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I.B. Public Comment
10-08021 Scope Meeting
Open Session

October 6, 2021

VIA EMAIL CTJG@calbar.ca.gov

Closing the Justice Gap Working Group

STATE BAR OF CALIFORNIA

180 Howard Street

San Francisco, CA

94105

Dear Closing the Justice Gap Committee Members:

On behalf of Consumer Attorneys of California (CAOC), we write to submit our formal written comments in anticipation of the upcoming CTJG meeting on Friday October 8th, 2021 on the proposed scope of a regulatory sandbox.

i. **AREAS OF CONTINGENCY FEE LAW SHOULD BE EXCLUDED FROM THE SCOPE OF A REGULATORY SANDBOX**

CAOC urges the committee to exclude areas where lawyers are already providing free and low-cost legal services, such as with contingency fee areas of practice.

The market for contingency fee legal services is fundamentally different than other legal services markets and should be treated as such. Providing access to justice to those without resources is at the core of the contingency fee lawyers mission, and yet the committee has completely ignored the role that contingency fee lawyers play in providing access to justice to individuals in need of their services. So, any area routinely handled on a contingency fee basis- like personal injury, wrongful death, employment law, consumer law, etc.- should be excluded from the Sandbox.

CAOC believes that any potential changes to traditional fee sharing rules should exclude for-profit platform lawyer referral services from the sandbox.

LEGISLATIVE DEPARTMENT

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For-profit platform lawyer referral services or “matching services,” are usually offered in exchange for a portion of the legal fee recovered. This change is often promoted as increasing “access to justice,” but its effect would be the complete opposite. In fact, this change would be devastating to consumers seeking competent representation on a personal injury, wrongful death, employment, or other claim routinely handled on a contingency fee basis.

For-profit platform lawyer referral services will target clients seeking attorneys who work on a contingency fee, exclusively.

Platforms work best when the product is “free” to the consumer. Facebook, Amazon, Uber, and many other platforms structure their sales process to collect their fee from the seller side of the equation. The contingency fee arrangement—offered on a “no win-no fee” basis—will allow a platform lawyer referral service to offer a “free” match to consumers. Any other legal service arrangement—contract, family law, criminal defense—requires collecting a substantial amount of money, up front, from the consumer. The contingency fee market is simply a much easier market to engage in.

Further, the contingency fee market may be the only market where the platform lawyer referral service could generate a profit because investment scales in a way that the market for other legal services does not.

For-profit platform lawyer referral services will be a surveillance nightmare, unlocking a data stream that has previously been protected by the attorney-client privilege.

Unless appropriate protections are put in place, the platform lawyer referral service would not be bound by attorney client privilege or other ethical obligations that prevent them from using data about the client to the disadvantage of the client.

A platform lawyer referral service could monetize the data about a client—their claim information, their health information (which was potentially exchanged through the website), their eventual settlement/judgment, and any other information about the individual—by selling such information to advertisers.

For-profit platform lawyer referral service may find that it is more lucrative to accept payments from potential defendants to offer a “dispute resolution” portal and bypass the attorney altogether.

Rather than matching a client with a potential claim with an attorney who could adequately represent their interests, a for-profit platform lawyer referral service may find that it is more lucrative to “settle” disputes through an

arbitration process where the platform collected a fee for every “resolution” that was achieved below a certain monetary threshold. Essentially, the platform could receive a kickback from potential defendants to cheaply settle cases on behalf of the defendant—imposing great harm to the client.

Much like the threat Facebook poses not just to the news industry but to the very idea of disseminating truthful information, a platform lawyer referral service allowed to operate unincumbered could wreck serious harms that could not be undone.

To avoid such a calamitous outcome, the following minimum protections must be put in place at the outset:

- 1) Registration and oversight by the bar and court.
- 2) Extension of legal duties of care and loyalty and other lawyer duties to the platform itself.
- 3) An absolute prohibition on forced arbitration.
- 4) Price regulation to prohibit monopsony price rigging.
- 5) Referral regulation to prohibit discrimination of referrals to “most favored” law firms.
- 6) Algorithm regulation to provide transparency into the way referrals are made.
- 7) Court approval of contracts with both clients and attorneys on the platform to ensure any agreement is fair and impartial.

ii. RECOMMENDATIONS FOR ASSESSING MORAL CHARACTER AND FITNESS FOR AUTHORIZED SANDBOX PARTICIPANTS

Applicants should have to show that they will provide a resource to “the unserved and underserved.”

A threshold question for assessing an applicant’s background should be a thorough explanation of how they are purporting to help reach consumers in areas of unmet legal needs.

Sandbox applicants must be willing to meet the same legal duties of care and loyalty as attorneys.

Applicants Shall Demonstrate a Commitment to Protecting Consumers. Applicants must ensure consumers have the same type of safeguards available to clients of attorneys: competent and ethical services, recourse when required,

and the provision of relevant details enabling informed choices to be made about the non-lawyer providers of the service.

In order to be accepted into the sandbox program, the governing body should properly investigate the applicant's financials, business interests, potential conflicts of interest and other pertinent background information. They should also explore proper insurance or bond requirements.

Finally, any sandbox applicant must agree to allow consumers to bring grievances in open court, and forced arbitration waivers must be expressly prohibited.

Applicants' Moral Character Must be Thoroughly Evaluated Prior to Acceptance to the Sandbox.

Applicants should be required to meet the same general requirements as attorneys. This should at a minimum include a completed application, any applicable fees, a fingerprint requirement, and satisfaction of the same moral character test that attorneys are required to meet. When considering whether an applicant has the good moral character required for admission to the sandbox, the governing body shall evaluate whether the applicant possesses the qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and for the judicial process by reviewing past conduct, if any.

If an applicant has received complaints of committing unauthorized practice of law in the past, in CA or any other jurisdiction, they should be excluded from the sandbox.

Further, applicants should be screened for the following factors:

- Abuse of the Legal Process
- Academic Honor Code/Student Conduct Violations
- Community Supervision
- Criminal History
- Drug/Alcohol Abuse
- Fraudulent Activity
- Lack of Respect for the Rights of Others
- Past Due Debt/Financial Responsibility/Bankruptcy
- Prior Attorney License Denial
- Professional Obligations/Discipline
- Prior Unauthorized Practice of Law
- Violation of Court Orders/Respect for the Law

iii. PREVENTING HARM TO CONSUMERS AND ENSURING ACCOUNTABILITY

California prides itself on being a leader in consumer protection, and this proposal must not lower the bar on that protection.

The most recent Closing the Justice Gap report says we should focus on bringing more lawyers and nonprofit organizations into legal aid, which begs the question: why is the State Bar even considering an entirely new proposal that would create a very costly social experiment that could severely harm consumers? Ultimately real consumers will be using the services of those selected for this experimental sandbox. The State Bar must ultimately be responsible should those consumers be harmed in any way by the sandbox.

Additional funding for the courts should be prioritized before the Sandbox is established.

One issue that does not get the same attention as Paraprofessionals or setting up Sandboxes that should get more focus is adequate funding for the courts to perform their core job: access to justice. Adequate funding of the courts would accomplish the goals of many of these proposals—physical and virtual access expansion, online dispute resolution, optional streamlined litigation process, and other innovations all relying on adequate funding to work.

However, not a single state bar proposal has emphasized this point as an access to justice issue. Instead, discussions have focused on how to leverage user fees to pay for a “sandbox” or “alternative business structures” approval process without addressing the more basic questions about court functionality.

Especially in the wake of the Covid-19 caused shutdowns, the State Bar should be focused on how to prevent future disruptions to existing court functionality and expanding opportunities under the existing framework.

Online hearings and other cost saving, such as easier to use and understand processes, should be expanded and promoted. This is something that cannot be addressed by a “sandbox” or allowing nonlawyer ownership of law firms—it is a preliminary step in infrastructure building that will be necessary for progress to be made on lowering the cost and increasing access to the courts.

iv. Conclusion

In conclusion, as consumer lawyers, we support innovation and expanding ways to access justice. However, we do and will have issues with handing over civil legal services to nonlawyers that do not have the clients’ best interests at heart. This is why the implications of any proposed rule changes within the Sandbox

must be studiously examined to ensure that they are not detrimental to our client's interest.

We thank the CTJG for its consideration of these issues.

Sincerely,

Consumer Attorneys of California (CAOC)

cc: Assembly member Mark Stone, Chair, Assembly Judiciary Committee
Senator Tom Umberg, Chair, Senate Judiciary Committee
Members, CTJG