



It's not over 'til it's over

STATE BAR INITIATIVES TO ALLOW NON-LAWYERS TO PRACTICE LAW STILL POSE EXISTENTIAL THREATS

If you have followed the California State Bar's efforts to allow paraprofessionals and corporations to practice law, you may have thought that the December 7, 2021, letter by Senator Tom Umberg and Assembly Member Mark Stone to the State Bar's Board of Trustees was a kill shot. Unfortunately, it wasn't.

Like the AI that big business ultimately wants to have practice law, the machines of the State Bar and big business are learning and improve from each interaction.

In response to the letter from Senator Umberg and Assemblymember Stone and public criticism of its proposals, the State Bar has revised its proposed paraprofessional program to eliminate certain lightning-rod components. But that doesn't change the fact that the paraprofessional program is a cyborg sent to initiate the end of lawyer representation of humans. The State Bar still seeks to allow paraprofessionals to represent consumers in court up until a jury trial in many case types.

The euphemistically named "Closing the Justice Gap Working Group," tasked with creating a "sandbox" to allow non-lawyers to practice law, has not been disbanded. Its work continues with the group and its mission statement having been restructured to make them appear more palatable.

No one should be lulled into a sense of safety; these State Bar initiatives still pose existential threats.

History and perspective

Because of the State Bar's failure to focus on its core function of protecting the public, it has many detractors and few friends. But she who lacks friends is often an easy mark for opportunists. It should come as no surprise that companies swooped in to befriend the State Bar, wooing it with the promise of an increased budget and power through the shiny new objects of a paraprofessional program and a regulatory sandbox.

The shiny new objects would be delivered to the people of California through a Trojan Horse named "Access to Justice." As with any Trojan Horse, the "Access to Justice" Trojan Horse would come with destroyers in its belly; in this case, the corporate takeover of the practice of law.

Like big tobacco paying doctors for studies saying that smoking cigarettes is not harmful, the State Bar commissioned a "Justice Gap Study" that surveyed 3,385 Californians with loaded questions and no follow-ups. The "Justice Gap Study" predictably concluded there's a "Justice Gap," and this purported "severe challenge" was used to justify the Paraprofessional Program Working Group.

But it's flawed and results oriented. For example, the program sought to vest paraprofessionals with the ability to practice all of employment law. But this was based on only 123 respondents saying they had employment problems in response to only eight employment-related questions. Out of those 123 people, only 66 people, or 54%, sought legal help. Half of those 54% obtained the help they sought. Only 12 people said they did not get help because of the cost. But *the survey did not even ask* if a lawyer advised that the respondent had *no case* or that the lawyer could *not* take their case on a contingency basis.

The State Bar next advanced the paraprofessional and regulatory sandbox ideas through the California State Bar Association's Task Force on Access Through Innovation of Legal Services (ATILS). ATILS and the State Bar published their proposals about allowing paraprofessionals to practice law and creating a regulatory sandbox in which corporations could practice law.

The responses in 2020 by legal aid groups, bar associations, and lawyers were almost universally unfavorable. Among concerns cited were (1) insufficient limits on scope, regulation, or enforcement mechanisms for the provision of legal services by nonlawyers; (2) no clear

picture of how the competence of nonlawyer-provided services will be assured, resulting in great risk of consumer fraud and harm; and (3) threats to the independence of professional judgment in the delivery of legal services, with profit motives likely to overwhelm compliance with fiduciary duties.

Notwithstanding the negative feedback, ATILS advocated for a regulatory sandbox designed to allow participants "to test innovative business models or offer products and services in a controlled environment under a regulator's supervision."

Who are driving forces behind the adoption of the corporate practice of law? One key proponent is the "Institute for the Advancement of the American Legal System (IAALS)," which is an academic research center based out of the University of Denver, major corporate donors to which include Exxon and State Farm. (<https://iaals.du.edu/partners>) As recently as January 4, 2022, IAALS's website listed the national Institute for Legal Reform (IRL), along with Exxon and State Farm, as "Business Leader Network" members. (<http://web.archive.org/web/20220104040224/http://iaals.du.edu/partners>)

IRL is the Chamber's tort-reform lobbying arm. IRL specifically touts its tort-reform agenda on its home page. (<https://instituteforlegalreform.com>)

IAALS's website explained that "Business Leader Network" members are "an important group of private sector advisors and investors" that "... meet twice annually ... to discuss the challenges faced in the current legal system and how it can be best improved"

In September 2021, the State Bar's Paraprofessional Program Working Group issued its initial report recommending, among other things, that paraprofessionals should be allowed to represent clients in court up to trial in approved practice areas; own up to 49% of a law firm; and share in attorneys' fees derived from cases outside their own areas of practice.

The State Bar's Closing the Justice Gap Working Group was stacked with five people who did not live in California and one of whom even resided outside the country, yet the group was developing rules under which corporations would be allowed to practice law in California. In working group meetings, some members actually said out loud that the goal of the group should be to design a system in which there was as little regulation as possible for corporations practicing law. Of course, all existing regulations on lawyers would remain.

Senator Tom Umberg and Assemblymember Mark Stone Letter

Into the fray stepped Senator Tom Umberg, Chair of the Senate Committee on Judiciary, and Assemblymember Mark Stone, Chair of the Assembly Committee on Judiciary, on December 7, 2021, via a letter to the State Bar Board of Trustees in which they wrote:

... 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, 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.

Being that the State Bar has to obtain funding from the legislature annually, the letter from Senator Umberg and Assemblymember Stone initially created a shockwave. But the State Bar, and corporations that want a lucrative piece of the legal services market in California, are undeterred.

Current Paraprofessional Program Working Group recommendations

From September 23, 2021, through January 12, 2022, the original Paraprofessional Program Working Group (PPWG) recommendations were out for public comment. Over 2,000 public comments were received from organizations, consumers, and attorneys. 81% of all respondents strongly opposed the paraprofessional recommendations.

In response to the letter from Senator Stone and Assemblymember Umberg, and the comments received from the public, the PPWG met again multiple times in 2022, to reconsider some key issues, among them including the ability of paraprofessionals to own up to 49% of a law firm and to appear in court. The PPWG decided not to recommend that paraprofessionals be allowed to own any portion of a law firm but that they still be allowed to appear in court except in jury trials. There will also be no fee cap on paraprofessionals' rates.

Once the PPWG report is finally revised, the report and recommendations will be presented to the State Bar Board of Trustees. If the Board votes in approval, the plan will go to the California Supreme Court and legislature for further consideration before the program could be implemented.

Current Closing the Justice Gap Working Group status

In 2022, in response to the letter from Senator Stone and Assemblymember Umberg, the Closing the Justice Gap Working Group (CTJG) recommended, among other things, that it:

- Eliminate members who do not have California-specific litigation experience.
- Streamline the meeting process.
- Modify the group's charter to:
 - a. Specify the roles sought of the Legislature and the Supreme Court in setting parameters for and/or approving who would be permitted to operate in the sandbox;
 - b. Clarify whether existing statutes and rules would apply to sandbox participants; and
 - c. Determine procedures to reduce the risk that corporate interests will unduly influence or compromise professional judgment and objectivity in the delivery of legal services.

The CTJG continues its work to establish the framework for corporations to practice law in California and will be meeting regularly. A new deadline has yet to be set by which a final recommendation is to be made to the State Bar Board of Trustees.

The future

Over 60 Alternative Business Structures (ABS) have been approved to do business in Arizona and Utah, including LegalZoom and other companies. These venture capitalists, big accounting, and big tech companies will practice law, gobble up market share and sell data. Unless otherwise prohibited, they will undoubtedly partner with licensed lawyers in California to open California branches of their newly minted out-of-state “law firms.”

As predicted by Senator Umberg and Assemblymember Stone, the ABS companies will be “... driven by profits and demands for returns to shareholders,

and [will] not have the same ethical duties and are not subject to the same regulatory oversight as attorneys.”

In order to protect consumers from profit-driven business practices, we must (1) continue to oppose the State Bar’s efforts, including by appearing remotely at CTJG meetings (register for automatic notifications at <https://board.calbar.ca.gov/Committees.aspx>); (2) educate every person we know about the State Bar’s and corporations’ takeover efforts and the harm that will happen if allowed; (3) talk with legislators about the threat and support legislators who believe that human beings should be represented in their legal matters by human beings, not by profit-driven corporations; and

(4) prohibit California lawyers from practicing or sharing fees with any ABS that is licensed out of state.

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