

## Comments on: Utah Supreme Court Regulatory Reform Proposal

Tom Gordon  
Executive Director,  
**Responsive Law**

Responsive Law thanks the Utah Supreme Court for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We advocate for policies that expand how and by whom legal services may be provided so that people of all income levels can get the legal help they need. We urge the Court to implement the Sandbox proposal and put a new regulator in place to ensure that people at all income levels have safe and affordable access to the legal help they need.

Submitted to the

**Utah Supreme Court**

July 23, 2020

### **Low- and Middle-Income Consumers Cannot Afford Legal Help at Any Level**

The growing access to justice crisis in the United States extends from the poorest Americans to those of modest means and beyond, encompassing most of the middle class. In the World Justice Project 2020 report, the United States ranks 109th out of 128 countries in affordability and accessibility of its civil justice system.<sup>1</sup> Americans cannot afford assistance with everyday legal needs despite the fact that the average household will face a significant legal problem every year.<sup>2</sup> More Americans suffer from a lack of access to justice than do their peers in England and the Netherlands, where there are fewer restrictions on how legal services can be offered.<sup>3</sup> In fact, the Court's

---

<sup>1</sup> World Justice Project, *WJP Rule of Law Index 2020*, available at <https://worldjusticeproject.org/rule-of-law-index/factors/2020/United%20States/Civil%20Justice>.

<sup>2</sup> Gillian K. Hadfield & Jamie Heine, *Life in the Law—Thick World: The Legal Resource Landscape for Ordinary Americans in Beyond Elite Law: Access to Civil Justice for Americans of Average Means* (Samuel Estreicher & Joy Radice eds., 2015) (observing that fifty to sixty percent of low- and moderate- income American households face an average of two legal problems annually).

<sup>3</sup> *Id.*

Implementation Task Force has recognized the lack of access in Utah itself: “In Utah’s largest district, in 93% of family and civil law disputes, one party did not have a lawyer.”<sup>4</sup>

Furthermore, the access to justice problem has been exacerbated by the current COVID-19 pandemic. Especially in areas of domestic violence, landlord-tenant law, and healthcare and consumer debt, many Americans will likely face a greater number of legal issues than this country has seen in the past. Even as the pandemic drastically increases the demand for legal services, it also diminishes consumer ability to pay. A risk- and outcomes-based regulatory plan will be necessary in the coming years to provide new, affordable, and high-quality innovations in the legal realm.

### **Consumers Have Little Awareness of Their Legal Needs or How to Find Legal Help**

Most low- and middle-income individuals, families, and organizations have little awareness of how to go about getting help for their legal matters. Due to a lack of sophistication regarding the legal system, many individuals fail to recognize when their problems require legal help. As noted by the American Bar Association Commission on the Future of Legal Services, past promotional efforts by state bars have proven insufficient to raise public awareness of the need for legal assistance.<sup>5</sup>

Moreover, even when a given consumer *does* recognize that their issue is legal in nature, they may be unable to determine what sort of aid they need and how it can be located. A 2013 study found that two-thirds of random adults in a mid-sized American city experienced at least one significant civil justice legal issue within an 18-month period; however, only one-fifth of those experiencing such a situation sought any formal help.<sup>6</sup> A significant factor in the justice

---

<sup>4</sup> Utah Implementation Task Force on Regulatory Reform, “Frequently Asked Questions,” 2020, [https://uploads-ssl.webflow.com/5d03efebc4cbd6d7c884b485/5eb4ce994c8c0c802e2c6bc2\\_Utah%20FAQs%20FINAL.pdf](https://uploads-ssl.webflow.com/5d03efebc4cbd6d7c884b485/5eb4ce994c8c0c802e2c6bc2_Utah%20FAQs%20FINAL.pdf)

<sup>5</sup> ABA Commission on the Future of Legal Services, “Report on the Future of Legal Services in the United States,” 2016, <http://abafuturesreport.com/#1>.

<sup>6</sup> Sandefur, Rebecca L., Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study (Aug. 8, 2014). Available at <https://ssrn.com/abstract=2478040>.

gap stems from the inherent difficulty in identifying particular consumers' needs and connecting them to appropriate legal aid providers. Under the regulatory regimes currently active in many states, the system through which consumers access legal services is "confusing, opaque, and inefficient for many people."<sup>7</sup> When faced with a civil justice issue, up to half of those who do not choose to seek outside help fail to do so because they believe that such help would be ineffective, too difficult to locate, or too costly.<sup>8</sup>

### **Misconceptions Regarding The Sandbox Proposal**

Many individuals and organizations have submitted comments regarding the Sandbox and regulatory reforms, outlining problems they believe the proposal poses. In many cases, these concerns are representative of misapprehensions and misperceptions that opponents of alternative business structures have previously raised in Utah and elsewhere.

#### *The Sandbox Proposal Permits Only Lawyers to Practice Law*

In fact, proposed Rules 5.4A and 5.4B *explicitly prohibit* the practice of law by non-lawyers, even if they own a business that employs lawyers. Further, lawyers in the Sandbox, no matter what entity employs them, are subject to the regulatory body, which is in turn subject to the Supreme Court. There is also no indication in the proposal that any kind of tech, AI, or other non-lawyer software would be permitted to "practice law."

---

<sup>7</sup> Carter, Stephen, "The Legal Services Corporation Launches Pilot Program to Increase Access to Justice," quoting Legal Services Corporation President James L. Sandman, Apr. 19, 2016, <http://www.lsc.gov/media-center/press-releases/2016/legal-services-corporation-launches-pilot-program-increase-access-0>.

<sup>8</sup> Sandefur, *supra*, n. 2.

*The Sandbox Proposal Does Not Change Any Ethical Rules Governing Attorneys Besides Rule 5.4*

Lawyers operating under the proposed Sandbox will retain all of the same duties to their clients in areas of confidentiality, zealousness, competence, professional independence, and everything else covered by the Rules of Professional Conduct. The only change from traditional rules is that lawyers who choose to be regulated will be permitted to share fees with non-lawyers and non-lawyer entities, subject to findings of minimal to no risk. As with all professions that operate under a similar structure to the Sandbox, lawyers and law firms will maintain all of their professional ethics responsibilities as they are covered in the proposal and in the Rules of Professional Responsibility.

*Restrictions on Law Firm Ownership Are Ineffective in Protecting Lawyers' Professional Independence*

Opponents of eliminating Rule 5.4 have cited the importance of protecting lawyers' professional independence. However, Rule 5.4 is not a particularly effective means of safeguarding that value. Lawyers' professional independence is already protected by numerous other provisions of the Rules of Professional Conduct.

Additionally, the frequent argument that non-lawyers would exercise improper influence over lawyers in their employ simultaneously overstates and understates lawyers' ethical propriety. It assumes that lawyers who own firms are saints who have no possible motivation to exercise undue pressure on subordinate lawyers to act against their clients' best interests (e.g., padding of hours, pressure to settle a contingency-fee case). At the same time, it assumes that lawyers have so little backbone that they would ignore all their obligations to their clients if pressured by their corporate employer.

Risk-based regulation will not lead to elimination of lawyer independence. On the contrary, by regulating entities rather than just individual lawyers, it will be able to use data to understand where this value may be threatened within a firm's structure, and how to intervene to protect it.

*The Sandbox Provides an Additional Degree of Consumer Protection By  
Regulating Both Firms and Individual Lawyers*

The current regulatory structure for lawyers governs individual lawyers, but not the businesses through which they provide services. As a result, while consumers are protected from the incompetence or misconduct of their lawyers, there is no way for consumers to be protected from systemic problems that may exist at a law firm.

In contrast, consumers using a company in the Sandbox will be protected by two sets of regulations. As mentioned above, the existing Rules of Professional Conduct (with the exception of fee sharing restrictions) would still apply. In addition, companies in the Sandbox would be regulated in a way that is common in other industries—although new to law—with the new regulator functioning as an inspector to maintain regulatory standards and protect consumers.

The proposal will allow the Sandbox regulator to collect data through 5.4B's notification and application processes; an "outcomes-based" approach in which the regulator will focus on *how* consumers are actually being harmed and formulate plans to combat those harms with innovative and flexible solutions. This is a marked and welcome change from the traditional, mechanistic "rules-based" approach, focused purely on technical compliance rather than actual consumer outcomes. With this approach, not only will the regulator be able to intake, review, assess, and respond to data from voluntary applicants, but approval is dependent on a finding of "no risk" or "minimal risk." This process is designed to catch bad faith actors from the outset.

Additionally, these processes are subject to further review by the Utah Supreme Court whenever the regulator finds it necessary to deny an applicant or remove a participant from the Sandbox. All such decisions are based on actual data indicating the risk the individual or entity poses to consumers in the state, regardless of economic status. Any finding of "more than minimal risk" will be placed under further review by the regulator *and* by the Court for final removal or denial.

Furthermore, the proposed Sandbox is a "risk-based" approach, assessing consumer risk under various business structures for legal services and designing specific and targeted regulations to protect consumers from foreseen harms. This proposal specifically allows

the regulator to tailor the Sandbox to best benefit consumers and lawyers at the same time. Rather than taking an all-or-nothing approach when it comes to new structures and practices, regulators using a risk-based approach can design regulations that preserve flexibility and access while ensuring that clients are protected. What's more, this process focuses more on prevention than post-act damage mitigation.

Finally, consumer surveys show support for policies allowing non-lawyers to have ownership stake or partnership in law firms, so long as regulations exist to catch bad actors.<sup>9</sup> Rule 5.4B will permit the new regulator to do just that: expand access to services while acting as another level of protection against consumer risk. Not only will the regulator be an inspector for individual lawyers, but it will also assess entities, such as law firms, which has been uncommon in regulatory bodies in the past.

### **Relaxing or Eliminating Rule 5.4 is a Necessary Condition for Making Legal Help Safer and More Affordable**

*The Sandbox Proposal Permits Outside Investment, Which Will Allow Lawyers to Garner More Financial Resources, Free Up Time to Spend on Clients, and Increase Productivity*

Allowing the corporate practice of law is a necessary condition to fill the gap in providing adequate legal help. Just as H&R Block and TurboTax have made navigating the tax code widely accessible and affordable, a mass-market law firm could allow Utahns to affordably and accessibly navigate the legal system. The economies of scale that can only be achieved by outside investment would bring down the costs of legal services. Almost every law firm providing services to middle-income individuals and small businesses on issues such as family law, employment law, housing, and basic corporate and business law is a small business of no more than a dozen attorneys. A large, well-capitalized firm specializing in these issues could provide standardized training to the attorneys it works with, perform quality control on services offered to clients, and let lawyers focus on

---

<sup>9</sup> State of Arizona Public Opinion Survey, Arizona Supreme Court Task Force on the Delivery of Legal Services, (Jan. 20-24, 2020).

practicing law rather than finding clients, maintaining trust accounts, and collecting fees.<sup>10</sup>

*The Proposal Puts Law on a Level Playing Field with Other Professions*

The concept of ownership from outside the profession is not an outlier in the professional world: For example, the corporate “practice” of medicine is far from unusual in the United States. While most states prohibit corporations from directly practicing medicine, all states “provide an exception for professional corporations and many states provide an exception for employment of physicians by certain entities.”<sup>11</sup>

Under this proposal, Rule 5.4B would be similar to corporate practice of medicine laws and statutes. Lawyers would be able to work for a range of different types of employers, without being restricted by the employer’s corporate structure.

*Lawyers in the Sandbox Should Not Be Subject to a Double Standard Compared to Lawyers in Traditional Firms*

Some commenters have suggested requiring lawyers in the Sandbox to have malpractice insurance or to guarantee that they will serve a certain quota of underserved clients.

It’s worth noting that no such requirements currently apply to Utah lawyers. We would welcome a requirement that *all* Utah lawyers be required to have malpractice insurance, but there is no reason to apply such a requirement solely to Sandbox lawyers. In fact, a Sandbox firm is less likely to need malpractice insurance, as regulators would be able to assess and minimize risk at the firm level.

---

<sup>10</sup> Lawyers spend only 2.3 hours a day on billable tasks and collect an average of only 1.6 hours of their billable time (Clio 2019 *Legal Trends Report*, <https://www.clio.com/resources/legal-trends/> reported on at <https://abovethelaw.com/2019/11/clios-latest-legal-trends-report-reveals-a-troubling-truth-about-lawyers/>).

<sup>11</sup> Issue Brief: Corporate Practice of Medicine, American Medical Association (2015), available at <https://www.ama-assn.org/media/7661/download>.

Similarly, while a minimal means focus is laudable, a minimal means *requirement* would unduly tax innovation and flexibility in this area, wasting precious time and energy on definitions, measurement, and compliance. We believe this proposal, unweighted by such bloat, would be an enormous step in the direction of expanded access to legal services.

### **Simplifying Advertising Rules Will Raise Public Awareness of Lawyer Services and Make Those Services More Accessible**

While most of the attention given to this regulatory proposal has focused on the Sandbox, we would be remiss in failing to address the proposed changes to lawyer advertising rules. Advertising has an important role to play in making the public aware of the legal components of their problems and the availability of legal services. It also serves as a valuable aggregator of legal information and resources.

The current advertising rules are archaic, overreaching, and unreasonably restrict lawyers' ability to provide information to consumers about the availability of legal services. This is particularly true as the growth of electronic media has exposed the inaptness of rules created in an era prior to either the internet or the recognition that advertising is protected by the First Amendment. Any excess advertising regulation represents another barrier preventing consumers from connecting with lawyers and making informed decisions about their legal needs. Changes to advertising rules will only increase the effectiveness of Rules 5.4A and B and expand access to justice across the state.

The proposal would strengthen Rule 7.1 to provide all of the consumer protection needed, while loosening unnecessary restrictions on lawyers. The proposed changes focus on false and misleading communications, as well as prohibiting interactions involving coercion, duress, and harassment. Under the current rules, lawyers face outdated, byzantine restrictions on the methods and messages they can use when trying to reach potential clients. The Task Force correctly determined that there is no need for specific regulation around attorney-matching services or other forms of marketing. Broadly prohibiting false and deceptive practices is sufficient to protect the public and provide a basis for discipline when required. We should actively welcome rules that provide



flexibility for new development in communications technology, rather than being trapped in the expectations and methods of a particular time.

Repealing Rules 7.1-7.5 and replacing them with a strengthened 7.1 would greatly increase the ability of lawyers and law firms to use modern digital marketplaces and marketing methods to reach the public. A recent study of California residents shows that 66 percent of Californians who are comfortable using the internet have looked online for legal help.<sup>12</sup> There is no reason to expect that this number would vary greatly for Utah. Furthermore, this number will only continue to grow as younger generations start facing legal issues of their own. By removing restrictive barriers and leaving an improved Rule 7.1, in combination with an overhaul of Rule 5.4, the proposal will undoubtedly help to provide many underrepresented Utahns with the legal assistance they need.

### Conclusion

The access to justice crisis in America is growing and cannot be improved without systemic changes to the rules and business models applicable to legal services. Adopting the proposed Sandbox regulations is a critical step, especially as the COVID-19 pandemic increases in severity. Uncertainty and consumer legal problems are only going to proliferate in the months ahead. Regulatory reforms that allow for flexibility and address actual public harms are critical. An updated Rule 5.4 will not only facilitate a broader range of practices for lawyers to expand their businesses, but it will also ensure that consumers are better protected from bad actors than they have been in the past. Modernized attorney advertising rules will allow for better-informed consumers. These changes are necessary, proportionate, and must be prioritized at an historic time of crisis and uncertainty in the United States. On behalf of the overwhelming majority of Utahns who cannot afford legal help, **we urge the Court to adopt the proposed Sandbox regulations.**

---

<sup>12</sup> ATILS Task Force Study, The State Bar of California, (Mar. 2020), available at <http://www.calbar.ca.gov/Portals/0/documents/ATILS-TaskForce-Study-Technical-Report.pdf>.