

## **Memo**

**To: All working group members**

**From: Crispin Passmore**

**Re: Working Group Charter**

At recent meetings there has been frequent and prolonged debate about the scope of our work and the impact on access to justice. This is of course an issue at least in part for the sub-committee looking at the scope of the sandbox proposal and some have argued passionately for limiting entry to those that are focused only on the poorest individuals in California. But this is about more than the sandbox and its scope – it applies equally to the other issues under consideration such as amending 5.4 and advertising rules.

I want to draw the Working Group back to our charter which is attached for ease. There is no mention of access to justice. There is no limit on the beneficiaries from reform. The Charter we have been given is explicit in its exhortation to be broad and deep in considering reform:

*“The Working Group on Closing the Justice Gap is charged with exploring the development of a regulatory sandbox to 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 other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others.”*

Of import is the clear direction to the working group to consider clients **‘of all income levels.’** We are not tasked with only improving access for the poorest. This is no surprise because to do otherwise would not be wholly rational.

If we think that economic restrictions on how lawyers practice or how legal services are delivered can be safely removed or relaxed for the most vulnerable and least experienced or even capable clients what possible regulatory or public interest justification can there be for having those restrictions on services for sophisticated or experienced consumers?

It is sometimes argued that corporate and small business clients already have adequate choice and can afford traditional attorney services. That is flawed logic but also wrong in fact. UK research consistently shows that small businesses think legal services are essential for running their business but only 13% think that solicitors are a good value way of handling those legal issues. And corporate clients have increasingly, over more than twenty years, shifted work away from law firms and attorneys to alternative providers. They are not doing that because they are satisfied with what is on offer – they are doing that because they are dissatisfied with the use of technology, pricing models and creation of value.

It would make no sense to allow innovation for the most vulnerable and least sophisticated but retain protectionist rules elsewhere. There can be no justification for that other than putting the interests of law firm owners ahead of the public interest and I know that no lawyer would think that ethical.

Furthermore the emerging evidence from Arizona and Utah, the 100 plus years of experience and research from England & Wales and the insight from other jurisdictions is that innovation, technology and new services delivered across the legal market to all sorts of consumers, at all income levels, are popular. As an aside they also create new opportunities for attorneys to practice ethically – hence the remarkable increase in solicitor numbers in England & Wales as reform has unfolded.

I encourage all working group colleagues to re-read the Charter and recommit to innovation for all.

***Crispin Passmore***  
***October 8<sup>th</sup>, 2021***

## **Charter of the Working Group on Closing the Justice Gap**

### **Purpose**

The State Bar formed a Task Force on Access Through Innovation of Legal Services (ATILS) in 2018 to study online legal service delivery models and to determine if regulatory changes are needed to increase access to legal services through the use of technology. The Task Force submitted its final recommendations to the Board of Trustees in March of 2020. The recommendations included exploration of the development of a regulatory sandbox. This sandbox would be a temporary regulatory structure established to allow participants to test innovative business models, products, and services, in a supervised environment that ensures collection of data on benefits and/or risks of harm to consumers. In response, the State Bar's Board of Trustees directed the formation of a Working Group on Closing the Justice Gap.

### **Working Group Charter**

The Working Group on Closing the Justice Gap is charged with exploring the development of a regulatory sandbox to 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 other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others. The working group may consider relaxation of rules and laws regarding the unauthorized practice of law, fee sharing, and nonlawyer ownership. In addition, the working group is charged with assessing concepts for amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation and fee sharing with nonlawyers, and to the statutes and Rules of the State Bar governing Certified Lawyer Referral Services. The working group is also charged with evaluating the draft of a proposed new rule 5.7 of the California Rules of Professional Conduct that was included in the ATILS final report. As a guiding principle in carrying out all of these assignments, the working group must balance the dual goals of ensuring public protection and increasing access to legal services for all Californians.

The working group will develop specific recommendations regarding the following:

1. A regulatory sandbox. Related recommendations will include an assessment of the pros and cons of a sandbox as a way to foster experimentation with innovative legal services delivery systems in a manner that protects the public and allows for the collection of 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. Sandbox recommendations should specifically address:
  - a. Scope and regulatory structure of a sandbox, including funding, staffing, and governance, and conflicts of interest issues for members of any governing body;

- b. Required changes to laws and rules, including practice of law statutes and attorney conduct rules;
  - c. Methods to apply to enter and processes governing entry into the sandbox, including eligibility criteria, approval processes, appeals processes for denied applicants, and possible reciprocity with sandbox participants in other jurisdictions;
  - d. Technology delivery system issues, including testing, accessibility, bias, confidentiality, privacy, dark patterns, and intellectual property rights of applicants;
  - e. Recordkeeping, reporting, data collection, and sandbox evaluation metrics;
  - f. Program oversight for persons and entities accepted for participation in the sandbox including standards of conduct, processing of client complaints, and enforcement through suspension or removal from the sandbox or other remedies; and
  - g. Termination of the sandbox, including participant exit/extensions and post-termination assessment of any permanent changes to laws and rules that might be considered as a result of the sandbox.
2. California's lawyer advertising and solicitation rules. In developing recommendations on this subject, the working group will evaluate California's and the American Bar Association's lawyer advertising and solicitation rules to determine whether and to what extent these rules inhibit or advance innovation and access to legal services;
  3. Lawyer Referral Service statutes and rules. In developing recommendations the working group will determine whether and to what extent the existing statutes and rules inhibit innovation and access to legal services;
  4. Amendments to rule 5.4 of the California Rules of Professional Conduct regarding attorney fee sharing with nonlawyers. The working group will specifically address the question of whether amendments to this rule are warranted independent of any temporary changes that might be evaluated in a sandbox; and
  5. Amendments to the California Rules of Professional Conduct regarding the delivery of nonlegal services by lawyers and businesses owned or affiliated with lawyers, including proposed rule 5.7 developed by the Task Force on Access Through Innovation of Legal Services.

The working group shall submit its recommendations to the Board of Trustees no later than September 2022.