



# The State Bar *of California*

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## **OPEN SESSION AGENDA ITEM 706 MARCH 2022**

**DATE:** March 24, 2022

**TO:** Members, Board of Trustees

**FROM:** Bridget Gramme, Deputy Chief of Programs

**SUBJECT:** Approval of Revised Charter for the Closing the Justice Gap Working Group

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### **EXECUTIVE SUMMARY**

At its meeting on May 14, 2020, the Board of Trustees authorized the formation of the working group on Closing the Justice Gap (CTJG), primarily 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.” CTJG is specifically tasked with developing recommendations for consideration by the Board of Trustees. Prior to implementation of any of these recommendations, Board, Supreme Court, and legislative approval must be granted.

At its February 25, 2022, meeting, the Board considered concerns raised by the chairs of the Senate and Assembly Judiciary Committees and others that the proposals under consideration pose significant risks to consumers and detract from the State Bar’s discipline efforts. The Board also considered concerns relating to the composition of the working group, and the need to maintain a working group whose members have relevant experience in California. After discussion, the Board directed staff to revise the CTJG charter to streamline the working group’s assigned tasks, limit membership to those with California-specific experience, and assign an attorney member and a public member of the Board to the working group.

This item provides proposed revisions to CTJG’s charter according to the Board’s direction at the February meeting.

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## BACKGROUND

The Board voted to form the CTJG in 2020 to further the State Bar's statutory mission to support greater access to the legal system in California, and its strategic goal to study potential regulatory changes to expand access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.<sup>1</sup>

Beginning with its meeting on January 14, 2021, the CTJG held eight meetings of the full working group and 14 subcommittee meetings before pausing its meetings when the State Bar received a December 7, 2021, letter from the chairs of the Senate and Assembly Judiciary Committees, outlining a number of concerns.<sup>2</sup>

At its February 25, 2022, meeting, to address these concerns, the Board adopted the following resolutions:

**RESOLVED**, that the Board of Trustees revises the membership of the Closing the Justice Gap Working Group so as to limit it to those with California-specific experience, and discharges the members of the working group without California-specific experience with the Board's appreciation for their work; and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to work with the chair of the Closing the Justice Gap Working Group to recommend amendments to the charter to, at a minimum, do the following:

1. Direct CTJG to specify the roles that they seek the Legislature and the Supreme Court to fulfill in setting the parameters for and/or approving the types of entities that would be permitted to operate in the sandbox, and the application (or exemption) of existing statutes and rules as they relate to sandbox participants;
2. Direct CTJG to adopt screening and monitoring procedures for the regulator to reduce the risk that corporate interests will unduly influence or compromise professional judgment and objectivity in the delivery of legal services;
3. Relieve the working group from its additional rule revision assignments to permit them to focus on the sandbox recommendation only;
4. Extend the deadline for CTJG's report to the Board of Trustees; and
5. Make any other revisions that are necessary to be responsive to the concerns raised.

**FURTHER RESOLVED**, that the Board of Trustees delegate to Chair Duran the authority to appoint one attorney member and one nonattorney member of the Board of Trustees to the Closing the Justice Gap Working Group.

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<sup>1</sup> See Business and Professions Code section 6001.1; Goal 4, objective d of the State Bar's 2017–2022 Strategic Plan.

<sup>2</sup> Attachment A provides the letter from the Senate and Assembly Judiciary Committee chairs to the State Bar Chair dated December 7, 2021.

## **DISCUSSION**

### **WORKING GROUP COMPOSITION**

In consultation with the CTJG Chair Justice Alison Tucher, staff developed the following set of criteria to determine whether each working group member possessed sufficient California-specific experience:

1. Status as a licensee of the State Bar or as a judicial officer in California;
2. Domicile in California;
3. Current or past professional employment or contractor activities in California pertaining to California legal, regulatory, or policy issues; and
4. Current or past participation on a volunteer group or committee in California, other than the CTJG Working Group, pertaining to California legal, regulatory, or public policy issues.

With respect to the four individuals who currently reside outside of California, the chair has determined that Professor Rebecca Sandefur has significant California experience, including nine years at Stanford University, a year as a visiting scholar at UC Berkeley's Center for the Study of Law and Society, seven years on the State of California Sargent Shriver Civil Counsel Act Evaluation committee, and two years on the California Commission on Access to Justice Right to Counsel committee. Based on input from Jim Sandman and John Lund, the chair has determined that they do not satisfy the above criteria, and Crispin Passmore, while reporting that he does have experience in the third category, resigned from the working group. A revised roster reflecting these changes is provided as Attachment B.

### **CHARTER REVISIONS**

Pursuant to the Board's direction, staff has prepared a revised charter, provided as Attachment C, which amends the original charter as follows:<sup>3</sup>

1. Removes the direction that the working group (1) assess concepts for amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation and fee sharing with nonlawyers, (2) assess concepts for amendments to the statutes and Rules of the State Bar governing Certified Lawyer Referral Services, (3) consider any proposed amendments to rule 5.4 outside of the temporary changes to be evaluated in the sandbox, and (4) evaluate proposed rule 5.7 regarding law-related services as proposed by the Task Force on Access Through Innovation of Legal Services.
2. Revises the specific recommendations the working group must provide to the Board in its final report to incorporate concerns raised by the Legislature and additional stakeholders, including specific recommendations pertaining to the roles of the Supreme Court and Legislature as they relate to the sandbox, developing screening and monitoring procedures for the regulator to reduce the risk that corporate interests will unduly influence or compromise professional judgment and objectivity in the delivery of legal services, specifying methods for oversight and consumer protection and

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<sup>3</sup> Attachment D provides a redlined version demonstrating the proposed revisions to the original purpose and charter dated July 2020.

recommending levels of attorney involvement to ensure accountability.

3. Extends the deadline for the working group's report to the Board from September 2022 to May 2023.

#### **APPOINTMENT OF BOARD LIAISONS TO THE WORKING GROUP**

At the chair's request, Trustee Toney, a public member of the Board, and Trustee Chen, an attorney member of the Board, have agreed to serve as Board liaisons to CTJG.

#### **FISCAL/PERSONNEL IMPACT**

The proposed revisions to the charter, which streamline the working group's assignments, eliminate the need for subcommittees at this time, and extend the deadline for the final report, will require less staffing for CTJG, thereby reducing the resources the State Bar has been dedicating to this project.

#### **AMENDMENTS TO RULES**

None

#### **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

#### **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 4. Support access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves, and strive to achieve a statewide attorney population that reflects the rich demographics of the state's population.

Objective: d. Commencing in 2018 and concluding no later than March 31, 2020, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

#### **RECOMMENDATIONS**

**Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees adopts the revised charter, as it appears in Attachment C, and authorizes the chair of the working group and staff to adopt effective meeting procedures to implement the revised charter as appropriate, and it is

**FURTHER RESOLVED**, that the Board of Trustees appoint Trustee Mark Toney, a public member of the Board, and Trustee Hailyn Chen, an attorney member of the Board, to serve as Board liaisons to CTJG.

## **ATTACHMENTS LIST**

- A.** Letter from the Senate and Assembly Judiciary Committee Chairs to the State Bar Chair  
Dated December 7, 2021
- B.** Revised CTJG Roster
- C.** CTJG Charter with Proposed Revisions
- D.** CTJG Charter with Proposed Revisions (redline)

STATE CAPITOL  
P.O. BOX 942849  
SACRAMENTO, CA 94249-0115



December 7, 2021

Ruben Duran  
Chair, Board of Trustees, State Bar of California  
180 Howard St.  
San Francisco, CA 94105  
(by electronic mail)

Re: Legislative Concerns Regarding the Closing the Justice Gap Working Group

Dear Chair Duran:

We are writing to express concern with the California State Bar's Closing the Justice Gap Working Group (CTJG). As Chairs of the Assembly and Senate Judiciary Committees, we have repeatedly urged the State Bar to focus on its core mission of protecting the public by correcting the delays and defects in the attorney discipline system. That focus remains urgent and must be prioritized.

Unfortunately, it appears that the State Bar has chosen to divert its attention from its core mission of protecting the public and addressing the critical issues affecting the discipline system. Instead, the State Bar has used a substantial amount of its resources for the CTJG, as well as the Paraprofessional Program Working Group, apparently utilizing hundreds of hours of staff time and an unknown amount of other State Bar resources. This is very disconcerting given the recent State Auditor's report noting that the State Bar's backlog of discipline cases grew by 87 percent since December 2015 and that recent changes to the system have significantly reduced its efficiency.

The CTJG has been exploring a proposed regulatory sandbox and proposals that would recommend allowing a participant in the sandbox who is not a licensed attorney to be exempt from existing statutory laws regarding the practice of law and rules of professional conduct. Our Committees have prioritized protecting consumers from unscrupulous actors, including those seeking to do business in the legal field. Corporate ownership of law firms and splitting legal fees with non-lawyers has been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients.

Corporations are driven by profits and demands for returns to shareholders, and do not have the same ethical duties and are not subject to the same regulatory oversight as attorneys. The regulatory sandbox could become an open invitation for profit-driven corporations, hedge funds,

December 7, 2021

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or others to offer legal services or directly practice law without appropriate legal training, regulatory oversight, protections inherent in the attorney-client relationship, or adequate discipline to the detriment of Californians in need of legal assistance. Any proposal that would materially change current consumer protections for clients receiving legal services and fundamentally alter the sacrosanct principles of the attorney-client relationship would be heavily scrutinized by our Committees.

We reiterate our call for the State Bar to redouble its efforts to focus on the core mission of policing attorney misconduct and supporting proven programs offering access to justice and legal services such as legal aid, court-sponsored self-help, and pro-bono assistance, as well as innovative approaches to increasing the number of attorneys who are licensed in California. These are tangible and existing problems that need your immediate and sustained attention, especially as our courts struggle to get through the COVID-19-induced backlog of cases.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark Stone", with a long horizontal flourish extending to the right.

Assemblymember Mark Stone  
CHAIR, Assembly Committee on Judiciary

A handwritten signature in blue ink, appearing to read "Tom Umberg", with a stylized, cursive script.

Senator Tom Umberg  
CHAIR, Senate Committee on Judiciary

Cc:

Leah Wilson, Executive Director, State Bar of California  
Justice Alison M. Tucher, CTJG Chair  
Merri Baldwin, CTJG Co-Chair  
Rebecca Sandefur, CTJG Co-Chair

**ROSTER****STATE BAR OF CALIFORNIA  
CLOSING THE JUSTICE GAP WORKING GROUP****OFFICERS**

**Justice Alison M. Tucher**  
Chair  
San Francisco, CA

**Merri Baldwin**  
Co-Vice-Chair  
San Francisco, CA

**Prof. Rebecca Sandefur**  
Co-Vice-Chair  
Fountain Hills, AZ

**MEMBERS**

**Marta Alcumbrac**  
Los Angeles, CA

**Andrew Arruda**  
San Francisco, CA

**Hon. Wendy Chang**  
Lancaster, CA

**Prof. David Freeman Engstrom**  
Stanford, CA

**Thomas Greene**  
San Francisco, CA

**Daniel Grunfeld**  
Los Angeles, CA

**Eric Helland**  
Claremont, CA

**Khathy Hoang**  
West Toluca Lake, CA

**Micha Star Liberty**  
Oakland, CA

**Prof. Kevin Mohr**  
Irvine, CA

**Wendy Musell**  
Oakland, CA

**Lucy Ricca**  
Stanford, CA

**Toby Rothschild**  
Westminster, CA

**Patricia Squitiero**  
Fremont, CA

**Sacha Steinberger**  
Oakland, CA

VACANT  
Senate Judiciary Committee  
Appointee

VACANT  
Judicial Officer

**BOARD OF TRUSTEES LIAISONS**

**Hailyn Chen**  
Board of Trustees  
Attorney Member

**Mark Toney**  
Board of Trustees  
Public Member

**STATE BAR STAFF**

**Bridget Gramme**  
Deputy Chief of Programs

**Randall Difuntorum**  
Director,  
Professional Competence

**Mimi Lee**  
Lead Program Analyst,  
Professional Competence

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**SUPREME COURT LIAISONS**

**Sunil "Neil" Gupta**  
*and*

**Greg Fortescue**  
Supreme Court of California  
San Francisco, CA



## CLOSING THE JUSTICE GAP WORKING GROUP PURPOSE & CHARTER

### Revised March 2022

#### 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 to inform whether future changes to rules and laws governing the practice of law would result in 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 encourage the development of innovative legal service delivery models serving clients at all income levels through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others. As a guiding principle in carrying out its work, 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. **Creation of a sandbox:** Assessment of the pros and cons of a sandbox as a way to foster innovative legal services delivery in a manner that protects the public, through temporary waivers to certain rules and laws that would otherwise prevent or limit such services from being offered to consumers
2. **Structure and governance of possible sandbox and Regulator:**
  - a. What agency or entity would house and be responsible for operating the sandbox and regulating its participants (the "Regulator")
  - b. Governing board structure, composition, and policies that apply to the board of the Regulator
  - c. Roles for the Supreme Court and/or the Legislature with respect to establishment and governance of the sandbox and the Regulator
  - d. Transparency measures such as open meetings and public records
  - e. Reporting requirements from the Regulator to the Supreme Court, the Legislature, and the public
  - f. Independent evaluation of the sandbox and the Regulator
  - g. Generalized funding needs and sources of funding
  - h. The term of the sandbox and the impact of sandbox termination on participants
3. **Regulatory principles:** Identification of regulatory principles to guide the Regulator's decisionmaking including the measurement of risk and consumer protection

**4. Scope:**

- a. Parameters for entities who are eligible to participate in the Sandbox
- b. Measures to ensure independence of professional judgment in the delivery of legal services in the sandbox
- c. Articulated roles for the Supreme Court and/or the Legislature in setting parameters for entry into the sandbox
- d. Limitations, if any, as to practice areas, activities, services, individuals, or entities that would be permitted in the sandbox
- e. Methods for attracting participants that seek to predominantly serve low- and moderate-income Californians who may not be able to access free legal services by legal aid organizations.

**5. Rules and Laws:**

- a. Specific rules and laws that will *not* be subject to modification, waiver, or exemption within the Sandbox and will apply to all entities authorized to participate in the Sandbox
- b. Specific rules and laws that may be subject to modification, waiver, or exemption in the Sandbox
- c. Articulated roles for the Supreme Court and/or the Legislature with respect to modification or exemption of existing rules or statutes as they relate to sandbox participants

**6. Consumer Protection Mechanisms:**

- a. Principles of oversight of persons and entities authorized to participate in the sandbox, including
  - i. Identification and enumeration of specific legal consumer harms to be targeted by the proactive regulatory function and corresponding data reporting requirements
  - ii. Compliance and accountability mechanisms, including any required level of involvement of a California licensed attorney in a sandbox participant's business model
  - iii. Expectations of conduct for sandbox participants to ensure public protection and privacy
- b. Principles for enforcement relating to sandbox participants, including
  - i. Processing and investigation of client complaints
  - ii. Suspension or removal from the sandbox
- c. Available consumer remedies

The working group shall submit its recommendations to the Board of Trustees no later than May 2023.

**CLOSING THE JUSTICE GAP WORKING GROUP PURPOSE & CHARTER**  
**(Redline Comparison)**

~~Approved by the Board, July 2020~~

Revised March 2022

**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~~ to inform whether future changes to rules and laws governing the practice of law would result in 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~~ encourage the development of innovative legal service delivery ~~systems such as consumer facing technology that provides legal advice and services directly to~~ models serving 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~~ its work, 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~~ Creation of a sandbox: 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, through temporary waivers to certain rules and laws that would otherwise prevent or limit such services from being offered to consumers~~ 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:
2. Creation of a sandbox: Assessment of the pros and cons of a sandbox as a way to foster innovative legal services delivery in a manner that protects the public, through temporary

waivers to certain rules and laws that would otherwise prevent or limit such services from being offered to consumers

**3. Structure and governance of possible sandbox and Regulator:**

- a. What agency or entity would house and be responsible for operating the sandbox and regulating its participants (the “Regulator”)
- b. Governing board structure, composition, and policies that apply to the board of the Regulator
- c. Roles for the Supreme Court and/or the Legislature with respect to establishment and governance of the sandbox and the Regulator
- d. Transparency measures such as open meetings and public records
- e. Reporting requirements from the Regulator to the Supreme Court, the Legislature, and the public
- f. Independent evaluation of the sandbox and the Regulator
- g. Generalized funding needs and sources of funding
- h. The term of the sandbox and the impact of sandbox termination on participants

**4. Regulatory principles:** Identification of regulatory principles to guide the Regulator’s decisionmaking including the measurement of risk and consumer protection

**5. Scope:**

- a. Parameters for entities who are eligible to participate in the Sandbox
- b. Measures to ensure independence of professional judgment in the delivery of legal services in the sandbox
- c. Articulated roles for the Supreme Court and/or the Legislature in setting parameters for entry into the sandbox
- d. Limitations, if any, as to practice areas, activities, services, individuals, or entities that would be permitted in the sandbox
- e. Methods for attracting participants that seek to predominantly serve low- and moderate-income Californians who may not be able to access free legal services by legal aid organizations.

**6. Rules and Laws:**

- a. Specific rules and laws that will *not* be subject to modification, waiver, or exemption within the Sandbox and will apply to all entities authorized to participate in the Sandbox
- b. Specific rules and laws that may be subject to modification, waiver, or exemption in the Sandbox
- c. Articulated roles for the Supreme Court and/or the Legislature with respect to modification or exemption of existing rules or statutes as they relate to sandbox participants

## 7. Consumer Protection Mechanisms:

- a. Principles of oversight of persons and entities authorized to participate in the sandbox, including
  - i. Identification and enumeration of specific legal consumer harms to be targeted by the proactive regulatory function and corresponding data reporting requirements
  - ii. Compliance and accountability mechanisms, including any required level of involvement of a California licensed attorney in a sandbox participant's business model
  - iii. Expectations of conduct for sandbox participants to ensure public protection and privacy
- b. Principles for enforcement relating to sandbox participants, including
  - i. Processing and investigation of client complaints
  - ii. Suspension or removal from the sandbox
- c. Available consumer remedies
  - ~~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~~

## ATTACHMENT D

- ~~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~~ May 2023.