CONSUMER ATTORNEYS OF CALIFORNIA

Seeking Justice for All

General Talking Points on State Bar's ATILS Task Force Proposals for Contingency Fee Practitioners

Ensuring access to justice and protecting the public are goals we work towards everyday as contingency fee attorneys. But the majority of the State Bar's ATILS Task Force proposals will simply allow large businesses, hedge funds, franchisors, and insurance companies to undermine small existing law firms and the historic structure of contingency fee practices. More importantly, the proposals will have serious and detrimental effects on Californians seeking access to justice. As a member of the plaintiff's bar, I write to urge opposition to these proposals.

The State Bar-commissioned "Legal Market Landscape Report" (also known as the Henderson report), which led to the 16 Proposals currently under consideration, reflects a number of unproven assumptions concerning the link between non-lawyer owned law firms (NLOs) and "alternative legal service providers (ALSPs) and access to justice. The argument is made that access to new sources of capital will allow lawyers to bring in technological innovations and adopt new business structures; firms using NLOs and ALSPs will have a competitive advantage and will thus be able to achieve economies of scale; with economies of scale firms can lower prices and improve access while "elevating the reputation of the legal profession."[1] This argument contains several premises that are not fully supported by the available data. The Henderson report claims that 'PeopleLaw' services (versus criminal legal services) severely dropped from 2007-2011. That period also coincides with the deep crisis of the Great Recession. During this same period, the Henderson report highlights how Alternative Legal Service Providers (ALSPs) and legal tech have burgeoned at a rapid pace and now offer a "bewildering array of offerings."[2] There is a huge lag, he argues, between the development of new innovations and the ability of laypeople (including lawyers) to accurately understand, contextualized and categorize how these innovations fit into our economy, society and system of government."[3]

The Henderson report also claims ethical constraints are hurting consumers. He argues that, "rather than amend an ethics framework built for a bygone era, the public interest is better served by a new regulatory structure."[4]

[1] Legal Market Landscape Report (July 2018). By Professor William D. Henderson.
[2] Henderson at 11.
[3] Henderson at 11.
[4] Henderson at 12.

This argument harkens to the same claims we heard from Wall Street pre-2007 calling for deregulation for the sake of innovation. We now know where that deregulation led us. That is definitely not where we want to see the legal landscape end up.

The Henderson report is based on flawed reasoning and should not be the basis for such drastic changes. By starting the conversation around this flawed reasoning, we are unable to consider alternatives to increasing access to justice that could be supported within our existing framework.

I. General Observations Regarding the ATILS Proposals and the Reasoning Offered for them by the Task Force

Allowing non-attorneys to hold equity positions (Proposals 3.1 and 3.2) in law firms could fundamentally affect how consumers are represented in the legal justice system. Although many larger law firms currently have non-attorney managers, those attorneys cannot ethically allow managers to direct what the lawyers do, and those managers also cannot have any ownership interest or fee split. If the proposed rules come into effect, we will see larger businesses and hedge funds buying law firms and making changes to the way those firms practice. This is in fact what happened in the United Kingdom and Australia when similar deregulation took place within their legal professions. Ethical obligations and appropriate attorney licensure are critical to ensure consumer protection.

We also know now that in the UK and Australia, deregulation and NLOs led to insurance companies buying and managing law firms. This created a huge potential systemic conflict of interest problem in this sector, given that insurance companies have now captured a large part of the personal injury sector in these countries. When corporate profit, shareholder interests and quarterly earnings reports dictate the practice of law and not the client's best interest, we all lose. Public trust in the justice system will be undermined, and transparency and quality are sacrificed in the name of quantity and efficiency.

There can be innovation in the law firm model, billing structures, or the delivery of legal services without completely replacing the existing rules on ownership and ethics. Innovation in legal services is a laudable goal, but deregulation or the introduction of NLOs and ALPSs is not a necessary precondition for such change and in fact is dangerous.

There are many examples of the evolution of legal services delivery in the *current* regulatory environment. In California, the legal profession has embraced innovations in technology under the current regulatory system while maintaining our ability to remain independent of corporate control. The paperless office, electronic communication with clients, websites with live chat features, free consultations, and pro bono services are just a few examples of the advantages to the public that have flourished under the present system. Also, contingency fee agreements are readily available to the average consumer, significantly increasing access to justice for personal injury, insurance, wrongful death, employment and elder law issues.

II. The 16 proposals raise a number of concerns for the bar that should be evaluated and studied before launching into a wide-scale overhaul of the legal profession.

We have yet to see data-driven justification for the sweeping deregulatory changes proposed by ATILS.

First and foremost, the State Bar should produce empirical evidence that ‘access to justice’ will be significantly improved by the introduction of these proposals. We have yet to see any evidence of meaningful benefits to consumers through similar deregulatory efforts in other countries. In fact, we have heard reports to the contrary.

There is not enough empirical evidence to show *any* increase in access to justice in the two jurisdictions (Australia and the UK), where NLOs and deregulation of legal services have taken place.

Has the State Bar commissioned any studies of Australia or the UK that demonstrate how non-lawyer ownership and majority corporate-owned law firms have increased access to justice in those countries? Have we seen a significant drop in self represented litigants in those jurisdictions? The Henderson report claims that such an examination is "beyond the scope of (his) report"[5] which demonstrates just how little data has been examined by the Task Force in respect to developing the 16 proposals at issue.

In those jurisdictions, the changes have primarily been used to expand non-lawyer ownership of *personal injury firms* and not into areas of practice where there is an 'access to justice' problem.

An empirical review and independent study conducted by Harvard University Professor Nick Robinson thoroughly examined non-lawyer ownership of law firms in Australia and the UK.[6] Professor Robinson concludes there is no evidence that the implementation of non-lawyer ownership structures leads to any increase in access to justice for the consumer. Robinson states in his report, "the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access [to justice] strategies, like legal aid." Furthermore, non-lawyer ownership of law firms can create unintended professionalism challenges.

Proponents of non-lawyer ownership structure or NLOs have often referred to benefits such as improved technology and increased economies of scale. They argue that without the ability for an ownership interest, corporations will simply not invest in a law firm's technology.

What we do know is that the NLO law firm Slater & Gordon, (the largest publicly traded law firm organized as a NLO which began with offices throughout Australia and the UK), consolidated a large number of small law firms in hopes of achieving economies of scale. Most of those consolidated firms were personal injury firms. In these same jurisdictions NLOs have achieved very little market share in the areas of family law, property, landlord tenant or criminal law. Further, their rates of self-represented litigants in family law remained high.[7]

Further, where income proves to be a very real barrier to access to justice, there is no evidence that app-based legal services charging a flat fee will be a lesser barrier to low-income people. In the areas of criminal law and family law, the two areas where we see the most persistent access to counsel issues, it is hard to see how a flat fee app-based service will help fill that gap. No matter how complete and user-friendly on-line resources are, they are not sufficient to replace needs for face-to-face orientation, education and other support. Perhaps the most pressing need of these individuals is greater access to pro bono attorneys, court interpreter services and clerks that can help them navigate the court system. These proposals do nothing to strengthen these areas of the justice system that are severely underfunded.

It is our position that we do not have enough evidence to know how NLOs will affect the public and the future practice of law. It would be unwise to implement the ATILS proposals at this time until further study can be made in jurisdictions where it exists already.

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[5] Henderson at 27.

[6] Nick Robinson; "*When Lawyers Don't Get All of the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism*" (August 27, 2014) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878

[7] Robinson at 25.

The proposals risk escalating conflicts of interest and divided loyalties in the interest of corporate profits.

We have a major concern that the introduction of the 'profit-driven' model that is characteristic of corporations could substantially impact our ability to act in the best interest of the client, particularly in high risk and low-value cases. We worry about resolving competing loyalties to corporate interests on the one hand, and our clients on the other. Lawyers should be working exclusively in the best interest of their clients rather than the profit-driven interests of a corporation.

III. Specific Comments on Individual Proposals:

(General Recommendations)

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

Support. CAOC agrees that the longstanding statutory and case law regarding the unauthorized practice of law should not be disturbed.

CA Rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See, *People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also, Opinion of the California Attorney General No. 93-303 (August 30, 1993).)

Rule 1-320 prohibits, with certain exceptions, a lawyer from directly or indirectly sharing fees for legal services with a nonlawyer.

Rule 1-600, in part, provides that a lawyer shall not participate in a nongovernmental organization furnishing legal services that allows any third person to interfere with the lawyer's independence of professional judgment.

Rule 1-300(A) includes a prohibition against aiding an *entity* in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code sections 6160 et seq. (re law corporations) and sections 6174 and 6174.5 (re limited liability partnerships).)

Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221].)

The ABA Model Rule counterpart is ABA Model Rule 5.4(b). Every other jurisdiction has adopted some version of Model Rule 5.4.

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

Oppose. This proposal would create a radical exception to the unauthorized practice of law and permit non-lawyer for-profit corporations to practice law.

CAOC is concerned that this proposal is premised on the idea that for-profit tech companies, tech venture capitalist and other non-lawyer investors are the answer to protecting the public access to justice, particularly with respect to underserved and vulnerable populations. But that has not been proven nor shown. Greater study is needed. In fact there has been no data from other jurisdictions that have opened equity to non-lawyers in the places that have allowed it (Great Britain, New Zealand and Australia) that access to justice has improved.

To date the most extensive empirical investigation on the effects of NLOs on access to justice was published by Nick Robinson, a research fellow at Harvard's Centre on the Legal Profession. [8] After an extensive review of the literature, field visits in the UK and Australia and interviews with lawyers and officials in both jurisdictions, Robinson concluded that NLOs in Australia made few inroads in anything but the personal injury, consumer, social welfare (disability) and mental health (malpractice) fields. [9]

In those countries NLOs like Slater & Gordon earned very little market share in family law, landlord tenant or criminal law work.[10] Based on the data, Robinson concluded that NLO investment in personal injury was largely driven by higher expected returns and not as much on access needs.[11]

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

Deserves further study.

CAOC supports the thoughtful use of technology in the delivery of legal services to the public and our members already strive to increase access to justice through the contingency fee system. However, striving for "modifications in relationships with non-lawyers is broad and ambiguous."

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

Support in part. We agree that this data should be collected to judge the impact of these proposals, but disagree that this should be done by the implementing body. Empirical data and evidence should be gathered *before* the adoption of any of these sweeping changes.

(Recommendations for specific exceptions to the current restrictions on the unauthorized practice of law)

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

Deserves further study. This proposal provides three different options of having non-lawyers provide legal services directly to the public, either through a regulated entity, a hybrid regulatory scheme where both the entity and non-attorneys are regulated, or by certification of non-attorney legal technicians. The idea is to increase the

[8] Robinson, supra
[9] Ibid. at 18.
[10] Ibid. at 24. In more than half of these cases at least one party is unrepresented.
[11] Ibid. at 40.

supply of those authorized to provide legal services with the aim of decreasing the cost to the consumer. The contemplated entity or limited license legal technician (LLT) regulation would be through the State Bar or another regulatory agency, such as the Department of Consumer Affairs (DCA).

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

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

Needs further clarification. This proposal contemplates a pilot project or "sandbox" approach to uncover what structures work to deliver legal services to underserved communities. One model is Washington's Limited License Legal Technician (LLLTs) program which is limited to providing limited family law services. However, it also would contemplate 100% non-lawyer corporations such as Walmart or Uber, could provide legal services under some sort of regulatory structure.

California should consider a pilot program for a limited time period, with appropriate government oversight (a sunset for example) for a specific practice area to see if the proposals, including entity regulation of non-profits, can help bridge the justice gap.

Before the wholesale authorization of for-profit corporations to practice law, a measured approach to first authorize non-profit entity regulation makes sense.

Regulating non-profits to provide low or no-cost legal services to underserved communities and the middle class on a sliding scale may be all that is needed to address the growing number of litigants who cannot find representation for their legal matters in areas of great need.

However, because LLLTs and the paralegal pool which they often come from are largely a female dominated industry, the State Bar should also consider supporting women lawyers and welcoming lawyers with diverse backgrounds as a means to filling the justice gap. Lawyers should be seen as an integral part of the solution.

(Technology Company Recommendations (2.2-2.6))

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

Oppose in its current form.

This proposal creates a carve out from the UPL statute for non-lawyer regulated entities to use technology to provide legal services. However, there is no limit as to practice area or type of legal services which could

potentially be provided by the entities who will be authorized to practice law through an online platform. This could be a technology company with no lawyer responsible to clients.

This proposal also does not limit ownership of the entities which provide the online legal services to lawyers, meaning an app's algorithm could dictate the legal advice given and the appropriate response.

This proposal may make sense where an attorney is ultimately responsible for the legal advice provided through the program, and the attorney and entity are required to maintain client confidentiality, minimum competence, loyalty and independent professional judgment. Without these safeguards, the proposal should be opposed.

App-based legal tech services may mistakenly assume injured people know their rights. Consumers do not know what liability arguments and damages they can and should claim. Just plugging in co-pays and out-of-pocket costs into an app also used by the insurance company and then resolving the case could lead the consumer to waive rights to compensation they are not even aware of. "Resolution" should not be reached by data entry, but must include full damages, including how the tortfeasor harmed the claimant.

The only weapon the injured person has is the right to a jury trial, so if a consumer uses this tech service or app before litigation to settle the case, the insurance company will know they are not intending to file the lawsuit and will undervalue of the claim. Using these services also directly impedes a hallmark of our civil justice system - the attorney-client relationship. Lastly, even if non-lawyer tech company apps have rules to follow as to confidentiality, how will this be regulated if the State Bar gives up that power to a newly formed entity?

If an attorney engaged in malpractice, their reputation, license and social esteem are directly compromised. An app-based company can simply reorganize, rebrand, file for bankruptcy or simply dissolve, leaving consumers without a remedy, which is an unacceptable result.

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.

Deserves further study. Definitions for AI may not be necessary. Just as UPL has become defined in case law, a definition for AI could also develop in the same way.

However, appropriate attorney oversight over the AI and technology driven service will be crucial. (see 2.2 discussion above). Technology is not foolproof. An AI product may not be ADA accessible, it may harvest data unknowingly, or its terms of service otherwise be unfair to consumers (contain forced arbitration and class action waivers). AI is also not immune to bias and discrimination. AI should explain its reasoning in order to detect this bias. Understanding AI outputs is crucial.

Attorney oversight and responsibility over any employed technology or AI algorithm is paramount to ensuring greater accountability and public trust in the adoption of this technology.

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

We agree that any entities that are authorized to provide legal services under these proposals should be required to comply with ethical standards developed to ensure public protection, which include the core values of the attorney-client relationship of confidentiality, loyalty and independence of professional judgment. Would the technology company be responsible for malpractice?

What concerns us is just how the public would ensure that a new regulator would be able to properly regulate the tech-driven systems. If the State Bar gives up this authority to an outside agency like the Department of Consumer Affairs, how would they ensure that tech firms are not surpassing their authority? Again, we stress that a limited pilot project exploring a select few areas that can be evaluated after a short period of time is the best approach.

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.

We agree, but are concerned with how this would be enforced. All persons and entities providing legal services should abide by the same professional and ethical requirements required of any lawyer.

Particularly, we are opposed to any change that would allow publicly-traded law firms in California. We believe attorneys should always maintain a controlling interest in law firms to ensure that core values concerning conflicts of interest, client confidentiality and independence of lawyers are maintained.

We also do not believe that these rules should be relaxed for tech-driven services to alleviate cost concerns. The stated purpose of the proposed change is to deliver *quality* legal services to bridge the justice gap, not to sanction technology companies to deliver substandard legal services. The attorney-client privilege and duty of confidentiality are crucial aspects of the delivery of legal services and should apply to any entity or person delivering these services.

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.

We agree in concept, but would need to see how this would work in practice.

Any pilot project should be limited and funded by those entering the project. There must also be stringent oversight by an appropriate government body.

At a minimum, these pilot projects should be transparent and forced arbitration and class action waivers should be expressly prohibited. Similarly waiver of rights should be prohibited in terms of services for consumers engaging in these NLOs or app-based technologies and caps on fees should be outlawed.

(Rules of Professional Conduct Recommendations)

3.0 - Adoption of a new Comment [1] to rule 1.1 "Competence" stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

Support in concept.

Case law already recognizes an attorney's obligation to remain up to date on best practices, including technological advances. Adding the suggested comment to Rule of Professional Conduct 1.1 may be appropriate.

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] "Financial and Similar Arrangements with Non-lawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a non-lawyer- Amendment 1 would: (1) expand the existing exception for fee sharing with a non-lawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may share legal fees with a non-lawyer and may be a part of a firm in which a non-lawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the non-lawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the non-lawyers have no power to direct or control the professional judgment of a lawyer.

The alternative proposals in 3.1 and 3.2 (discussed below) are the heart of the Task Force's recommendations.

Amendment 1, to authorize fee sharing with non-profits, including technology non-profits, deserves further study.

Currently, these non-profits can only share court awarded fees. It makes sense that as part of tackling the justice gap, we prioritize expanding the reach of Legal Aid and Neighborhood Legal Services, so that these non-profits and others like them can provide legal services to underserved communities.

As to the second part of this proposal, to allow fee-sharing with non-attorneys under specified conditions, this carve out to Rule 5.4 requires further study to determine its merit. It could incentivize non-attorneys to invest capital in law firms to increase the use of technology, while taking steps to ensure that the professional judgment of the attorney is not compromised, and the public is protected. Again, further research on this proposal is needed.

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

The impact of this change should also be evaluated closely by the CA Legislature and perhaps requires statutory authorization.

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

Oppose.

This proposal will wholly supplant the professional judgment of the attorney in providing legal services to the consumer so long as the client provides "written consent." The whole reason for prohibiting attorneys to share

fees with a non-attorney is to prevent motives other than providing the best legal services to the client from becoming the purpose of the representation.

There is no reason to believe allowing non-attorneys in general to share fees with attorneys will do anything to bridge the justice gap. What that proposal is certain to do is undermine the independent professional judgment of the attorney. An attorney's primary duty is to their client, with the understanding that they owe a duty to the system of justice as well. If permitting non-lawyer ownership impinges on client confidence, interferes with the lawyer's independent judgment or violates other ethics rules, the fact that it may benefit the client economically should be of no consequence. Substandard legal representation should never be the goal.

Allowing non-attorneys to share fees will result in other interests separate and apart from the clients' interests to shape the course of the clients' legal matters. This will not likely result in lower overall attorney fees, but it is sure to mean much lower quality legal services for consumers.

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

Oppose.

There is no reason to consider adopting a version of ABA Model Rule 5.7. California case law already provides the parameters of when an attorney providing non-legal services to a client may be subject to the Rules of Professional Conduct.

3.4 - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions. *(for discussion purposes only)*

Our association needs additional time to reflect on the concept of this proposed rule change. Since it is up for discussion purposes only, we reserve the right to evaluate this concept in the future.

Other solutions that should be explored by the State Bar with more urgency include:

- Increasing access to the courts through technology portals and services for the public: e-forms, e-filing, more clerks at windows to help answer questions, remote interpreter services;
- Increasing funding for pro bono services;
- Forgiving student loans to students who pursue public interest work;
- Securing funding for legal services more robustly;
- Funding education in technology in law schools for basic legal skills and concepts;
- Funding our courts and increasing judges from diverse backgrounds.