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

August 9, 2022

Via E-Mail & U.S. Mail

The Honorable Mark Stone
Chair, Assembly Judiciary Committee
State Capitol, Suite 5740
Sacramento, CA 95814
Assemblymember.stone@assembly.ca.gov

The Honorable Tom Umberg
Chair, Senate Judiciary Committee
1021 O Street, Suite 6730
Sacramento, CA 95814
Senator.umberg@senate.ca.gov

Re: Support for AB 2958 Section 3

Dear Hon. Mark Stone and Hon. Tom Umberg:

The Orange County Bar Association ("OCBA"), one of the largest voluntary bar associations in California, writes to express its strong support for Section 3 of AB 2958.

This letter of support reflects feedback received from OCBA members as well as the work of the OCBA State Bar Task Force, which is dedicated to reviewing and analyzing the State Bar's proposed changes to the practice of law. Founded over 100 years ago, the OCBA is comprised of thousands of practitioners from large and small firms, governmental entities, corporations, public interest organizations, and other civil and criminal practitioners. The OCBA's members reflect a wide range of ethnic backgrounds, gender identities, religious affiliations, and political leanings.

The OCBA has joined numerous bar associations, pro bono legal services firms, and the vast majority of California attorneys in communicating to the State Bar their significant concerns with the State Bar's proposed Paraprofessional Program and Closing the Justice Gap Working Group proposals. As outlined in the OCBA's enclosed letters of September 23, 2019, and January 12, 2022, there is substantial evidence that these programs will widen the Justice Gap by exposing vulnerable members of our population to unscrupulous and unqualified legal advisors. For example, implementing a "sandbox" of corporately owned law firms, splitting legal fees with nonlawyers, and allowing legal services by technology-based programs risk (1) putting attorneys' fiduciary obligations to their clients at odds with a non-lawyer's or corporation's profit interest or duties

to shareholders, (2) flooding the courts with meritless cases and unsubstantiated filings, and (3) exposing indigent populations to ineffective assistance of counsel. AB 2958 Section 3 recognizes these risks and attempts to build in reasonable protections to protect the public from corporate lobbyists aiming to monetize California's legal system under the pretext of "access to justice." There have been tremendous efforts to have Section 3 removed by proponents of the State Bar's initiatives, including many technology companies who stand to profit and groups like the Justice Technology Association, whose board is comprised of CEOs from the legal service companies Courtroom5, EasyExpunctions.com, HelloDivorce, and PeopleClerk.[1]

It is disheartening that the State Bar – whose primary mission is to protect the public – would express opposition for the Assembly's efforts in this regard.

As a background, the State Bar's reason for implementing and championing these programs is based on a Justice Gap study done in partnership by the State Bar and NORC at the University of Chicago. That study found that 71% percent of Californians, especially low-income individuals, believed they had civil legal needs that are not being met. When legal organizations took a closer look at the study's data, however, it turned out that a large percentage of study participants chose not to seek legal help for a myriad of reasons, including a majority who said they had no need for advice. For example, 27% talked to someone about their legal issue, 19% went online, 11% took both of these actions, and 42% took no action. Legal assistance was only sought and received in 30% of the cases, and only 1% of Justice Gap respondents reported that they attempted to get legal help, but could not obtain it. Many organizations pointed out these flaws and cautioned the State Bar against relying on the Justice Gap study. The State Bar responded that the flaws were the product of the public's "knowledge gap" and argued that the public needs to be educated on the fact that they have legal issues for which they should be seeking help.

The Flawed Paraprofessional Program

Despite the flaws in the Justice Gap study itself, the OCBA believes a justice gap exists in California and supports robust research into its origins, populations affected, as well as any science-based solutions. AB 2958's focus on serving low-income consumers is already in alignment with where a documented and identifiable justice gap has long existed. The OCBA does not believe the problem will be solved, however, by the State Bar's proposed solution of having the state with the greatest number of lawyers[2] allowing non-lawyer "paraprofessionals" to practice law without a lawyer's training, qualifications, experience, oversight or ethical responsibilities.

[1] https://justicetechassociation.org/meet-the-team/ (last accessed August 8, 2022).
[2] According to the American Bar Association's 2020 "Profile of the Legal Profession," California has the most lawyers in the nation (39,512,223), followed by Texas (28,995,881) and Florida (21,477,737). https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf (last accessed August 8, 2022).

The State Bar has ignored dire warnings from county bar associations, non-profits, and respected legal organizations. For example, many groups have warned about California's history of predatory fraud by notarios targeting California's undocumented immigrant population. A newly minted and expanded bevy of non-lawyers practicing law would broaden these risks. One of the reasons why the pro bono legal services community is overwhelmingly against the Paraprofessional Program is because they, along with the courts, bear the brunt of the harm caused by non-lawyers' mistakes, abuses, meritless filings, and other harms.

One data point frequently cited is the State of Washington, which instituted the first paraprofessional program in the country. Notably, there was zero evidence the program had any impact at all on the justice gap, Washington paraprofessionals ended up charging nearly the same rates as lawyers, and the program cost the Washington State Bar Association millions of dollars. By any objective measure, the Washington program was a failure. Not surprisingly, the Washington Supreme Court in 2020 decided to sunset the program.

The Flawed "Sandbox" Proposed by the Closing the Justice Gap Working Group

The "sandbox" proposed by the State Bar would allow for technology-based platforms to provide direct legal services to consumers without any attorney supervision. It would also allow for ownership of law firms by non-lawyer corporations and splitting of legal fees with nonlawyers. Critics have voiced many concerns, such as putting attorneys' fiduciary obligations to their clients at odds with their corporation's duties to shareholders and obligation to maximize profits. For example, allowing nonlawyers or private equity groups to influence an attorney's decisions concerning which cases are meritorious or frivolous, which cases should be filed or rejected, and which claims should be brought (if any), could result in a flooding of the courts with meritless and unsubstantiated filings, as well as exposure of indigent populations to objectively unreasonable legal assistance.

It is also worth noting that many of the proponents of the State Bar's programs are technology companies seeking to make significant profits if such programs are implemented. Critics of the programs are primarily non-profit legal services organizations, many of whom are on the front lines providing direct services to California's underserved and indigent communities.

Section 3

The California Legislature added Section 3 of AB 2958, requiring the State Bar working groups to exclude from their proposals corporate ownership of law firms and the sharing of legal fees with non-lawyers. The fee bill would require prioritizing the protection of individuals and adherence to, and prohibition of, any abrogation of the restrictions on unauthorized practice of law. The OCBA supports the California's Legislature's decision in this regard and believes Section 3 provides necessary protections for consumers.

The programs originally proposed by the State Bar are bound to lead to significant fraud, abuse, and other misconduct, as well as subject indigent Californians to substandard legal services. Section 3 ensures that the State Bar takes appropriate actions and only goes forward with a program if it can do so in a safe and organized manner that ensures protection of the public. Section 3 should not be controversial.

Conclusion

We appreciate your and your colleagues' efforts to protect the public and California consumers, and hope you will remain steadfast in your efforts to pass AB 2958 with Section 3.

Sincerely,

Daniel Robinson
2022 President
Orange County Bar Association

Encl.

cc: N. Miliband
M.C. Sungaila

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]

* * *

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

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

January 12, 2022

Via Electronic Submission

Board of Trustees
State Bar of California

Re: Public Comment on Final Report and Recommendations of the California Paraprofessional Program Working Group (CPPWG)

Dear California State Bar Board of Trustees:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning the Final Report and Recommendations of the California Paraprofessional Program Working Group (CPPWG). Founded over 120 years ago, the OCBA has over 7600 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors is 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. These comments reflect feedback received from OCBA members about the proposed changes, as well as the work of the OCBA State Bar Task Force dedicated to reviewing and analyzing the proposed changes on behalf of its members.

Overview: Context, Impact, and General Objections and Concerns

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 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 and attempts to improve access to justice for all[1], but we have significant concerns that the State Bar's proposals will upend the profession and expose the public to new dangers without meaningfully expanding access to justice or helping the public. After a careful review of the final report of the CPPWG, the presentation of the CPPWG recommendations to the State Bar Board of Trustees, the various presentations at bar associations regarding the recommendations, as well as the dissenting statements included in the CPPWG final report, the OCBA respectfully opposes the CPPWG final recommendations as to regulation, structure, and implementation of a paraprofessional program in California. As Carolin Shining stated in her dissent from the CPPWG report: "The Working Group has labored mightily and with the best of intentions to create a new license to help increase legal services to low and middle-income consumers. The result is one of the largest and most expansive experiments in the legal world in decades . . . . Our legal system, while imperfect, is not so fundamentally flawed as to need a complete overhaul by creation of a non-lawyer with powers equal to that of a lawyer."

Before we comment on individual proposals, we provide a broader context for these paraprofessional proposals, as well as perspectives on the unprecedented scope of the proposed paraprofessional program, the now-defunct Washington state paraprofessional program, the disconnect between the goal of access to justice and the proposed paraprofessional program, structural concerns about lack of and potential source of funding, oversight, and consumer protection concerns related to the proposed paraprofessional program, and concerns about a failure to expand or fund already-tested court and legal aid-initiated programs such as court navigators and pro bono programs.

The broader context: the metamorphosis of the State Bar, and the ATILS report. In 1927, legislation created the State Bar of California (State Bar), a regulatory body and trade association, as an arm of the California Supreme Court. Membership was mandatory for practicing attorneys. By 2017, adverse court opinions, legislative criticism, and advocacy by certain bar leaders led to passage of the State Bar Act of 2017, separating the regulatory and trade association functions. The new California Lawyers Association (CLA) took the trade association functions, while the State Bar kept regulatory functions. CLA is a voluntary bar; the State Bar remains mandatory.

According to its Mission Statement, the State Bar's primary function is public protection. The State Bar is also charged with "supporting" access to justice. However, these two may conflict.

For many years the State Bar has had discussion about allowing non lawyers practice law. Therefore, the State Bar hired Bill Henderson, who has focused on innovation within the legal industry, to prepare a July 2018 Legal Services Landscape Report (the Henderson Report).

[1] We do, however, have a concern that the State Bar, through its various working groups and task forces, including ATILS, CPPWG and the Closing the Justice Gap Working Group, 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 CPPWG's recommendations could ultimately increase costs for those seeking help or result in disastrous consequences for clients should be thoroughly analyzed and studied; without considering these impacts, it cannot be determined whether the recommendations will provide any meaningful access to justice.

Over the last several years, the Report has been used by many state bar associations, in the name of "access to justice," to allow non-lawyers to practice law, artificial intelligence to engage in the practice of law without attorney input, and non-lawyers to share fees and own law firms.

In response to the Henderson Report, the State Bar, too, formed the Task Force on Access Through Innovation of Legal Services (ATILS), charging it with identifying regulatory changes that could remove barriers to innovation and enhance the delivery of, and access to, legal services. ATILS included ten lawyers, two judges, eleven non-lawyers, several individuals from commercially interested technology companies, as well as self-proclaimed "legal disruptors."

In July 2019, the State Bar requested public comment on ATILS' sweeping recommendations, which included authorizing non-lawyers to provide specified legal advice and services, allowing entities providing legal or law related services to be composed of lawyers and non-lawyers, and further excepting from the unauthorized practice of law (UPL) the provision by entities of technology-driven legal services.

The OCBA submitted a detailed public comment opposing many of ATILS' recommendations on the basis that the recommendations fail to accomplish the primary edict of the State Bar—public protection—, and that the recommendations create an unavoidable conflict between protecting the public and access to justice. While access to justice *may* increase from these changes, the potential public harm was undeniable.

In response to the ATILS' recommendations, the OCBA suggested it would be prudent to study the effect on the justice gap in those jurisdictions already implementing some of these recommendations before completely upending the country's largest bar. A study of the U.K.'s Legal Services Act of 2007, for example, reveals that allowing non-lawyers 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), www.law360.com/articles/1201357/like-it-or-not-law-may-open-its-doors-to-nonlawyers.

After receiving thousands of overwhelmingly negative public comments,[2] ATILS requested an extension of time to review the comments and to deliver its recommendations. In the interim, the State Bar elected to move forward with at least part of the ATILS' agenda— formation

[2] California lawyers who commented on the proposed changes of ATILS (which included allowing non lawyers to practice law) 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).
Some California lawyers who have pointed 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 – have been ignored, or worse, vilified. 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.

of the CPPWG. The CPPWG's charter is to develop recommendations for creation of a paraprofessional licensure/certification program to increase access to legal services in California.

In so doing, the State Bar essentially skipped past a meaningful discussion or consideration of public comment on whether a paraprofessional program should be implemented at all to a discussion of how one should be implemented.

Flaws in the Justice Gap study underlying these recommendations. The State Bar and NORC at the University of Chicago partnered in 2019 on a survey to determine civil legal needs of California residents and to evaluate the "justice gap." This survey formed the basis for many of the ATILS recommendations and those of the CPPWG concerning paraprofessionals. Unfortunately, however, the study appears flawed.

The survey concluded that over 71% of Californians, particularly low-income individuals, have civil legal needs that are not being met. This claimed "justice gap" is reportedly too large to be fixed by pro bono or other lawyer or legal aid-based alternatives. But a closer look at the numbers suggests that a large percentage of these individuals simply chose not to seek legal help for a myriad of reasons, including a majority who responded that they had no need for advice. While the OCBA acknowledges that there is a "justice gap," there is no evidence that the 70% number is driven by economics or that any of the proposed recommendations will narrow it.

The 2019 Justice Gap Study reveals that of those who responded to the survey indicating they had experienced a legal problem, 27% talked to someone about these problems, 19% went online, 11% took both of these actions, and 42% took no action. Legal assistance was only sought and received in 30% of the cases, and only 1% attempted to get legal help, but could not. While the Justice Gap Study states, "Low-income Californians did not receive legal help for 70% of the problems they experienced," when you look at the graph, in 70% of those cases "no legal help [was] sought." The survey also shows that cost is a barrier for only 15% of the respondents, with 85% citing other reasons for not seeking assistance.

The study also purports to show that 123 respondents surveyed had employment problems, and of those 66 (54%) sought legal help, and only half of the 54% actually received help, thus only 12 people (21%) who sought help received help. However, findings such as this, which the justice gap studies are fraught with, are very misleading in that there were no questions as to whether or not the individuals who sought assistance didn't receive assistance because an attorney had determined that their case lacked merit.

Now-defunct Washington State Paraprofessional Program. Washington State is the only state that has had in place a somewhat similar paraprofessional program (though much more limited in scope, with much higher standards for admission), but there is no evidence that it has had any impact on the justice gap, and the Supreme Court of the State of Washington has now sunset the program.

The Washington program had substantial educational and experience requirements (3000 hours of experience, just recently reduced to 1,500), resulting in only 39 active LLLTs as of June of 2020. (How the Washington Supreme Court LLLT Program Met its Demise, ABA Journal by Lyle Moen, 7/9/2020.) There were also reports that many of the LLLTs often charged as much as licensed attorneys in the area, thus failing in any meaningful way to bridge the justice gap and create increased access to justice. As a result, The Supreme Court of the State of Washington stated in its June 5, 2020 letter to the Washington State Bar Association as follows:

> The program was an innovative attempt to increase access to legal services. However, after careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs, and voted to sunset the program.

Further, according to a letter dated May 12, 2020 to the Justices of the Washington Supreme Court from Daniel Clark, the Washington State Bar Association's Treasurer, the bar association lost approximately 1.4 million dollars on the LLLT program, a "massive financial loss" that fell on the attorney members of the bar., despite promises that it would not. The letter also noted that the "costs [of the LLLT program] have had to be subsidized by the WSBA and its membership. . . ." In conclusion, the letter states "I strongly believe that the LLLT proposal for expansion of their current business plan's request for another 1 million dollars to be subsidized by WSBA attorney members for at least another 9 years, **is unwise, improper, and most of all tremendously unfair to the members of the Washington State Bar Association**." (Emphasis in the original.) The proposed sources of funding for the California program, discussed below, are even more problematic than that of the Washington program.

Also, 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). 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.

In order to avoid the same pitfalls of the Washington program, the CPPWG seeks to drastically reduce the educational, experiential, eligibility, regulation and discipline requirements to attract more people and make the program more viable than Washington's program – thereby risking protection of the public. As an added incentive to make the program viable, the CPPWG has proposed to allow paraprofessionals to have up to 49% ownership of law firms – substantially

changing Rule 5.4, and allow in court representation of clients by paraprofessionals, all to the detriment of the California consumer. These changes could adversely impact quality of service to the public, overload the courts, entrench the perception of a two-tiered justice system, expose those of limited means to unscrupulous and inadequate legal assistance 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). *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").

A Singularly Broad Proposal that exceeds changes in any other jurisdiction. While the State Bar asserts that its recent recommendations for the creation of a paraprofessional program are similar to the many programs that exist or under implementation in other states (pointing primarily to Utah and Arizona), it is not. The proposed recommendations by the CPPWG are wholly unprecedented in scope and collectively untested in any one jurisdiction.

Other jurisdictions do not allow for broad in court representation of clients by paraprofessionals in a range of substantive practice areas. In any event, but for Washington's State's program, the other programs are relatively new and are in the initial implementation of such, and no data has been collected or studies performed to determine if there is any decrease in the justice gap.

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. California's court system is significantly larger than Washington (population 7.6 million), Utah (population 3.2 million), and Arizona (population 7.2 million). Similarly, the number of licensed attorneys in these jurisdictions is substantially different with California having over 266,000 licensed attorneys with 190,000 on active status, Arizona having 15,600, and Utah having only 8,200. No comparison can be made regarding the possible impact to access to justice between California and these other jurisdictions. The potential impact of these proposed untested changes to California's legal system, the public, and the profession cannot be measured nor compared to these other jurisdictions. The other jurisdictions combined do not equal the population in California, nor do their programs have any resemblance to the recommendations set forth by the CPPWG, thus continued comparison should not be relied upon by the State Bar.

By and large, the more populous states like California have rejected similar proposals. In November of 2021, the Florida Bar Board rejected plans to loosen firm ownership rules. The Florida Bar's Board of Governors unanimously rejected proposals to let non-attorneys own law firms and share in legal fees. (Bloomberg, Florida Bar Board Rejects Plan to Loosen Firm Ownership Rules by Sam Skolnik, Nov. 12, 2021.) Similarly, two other states – Illinois and Virginia – previously 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).

We also understand that the Legal Aid Association of California (LAAC), which represents the state's public interest organizations, has opposed many of the CPPWG's recommendations, citing concerns about "the devastating harm that comes from programs similar to the one being proposed by the Working Group." LAAC has also expressed concern that the recommendations will not benefit its clients in that the proposed CPPWG program is "for profit" while the majority of LAAC clients cannot afford to pay anything. It should also be noted that many individuals from the nonprofits who were asked to participate in the CPPWG meetings have reported that the majority of their concerns and comments were disregarded by the CPPWG and are not reflected in the final recommendations.

The recommendations of the CPPWG also cannot be viewed in a vacuum. These recommendations are just the tip of the iceberg of other sweeping changes to the legal profession, which include other non-lawyer ownership of law firms and the practice of law by technology based programs, as previously set forth by ATILS and as such recommendations are being prepared by the Closing the Justice Gap Working Group. All of these proposed and contemplated changes will result in a complete and untested change to the entire profession and the American system of justice. No jurisdiction has simultaneously enacted the full range of proposed changes to the practice of law and delivery of legal services that the State Bar is proposing: 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 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).

Concerns about consumer harm, funding, and implementation of the proposed program. The final report of the CPPWG (at page 73) acknowledges that "the CPPWG identified the need to recommend enhanced enforcement for violations of statutes governing UPL, to counteract the potential risk of increased UPL that may arise from the implementation of the paraprofessional program." According to the final report, the Regulation and Discipline Subcommittee for the CPPWG considered concerns raised by law enforcement, State Bar staff, legal service providers and other consumer advocates, that "nonlicensed individuals may represent themselves as licensed under the new program, creating a new method to defraud the public." Specifically, the subcommittee identified the following resource concerns: (1) lack of law enforcement resources to investigate and prosecute cases; (2) lack of State Bar jurisdiction and resources to prosecute cases; and (3) potential client confusion regarding licensure of service providers.

The paraprofessional program should not in way, shape or form be implemented until and unless specific measures have been adopted to address these issues. Many of the suggested changes to law regarding UPL set forth in the CPPWG final report and acceptable, but the

provision providing the State Bar with more authority to police UPL violations (which for some reason was left off the corresponding table), should be rejected. Based upon its history, the State Bar should not be tasked with policing issues of UPL.

During a PowerPoint presentation by the CPPWG, the CPPWG set forth certain factors it considered in balancing public access and public protection. Some of the factors identified by the CPPWG as increasing access include: (1) attorney supervision is not required, (2) co-ownership of law firms will be allowed, (3) no caps on legal fees charged (but for one-third contingency fees in enforcement matters), and (4) there will be hearing panels for discipline instead of the State Bar Court which will reduce the cost of the discipline system, with paraprofessionals to serve on the panel. These factors, however, appear more likely to result in harm to the consumer, rather than increase access to justice.

Further, recently the Closing the Justice Gap Working Group set forth at a presentation the two greatest risks to the public regarding the various options being considered to decrease the justice gap. The two greatest risks were nonlawyers practicing law without lawyer supervision and software providers practicing law without lawyer supervision. The CPPWG recommendations have completely disregarded this and instead provide for the implementation of an entire program with nonlawyers practicing law without any law supervision. Law supervision does not even appear to have been considered or contemplated by the CPPWG.

In addition, the final report provides that paraprofessionals and their firms will be able to hire disbarred or otherwise ineligible-to-practice-law attorneys to work for them. This is of the utmost concern and to the detriment of the California consumer.

Another thing not addressed or requested for public comment, but which was included in the final report, is how the paraprofessional program will be funded. Without funding, the program cannot exist. The final report (page 78) estimates that the program startup costs for the first approximate 5,000 participants to be $1,645,000, which does not even include costs related to curriculum development or program evaluation. The suggested source of this funding to avoid the State Bar's general fund includes "philanthropic grants" from "funders who support innovation in expanding access to justice" and/or a loan from the State Bar's general fund to be repaid once the program becomes self-sustaining, which would require authorization from the Legislature and the Supreme Court. The OCBA is opposed to either of these sources of funding for the paraprofessional program. It is quite ironic to seek to utilize mandatory licensing fees from attorneys to fund an untested program designed to upend the entire legal profession while dismissing the concerns raised by attorneys as "protectionist." Also, as seen by the Washington State program, the program never became self-sustaining and the bar ended up with a substantial loss. Similarly, it would be a conflict of interest for the State Bar to obtain "philanthropic grants" from "funders who support innovation" in that those exact funders will likely be the very entities seeking approval from the State Bar for inclusion in the "sandbox" being established by the Closing the Justice Gap. This issue should have been at the foremost of the request for public comment since without funding there is no program. Instead, the issue of funding was not even included.

Summary. The OCBA recognizes that the State Bar is, by and large, not interested in hearing public comment to the extent that it raises concerns about the overall implementation and soundness of such a program, and instead seeks focused recommendations as to the specific structural recommendations, however, we would be remiss to not point out overall impacts of the program.

Allowing non-lawyers, who lack the training necessary to provide competent and ethical légal services, *may* increase some form of access to justice, but at the cost of an unsuspecting and ultimately unprotected public 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. When such a true balancing occurs, public protection prevails over any slight and unproven decrease in the justice gap that may result from allowing non-lawyers to provide legal advice without attorney supervision.

The recommendation by the CPWWG that paraprofessionals can own up to a 49% interest in a law firm is also untenable. It potentially places the nonlawyer as having controlling interest of a law firm if the other 51% interest is divided between two or more attorneys. In addition, it sets up a mechanism whereby the nonlawyers will receive fees for legal services from areas of law for which they are unlicensed (discussed in more detail below).

While the entire focus of the CPPWG has been to allow greater access to justice to the public at more affordable prices, there is no requirement that paraprofessionals charge low fees. As seen in Washington, it was found that often the LLLTs charged the same or more as attorneys, thus not impacting access to justice. It was found that paraprofessionals also had to pay rent, overhead, etc., therefore, in order to make a profit were required to charger similar rates as attorneys. If, as in Washington, this turns out to be the case in California, the entire purpose for the paraprofessionals program fails. In addition, the CPPWG report does not set forth any type of a fee cap for paraprofessionals. While OCBA is not necessarily in favor of fee caps, without such, the purpose for the program (access to justice for lower income individuals) will likely fail.

There are also significant concerns about extending equivalent protections afforded by the attorney-client privilege and attorney work product to nonlawyers. Even if California amended the Evidence Code to allow for such, there would be no protection to the client if that nonlawyer was 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.

There is an apparent need to expand access to justice in specific practice areas, but the limited license program is not the appropriate avenue to do this. Some other 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.[3] There are many programs that could be analyzed and potentially implemented which would have a much more significant impact on the justice gap and providing meaningful access to justice; by way example, Legal Link Court Navigators in Oakland, California and the Court Navigator program in New York,

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 paraprofessional program; in fact, they are likely to cause more problems than they solve.

RESPONSES TO SPECIFIC RECOMMENDATIONS

APPENDIX A: TABLES FOR PARAPROFESSIONAL PROGRAM

TABLE 1 – PRACTICE AREAS AND TASKS

Position: Overall Oppose.

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

One of the primary concerns of the OCBA is that this is just the beginning. The CPPWG and the various town halls attempt to emphasize how the entire program is narrowly focused on very specific practice areas, tasks, etc. However, there is nothing that prohibits a never ending expansion of practice areas and tasks to be performed by paraprofessionals, all to the detriment of the public. In fact, Table 11 places in the hands of the Oversight Committee the implementation of keeping abreast of national and international developments in paraprofessional licensing. It is truly difficult to understand how the State Bar is able to reconcile putting the public at such a risk (which neither the State Bar nor the CPPWG can credibly demonstrate will not happen) with its overall mission to protect the public.

[3] 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.

Collateral Criminal Practice Area:

When an individual seeks the advice and services of an attorney, such an individual is usually facing challenging and unpleasant circumstances with many important interests at stake. This is especially true when the individual is dealing with a criminal matter. In criminal cases, a licensed attorney (prosecutor) usually represents the State of California. Individuals dealing with the criminal justice system as defendants will invariably suffer a disservice if their interests are not similarly represented by a licensed attorney. Even in the context of expungement, reclassification of prior convictions, and infractions, the potential for harm and injustice to an individual is too grave to allow an unlicensed attorney, even one called a paraprofessional, to represent such individual.

The ability of an individual to receive competent advice and reasonable legal services when dealing with issues in the criminal field relating to the expungement or reclassification of prior convictions should not be viewed as being less important or less significant than legal services provided in connection with other criminal law related cases. The same is true when it comes to providing legal advice and services in connection with criminal infractions. The ability of an individual to receive competent and reasonable advice and representation in the context of a petition to expunge or reclassify prior convictions is in many instances paramount to such individual's ability to deal with immigration matters, obtain a desired job, obtain financial aid to attend college, or the ability to enlist in the armed services. Non-attorneys who may have a working knowledge of the process relating to filing petitions or motions to expunge or reclassify prior convictions will most likely never have the same level of knowledge and expertise that a licensed attorney will have about the many possible ramifications of filing the wrong petition or an untimely petition. Equally true, if a criminal infraction is not handled properly and an individual does not receive the proper competent advice because the unlicensed attorney providing the legal advice is not fully familiar with criminal law, such inferior advice and services may result in additional fees and potentially the loss of liberty in the form of incarceration; a risk that rarely exists in the other areas of the law. This is true because a licensed attorney, unlike a paraprofessional, will be able to provide advice about consequences and ramifications unknown to the individual seeking the legal advice.

The noble goal of this proposed change in the legal profession is to provide more access to justice to all members of our community. For sure, that is certainly a worthwhile and admirable goal. Having said that, it should be abundantly clear to all involved that individuals from low-income communities will bear the burden of the harm and abuses that will certainly be inflicted by unlicensed attorneys who will take advantage of individuals when they are facing challenging and difficult circumstances in connection with criminal matters. It should also be noted that there is a wealth of non-profit and indigent attorney services that are available to assist in the area of criminal law for those seeking relief in the form of expungement, reclassification of prior convictions, and infractions. As a matter of fact, most Public Defender Offices throughout California provide this service at no cost by assigning such matters to licensed and experienced attorneys. There are also many non-profit organizations, Legal Aid Centers, and Universities that provide these types of services at no cost. All such already existing providers of this free service are inherently mindful

of the collateral criminal consequences that could occur if the provider of such services is not a licensed attorney experienced, and properly trained in the field of criminal law.

As a society, we owe it to all our fellow human beings facing the consequences of criminal convictions, infractions included, to ensure that the professional legal advice and representation they are receiving is being provided by licensed attorneys. Allowing unlicensed attorneys to provide any advice and services to any clients in connection with criminal matters, including expungement, reclassification of prior convictions, or infractions, will undoubtedly cause damage to the public's trust in the legal profession. Calling such unlicensed attorneys "paraprofessionals", or any of the other proposed names, will not mitigate such erosion in the public's trust, and will not provide any solace to clients who suffer because of the less than desirable services such paraprofessionals will provide when compared with the services that a licensed attorney will be able to provide.

The same factors that caused the State Bar to prohibit paraprofessionals from being able to provide any legal advice or services in the vast majority of the criminal law field should equally be applicable to the areas of expungement, reclassification of prior convictions, and infractions.

Consumer Debt/General Civil:

A specific concern that has been expressed in this area is that a paraprofessional will attempt to deal with creditors of a client or reach a settlement that will have a negative future impact on the client. These paraprofessionals are not bankruptcy attorneys. It may be to the advantage of a client, depending on the facts and circumstances, that they file bankruptcy. Since a paraprofessional is not and cannot be licensed to provide this service, it will be in the paraprofessional's interest to attempt to reach out the creditors and attempt to resolve the matters. However, the information provided regarding such could have a detrimental impact on the client if bankruptcy is the better option or the ultimate legal strategy. Clients in these matters could potentially end up with "debt plans" that places the consumer in more debt, thereby creating further consumer risk. Also, there is a concern that the clients involved in consumer debt matters have no ability to pay anything to an attorney or paraprofessional, even at a reduced rate, thereby not having a significant impact on the justice gap.

Estates and Trusts:

While Table 1 suggests that the CPPWG is presently excluding estates and trusts, this is disingenuous. A huge area of estates and trusts is conservatorships and guardianships which are almost always heard in the probate court. However, the CPPWG has quietly included this in the "family law" practice area and will likely not get as many comments from the practitioners in the probate and trust practice area since the chart inaccurately states that this practice area will not be affected.

Guardianships and Conservatorships:

While the CPWWG purports not to be wading into the area of trust and estates, it is certainly making major inroads. Conservatorships and guardianships, which are covered areas of practice being proposed for paraprofessionals, are heard in the Probate Court and are typically handled by trust and estate attorneys.

Regarding this area of law, there is certainly a need. Similar to family law, conservatorships and guardianships are form driven by the Judicial Council. However, even the most seasoned attorneys, and indeed many of the California probate judges, are often unable to keep up with the ever-changing forms and specific requirements necessary to properly establish a conservatorship and/or guardianship. Also, the seasoned practitioner often has difficulty in seeing past the motivations of those seeking "assistance" on behalf of an elderly client, which is imperative in this area of law since the proposed conservatee will lose many of their life's freedoms and liberties if a conservatorship is established and it wasn't necessary and/or the person who is seeking such has nefarious motivations about controlling the assets of the proposed conservatee. The possibilities for foul play and the dire results that can occur if there are mistakes in judgment and practice are immeasurable to the proposed conservatee. The cost to the client could also end up being much more than if they had hired an attorney in the first place in that the recommendations only allow a paraprofessional to represent a client in uncontested guardianships and conservatorships. It may not be known at the outset whether or not there is going to be a contest. If this is the case, the client will then have to hire an attorney and pay the attorney to bring them up to speed since the paraprofessional will not be able to continue the representation.

Many in this practice area see self-represented individuals appearing and causing substantial delays because they inevitably get the forms incorrect, which result in the court being unable to proceed when action is imperative and necessary. Therefore, these individuals view <u>any</u> help (even if inadequate help) to be advantageous, but at what cost? Some California probate judges are concerned that inadequate assistance would result in even more problems than if there was no assistance. The other suggested alternatives to the CPPWG program, including court navigator programs, etc. would like prove to be more advantageous to the public in this area of the law.

Employment Law:

Allowing paraprofessionals to represent individuals in claims before the California Labor Commissioner and to seek to obtain limited jurisdiction wage and hour judgments may have limited impact because such claims are almost always brought on contingency.

California law already provides a process for unrepresented employees to file a wage claim with the California Labor Commissioner under Labor Code section 98 et. seq. The Labor Commissioner's office interviews the employees and assists them in preparing a complaint, which is then sent to the employer. The Commissioner will first send notice to the employer regarding a settlement conference (where a Deputy Labor Commissioner attempts to settle the case). If the

case does not settle, the matter will proceed to an informal administrative hearing pursuant to Labor Code section 98(a). During this informal hearing, both parties can present their cases through testimony, witnesses, and documents. Formal rules of evidence do not apply. Accordingly, as California law already provides a process for unrepresented employees to file a wage claim with the California Labor Commissioner, educating individuals about their wage rights may result in greater access than allowing paraprofessionals to provide legal representation in connection with such hearings.

An individual who is not well versed in evolving wage and hour laws will also not be in a position to provide an individual with meaningful advice about whether it would be better to pursue claims in Court. Since the paraprofessional is precluded from representing an employee in Court, the paraprofessional's interests may conflict with the interests of the individual.

Unemployment insurance claims are also adjudicated in a very informal setting with evidence routinely admitted without being bound by formal rules of evidence. The process is generally straight forward and, as such, it is not clear how a paraprofessional could add value. The awards are also limited and will only serve to reduce the amount to an individual after having to split a portion of the award with a paraprofessional.

Family Law Practice Area:

This is the area of law that is likely to initially be most impacted and cause the most harm to the public. Family law cases often result in life-changing impacts on litigants. Litigants' most precious commodities, their children and community estate, are at issue. The legislature has recognized the increasing disparity in access to justice and has taken measures to ensure access for all. The legislature has implemented mandatory judicial council forms which are designed to be self-explanatory so that anyone ranging from a seasoned family law litigator to a self-represented litigant can easily complete the forms without any assistance. Theoretically, a litigant should be able to review the judicial council forms and easily check the boxes to complete them. For example, in a Petition for Dissolution of Marriage, the questions seem self-explanatory. A litigant can simply review the document, insert their answers in the blank fields to questions such as the date of marriage and date of separation, and submit the Petition for filing. However, completing this form is not as simple as it seems as a comprehensive understanding of California family law is often necessary in order to complete it accurately.

A simple question, such as the date of separation, can be so complex that often parties do not initially know the answer and even the California Supreme Court has recognized this is a difficult issue (*See, e.g., In re Marriage of Davis* (2015) 61 Cal.4th 846, 189 Cal.Rptr.3d 385, 352 P.3d 401). A couple's date of separation is important because it determines the point at which a parties' earnings and accumulations are separate property and no longer considered community property. In *In re Marriage of Davis*, the California Supreme Court held living in separate residences is an indispensable threshold requirement for a finding that spouses are "living separate and apart" for purposes of Family Code section 771(a). This issue was subsequently addressed by

the legislature in 2017, when it implemented Family Code section 70, which defines the date of separation.

Unlike other paraprofessionals such as nurse practitioners, paraprofessional's services in the legal field will have authority to operate independently with no direct supervision. While paraprofessionals will attend training (13 units in family law training, which includes 2 units of adoption training and 3 units of guardianship/conservatorship training), they will not be subjected to the same training requirements as other paraprofessionals such as nurse practitioners. A nurse practitioner has training beyond being a nurse, equivalent to a masters in medicine. The State Bar is not requiring training for paraprofessionals equivalent to a masters in law. Many family law attorneys have witnessed "legal document preparers" take advantage of the most vulnerable, such as the elderly and undocumented individuals, by claiming they can prepare documents cheaper than attorneys. There have been many instances when document preparers have made so many mistakes that it ultimately costs the client too much to have the document corrected by an attorney with the client having no recourse.

It is often difficult for clients to discuss problems in their marital relationships with experienced attorneys. It will be even more difficult for them to discuss such problems with paraprofessionals with limited training. Many aspects of family law entail dealing with clients who are experiencing emotional trauma. While expanding access to justice is important, it is more important that clients who are experiencing one of the most vulnerable times in their lives are treated respectfully by someone qualified to advise them.

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. Allowing a client to issue-spot on his or her own without attorney guidance is likely to cause substantial prejudice to their claims.

TABLE 2 – IN-COURT REPRESENTATION

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The proponents for the sweeping changes that are being sought throughout our country have repeatedly attempted to point out at the various townhalls and through its presentations that California is not alone in this movement. However, no other jurisdiction has proposed the breadth of changes as set forth by the CPPWG. The CPPWG's fall back and general rule will allow for complete in court representation by paraprofessionals unless there is a specific carve out for such. Right now there remains few instances that in court representation will be allowed, but as we have seen with other programs, this is likely the tip of the iceberg. There is absolutely nothing in the

CPPWG's recommendations that limit the practice areas that are assuredly going to be added in the future that could include in court representation.

The OCBA opposes any in court representation by nonlawyers. The minimal education in this regard is not nearly adequate to allow for in court representation by paraprofessionals. Specifically, in court representation in family law matters and/or conservatorship and guardianship proceedings should not be permitted. The stakes are too high and the risks to clients too certain.

The proposed recommendations and limitations will create certain confusion to the consumer as to when and why a paraprofessional can or cannot represent them in court, and when and why they may have to then hire an attorney for further representation in a matter. Such confusion will almost assuredly lead to paraprofessionals overstepping their limitations resulting in the unauthorized practice of law.

TABLE 3 – LICENSING REQUIREMENTS

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The CPPWG recommends that to be a paraprofessional, a person (1) must receive a JD or LLM from either an ABA or California accredited law school or any registered law school, or (2) be a paralegal, or (3) be a legal document preparer. The educational requirements for a document preparer or paralegal are far substandard to allow for the proper education to assure the public is protected. A person with a JD or LLM from an ABA or California accredited law school could, depending on the circumstance, be acceptable to assure public protection. However, there would need to be some type of inquiry as to why someone with a JD or LLM is not a licensed attorney. Have they been unable to pass the California bar exam? If so, do we really want someone unable to evidence the minimum requisites to be a licensed attorney to be assisting the public in the unfettered manner as this program allows? Furthermore, while individuals graduating from ABA accredited law schools have a substantially higher pass rate of the bar exam (which is a factor looked at by the CPPWG), it can be understood why this category is included, but again, if this is the case, why are the applicants for being a paraprofessional not licensed attorneys? Also, why would the CPPWG recommend inclusion of those who have graduated from a California accredited law school or registered law school (which overall receive much lower scores on the bar exam)? The CPPWG observed in its Final Report that there is a significantly lower pass rate of the California bar from California accredited and California registered law schools, but recommends including these individuals, even though they are admittedly less qualified to practice law. The justification of the CPPWG is that paraprofessionals will only be licensed in very specific areas of the law. This will inevitably will cause harm to the consumer as noted above.

Similarly, the CPPWG recommends allowing legal document preparers (LDAs) to be eligible to be paraprofessionals. A LDA only requires a bachelor' degree and one year of law

related experience. This is inadequate to allow in court representation and/or representation of a client without attorney supervision.

There are also specific additional educational requirements for the various "practice areas" for which the paraprofessionals will be licensed. The CPPWG claims to have balanced the consumer protection against program viability. In our view public protection should always prevail in this analysis.

Paraprofessionals are going to be licensed to practice law and unless there is a specific carve out, will be permitted full in court representation of clients. Currently, to be a licensed attorney in California, the general curriculum to graduate law school includes 3 years of law study, typically following a four year degree. Then, people usually spend a minimum of 6 weeks taking intense bar review courses in order to prepare for what used to be a 3 day (recently reduced to two day) bar exam (which even with licensed attorneys it appears that the State Bar's trajectory has been to provide less and less protection to the public in that it recently drastically reduced the cut score for the licensed attorneys to 1390 from 1430).

There is no comparison between an average law school education compared to the proposed educational requirements of a paraprofessional.

The primary reason for the lax educational requirements being recommended by the CPPWG, and as set forth by a representative of the State Bar is that the State Bar does not want the educational and licensing requirements to be overly onerous because it wants the program to succeed. Accordingly, the purpose behind the lax educational requirements of the paraprofessional program appear to conflict with the State Bar's mission of protecting the public.

There will also be a "practical experiential training" required under the supervision of an attorney to ensure that paraprofessionals are adequately prepared to provide independent service to a client. Again, the CPPWG purports to have been "mindful of the need to require enough hours to ensure competence without imposing a burden that would preclude broad participation from a diverse pool of Program applicants." The proposed experiential training is 1,000 hours over 6 months, with 500 being in the practice area for which the applicant seeks to be licensed. This requirement can also be satisfied by working as a paralegal or in a law school clinic. The 1000 hours is substantially less than required by the failed Washington State program, which required 3,000 hours (recently reduced to 1,500).

There are also logistical issues with the experiential requirement. In connection with this requirement, the State Bar proposes to incentivize licensed attorneys to assist and be "supervising attorneys" for the paraprofessional program. A "supervising attorney" must be licensed for 4 years or more, provide training and counsel to the applicants, assume responsibility for the applicant's activities, approve and sign documents prepared for the clients, submit written declarations certifying the applicant's experience and training and supervise no more than 5 applicants at a time. The State Bar's proposed incentive to these attorneys for incurring this liability and time is a mere 1 hour of CLE for 125 hours of supervision and the ability to be listed in an online directory showing the attorneys who have provided supervision. This is essentially a non-starter. First, in

most bar associations, an attorney with only four years of experience is still eligible to have a mentor assist them at this early phase of their legal career, yet the State Bar would permit such an attorney to supervise up to 5 paraprofessional applicants and declare that the applicants have received the requisite training and supervision required. The risk to the public in this regard would be overwhelming.

While the CPPWG did take into consideration and expressed concern as to whether an applicant would be required to gain practical experience either for free or with pay insufficient to support themselves, it appears from the Final Recommendations that no recommendation or requirement was set forth on this issue.

Would supervising attorneys be required to pay applicants? If so, how much? Can they bill out applicants to clients similar to paralegals even though they have not completed their licensing requirements? Would insurance carriers cover the work being done by these applicants? The OCBA suggests that this is a significant deterrent to the viability of this program.

Regarding the testing requirements, it appears that there will be subject matter specific tests, as well as a professional responsibility exam "modeled after the attorney exam." If this program is implemented, at the very least, the professional responsibility exam should mirror the one for attorneys, given that the education and experience of applicants on issues of professional responsibility are substantially less than that of licensed attorneys. As to the subject matter specific tests, informed objection is not possible since the CPPWG has failed to include any of the specifics. Is this going to be a one day or two day exam? Who will prepare the exams? Who will grade the exams? What will the metrics be? What will be the pass rate and cut off? None of this information is set forth in the report, thus meaningful objection and input is impossible.

Regarding Moral Character requirements, fingerprinting and moral character determination requirements are to mirror attorneys. However, who will determine the moral character requirements? It appears that it will be the Oversight Committee, whose makeup and structure is problematic, as set forth below. It also will prohibit disbarred and resigned with charges pending individuals from serving as paraprofessionals. However, as set forth in the Report, disbarred attorneys will be able to work for paraprofessionals. This, in and of itself, raises significant concerns about the level of legal services the CPPWG appears to believe those in underserved communities are entitled to.

TABLE 4 – REGULATION REQUIREMENTS

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The regulation requirements are woefully inadequate to assure public protection. On the financial side, there will be a Client Security Fund, and applicants would only have to provide a $100,000 surety bond. At a minimum, due to the substantial risk to the public for allowing less

educated and experienced individuals to practice law and provide full in court representation, these applicants should be required to carry malpractice insurance. If the hindrance is that there are no insurance carriers who provide this coverage, it should be the primary focus of the CPPWG and the State Bar to get this accomplished. If it cannot be accomplished, the program should not proceed until this issue is resolved. This is fundamental to the protection of the public and cannot even be compared to the lack of such a requirement for fully licensed attorneys, which is a debate for another day. The State Bar has previously had a working group to study (and push) for attorneys to be required to obtain malpractice insurance. How is it then, that the State Bar is even contemplating allowing nonlawyers to practice law without such? As the State Bar knows, a Client Security Fund will not be nearly sufficient to protect the public, nor will a mere $100,000 surety bond.

The OCBA does not have any specific objection to the supportive measures, annual reporting requirements, or MCLE requirements, but for a suggestion that the number be increased and that the reporting time be annual since this is a new program and the public risk is high and acknowledged in the final report.

TABLE 5 – ADDITIONAL REGULATION RECOMMENDATIONS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The regulation requirements are woefully inadequate to assure public protection. On the financial side, there will be a Client Security Fund, and applicants would only have to provide a $100,000 surety bond. At a minimum, due to the substantial risk to the public for allowing less educated and experienced individuals to practice law and provide full in court representation, these applicants should be required to carry malpractice insurance. If the hindrance is that there are no insurance carriers who provide this coverage, it should be the primary focus of the CPPWG and the State Bar to get this accomplished. If it cannot be accomplished, the program should not proceed until this issue is resolved. This is fundamental to the protection of the public and cannot even be compared to the lack of such a requirement for fully licensed attorneys, which is a debate for another day. The State Bar has previously had a working group to study (and push) for attorneys to be required to obtain malpractice insurance. How is it then, that the State Bar is even contemplating allowing nonlawyers to practice law without such? As the State Bar knows, a Client Security Fund will not be nearly sufficient to protect the public, nor will a mere $100,000 surety bond.

The OCBA does not have any specific objection to the supportive measures, annual reporting requirements, or MCLE requirements, but for a suggestion that the number be increased and that the reporting time be annual since this is a new program and the public risk is high and acknowledged in the final report.

TABLE 6 – STATUTORY AND RULE AMENDMENTS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The content of the Overview: Context, Impact, and General Objectives and Concerns above are incorporated into this response to this Recommendation.

Attorney Client Privilege/Attorney Work Product Doctrine:

In the event that the paraprofessional program is indeed implemented, we agree that clients should be able to expect that their "communications" with a paraprofessional to be confidential, and not subject to access by anyone without the client's consent. 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 paraprofessionals 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 or other out of state jurisdictions – 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. Simple disclosures are not enough, when this very fundamental tenet is at stake. Again, we believe the risks to public protection outweigh the benefits gained in attempting to achieve access to justice.

Unauthorized Practice of Law:

It is the view of the OCBA that if this program is to proceed, and based upon the CPPWG's unequivocal acknowledgement that the public will be more at risk if the paraprofessional program is implemented, at a very minimum, more stringent laws relating to the unauthorized practice of law should be implemented, though not necessarily the proposed changes set forth by the State Bar. The OCBA would be in favor of the proposed laws to allow felony convictions for UPL, to extend the statute of limitations for UPL prosecution, and the creation of record keeping requirements for paraprofessionals. Regarding the proposal that there be additional funding and resources to law enforcement to investigate and prosecute UPL by non-licensees, as a general rule, OCBA would also be in support of this. However, why would it be restricted to non-licensees? One of the greatest threats to the public if the paraprofessional program is implemented will be if a licensed paraprofessional strays outside of the specific confines for which they can practice, which most assuredly is going to happen on a regular basis. This risk to the public would not be covered under the proposal by the State Bar. If these laws are not enacted to protect the public, the program should not proceed. The program cannot be established first with the hopes that these laws will be enacted later.

Another recommendation by the CPPWG, which was conveniently left of Table 6, but is included in the Final Report is that the State Bar be given more authority investigate and cite

incidences of UPL. As set forth above, the OCBA would oppose this proposal in that the State Bar should not be turned into a quasi-criminal prosecution agency.

TABLE 7 – DISCIPLINE SYSTEM STRUCTURE

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

No matter how limited it may—or may not—turn out to be, as proposed, the licensed paraprofessional will be practicing law. Beyond any notion of a legal technician, such as a legal document preparer or an immigration consultant who is, by applicable statutes, expressly and repeatedly prohibited from selecting documents or providing legal advice, the licensed paraprofessional will be making decisions, choosing and implementing strategies, and setting and fulfilling the course of representation for the client. Whether good or bad, the impact of these activities, often irreparable, can be life-changing for a client. For these reasons, attorneys engaging in these activities have been held to rigorous standards and subject to discipline when their actions fall short. The practice of law is, and the whole of it must remain for the practitioner, a serious and consequential endeavor. Accordingly, the licensed paraprofessional should be held to no lower disciplinary standard, whether by way of any diminished RPC, Standards for Sanctions for Professional Misconduct, or disciplinary system.

In order to do its work, the CPPWG appointed seventeen subcommittees. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 5. Of these subcommittees, only five had no member judge. *See* Table 2., Final Report and Recommendations of the California Paraprofessional Program Working Group, pp. 6-9. Three of these five subcommittees addressed "practice area" issues, two "policy/structure" issues. *See* Table 16., Final Report and Recommendations of the California Paraprofessional Program Working Group, pp. 28-29. The Discipline Subcommittee was one of these two. *See* Table 42., Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 64. It would seem that a subcommittee charged with the development of an adjudicatory system, the very function and purpose of which is to render decisions and impose appropriate penalties where warranted, should have had input from a professional. That the recommendations of any subcommittee were considered by the full working group is inapposite.

The Discipline Subcommittee considered incorporating paraprofessionals into the discipline system for attorneys, acknowledging the benefits of such an approach, noting the "efficient use of an existing structure" and associated "economies of scale." *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65. It dismissed this idea, however, based on the observation that to add paraprofessionals would "burden the attorney discipline system, which already suffers from a high caseload and backlogs." *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65. There simply is no good reason, particularly when the recommended alternative, as discussed

below, is considered. The system works, albeit slowly, and it is important for any practitioners providing legal advice to individuals. It takes time to provide the fair, adequate, and reasonable process required by Section 6085 of the California Business and Professions Code. To the extent "backlogs" are the result of inadequate funding, it is stressed that presently, there is *no* funding for the entire licensed paraprofessional program, of which a disciplinary system must be a part. In that the licensed paraprofessional would be practicing law, their conduct should be evaluated and adjudicated in the same manner and forum as that of a licensed attorney.

Speculating that a "new" disciplinary system "*could* allow for the inclusion of nonlicensed public members in the discipline process," and "*could* move cases more quickly," and "*could* also prove to be less expensive" (emphasis added), the Discipline Subcommittee recommended a system which utilizes the existing structure of the OCTC to conduct initial review and investigation of complaints, but removes actual adjudication and appeal from the jurisdiction of the SBC. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65. In this hybrid system, "first-level adjudication [would be] by a three-person panel, and appellate-level adjudication by a committee of the Paraprofessional Licensing and Oversight Committee." *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65. Neither the Discipline Subcommittee nor the CPPWG offers anything more than this vague description of the recommended system.

The recommendations adopted by the CPPWG as to the disciplinary system structure are set forth at Table 43. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 66. Again, a three-person panel to adjudicate complaints is referenced but no information as to who these individuals would be is provided. As noted above, the Subcommittee was speculating that a new system could include nonlicensed public members in the discipline process. At Table 43, there is a reference in connection with "Settlement Conferences," to a "staff adjudicator." Based on what is admittedly minimal information, it appears that the CPPWG contemplates members of this panel would be staff and/or nonlicensed public members. Given the rigorous requirements for SBC judges set forth in California Business and Professions Code, Section 6079.1, obvious questions arise as to what credentials these panel members would have, who would select them, and how and by whom would they be vetted. These requirements must be thoroughly thought out and clearly defined, together with the basis upon which the lead adjudicator for any panel would be selected. Additionally, given the desire of the CPPWG to incorporate the nonlicensed into the disciplinary process, it is more likely these panel members would need training to include, at the least, courses on bias, bench demeanor and, perhaps, ethics as impacting on the question of recusal. Throughout the discussion of the recommended system, the potential for reduced expense over that of the attorney discipline system is repeatedly mentioned, yet solid, meaningful training is a cost in time and expense which should not be discounted. The discussion also mentions that the recommended system could move cases more quickly. This is to ignore the implications of a three-member panel. Requisite and considered deliberation among panel members, together with agreement on the content and wording of a disciplinary order, could take considerable time. Further, with a three-member panel, dissenting opinions would be possible. These could then provide incentive or form the basis for appeals, increase their number, and delay the final resolution of cases even more.

Per Table 43, appeals would be heard by the Paraprofessional Licensing and Oversight Committee which, as proposed, would be comprised of thirteen members. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 69. The discussion of the system, however, states that appeals would be heard by a *committee* of the PLOC. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65. While it is unlikely that the entire thirteen member PLOC would hear an appeal and, while the contemplated appellate committee is not referred to as a *subcommittee* of the PLOC, there is no information given as to the size or composition of the contemplated appellate committee. No information is provided as to who would determine which members are to serve on the appellate committee, or whether assignment to the appellate committee will be permanent or rotate among the thirteen members. As proposed, the composition of the PLOC includes a judge, two attorneys, three paraprofessionals, six nonlicensed public members, and a paraprofessional educator. *See* Table 46., Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 69. This makes not only the number of appellate committee members important, but also its composition so as to ensure its efficacy and the quality and consistency of its orders. As it is possible a number of public members may serve on the appellate committee, as with members of the three-person panel, extensive training may be required here, as well.

The problems and concerns with the proposed adjudicatory bodies is only the tip of the iceberg as to the hybrid system of discipline, in particular, and the licensed paraprofessional program, in general. The CPPWG asserts that the paraprofessional RPC and Standards for Licensed Paraprofessional Sanctions for Professional Misconduct are largely consistent with and, in some cases, mirror those for attorneys. *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, pp. 56 and 67. As this may be the case, having a separate discipline system which uses adjudicators rather than SBC judges creates the risk that there will be conflicting interpretation and application of similar or identical RPC and Standards for Sanctions for Professional Misconduct, which will only confuse and lessen their respective application overall. The likelihood of this is high, given the express desire of the CPPWG for adjudicators with backgrounds, experiences, and requirements to serve, different and distinct from those of SBC judges.

The CPPWG indicated its desire to include nonlicensed members of the public in the disciplinary process (*See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 65.), but provided no reason or associated benefit for this inclusion. In discussing the composition of the PLOC, the CPPWG noted "[t]he PLOC composition should ensure that expertise is available that informs its work by including members who represent the consumers that paraprofessionals will serve, as well as, those who can inform the specific topics of licensing, regulation, and discipline." *See* Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 69. As noted above, appeals in the proposed hybrid system will be heard by the PLOC, in whole or in part. It is possible then, that the appellate body would include nonlicensed public members, that is, as the CPPWG puts it those "who represent the consumers that paraprofessionals will serve." At least some of these individuals, when faced

with a legal problem, were found by the California Justice Gap Study--which study's findings were the impetus for the CPPWG--not to have recognized the problem as such or not to have known where to go for help with it. *See* Open Session, Agenda Item 701 September 2021 Memo, Dated: September 23, 2021, Subject: Final Report and Recommendations of the California Paraprofessional Program Working Group, p. 3. It seems neither wise nor desirable to consider for inclusion in a body adjudicating matters of licensee discipline, such individuals apparently so far-removed from, or unfamiliar with, legal issues and services. This possibility underscores the problem, as utilizing anything less than a qualified SBC judge can in no way improve the quality of discipline adjudication. This, like CPPWG proposals to impose citations and fines in lieu of discipline, utilize a venue other than the SBC to minimize expense to the paraprofessional, and limit the assessment of discipline costs against the paraprofessional (*See* Final Report and Recommendations of the California Paraprofessional Program Working Group, pp. 65 and 67), frustrate the purpose and dilute the efficacy of a disciplinary system and adversely impact the quality and care of the practitioner. This, in turn, results in the delivery of legal services of a markedly lower quality, all to the detriment of any possible consumer.

Licensure, as contrasted with certification or registration, is the strongest mechanism for consumer protection. A discipline system is fundamental for any program of licensure. It is imperative, for both consumer protection and confidence, that any disciplinary system be well-considered, fully developed, and in place, even before any contemplated pilot program is launched. The disciplinary system structure as recommended by the CPPWG falls far short of these imperatives.

TABLE 8 – ALTERNATIVES TO FORMAL DISCIPLINE

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The content of the response to Table 7 above is incorporated into this response to this Recommendation.

TABLE 9 – PUBLIC RECORDS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The time limitation for discipline to remain on the website or upon request should, at a minimum, mirror that of attorneys. The proposal is that it stay on the website for 3 years unless withdrawn or dismissed.

TABLE 10 – PARAPROFESSIONAL LICENSING AND OVERSIGHT COMMITTEE

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The proposed makeup of the Licensing and Oversight Committee is problematic. There will only be 3 of 13 individuals with a true knowledge of the law on the committee. The proposed committee is to be comprised of one judge, two attorneys, three paraprofessionals, six public members and a paraprofessional educator. The composition of the Oversight Committee is inadequate. Out of 13 individuals, only 7 will have any knowledge of the legal profession, and of the those 7 individuals, 3 will be paraprofessionals. Also, these individuals will hear appeals of staff denial of eligibility, establish all educational requirements, establish experiential requirements, establish attorney supervision requirements, establish incentives for attorneys for supervision, hear appeal of staff denial of waivers of education and experiential requirements, review appeals of moral character staff decisions, with it to be determined its role with regard to developing test questions, review of questions, grading, and challenges to exam questions. Similarly, these individuals are charged with implementing and keeping abreast of national and international developments in paraprofessional licensing and will be responsible for evaluation metrics and assessment of the program. The Oversight Committee would similarly be in charge of all testing eligibility and exam analysis, as well as certification of paraprofessional educational institutions. The Oversight Committee would also be in charge of MCLE, financial responsibility, Rules of Professional Conduct. The Oversight Committee would also be over the Discipline System, including compensation for hearing officers, hearing panel selections, licensure suspension and other discipline with little to no overview from the Board of Trustees.

Based on the breadth and power that will be wielded by the Oversight Committee, and the relative lack of experience of such, the room for grave error and irreparable damage to the public seems inevitable. The makeup of the Oversight Committee should be further analyzed and/or another method of oversight should be considered.

TABLE 11 – PARAPROFESSIONAL PROGRAM GOVERNANCE FUNCTIONS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The content of the response to Table 10 above is incorporated in this response to this Recommendation.

TABLE 12 – PHASED IMPLEMENTATION

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The OCBA is against the phased implementation set forth in Table 12 and urges that if the paraprofessional program is going to be implemented at all, it should only be done as a very limited

and specific pilot program. Representatives of the State Bar have asserted on various calls that the term "pilot program" was being purposefully omitted in they didn't want anyone thinking that the program was temporary because it is here to stay.

TABLE 13 – INCREASED UPL ENFORCEMENT

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

It is the view of the OCBA that if this program is to proceed, and based upon the CPPWG's unequivocal acknowledgement that the public will be more at risk if the paraprofessional program is implemented, at a very minimum, more stringent laws relating to the unauthorized practice of law should be implemented, though not necessarily the proposed changes set forth by the State Bar. The OCBA would be in favor of the proposed laws to allow felony convictions for UPL, to extend the statute of limitations for UPL prosecution, and the creation of record keeping requirements for paraprofessionals. Regarding the proposal that there be additional funding and resources to law enforcement to investigate and prosecute UPL by non-licensees, as a general rule, OCBA would also be in support of this. However, why would it be restricted to non-licensees? One of the greatest threats to the public if the paraprofessional program is implemented will be if a licensed paraprofessional strays outside of the specific confines for which they can practice, which seems to be a likely risk not be covered under the proposal by the State Bar. If these laws are not enacted to protect the public, the program should not proceed. The program cannot be established first with the hopes that these laws will be enacted later. There must be absolute assurance that these measures will be enacted prior to the establishment of the program.

Another recommendation by the CPPWG, which was conveniently left of Table 6, but is included in the Final Report is that the State Bar be given more authority investigate and cite incidences of UPL. As set forth above, the OCBA would oppose this proposal in that the State Bar should not be turned into a quasi-criminal prosecution agency.

TABLE 14 – POTENTIAL LICENSEE NAMES

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The OCBA takes no position on the various proposed names for paraprofessionals other than all three will be equally confusing and misleading to the California consumer.

TABLE 15 – EVAULATION METRICS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

TABLE 16 – ADDITIONAL REQUIREMENTS

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

APPENDIX B: PROPOSED RULES OF PROFESSIONAL CONDUCT

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

The new Rules of Professional Conduct were just rolled out a couple of years ago. It took approximately 16 years of hard work and critical analysis before these rules were finalized and adopted. Now, in less than two years 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. Since the OCBA has an objection to the overall implementation of the CPPWG recommendations, we are not providing detailed comment to the Proposed Rules of Professional Conduct because to do so would lend itself to suggestion that the program has viability. However, the OCBA will comment on a few of the more concerning proposed changes.

Rules 1.4.2, 1.4.3, 1.5.2

These rules do not do enough to protect the public and will cause confusion to the average person. Further protections are necessary.

Rule 1.6 – Confidential Information of a Client

In the event that the paraprofessional program is indeed implemented, we agree that clients should be able to expect that their "communications" with a paraprofessional to be confidential, and not subject to access by anyone without the client's consent. 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 paraprofessionals 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 or other out of state jurisdictions – 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. Simple disclosures are not enough when this very fundamental tenet is at stake. Again, we believe the risks to public protection outweigh the benefits gained in attempting to achieve access to justice.

Rule 5.3.1 – Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyers or Licensed Paraprofessionals

A paraprofessional should not be permitted in any manner to employ a disbarred or ineligible to practice attorney in any manner. The dynamic between a formerly licensed an attorney and a paraprofessional will be tenuous, and the potential harm to the California consumers is certain.

Rule 5.4 – Non Lawyer Ownership of Law Firms

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.

Additionally, California courts have already seen a marked spike in filings as a result of third-party litigation financing. No studies have been conducted 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.

The recommendation by the CPWWG that paraprofessionals can own up to a 49% interest in a law firm is untenable. It potentially places the nonlawyer as having controlling interest of a law firm if the other 51% interest is divided between two or more attorneys. In addition, it sets up a mechanism whereby the nonlawyers will receive fees for legal services from areas of law for which they are unlicensed.

Apart from the impact these sweeping changes to the profession may have on such issues as lawyer independence (which will be threatened by ownership of law firms by nonlawyers), fiduciary duties to clients (which may be compromised by ownership by nonlawyers), and the attorney-client privilege (at least as to Federal and out of state jurisdictions which do not recognize paraprofessionals), there is simply not enough data 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 purported reason stated in the final report for allowing paraprofessional ownership of law firms is to encourage collaboration between attorneys and paraprofessionals. For this relatively small potential gain, the risk to the public is exceedingly high.

Without additional data or even reasoned analysis supporting the notion that non-lawyer ownership of law firms will reduce the access to justice gap, we cannot agree with this proposal.

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) "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).

(c) "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.

(d) 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.

APPENDIX C: PROPOSED STANDARDS FOR LICENSED PARAPROFESSIONAL SANCTIONS FOR PROFESSIONAL MISCONDUCT

Position: Overall Oppose

The content of the Overview: Context, Impact, and General Objectives and Concerns above is incorporated into this response to this Recommendation.

Since the OCBA has an objection to the overall implementation of the CPPWG recommendations, we are not providing detailed comment to the Proposed Standards for Licensed Paraprofessional Sanctions for Professional Misconduct because to do so would lend itself to suggestion that the program has viability.

Conclusion. 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 further encourage the State Bar to implement and investigate

the many alternatives that have been suggested in this recommendation and those set forth by others in public comment before adopting the CPPWG recommendations.

We thank you for your consideration of our comments.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Daniel S. Robinson
Robinson Calcagnie, Inc.
2022 OCBA President