

June 17, 2021

Dear Members of the Closing the Justice Gap Working Group:

I write to encourage the working group not to limit the scope of the sandbox to applicants that serve “underserved” parts of the market. I will discuss both the benefits of doing so and why the “risk” side of the equation weighs strongly in favor of a broader scope.

Background and Context. The Stanford Center on the Legal Profession (CLP) studies a range of issues, with one of its top priorities being the intersection between lawyer regulation and access to justice. CLP has no financial interest in legal services innovation. In fact, most of our funding comes from law firms.

The State Bar Board of Trustees directed this working group to address these recommendations with a primary focus on exploring the development of a regulatory sandbox in order to:

- “Foster experimentation with innovative legal services delivery systems in a manner that both protects the public and yields data to assess the impact on access to legal services of possible changes in the laws and rules regulating the practice of law in California”;
- “Evaluate possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems, such as consumer-facing technology that provides legal advice and services directly to clients at all income levels”; and
- “Evaluate changes to laws and rules that inhibit the formation and continuation of delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others.” (Closing the Justice Gap Working Group Fact Sheet)

This language is broad, with a focus on promoting and experimenting with “innovative legal service delivery systems” generally, and that provide service to clients “at all income levels.” On its face, the charter from the State Bar weighs in favor of keeping the scope broad.

It is worth stepping back to consider the purpose of a regulatory “sandbox” like this one. The idea is to experiment with relaxing existing regulations to see if the resulting risks and benefits are worth continuing on an ongoing basis. In the legal services context, the main regulations implicated are (1) Rule 5.4’s ban on lawyers sharing fees, ownership or investment with people or entities who are not lawyers; and (2) the ban on the provision of legal advice by anyone other than lawyers, also known as unauthorized practice of law (UPL).

Most, if not all, of the entrants to Utah’s sandbox, for example, are providers whose model would violate one or both of these regulations, absent the sandbox. Because most of the discussion within

and outside the working group around scope has focused on the effect of suspending Rule 5.4, I will focus on that issue.

Rule 5.4 Justification

The justification for Rule 5.4's ban is that it serves to protect lawyers' "independent professional judgment" from being affected by the profit motive. But as scholars and professional responsibility lawyers have pointed out, this interest is adequately covered by other ethical rules, such as conflict-of-interest and the lawyer's fiduciary duty to clients. And it seems unlikely that lawyers would be more willing to cut corners and violate ethics rules to make money for others than to make money for themselves.

For these reasons, Rule 5.4 has been criticized for years by scholars and policymakers as purely protectionist and without sufficient policy justification, which is why California's leading legal ethics scholars wrote the State Bar last year urging them to move forward with the sandbox. In doing so, they argued that "there is no evidence to support the claims of ethical problems that opponents of reform often invoke."¹ This is also why the Arizona Supreme Court – supported by their State Bar -- has taken a less incremental approach than Utah and simply repealed Rule 5.4 altogether without "testing" its suspension in a sandbox.

Perhaps the strongest argument for suspending the operation of Rule 5.4 is that it simply unnecessary to protect consumers from the risk of harm. The best evidence for this comes from England and Wales, where alternative business structures have thus far dealt better with complaints and had no more disciplinary sanctions than traditional lawyer-owned practices.² Even the strongest proponents of repealing 5.4 do not believe that this change is some kind of panacea for access to justice, however defined. But we only regulate – whether in legal services or any other market – when such a regulation is necessary to achieve some end that is not met by the market and other regulations. Rule 5.4 is simply not necessary to protect consumers.

All of this is background to the critical question before the working group: is there reason to believe that even if it is worth suspending Rule 5.4 for "underserved" parts of the market, it is still too risky to allow nontraditional legal service providers to serve the wealthy and big businesses?

Benefits of Broader Scope

To be sure, one can argue in favor of a limited scope by saying that the benefits to the "underserved" will be greater than those who already have considerable choice of providers and services at a price they can afford. I will explain briefly why there may still be considerable benefits.

Allowing entities to enter the sandbox with "innovative legal service delivery systems" that target relatively wealthy consumers and large businesses may still have benefits and help close the justice gap. First, it allows the collection of data on how such innovative systems work, including possible harms to consumers, with relatively low severity of harm if it occurs. If a relatively wealthy person or large business pays for unnecessary services, that is less troubling than if it happens to a person of modest means. Moreover, products and services developed for one segment of the market can then be adapted and sold to a different part of the market. The iPhone and automobile are two well-

¹ Letter from California Legal Ethics Scholars to State Bar Board of Trustees, May 12, 2020.

² See Jason Solomon, Deborah L. Rhode, & Annie Wanless, How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice, April 2020.

known products that initially served only wealthy consumers, but developments in technology and production brought the cost down over time to serve a mass market. It may be that investors are willing to commit capital to a business targeting the wealthy and large businesses to start, but not a business that targets another market that is relatively undeveloped.

Consider a specific example from Utah's sandbox, LawGeex, a company that is using artificial intelligence to help companies review contracts. LawGeex has traditionally sold into larger businesses through their corporate law departments. They applied to the sandbox so that they could also provide legal advice on contracts, which would otherwise violate Rule 5.4 because the company has more than 50% nonlawyer ownership and might also violate UPL because of the software's involvement in the provision of legal advice. Now they can expand their services to smaller businesses without in-house counsel that currently get no legal help at all in reviewing contracts.

One could imagine such technology eventually being adapted further to help *individuals* asked to sign employment contracts, for example. For example, one out of every five Californians are asked to sign a noncompete even though they are unenforceable in the state.³ But if California's sandbox is limited in scope, such technology and business model may not get developed at all.

The question remains, though: even if there is only *some* benefit to allowing nontraditional providers to serve the wealthy and big business, are there real risks? Are Rule 5.4 and UPL *necessary* to protect wealthy and big-business consumers of legal services from the risk of harm?

Risks of Broader Scope

In the legal services market, the risks to consumers are: (1) paying for an unnecessary service or paying too much for a service; (2) failing to exercise a legal right; and (3) getting a worse legal outcome as a result of service or the lack thereof. And the risks must be considered on a relative basis – does a particular service increase risk relative to the most likely alternative for a consumer, which in many cases is no legal help at all.

The relevant risks to the consumer in the sandbox would be of paying more than necessary (or for unneeded services), and getting a bad legal outcome. And the relevant inquiry for the scope issue is: are these risks as bad or worse for wealthy and big businesses than they are for middle and low-income individuals and small businesses, such that we should preclude participation from entities that seem to focus on relatively well-served consumers?

Risk to Wealthy/Big Business vs. Underserved

Consider the Big Four accounting companies, who have been invoked by critics of the sandbox as a reason to oppose it. Under the proposed limitation on scope, such companies could offer integrated tax, accounting and legal services to small businesses like restaurant or nail salon owners, who often get no legal help at all. But they could not offer such services to big businesses like Genentech or Netflix. Are members of the working group worried that Genentech or Netflix will be overcharged or pay for unnecessary services? One would think that such sophisticated consumers of professional services would be *least* in need of protection from a regulation like Rule 5.4, but limiting the scope of

³ J.J. Prescott, Norman D. Bishara & Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project, 2016 Mich. St. L. Rev. 369, 461.

the sandbox to the “underserved” would mean that the working group thinks that big businesses are *more* in need of protection than restaurant and nail salon owners.

This would make little sense. Opponents of the broad scope envisioned under the State Bar’s charter for this group must be precise about the risks to wealthy and big business consumers that they fear and that ought to preclude “innovative legal service delivery systems” that serve such consumers.

To be sure, one can imagine ways to prioritize those entities that are working to more directly close the justice gap for small businesses and people of modest means. Perhaps other than the “first-come, first-serve” model used by the Utah Office of Legal Services Innovation, such applications could automatically go to the front of the line for consideration. But that does not mean that other applications should not be considered at all.

Conclusion

If nothing else, until relatively recently, Rule 5.4 did a job of protecting lawyers from competition. No longer. Companies like Rocket Lawyer and LegalZoom serve millions of Americans by offering form completion tools and general information to individual consumers and businesses in areas like end of life planning, family law needs, incorporation, and contracts.

At the end of April, Rocket Lawyer announced that it raised \$223 million in its Series E round of financing. In its last funding round in 2018, LegalZoom was valued at \$2 billion. But practicing lawyers own no piece of these leading legal businesses serving everyday Americans because we lawyers have barricaded ourselves out of these opportunities. Nor are these companies’ products and services subject to regulation because they manage to stay just on the right side of the legal advice/legal information line.

Now is the time for the regulator of the legal services market in California to open the door wide to innovation that will benefit consumers and create opportunities for lawyers. The way to do that is without an upfront limitation on the scope of the sandbox.

Sincerely,



Jason Solomon