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May 12, 2020

Mr. Alan Steinbrecher, Chair, and Members
Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

re: Testimony of the Center for Public Interest Law – Access Through Innovation of
Legal Services task force recommendations

Dear Mr. Steinbrecher and Members of the Board of Trustees,

On behalf of the Center for Public Interest Law (CPIL) at the University of San Diego School of Law, and as a member of the Access Through Innovation of Legal Services (ATILS) task force, I strongly urge you to vote in favor of ATILS' remaining recommendations – particularly the recommendation to establish a working group to explore the development of a regulatory sandbox. This recommendation, which was already of vital importance to the innovative expansion of legal services at the time it was presented to you in March, is exponentially more critical now in light of the global pandemic and its certain economic consequences.

As most of you know, as the Director of CPIL, I have closely monitored this Board, attending most of its meetings, and advocating for the Bar to maintain its priority to protect the public, and not the profession it regulates, for over five years. I have personally advocated for – and observed first-hand – the transformation of this Board into one that is dedicated to its public protection mission and understands its role as a regulatory body, not a trade association.

That being said, I was deeply concerned with the Board's decision at the March meeting to postpone a vote on ATILS' recommendation to form a working group to explore the development of a regulatory sandbox. The Chair's presentation of this vote as "controversial," even though the public comments on this item – from very well-respected individuals, academic institutions, and organizations across the country – were overwhelmingly in support of the recommendation, was puzzling at best. Even more concerning to me was the fact that the **only** comment you heard in opposition to this recommendation was made on behalf of a group of attorneys, who cited no specific consumer harm that would result from the proposal, nor did they produce any alternative proposals for addressing the enormous justice gap we have here in California.

The decision to postpone the vote sent a concerning message to the public: that the voice of the very professionals you license and regulate are exponentially more important to you than any other voice – including those of the task force who dedicated 18 months of extremely hard work to present these recommendations to you. This is simply unacceptable.

The ATILS recommendation presents an opportunity for this Board to take real action, and demonstrate your dedication to your statutory mission to serve the public and increase access to justice – even if it might be unpopular with licensees of the Bar.

The ATILS recommendation is modest, careful, and the result of months of study

To the extent that additional stakeholders such as the Supreme Court or the California Legislature have expressed concern to you about ATILS' proposal in light of some of the criticism they may have heard from attorney groups, you as a Board should feel confident in assuring them that ATILS' recommendation before you today is the result of months of research and careful deliberation by the task force. It is also extremely modest. It simply recommends that you authorize a ***working group*** to continue exploring the development of a regulatory sandbox, and the means for its implementation. It is not even a vote for you to establish the sandbox, which in and of itself is an incremental and measured means of looking at the issue of non-attorney ownership as a means to stimulate innovation in the delivery of legal services.

The task force made this recommendation after considering models from other jurisdictions within and outside of the U.S. We also considered the public comments and concerns we received last summer about the potential unintended consequences of relaxing the rules; conducted additional stakeholder meetings with the Legislature, law enforcement, legal services groups, and attorney groups; and identified the need to develop more data with respect to the impact that relaxing ownership restrictions would have on consumers.

After all of this study, we concluded that the sandbox model would be the best way, in a controlled environment, to relax existing prohibitions on non-lawyer ownership and fee sharing and observe the impact of that relaxation on the development of new and innovative ways to deliver legal services to those who cannot access them now. At the same time, the sandbox regulator would be able to gather data, assess consumer harm, and measure the impact on access to justice *before* recommending a wholesale change to existing laws. In this way, the task force believes that the dual goals of protecting the public and increasing access to justice in a systemic way can be achieved. To put this recommendation into context, Arizona's task force recommended repealing their equivalent rule on ownership and fee sharing altogether without any kind of pilot program.

The task force recommends an additional working group today because there are important areas still to be considered before this sandbox is ready for a roll-out, including the regulatory structure of such a sandbox, the parameters for applicants, and working with the Legislature to address existing statutes that may need to be amended to ensure a properly functioning and efficient program. Thus, this recommendation should not be deemed controversial, nor an attempt to cavalierly make drastic changes without consideration of the consequences. Rather it is measured, modest, and an opportunity to move forward to create meaningful change.

The other "options" are not reasonable compromises; they gut the entire recommendation

Options 2 and 3, which the staff memo offers for your consideration, present no rationale for limiting the scope of the working group's exploration of the regulatory sandbox, other than to respond to "concerns" from unidentified opponents of regulatory reform that ATILS had not "sufficiently demonstrated the need to reconsider nonlawyer ownership restrictions," and that

“traditionally, nonlawyer ownership arrangements have been viewed as potentially undermining lawyers’ independent professional judgment and the duty of loyalty.”

It bears repeating that the impetus for forming our task force, and the foundation for its charter, was Professor William Henderson’s Legal Landscape report commissioned by this Board, in which he concluded:

The legal profession is at an inflection point that requires action by regulators. Solving the problem of lagging legal productivity requires lawyers to closely collaborate with allied professionals from other disciplines, such as technology, process design, data analytics, accounting, marketing and finance. By modifying the ethics rules to facilitate this close collaboration, the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.¹

In light of this, ATILS’ charter expressly directed the task force to “evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with nonlawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law related services especially in those areas of service where there is the greatest unmet need.” The sandbox recommendation, after months of study, is precisely that.

I urge you not to be tempted into thinking that options 2 and 3 are “safer” options, given the criticisms presented by attorney groups. Not only are they missing any supporting data (especially compared with the full-scale report ATILS presented to you), but they severely undermine the very heart of ATILS’ proposal. There is no justifiable reason to prohibit the working group from even considering allowing entities who have real potential to deliver new methods of legal services from participating in the sandbox simply because they are not 100% owned by attorneys.

The vaguely referenced “concerns” about ATILS’ proposal are almost certainly politically-driven – a direct line from those with a vested profit stake interest in maintaining the status quo. The Bar’s own research exposes their hypocrisy. The Justice Gap study reveals that 70% of Californians who have had a legal problem do not get legal help. That number is ever increasing in this time of crisis.

¹ See Legal Landscape Report, p. 27 <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>

Access to justice is not a new problem in California. CPIL has monitored the State Bar for 40 years, and we can recite countless examples—as I’m sure you all can—of commissions, working groups, and task forces tasked with closing the justice gap for decades. And yet the gap continues to widen. Both options 2 and 3 propose yet another working group to “focus” on access to justice issues, while completely hamstringing such a group from considering any real and meaningful opportunities for change.

The Covid 19 Pandemic only accelerates the need for these innovations

On Monday, May 11, Mr. Steinbrecher testified to the Assembly Judiciary Committee that the Bar expected a “tidal wave” of need for legal services in light of the pandemic. He is absolutely correct. This increasing need only amplifies the already dire problem that ATILS was tasked with solving, and is far too vast to be filled with increased pro-bono hours or relying on already overburdened legal services organization. Moreover, the need to access these services remotely via technology is now absolutely critical.

Californians deserve a legal profession driven to innovate and able to do so under careful oversight. This is what the sandbox proposal envisions. After months of careful research, ATILS believes that this is the way to increase options for all Californians, especially those with low and moderate incomes and small businesses, to achieve meaningful access to justice. To retreat from this opportunity by voting against ATILS’ proposal at such a time of critical need would be tragic.

Now is the time for leadership, not fear.

I deeply appreciate your consideration of this important matter and am happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, reading "Bridget Fogarty Gramme". The signature is written in a cursive, flowing style.

Bridget Fogarty Gramme
Administrative Director
Center for Public Interest Law
University of San Diego School of Law

cc: Hon. Mark Stone, Chair, Assembly Judiciary Committee
Hon. Hannah-Beth Jackson, Chair, Senate Judiciary Committee