



August 28, 2024

Washington State Bar Association
1325 4th Ave suite 600
Seattle, WA 98101
entityregulationpilot@wsba.org

Re: Comment in Support of the Washington State Bar Association and Washington Supreme Court Practice of Law Board Pilot Test of Entity Regulation Proposal

Dear Washington State Bar Association Board of Governors and Washington Supreme Court Practice of Law Board Members,

On behalf of IAALS, the Institute for the Advancement of the American Legal System, we commend the Washington State Bar Association (WSBA) and the Washington Supreme Court Practice of Law Board (POLB) for your leadership in regulatory reform efforts in Washington.

IAALS is a national, independent research center at the University of Denver that innovates and advances solutions that make our civil justice system more just. Since 2019, IAALS has had an Unlocking Legal Regulation initiative through which it has worked with leaders in states across the country to rethink how we deliver and regulate legal services. IAALS supports the Pilot Test of Entity Regulation proposal (“the pilot project”) and its data-driven approach, and we offer the following recommendations based on what we and other leaders have learned from other regulatory innovation initiatives.

We Recommend Implementing a Risk-Based, Data-Driven Regulatory Model and Expanding the Focus of the Pilot Project to Achieve its Objectives

Since 2019, IAALS has been at the forefront of efforts to rethink how we regulate the delivery of legal services and how we can create a consumer-centered regulatory system to ensure a more robust ecosystem for high-quality legal services—one that is competitive, broadly accessible, and better meets the needs of the people. From the outset of our work in this space, IAALS has believed that a risk-based, data-informed regulatory model is the best approach for achieving this goal while also mitigating consumer harm. The Utah sandbox is a good example of this approach. With their risk-based, data-driven regulatory approach, regulators in Utah have been able to collect and use data to better estimate the likelihood of events, including potential harm resulting from innovations, and to better monitor for and respond to them. Some of the innovations being tested in the Utah sandbox include:

- firms, companies, or organizations using software to practice law.
- traditional law firms taking on nonlawyer investment or ownership.
- traditional law firms and lawyers entering into profit-sharing relationships with nonlawyers.
- nonlawyer-owned entities employing lawyers to practice law.
- lawyers or firms entering joint ventures or other forms of business partnerships with nonlawyer entities or individuals to practice law.
- entities providing intermediary services to connect lawyers to consumers in new ways.
- other innovative methods or services not permitted under the traditional rules.

We know from the [activity reports](#) shared out by the Utah Office for Legal Services Innovation, from the [research](#) conducted by the Deborah L. Rhode Center on the Legal Profession at Stanford, and from our own interim evaluation of the Utah sandbox (interim evaluation report forthcoming later this year) that the Utah sandbox is meeting its stated regulatory objective—consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services—while also more than adequately protecting consumers from harm.

The WSBA and POLB Pilot Project appears to have regulatory objectives similar to the Utah Sandbox, but it appears to be limited to technology-based innovations. Given that the Utah Sandbox is meeting its regulatory objectives, we recommend that the WSBA and POLB pursue a risk-based, data-driven regulatory approach to their Pilot Project and expand the focus of the Pilot Project to include additional innovations beyond the use of technology.

*We Recommend Changing the Pilot Project Objective from “Increasing Access to Justice” to
“Increasing Access to Legal Services”*

In the Pilot Project proposal, one of the stated objectives is to determine whether entity regulation will “increase access to justice” by enhancing access to affordable and reliable legal and law-related services consistent with protection of the public. The phrase “access to justice” means different things to different people. In the context of legal services, some people use the phrase to mean increasing access to legal services solely for the low-income population that qualifies for free legal aid services. Others use the phrase to mean increasing access to legal services for anyone who cannot currently afford or access them, not just the low-income population. This approach would include people who do not qualify for free legal aid services because they make more than 125% of the federal poverty level or \$18,825 per year for an individual.

IAALS has two concerns with using the phrase “access to justice” in a regulatory objective. First, the inclusion of a seemingly ambiguous phrase such as “access to justice” in a regulatory objective will make it harder for leaders from various stakeholder groups to be on the same page, and it will also make it harder for regulators and other leaders to evaluate whether they are meeting their regulatory objectives. Second, using the phrase “access to justice” could limit the reach and impact of the Pilot Project. We know from our [US Justice Needs Study](#) and the most recent [LSC Justice Gap Report](#) that the gap in legal services extends far beyond the income eligibility line for free legal aid and well into the middle class. This Pilot Project would be most impactful if it permitted an ecosystem of models, providers, and services that target *all gaps* in legal services and not just gaps experienced by the low-income population. By changing the Pilot Project objective from “increasing access to justice” to “increasing access to legal services,” the WSBA and POLB will better ensure that all stakeholders are on the same page, that regulators will be able to collect the relevant data to understand and evaluate whether the regulatory goals are being met, and that the program will maximize its potential impact.

We Recommend Establishing Program Parameters and Requirements at the Outset of the Pilot Project

As currently written, the Pilot Project proposal is vague with respect to a few important program parameters and requirements—program timeframe and fees charged to participating entities. In October

2023, IAALS invited a group of leaders from the different regulatory innovation initiatives from across the country to participate in two days of thought leadership sessions to further momentum in the regulatory innovation space, and to develop an initial set of recommendations for launching and sustaining regulatory innovation. In our soon-to-be published post-convening report—*Unlocking Legal Regulation: Lessons Learned and Recommendations for the Future*—Recommendation 5 outlines IAALS’ and other regulatory innovation leaders’ concerns pertaining to pilot projects generally and provides recommendations for alleviating these concerns:

“Recommendation 5: *Elimination of, waivers of, or changes to unauthorized practice of law and ethics rules are generally going to be more successful than pilot projects in the regulatory reform space.* For states that have had success with pilot projects in the past, a pilot project is a way to introduce innovation that is already understood and has buy-in. It also allows for quicker adoption and nimbleness, both of which are good for innovation. On the flipside, projects that include market-based models need stability to attract participants. Entities that are targeted by these reforms are less likely to invest in a pilot project than a permanent program. The word “pilot” injects uncertainty into a program, and uncertainty is scary to business owners, investors, and potential new providers, such as Allied Legal Professionals and Community Justice Workers. Starting a business or changing careers is a monetary- and time-intensive endeavor, and no one wants to invest in a program that could shutter at a moment’s notice.

With all of this being said, if a pilot project is the best option for gaining traction and support for innovation, it is worth the time and money to move forward with it, and many concerns can be alleviated by specifying a timeframe—a set number of years for the pilot project—at the outset of the program. The key here is to make the timeframe long enough so that the program and the entities participating in it can achieve their goals. The Utah sandbox started out as a two-year pilot project but was extended to a seven-year pilot project to ensure it had enough time to produce and collect the data needed to measure whether its objectives were being met. Timeframes should be paired with adequate funding to sustain and evaluate the programs.”

In the same forthcoming report, Recommendation 6 outlines IAALS’ and other regulatory innovation leaders’ concerns with program fees being vague in pilot project proposals and provides recommendations for alleviating these concerns:

“ . . . In the alternative business structures space, unreasonable registration and renewal fees can be a barrier to entry. Flat fees commensurate with the size of the company work best. Percentages of revenue, however, are disliked by entity owners and should be avoided. Fees should also be determined at the outset of a pilot project or program and not partway through it. When fees are sprung upon participants partway through the process, it forces business owners to absorb an unknown and unaccounted for expense, and it injects uncertainty into the program. And, as shared in the previous recommendation, uncertainty repels business owners and investors.”

IAALS recommends that the WSBA and POLB consider these recommendations put forth by other leaders in the regulatory innovation space as the Pilot Project details continue to be fleshed out and finalized.

Conclusion

IAALS applauds and thanks the WSBA and POLB for putting forth this innovative proposal. Adapting to change is not easy, and the future will almost always be uncertain. But you have chosen a proven framework for working through these issues—entity regulation paired with data-driven decision-making—so you are building a solid foundation. IAALS is grateful for the opportunity to share our support for the Pilot Project and recommendations for building upon that foundation, and we encourage the Washington Supreme Court to approve the Pilot Project. If the WSBA, the POLB, or the Washington Supreme Court have any follow-up questions regarding our comments, we welcome the opportunity to discuss in more detail IAALS’ extensive research and work in this area.

Sincerely,

Jessica Bednarz

Director of Legal Services and the Profession