

Comments on: Report and Recommendation of the ATILS Task Force

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Responsive Law thanks the State Bar of California for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We advocate for policies that expand how and by whom legal services may be provided so that people of all income levels can get the legal help they need.

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We have provided our input on numerous occasions to the Task Force on Access Through Innovation of Legal Services (“ATILS”), as well as to the State Bar when it initially considered the ATILS proposals in March. While the Bar has continued to delay and dilute the ATILS proposals, **the original ATILS proposal remains the only acceptable way to move forward—albeit slowly—to help consumers get affordable legal help in the current crisis and beyond.**

The Option To “Explore the Development of a Regulatory Sandbox” Is a Small Step Forward

The ATILS Task Force spent 16 months studying ways to improve regulation of legal services to foster innovation. It held dozens of meetings with interested parties, including local bar associations and other stakeholders. It received presentations from experts in legal technology and access to justice. After issuing its initial recommendations on areas for reform, it held a public hearing and solicited public comment, receiving comments from over 1,300 individuals and organizations. It studied data from the 2019 California Justice Gap Study.

After its thorough study of the issues, the Task Force made a modest recommendation. It didn’t recommend complete repeal of the prohibition on non-lawyer ownership (although the Arizona

Supreme Court has made such a proposal). It didn't recommend establishing a regulatory sandbox (although the Utah Supreme Court has done so). Instead, it merely recommended that a working group be established to study the development of a regulatory sandbox.

This working group would not even start from the presumption that rules regarding fee sharing and outside investment be abolished. Its charter may include, according to the proposed resolution, "examination of amendments" to those rules. In contrast, the other two options before the Bar explicitly foreclose consideration of such amendments.

Option 2—exploration of a sandbox without considering a change to outside ownership rules—defeats the purpose of the proposed working group. The Task Force's explicit recommendation, after its thorough study, was that a working group consider allowing nonlawyer ownership. This option merely substitutes the judgment of the Bar for the more highly informed view of the Task Force and the future working group.

Option 3—forming a Working Group on Closing the Justice Gap—merely creates a new group to do the ATILS Task Force's work again, only with severe restrictions placed on the regulatory changes it may explore. The most plausible reason for this option to exist is to make Option 2 look like a compromise option.

The State Bar Is A Regulatory Agency, Not A Trade Association

In the two months since the Bar last considered the ATILS proposal, the coronavirus pandemic has had extreme impacts on every part of society, including legal services. As our national crisis continues, people's legal needs are becoming greater just as their ability to pay for legal help diminishes. People are far more likely to face legal issues in areas such as employment law, estate planning, landlord-tenant law, and family law. And of course, federal and state stimulus packages and other governmental responses to the pandemic raise a host of novel legal issues. At the same time, economic conditions make it harder than ever for people to afford traditional legal help.

As we have stated before, merely studying possible changes to the rules governing how legal services are provided is literally the least

that a regulator can do to address this crisis. Yet, the bar's proposed Options 2 and 3 foreclose further study of a wide range of possible solutions.

The Rules of Professional Conduct are not values of the profession; they are merely ways to promote and protect those values. If lawyer independence and loyalty are the core values we are trying to protect, then we should be open to exploring ways of protecting them other than prohibiting non-lawyer investment.

Unfortunately, much of the opposition to considering non-lawyer investment in law practices comes from lawyers who believe that continuing the regulatory status quo is to their benefit. The State Bar is a regulatory agency, not a trade association, and its decision should not be influenced by the perceived self-interest of California lawyers.

If the Bar decides to reject the recommendation of the ATILS Task Force, it would be the decision of a lawyer-controlled body to restrict competition by throwing away the work of a non-lawyer majority body. According to the Federal Trade Commission's Staff Guidance on Active Supervision of State Regulatory Board Controlled by Active Market Participants, unless this decision faces substantive review by the California Supreme Court, it would not be immunized from antitrust liability under the state action doctrine.

Of course, the Board of Trustees should not be motivated only by a desire to avoid antitrust liability. It should approve the ATILS recommendations because it is good public policy to put its faith in the well-researched recommendations of a group of experts rather than the knee-jerk reaction of influential lawyers.

The State Bar faces a critical decision at a critical time. Its actions could help lay the groundwork for greater access to legal help for Californians when they need it most, or it could brand the post-deunification Bar as a failed attempt at truly independent regulation. We know the right choice to make; we hope the Board of Trustees does as well.