

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 8th, 2021



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October 15, 2021

VIA EMAIL CTJG@calbar.ca.gov
Closing the Justice Gap Working Group

I am writing regarding certain comments and concerns that I have related to the materials for the October 15, 2021 Closing the Justice Gap Working Group (CTJG). I am the designee for the State Assembly Judiciary Committee to the CTJG and am a SAGE Subcommittee member. I request that these matters be considered by the CTJG.

Many of the concerns I have that were expressed in my September 15, 2021 memo remain the same.

1. Separation of Powers

I continue to have concerns regarding the role of the legislature and the Court. It's true that the Supreme Court has sole authority over regulating *admission* to the practice of law and *discipline* of attorneys, but the line where the practice of law begins is not always clear. For example, the Legislature has created a 20 year-old regulatory scheme for persons who work as document assistants (which more recently was expanded to include unlawful detainer assistants). This is within the Legislature's power and purview because these individuals, assuming they abide by the statutory limits of their authority, do not engage in the practice of law. Here's an excerpt the Judiciary Committee's analysis of AB 1213 (Chen, 2019):

The Legislature has maintained consistent oversight of legal document assistants. This bill is the latest in a series of legislation seeking to change the legal framework and statutory authority for legal document assistants. As noted above, the original authorization for legal document assistants was conducted on a trial basis. In 2002, the Legislature agreed to extend the program and remove the initial sunset. (AB 1698 (Committee on Judiciary) Chap. 1018, Stats 2002.) In 2015, seeking reforms to the legal document assistant program, AB 285 (Gallagher), Chap. 295, Stats. 2015, was enacted subject to a six-year sunset. Given that regulation of legal document assistants is conducted by both state and local authorities, with no one body serving to oversee legal document assistants, moving forward it may be prudent for the Legislature to reexamine the entire statutory framework regulating legal document assistants to determine if a singular oversight body is necessary for the industry. Similar inquiries may be necessary for other providers of self-help services for indigent litigants. Notably, however, the creation of a broader regulatory apparatus would generate significant cost pressures to the state, and no evidence has been provided to this Committee to suggest systematic issues within the legal document assistant profession, or the current regulatory structure.

Nonetheless, in the absence of a full-time regulatory body for legal document assistants, the Legislature must remain vigilant. In order to maintain the Legislature's continued oversight of legal document assistants, in lieu of repealing the sunset date, the author proposes extending the sunset date to January 1, 2024.

So while the Court has sole authority over the qualification of attorneys to practice law and the Legislature has authority over persons whose actions do not constitute the practice of law, the area where those issues abut or intersect is clearly of shared interest and authority of the two branches of government. The Legislature's continued exercise of its authority does not "defeat or materially impair" the court's authority over the practice of law by attorneys and the discipline of attorneys. The Court cannot unilaterally move the line of what constitutes the practice of law to encompass areas that are regulated by the Legislature without running afoul of legislative authority.

Presumably, the purpose of the Sandbox is to create a new category of persons who are *not attorneys* and who are *not independently engaged in the practice of law* but who work in the legal field with attorneys in some capacity. This seems to be a classic case of shared legislative and judicial authority and oversight.

I previously proposed the following language to address these issues, but it was rejected and I was the sole no vote for the accepted proposal.

"The Sandbox Regulator is subject to active supervision by the Supreme Court and must act pursuant to clearly articulated state policy. The Sandbox Regulator should make recommendations to the Supreme Court and the Legislature concerning the licensing and discipline of sandbox participants. However, as with attorneys, the Court should reserve to itself the primary authority over licensure of sandbox participants who are engaged in the practice of law, while recognizing the Legislature's regulatory authority over nonattorneys engaging in conduct that does not constitute the practice of law, and the shared responsibility of the two branches for approval of any governing principles the Sandbox Regulator employs. The Supreme Court shall exercise ~~that~~ its authority over licensed attorneys and others engaging in the practice of law as it deems most efficient and appropriate. None of the foregoing is meant to alter the existing role of the Supreme Court and Legislature in regards to the regulation of the practice of law in California or the existing role of the Legislature in regards to the regulation of conduct that does not constitute the practice of law."

This is an ongoing issue that I request the CJTG reconsider.

2. Mission Creep:

I remain concerned that the mission of the CTJG should remain on low income and historically underserved communities. It appears that "moderate income" individuals were included, with no definition. Also, small businesses, corporations and tech companies also appear to be in the expected ambit of the Sandbox. This was not the intended mission.

3. Funding:

I continue to have concerns about funding. We have not identified how these efforts will be paid for, or where in the budget it would come from. I also am concerned of duplication of administrative positions between the State Bar and the Sandbox Regulator, resulting in a waste of limited public funds.

4. Standard of Care

Globally, I also have concerns related to the standard of care for sandbox participants being at the level of care as if the consumer had no legal representation. This is not a recognized legal standard and appears to be no standard at all. It would be more appropriate to use the legal standard for malpractice that is already enshrined in law.

Judicial Council of California Civil Jury Instructions (2020 Edition), No. 600, sets forth the Standard of Care as follows:

[A/An] [insert type of professional] is negligent if [he/she/nonbinary pronoun] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

[You must determine the level of skill and care that a reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses[, including [name of defendant],] who have testified in this case.]

CACI, No. 600. *See also Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 (“In addressing breach of duty, “the crucial inquiry is whether [the attorney’s] advice was so legally deficient when it was given that he [or she] may be found to have failed to use ‘such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.’”).

Creating a standard of care that is as if the consumer had no legal assistance at all is in essence, no legal standard of any kind. It is also against the interests of consumers.

5. Ad Hoc Rule Making

Similarly, allowing an ad hoc after the fact determination of which rules apply to sandbox participants after the application of the participant to be determined in the subjective determination of the regulator at the time is not consistent with consumer protection. I am unaware of any other regulatory agency that functions in that manner. There should be transparency regarding the rules that apply to sandbox participants that is published and considered by the legislature. Otherwise, this is an issue regarding consumer protection, governmental transparency, separation of powers and may also raise other issues where certain favored businesses are subject to some subset of

regulations than attorneys and other participants, with no meaningful way for the consumer to evaluate those issues. It also raises concerns of proper regulatory oversight.

6. Lack of Oversight to the Detriment of Consumers

Regarding the Proposed Amendments to allow nonlawyer ownership or the sharing of fees that would otherwise be in violation of an unamended rule 5.4, I have concerns related to how this would work in practice. For example, regulation of trust accounts and conflicts issues would have to be addressed. The area of whether insurance would be required in cases of malpractice is also of concern.

The proposed Sandbox application previously presented also appears to encompass proposed categories for sandbox participants. I understood the mission of the sandbox to be determining ways to address access to justice for low income and historically underserved communities. The list of proposed areas appears expansive and not narrowly tailored to address the mission.

Further, as set forth above, rules that apply to sandbox participants should be transparent and up front. The application contemplates determining waiver of rules after the fact. It also contemplates waiver of statutory rights, which is an overreach and not likely legal. This also raises issues regarding separation of powers, as set forth above.

The application also contemplates “sharing or selling of consumer data in any form to third parties.” There is no discernable benefit to consumers to allow the selling of their most private data. This is also anathema to what I understand to be my duty as an attorney.

7. Interaction with Other Laws and Constitutional Protections

Further, certain data is governed by statutory protections and constitutional law. I recognize and applaud the prior recommendation regarding data security, which as I understand it, would not generally allow piercing of the confidentiality for pecuniary gain. However, to be clear, I do not support commodification of client files and data. This is anathema to consumer protection and the practice of law.

I thank the CTJG for its consideration of these issues.

Sincerely,
LAW OFFICES OF WENDY MUSELL

A handwritten signature in black ink, appearing to read 'Wendy Musell', with a stylized flourish at the end.

Wendy Musell

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.



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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

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*Deceased

October 13, 2021

VIA ELECTRONIC TRANSMISSION

Closing the Justice Gap Working Group
STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105
CTJG@calbar.ca.gov

Dear CTJG Working Group Members:

On behalf of the Beverly Hills Bar Foundation (BHBF), I write for your consideration of the following in furtherance of your endeavor to provide the greatest access to justice possible in the State of California.

By way of background, the BHBF's mission is to support the good works of the Beverly Hills Bar Association, including access to justice. The Beverly Hills Bar Association was founded nearly 100 years ago on inclusion, activism and pursuing justice for the undeserved.

The BHBF began as a scholarship fund. To this day, it annually awards law school scholarships to students who come from primarily minority backgrounds and who are committed to public interest law upon graduation. The BHBF has since expanded its support to additional community assistance projects, including a monthly free legal clinic. Our most pressing endeavor now, however, is building our own bridge over the justice gap.

To that end, I submit the following for your consideration:

PAVING THE WAY FOR TRUE ACCESS TO JUSTICE PROVIDERS

Of the more than 170,000 licensed California attorneys, many are new licensees seeking to build their own practice. Many others are experienced attorneys who wish to give back to their community or whose law firms support pro bono representation.

Among numerous bar foundations and other non-profit organizations already providing low-cost legal assistance, the BHBF is exploring the expansion of its support to include a Low Bono/Modest Means Legal Service: a *no charge, no fee* "access to justice matching service" between licensed attorneys who have committed to capping their fees on a sliding scale and fraction of normal hourly rates with low to modest means residents who do not qualify for free legal aid.

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*Deceased

If the California State Bar wants to accelerate the connection between the low or modest means income population with licensed legal representation, it could clear out the roadblocks for existing and future non-profit providers who have fully educated, licensed attorneys at the ready.

Above all, the State Bar should not be flooding the legal profession with paraprofessionals who cannot rise to the level of a fully law school trained, educated and state bar licensed attorney dedicated to the rule of law.

MORE IS NOT BETTER

The state of California has in excess of One Hundred Seventy Thousand (170,000) active, licensed attorneys. That is nearly 50 attorneys for every resident of the state.

By contrast, Utah and Arizona have fewer than 24,000 attorneys combined; an average attorney/population ratio of only 24 attorneys per capita. The CTJG Working Group has compared its proposed regulatory sandbox to the paralegal practitioner programs of both Arizona and Utah. The key difference is that both Utah and Arizona have less than half as many attorneys per capita to serve their populations than does California.

Where Arizona and Utah may want to encourage more legal service by adding non-attorneys to serve their population, our state has an abundance of already educated licensed attorneys who can step in immediately without additional education or examination.

This raises the question: if California already has an ample supply of licensed professionals, why would the State Bar want to increase that number even higher and dilute the value of a state bar license?

THE DEVALUATION OF A LAW SCHOOL EDUCATION

As was brought up numerous times during the October 8, 2021 public comment period, adding non-lawyers to perform nearly every legal service that licensed attorneys already are permitted to perform, devalues the time, effort and financial investment (or exponentially increases the debt burden) of every graduate of law school. Further, it dissuades future lawyers from embarking on a law school education, sitting for the bar exam and paying very high bar dues when they could circumvent it all by getting a paralegal or paraprofessional license to do virtually the same thing.

Eventually, only very high powered, cost prohibitive lawyers will be left to serve and represent the entire population of California but no affordable attorneys at all; just the opposite of what the CTJG is trying to achieve. The law of unintended consequences will create a greater justice gap than we already have.

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Robert H. Rosenfield
Allan Browne

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THE FORREST FOR THE TREES SYNDROME

While thinking out of the (sand)box to solve problems is admirable and can lead to beneficial innovation, the answer to closing the justice gap doesn't require looking to different states or creating brand new systems when there is already a system in place that just needs a little modification.

Rather than invest even more time and resources on designing a new regulatory scheme, the State Bar can use the Lawyer Referral Service (LRS) framework already in existence to direct the public to low-cost providers of *already licensed* lawyers who are willing to reduce their rates for low to moderate income clients. LRS could waive its fees and relax its rigid reporting and staffing requirements to make the process easier and without cost for organizations like the BHBF to match clients with modest rate attorneys *without charge*. The easier the process, the more participation there will be, the greater the number of low-income clients will be served.

IN CONCLUSION-LESS IS MORE

The State of California currently has more than enough licensees to close the justice gap already. Streamlining a method to permit the matching of attorneys who have the requisite training, knowledge, expertise and willing to cap their fees with low to moderate income clients will achieve the goal of the committee more quickly and effectively than the current proposal to add non-attorneys as paraprofessionals.

There is an immediate need for legal guidance and representation which cannot wait for the sandbox to develop new applications, regulations and enforcement (there is enough of a backlog of State Bar complaints as it is). Rather than create a better mouse trap, the CTJG working group could just make some adjustments to the current LRS mechanism as outlined above.

Thank you for your consideration of the above.

Respectfully,



Linda E. Spiegel, Esq.

President, Beverly Hills Bar Foundation

cc: Assembly member Mark Stone, Chair, Assembly Judiciary Committee

Senator Tom Umberg, Chair, Senate Judiciary Committee



October 15, 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 the Consumer Attorneys of California, Public Counsel, the California Employment Lawyers Association, and the Consumer Attorneys Association of Los Angeles, we write to submit our formal written comments in anticipation of the upcoming CTJG meeting on Monday October 18th, 2021 regarding establishing a general framework for a risk-based regulatory approach for oversight within the proposed sandbox. The committee is largely looking to Utah as a model for a risk-based approach. We have serious concerns that the potential harms a consumer or worker may face in obtaining legal services from a sandbox provider, are too great to experiment with. We are also greatly concerned with the cost and staff time this approach will require to implement safely. Finally, we are fundamentally unconvinced that the committee has appropriately addressed the improper advantage that will be granted to those inside the sandbox, to the detriment of those competing outside of the sandbox that have to abide by existing laws and regulations.

i. A SANDBOX FOR LEGAL SERVICES IS AN UNTESTED IDEA THAT COULD LEAD TO THE PERMANENT EROSION OF CONSUMER AND WORKER PROTECTIONS UNDER THE GUISE OF FOSTERING INNOVATION IN THE CONSUMER LEGAL MARKETPLACE

Sandboxes were initially started in the UK as a 'safe space' for businesses to test financial products, services, and business models without immediately incurring all the normal regulatory consequences of engaging in the activity in question.

LEGISLATIVE DEPARTMENT

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In other words, a sandbox allows those who are granted entry to waive the rules that everyone else must abide by in the hopes that they will want to provide a good or service that the regulator ultimately desires.

They have been mostly launched in financial services and sandboxes for legal services are largely new and untested. While the committee upholds Utah as its model that California should emulate, Utah is the only other state that has implemented a legal services sandbox, and we still do not have data that their sandbox is even successful. In addition, Utah has a very different population and legal system than California – California is more diverse, more populous, we have more robust laws, more attorneys, courts and judges, etc.

We would be taking a big gamble, based on insufficient evidence, on a regulatory sandbox that may or may not result in the creation of low-cost legal services and products for California consumers. A gamble that put the rights of consumer and workers at considerable risk.

The State Bar could simply be embarking on a costly, years long bet that will cost the state millions. This is against the backdrop of the pandemic, where our courts are severely backlogged and struggling to address the delays imposed by the shutdowns. We continue to implore this committee to consider alternatives that would benefit existing pathways that are proven to close the justice gap, like funding non-profit legal services organizations or alternative dispute resolution programs, etc.

a. The Trump Administration's CFPB Sandbox Serves as a Cautionary Tale for CA

Perhaps the most well-known sandbox is the one launched by the CFPB under the Trump administration in 2019. The CFPB Sandbox focused on financial services and serves as a cautionary tale for regulators looking at sandboxes to encourage certain firms and products in the marketplace.

Over 80 consumer groups opposed the CFPB's Sandbox proposal, including 21 Attorney Generals, then California AG Xavier Becerra included. Why did so many groups oppose the CFPB sandbox? They argued that the sandbox "could enable staff to issue approvals or exemptions, effectively change the law, and amount to substantive, legislative rules without following rulemaking requirements."

The proposed legal sandbox the CTJG committee seeks to establish is plagued by these same problems. It will permit some unknown entity to pick winners and losers- a system where some get to enjoy the benefits of not having the rules

apply to them, while those outside the sandbox (the losers) are stuck having to follow regulations or face legal consequences.

ii. A REGULATORY SANDBOX WILL DISADVANTAGE LEGAL PROVIDERS OUTSIDE OF THE SANDBOX WHILE IT IS IN OPERATION

By definition, regulatory sandboxes grant certain advantages to specific firms or companies without extending those same privileges to other firms/companies. This is fundamentally unfair and will erode critical consumer protections under the guise of fostering innovation in the consumer legal marketplace.

When the government allows only one firm to experiment with a particular product or service, it gives that firm, at least for a limited time, monopolistic control over that product or service, which can lead to worse outcomes for consumers.

a. The Problem with a risk-based approach is that the worker or consumer will ultimately bear the brunt of the risk.

The criteria this committee is considering for a risk-based approach model are as follows:

- a) whether the consumer receives inaccurate or inappropriate legal services;
- b) whether the consumer fails to exercise legal rights through bad advice or incomplete information within the scope of the agreed-upon services;
- c) whether the consumer receives an unnecessary legal service or pays an inappropriate amount for legal services; and
- d) whether the consumer experiences fraud, theft, or abuse of trust by the service provider.

Unfortunately, these criteria are all only going to be known by the regulator after the consumer experiences the harm.

Current rules and regulations are in place precisely to mitigate these kinds of risks that have arisen in the current legal marketplace. It is unreasonable to assume that these risks would be any less prevalent in this proposed legal sandbox, or that these risks would be outweighed by the access to new legal services.

b. The committee should make it absolutely clear that sandbox entry will not mean companies will enjoy legal immunity for their mistakes.

While the intent may be to waive certain regulations on UPL, there should be no safe harbors or immunity from liability for sandbox participants. They should be held liable for any harms they cause to consumers and workers, including for any data breaches. Forced arbitration of claims against these sandbox participants should be expressly prohibited from the outset.

If and when a worker or consumer is harmed, how will the State Bar or its sandbox regulator step in at that point and ensure the worker or consumer is made whole? What will that cost? How much staff time and resources will that require? How much legal counsel and court time will be needed to remedy the harm? Or will the sandbox participant be forced to address the worker's or consumer's legal harm? These are all very risky scenarios that the State Bar is simply not equipped to handle.

iii. THE STATE BAR'S MANDATE IS TO PROTECT THE PUBLIC, NOT TO HELP COMPANIES EVADE THE LAW.

Recommendation 3 states, "lawyers participating in sandbox entities should remain subject to the same rules and laws governing other licensees of the State Bar except to the extent that compliance with specified rules is waived as a condition of entry into the sandbox." This entire statement is problematic. The sandbox regulator will ultimately have the final say over which legal rules and regulations to waive, putting those outside of the sandbox at a complete disadvantage to those inside. How will sandbox outsiders, i.e., the majority of legal services providers, be able to compete?

Recommendation 4 states, "Entities participating in the sandbox should be subject to the rules and laws governing licensees of the State Bar except to the extent that compliance with specified rules is waived as a condition of entry into the sandbox." This proposal suffers from the same fundamental problems as recommendation 3. This patchwork of rules and regulations that apply to some, but not to all will ultimately undermine the public's trust in the legal profession.

iv. Conclusion

The State Bar choosing companies and firms to bend the rules for is against its core mission. This will not give the public faith that everyone must play by the same rules or that all those seeking legal services will have the same protections. Some companies will get the benefits of regulatory exemptions and others will not. This dangerous experiment will result in real harms to workers and consumers and unknown costs to the state at a time when we simply cannot afford it.

We thank the CTJG for its consideration of these issues.

Sincerely,

Consumer Attorneys of California
Public Counsel
California Employment Lawyers Association
Consumer Attorneys Association of Los Angeles

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