



COMMENT REGARDING ATILS TENTATIVE RECOMMENDATIONS

We write on behalf of IAALS, the Institute for the Advancement of the American Legal System, in response to the California State Bar Task Force on Access Through Innovation of Legal Services (ATILS) request for public comment on its tentative regulatory recommendations for enhancing the delivery of, and access to, legal services.¹

The crisis in access to affordable legal help is well documented and is devastating to public trust and confidence in the civil justice system. Americans seek lawyers for help or consider doing so for only 16% of the civil justice situations they encounter, and 76% of cases in state courts involve at least one self-represented party.² The problem reaches far up the income scale. It is not only the poorest who lack access to legal services, it is also the middle class and small businesses. According to the ABA, in some jurisdictions over 80 percent of the civil legal needs of lower-to-middle income individuals are unmet.³

As astounding as these numbers are, they only partly tell the story. People without legal help often face problems that affect basic life needs, so the stakes can be life-changing. We know that those forced to deal with issues such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases without legal advice or representation face disproportionately adverse outcomes.⁴ Everyday people know this too. In 2016, IAALS conducted its Cases Without Counsel study, focused on the experience of self-representation in family court, where the majority of Americans will be involved with our courts over the course of their lives. More than 85% of the people we talked to in that study wanted legal advice or representation, but they could not get the help they needed because the cost was too high and they were unclear on where to find the right resources.⁵ It was demoralizing for them, and left them feeling that the legal system is unfair and out of touch.

¹ IAALS is a national, independent research center at the University of Denver dedicated to continuous improvement of the of the civil justice system. IAALS identifies and researches issues in the legal system; convenes experts, stakeholders, and users of the system to develop and propose concrete solutions; and then goes one step further to empower and facilitate the implementation of those solutions so as to achieve impact.

² See REBECCA L. SANDEFUR, AM. B. FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 14 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf, and CIVIL JUSTICE INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE, p. iv (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>, respectively.

³ Victor Li and James Podgers, *Can the access-to-justice gap be closed? These recommendations might make it possible*, ABA JOURNAL (Aug. 6, 2016), http://www.abajournal.com/news/article/aba_commission_future_legal_services_report_access_to_justice.

⁴ As just one example, renters in Colorado who lacked legal representation were evicted 68 percent of the time from private housing and 43 percent of the time from public housing, while those who were represented by counsel kept their private housing 94 percent of the time and public housing 80 percent of the time. AUBREY HASVOLD & JACK REGENBOGEN, FACING EVICTION ALONE: A STUDY OF EVICTIONS, DENVER, CO, 2014–2016, COLORADO COALITION FOR THE HOMELESS 2, 8 (September 11, 2017), http://cclponline.org/wp-content/uploads/2017/10/Facing-Eviction-Alone-9-11-17_revised.pdf.

⁵ NATALIE ANN KNOWLTON, LOGAN CORNETT, CORINA D. GERETY, AND JANET DROBINSKE, CASES WITHOUT COUNSEL, RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 12 (May 2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

We cannot continue to expect people to confront legal problems without help. That is why IAALS concentrates on user-centric problem solving, striving to answer the question of how to ensure that the delivery of legal services meets the needs of legal consumers.⁶ In all our work on these issues, we have learned the root of the accessibility problem lies with regulation. Regulations are supposed to be in place to protect people from harm, but they have become so onerous that they prevent people from getting help. The millions of Americans facing legal problems alone, without legal assistance, and the many more millions of Americans foregoing the legal system altogether, despite facing problems that are legal in nature, are certainly not being offered any protection by current regulations. In fact, we have “protected” people right out of access to the services they need.

Under today’s regulatory system, in most jurisdictions, anyone other than a lawyer providing legal services would be seen as engaging in the unauthorized practice of law and can be subject to sanction—even if those services were actually helping, not harming, consumers. To make matters worse, current rules prohibit lawyers from sharing fees with others, which prevents many with novel and potentially ground-breaking solutions from working directly with lawyers to facilitate development of new legal services. And although lawyers themselves are regulated, there is no structure in place in any state to authorize entities that would seek to provide legal services, barring entities and innovators that could meet consumer needs from entering the market. The rules that create these barriers to access needlessly burden the market for legal services and close it to the types of innovation occurring in almost every other market.

Eliminating these obstacles is necessary for change, but the strategy of revising rules written for a different era is not enough. We must re-envision how legal services are delivered. We live in a time of unprecedented technological disruption and we must fundamentally shift our thinking to catch up to the present. To better suit the needs of today’s society, we must meet people where they are and we must place legal services within their reach. Every incentive exists for the creation of new pathways to legal services—demand is enormous, creativity is abundant, and the tools are more sophisticated than ever before—but we must first unlock legal regulation and open new channels for the delivery of legal services. In order to do so, we must move past regulating narrow roles and focus instead on regulating a wide variety of legal services created and provided in different ways.

Our conclusion, driven by our close work with experts, our research, and our work with people who want and need legal help, is that a new regulatory structure must be formed to more broadly regulate entities that provide legal services, assures accountability and consumer protection, and is nimble enough to adapt to rapid changes in society and the market. The new regulatory structure should be implemented by creating a new regulator with the following attributes:

- Authority by the state supreme court to regulate non-traditional legal entities;
- Independence from management and control by those it regulates;

⁶ For instance, in our Court Compass project (<https://iaals.du.edu/projects/court-compass/Court%20Compass/Court%20Compass>), we mapped how courts can use emerging technology to make the legal process more navigable for people and created a maturity model for court to illustrate the evolution of court-offered solutions for self-represented litigants. We also worked directly with people who had to represent themselves in court to explore user-friendly, streamlined, and accessible solutions that could help them through the divorce and separation process.

- Clearly articulated policy objectives and regulatory principles that drive governance; and
- Appropriate and state-of-the-art regulatory tools implemented to forge evidence-based policy, guided by the assessment, analysis, and mitigation of consumer risk.

The Utah Supreme Court, recognizing the need for leadership and action, has taken the first step toward creating such a new regulatory body.⁷ IAALS is working closely with Utah on this reform. Our Unlocking Legal Regulation project is about taking a bold step towards laying the foundation for a consumer-centered regulatory system that will ensure access to a well-developed, high-quality, innovative, and competitive market for legal services. Our vision is a legal system that works for all people by being accessible, fair, reliable, efficient, and accountable: a system that earns trust, because a trusted and trustworthy legal system is essential to our democracy, our economy, and our freedom.

IAALS urges the ATILS Task Force to likewise adopt bold recommendations in accordance with what task forces in Arizona and Utah have done to eliminate rules that impede innovation, and to join Utah and IAALS in forging a new regulatory framework that exists to serve the consumer. Accordingly, we support the ideas embodied in the following ATILS recommendations as critical to laying a foundation for meeting the needs of legal consumers and opening up the market to entities that provide legal services in a way that is consistent with the efforts being made by Utah and IAALS:

- 1.1 – The models being proposed would include individuals and entities working for profit and would not be limited to not for profits;
- 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;
- 2.0 - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation;
- 2.1 - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity;
- 3.2 - Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which eliminates the general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.

⁷ NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION, REPORT AND RECOMMENDATIONS FROM THE UTAH WORK GROUP ON REGULATORY REFORM 15-22 (August 2019), <http://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.



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In this age of disruption, there is no time for half-measures or hesitation. No longer can we allow unproven assumptions to be the basis for regulating our legal services. The legal system belongs to the people and the ATILS Task Force has the opportunity now to place it back within their grasp.

Sincerely,

Scott Bales
Executive Director

Zachariah J. DeMeola
Manager