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PERSPECTIVE

Legal innovation report: part promising, part unexceptionable

By Don Willenburg

It is both unfortunate and telling that the State Bar of California rolled out proposals involving technology and access to justice within a week of three major technology-fail stories: the Facebook privacy slap on the wrist, the Capital One credit privacy breach, and the State Bar's own accidental emailing of bar exam topics ahead of the exam.

It is unfortunate, because these tech fail stories will cloud perceptions of the hard, detailed work that dedicated members of this task force have done towards an indisputably noble, and too-often ignored, goal: increasing legal services to underserved communities, to individuals without the sophistication or money to hire lawyers.

It is also telling, because these technology fail stories *should* color our perception of proposals that technology companies, technology venture capitalists, or other nonlawyer investors are the answer to protecting the public and access to justice, particularly with respect to underserved and by definition vulnerable individuals.

The State Bar is accepting comment on the proposals through Sept. 23. Everyone who reads this journal should pay attention.

There are parts that seem promising, such as allowing some trained nonlawyers to provide limited tasks. There are other parts that seem unexceptionable, like requiring attorneys to "keep abreast of the benefits and

risks of relevant technology."

There are other proposals, however, that are extremely problematic. Chief among these is the proposal to allow nonlawyer investors to own equity positions in law firms, on the rationale that the ability to own a portion might be an incentive necessary "to develop innovative low-cost solutions to legal problems." This proposal is based on the premise that nonlawyer equity investors will have more of an incentive to provide services

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to underserved populations than lawyers alone, and will do a better job. But even the proposal says only about this "could" or "might" happen. (And is therefore to be commended for not overpromising.) How much consumer protection should we be willing to throw out for such speculation? One inevitable result of nonlawyer investor equity ownership, even in a minority stake, will be increased focus on profit. Quality of service is simply a means to an end. Might happen, might not. (Who is happier when insurance companies instead of doctors and nurses determine what health care services are appropriate?) As David Sosin, president of the Illinois State Bar Association, pointed out at the Aug. 10 public comment meeting, there is apparently no data from other jurisdic-

tions that have opened equity to nonlawyers (Great Britain, New Zealand) that access to justice has improved.

Similarly, the State Bar proposes allowing fee-sharing between lawyers and nonlawyers. It is unclear why, perhaps even contra-factual to suppose that, this would be any more of an economic incentive to the nonlawyers than charging license fees for their products (plus service contracts, plus...) This is particularly problematic, given

the inability of many in the underserved to pay fees at all. And as the bar recognizes, fee-sharing "may jeopardize confidentiality and result in clients being offered services that they don't actually need."

These proposals are premised on the supposition that these incentives are necessary to the development of tech products that will deliver "efficient," "low-cost," and effective services. Thus, the proposals are premised on an unknowable risk/benefit value of product that does not even yet exist. A product that may or may not be ADA-accessible, harvest data, or otherwise be oppressive or unfair (see the California Supreme Court's recent *Wright v. Square, Inc.*, involving discriminatory terms of service). There is abundant evidence that attorneys are quite willing to use

technology to help render services, particularly where it will reduce costs, without fee-sharing or equity ownership. Microsoft did not have to partner with law firms to sell them software.

When similar proposals to "open up" ownership in law firms to nonlawyers were floated several years ago, the expressed reason was to facilitate multijurisdictional practice for sophisticated clients, and their mostly larger law firms. There is every reason to believe they, and other investors, would be the primary beneficiaries of these proposals. Likeliest to suffer, other than consumers and clients, are the many attorneys now representing low and moderate income people, many of whom already operate on razor-thin margins. Tech capital revels in disruption. If the legal market is disrupted by driving these attorneys out of business, that will be another example where disruption does not equal progress.

Here are some ways to harness technology to improve legal access that are safer, likelier to produce favorable results, and utilize existing systems rather than radically reshaping the protections current law allows.

1. Increase investment in court technology access and portals. California courts have made amazing strides in implementing technology to improve access. This includes e-filing (usually until midnight from anywhere, instead of standing in line and hoping to get to the clerk's window before closing); e-access to court dockets and filings; remote

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video appearances; remote interpreter services; and web access (including chatbots) to augment in-courthouse self-help centers. These efforts are particularly remarkable given the severe financial cuts imposed during the recession and never restored. Courts are never going to sell data to third parties, or market litigants for other services.

2. Increase funding to pro bono legal services organizations to ensure that they have up-to-date technology to service their client populations. These are people who are not driven by profit motive, who are already dedicated to serving the underserved and would help more if they only could, and many of whom are tech-savvy. One proponent at the August 10 meeting said using such organizations has been tried “for decades, but they haven’t worked.” First, the same could be said for democracy and capitalism, at least in terms of access to justice. (Even longer!) Second, many would disagree that this has been ade-

quately tried, given the chronic underfunding and overworking endemic to pro bono legal services providers.

3. Tax the tech behemoths and use the money to reduce or eliminate tuition at state law schools. (And maybe address the other items on this list.) That would enable many law students to work for those with less, without having crushing debt driving them into other areas of practice. If this seems like too big an idea, it’s less extreme than letting technology venture capital determine the legal services that poor people are offered.

4. Invest in technology in schools to help teach students about basic legal rights and concepts, including what situations call for asking for legal help.

I’d rather the State Bar and lawyers leverage technology by lobbying the legislature for funding, at least the first two above, than pursue the current proposals. Lawyers’ exclusive right to practice law is certainly as valuable a protection to

the community as allowing only doctors to perform surgery, licensed contractors to build or repair your home, licensed dentists to drill your teeth, licensed cosmetologists to cut your hair, licensed plumbers to fix your pipes. In none of those other situations is requiring that specialized services be performed only by qualified licentiates regarded as a factor unfairly reducing access to those services. In none of those other fields are people suggesting AI, chatbots or robots as replacements for humans. (OK, these proposals aren’t there yet either, just closer.)

The proposals and report reflect much considered thought by many good people trying to achieve a worthy end, and address some of the concerns mentioned here. Everyone should read them. There may be angels in the details. The public comment process may well winnow away some (proposals, not angels) and improve others. There are, however, better ways to harness technology to improve

access to justice than the current State Bar proposals. As a recent *New Yorker* article on self-driving vehicles said: “A smarter futurism would focus less on pushing through advances and more on being sure we will use them wisely when they come.”

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