recommendation 3.4.

Again, the new Rules of Professional Conduct were just rolled out this past year. It took approximately 16 years of hard work and critical analysis before these rules were finalized and

adopted. Now, less than a year after the new rules were implemented, broad sweeping changes are being proposed. It can be assumed that these suggestions and recommendations were considered in the adoption of the new rules, and such consideration should stand.

In sum, we urge the State Bar to reconsider adopting any of these proposed radical changes to the practice of law in this state, particularly absent any proof that the proposed changes will result in any increased access to justice. At the very least, before proceeding to any implementation stage, we urge the Bar to commission or await further studies that would show an impact on the justice gap from these proposals, which would outweigh significant concerns about public protection, decreased pro bono or legal aid work, impact on the courts, and decreased diversity in the legal profession.

We thank you for your consideration of our comments.

Sincerely,

Deirdre M. Kelly
President, Orange County Bar Association