



# The State Bar of California

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## **OPEN SESSION AGENDA ITEM 702 JULY 2020**

**DATE:** July 16, 2020

**TO:** Members, Board of Trustees

**FROM:** Donna S. Hershkowitz, Interim Executive Director

**SUBJECT:** Closing the Justice Gap Working Group - Approval of Proposed Charter and Composition

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### **EXECUTIVE SUMMARY**

At its meeting on May 14, 2020, the Board of Trustees authorized the formation of a working group on Closing the Justice Gap (CTJG Working Group) in response to the report and recommendations of the Task Force on Access Through Innovation of Legal Services (ATILS). This agenda item presents staff recommendations for a CTJG Working Group charter and the appropriate size and composition of this group.

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### **BACKGROUND**

At the Board's March 12, 2020, meeting, ATILS presented its final report and recommendations. In accordance with ATILS' recommendations, proposed amendments to rules 1.1 and 5.4 of the California Rules of Professional Conduct<sup>1</sup> were authorized for a 60-day public comment period. The Board also approved a recommendation to develop a nonlawyer paraprofessional program and referred that activity to the recently established Paraprofessional Program Working Group. Action on remaining ATILS recommendations, including a proposal that the Board establish a new working group to explore development of a "regulatory sandbox," was deferred. At the Board's May 14, 2020, meeting, the remaining ATILS recommendations were considered and the Board authorized the formation of the CTJG Working Group and directed staff to prepare a proposed charter and a recommendation for the size and composition of this new group.

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<sup>1</sup> Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

## DISCUSSION

The ATILS recommendations considered at the May Board meeting are summarized below:

1. Form and appoint a new working group to explore the development of a regulatory sandbox that can provide data on any potential benefits to access to legal services, as well as the potential for consumer harm if prohibitions on unauthorized practice of law, fee sharing, nonlawyer ownership, and other legal restrictions are modified or completely suspended for authorized sandbox participants. The working group would also consider amendments to rule 5.4 regarding fee sharing.
2. Issue for public comment a new rule 5.7 addressing the delivery of nonlegal services provided by lawyers and businesses owned or affiliated with lawyers. ABA Model Rule 5.7 addresses a lawyer's provision of nonlegal services. It describes when a lawyer's provision of such services is subject to the rules and when it is not.
3. Consider recommendations for amendments to the Certified Lawyer Referral Service statutes and Rules of the State Bar together with relevant rules to ensure that they properly balance public protection and innovation in light of access to justice needs, and with a particular emphasis on ascertaining if existing laws impose unnecessary barriers to referral modalities (such as automated referrals or online matching services) that are in the public interest.
4. Consider recommendations for amendments to the rules governing advertising and solicitation informed by the current American Bar Association Model Rules of Professional Conduct, and the proposed advertising and solicitation rules developed by the Association of Professional Responsibility Lawyers.

Following discussion, the Board adopted the following resolution addressing these recommendations:

**RESOLVED**, that the Board of Trustees directs staff to form the Working Group on Closing the Justice Gap to explore the development of a regulatory sandbox (as described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A) as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems, including: (1) consumer facing technology that provides legal advice and services directly to clients at all income levels; and (2) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. The working group will examine the propriety of relaxing rules regarding the unauthorized practice of law, fee sharing, and nonlawyer ownership among other issues; and it is

**FURTHER RESOLVED**, that staff is directed to prepare a proposed charter for the working group that emphasizes as twin goals of the working group public protection and enhanced access to legal services, and, in addition to the above, may include: (1)

examination of amendments to rule 5.4 and rule 5.7 of the California Rules of Professional Conduct; (2) exploration of amendments to the California Rules of Professional Conduct governing lawyer advertising and solicitation; and (3) evaluation of amendments to the statutes and Rules of the State Bar governing Certified Lawyer Referral Services as described in the Final Report and Recommendation of the Task Force on Access Through Innovation of Legal Services attached hereto as Attachment A.

### **Proposed Working Group Charter**

Staff recommends the following charter pursuant to the Board resolution:

#### **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 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.

### **Proposed Composition of the Working Group**

Following the solicitation of nominations, the Board shall appoint 15-17 members to comprise the Closing the Justice Gap Working Group, including a chair and vice-chair. The chair should be authorized to: (i) designate subcommittees with subcommittee officers; and (ii) appoint additional advisory members as needed to strategically add expertise on discrete issues that are included in the charter (e.g., evaluation of the regulation of lawyer referral services). The term of the appointments should expire on December 31, 2022, unless extended by the Board.

To ensure that a wide variety of perspectives are fully and thoughtfully considered in this exploration of fundamental shifts to the traditional practice of law, the working group should include the expertise and/or reflect the organizational representation outlined below:

- **Technology Expert:** to serve as a subject matter expert on the potential uses of technology to increase access to legal services
- **Economist:** to serve as a subject matter expert on the development of a financially sound regulatory structure as well as the performance metrics that will be used to assess the efficacy of the sandbox
- **Legal Ethics Expert:** to serve as a subject matter expert on lawyer conduct rules, unauthorized practice of law issues, and the laws governing lawyers generally
- **Trial Court Judge:** to serve as a subject matter expert on the impact of reforms on proceedings before a tribunal and the administration of justice generally
- **Academic:** to serve as a subject matter expert on the extensive academic scholarship on regulatory reform
- **Regulator:** to serve as a subject matter expert regarding the development of a new regulatory structure for sandbox participants
- **ATILS:** to provide continuity between the foundational ATILS effort and the working group
- **Consumer of Legal Services:** to provide a consumer voice
- **California Lawyers Association:** to provide a practitioner voice
- **Consumer Attorney Representative:** to provide a practitioner voice
- **California Defense Counsel:** to provide a practitioner voice
- **California IOLTA-funded Legal Services Organization:** to provide a California legal services organization voice
- **National Legal Services Organization:** to provide a legal services organization voice from a national perspective including with respect to those jurisdictions that have or have had legal paraprofessional programs in place

- **Utah Regulatory Reform Task Force:** to facilitate alignment between the California and Utah efforts where appropriate
- **Assembly and Senate Judiciary Committees<sup>2</sup>**

The proposed composition is in part informed by the [Utah sandbox](#) effort. In addition, it represents the goal of having diversity of thought on regulatory reform generally. As needed, and depending on the applications received, there may be more than one appointee for some of the categories on the list. For example, there may be more than one legal ethics expert, as was the case with the ATILS task force. In addition to formal appointees, staff will also seek a liaison appointment from the California Supreme Court.

If the Board adopts the foregoing approach, the next steps will be to conduct outreach and implement a formal appointment application process with a goal of returning to the Board to make the appointments at the Board’s September 24–25, 2020 meeting. In addition, a Board liaison to the working group could be designated at that time.

## **FISCAL/PERSONNEL IMPACT**

Working group activities in 2020 will be limited and will be absorbed by the Office of Professional Competence’s committee and commission budgets. Reasonable additional funding will be authorized from existing funding for 2021 and 2022 if needed to support the working group.

## **AMENDMENTS TO RULES OF THE STATE BAR**

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

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<sup>2</sup> The Judiciary Committees may or may not choose to appoint a representative for the CTJG working group. As a result, staff seeks flexibility to accommodate appointments of formal members or liaisons consistent with each Committee’s respective decision on whether to designate a representative.

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 charter for the Working Group on Closing the Justice Gap in the form attached to these minutes; and it is

**FURTHER RESOLVED**, that the Board of Trustees directs staff to carry out appointment outreach and an application process to be completed in time for the appointment of the working group at the Board's September 24–25, 2020 meeting.

## **ATTACHMENT(S) LIST**

- A. Charter of the Working Group on Closing the Justice Gap

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

### Purpose

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### Working Group Charter

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  - 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.