

## **MEMORANDUM**

**TO:** Utah State Bar Commission

**FROM:** Utah State Bar Committee on Regulatory Reform  
Erik Christiansen and Honorable Thomas Wilmore – Co-Chairs

**DATE:** July 8, 2020

**RE:** Findings and Recommendations Concerning the April 24, 2020 Utah Supreme Court Standing Order No. 15 and Associated Proposed Changes to the Rules of Professional Conduct (collectively “**Proposal**”)

### **ASSIGNMENT**

On April 24, 2020, the Utah Supreme Court officially proposed what it characterizes as the “Largest Reforms to Legal Profession in a Generation.” In anticipation of the Proposal, the Bar Commission formed this Committee to liaise with the Utah Implementation Task Force on Regulatory Reform and also to independently assess the issues surrounding regulatory reform with an eye to achieving increased access to justice for the people of Utah. This Committee was asked to review the Proposal, interact with members of the Bar, and make a recommendation to the Bar Commission concerning the Committee’s response to the Proposal.

### **BACKGROUND**

We believe it is critical to take note of what initiated and served as the initial impetus for this entire endeavor. On August 22, 2018, the President of the Utah State Bar sent a letter to the Justices of the Utah Supreme Court, expressly noting data regarding the extremely high volume of self-representation in matters before the courts in Utah. The letter noted challenges confronted by low and middle-income people with legal needs in and outside of the courtroom and challenged the Court to address the issue.

We note that that letter led to an August 2019 report from the Utah Work Group on Regulatory Reform (the “Report”). That Report concluded that courts and lawyers have failed to provide meaningful access to justice for all of Utah’s citizens. While “meaningful” is a normative term, this Committee notes that it rejects the notion that there is fault with the courts, or with lawyers, in their motivation or desires to increase access to justice. There is no dispute within the legal community that courts and lawyers share a strong interest in meeting the unmet needs of the indigent and unrepresented in Utah’s Courts. Indeed, the extraordinary pro bono and volunteer efforts in which lawyers regularly and voluntarily engage, the court-initiated moves to systematize court-approved forms and make them easily accessible online, the establishment of a new legal profession in Licensed Paralegal Practitioners, and the piloting of an online dispute resolution model for small claims court where lawyers are not even necessary, are all examples of the myriad of efforts and the genuine motivations of lawyers and judges to

serve Utah citizens. While the Report effectively concludes that lawyers may not be essential to every endeavor to increase access to justice in Utah, we believe the collective wisdom and thoughts of thousands of men and women who have sworn an oath to serve and protect the public in connection with being admitted to practice law in this state should neither be rejected nor discounted by the mostly mistaken assumption that lawyers see these proposed reforms as threats to their livelihoods. Our Committee believes that increasing access to justice and the courts for the indigent and unrepresented people in Utah is an important part of the goals and missions of the Utah State Bar and its membership, and we applaud the Supreme Court's efforts to address these issues.

We also importantly note the sentiments expressed by Judges Robert Shelby and David Barlow at the recent induction ceremonies for new Bar Admittees on May 14, 2020. Their comments and encouragement for the newest crop of Utah lawyers focused on the privileges, obligations, and responsibilities incumbent with a license to practice law in Utah. There was also a mandate to be professional.

### **WORK, STUDY, AND INPUT**

This Committee studied the issues prior to the April 24, 2020 announcement of the Proposal, and since then this Committee has benefitted from the Bar's very concerted efforts to both educate and solicit input from a number of sources. Those solicitations have prompted responses and comments from individual lawyers and judges, but also from discrete groups of lawyers, including the Litigation Section of the Utah State Bar, the Intellectual Property Section of the Utah State Bar, the Central Utah Bar Association, the Utah Association for Justice, the Access to Justice Commission, and the state's largest private law firms, among others. Members of the Committee also have spoken at numerous CLEs and presentations, met with individual law firm leaders and members, and spoken with many members and leaders in the Utah State Bar.

With all of the input the Commission has solicited, reviewed and considered, there are two very consistent and uniform responses from the members of the Bar. First, there is no debate, and absolute uniformity among the members of the Utah State Bar, that increasing and improving access to justice are critical and defining aspects of both judicial, government, and private providers of legal services. Our Committee shares that goal. There also is, however, a clear majority view that the *methods and means* proposed by the Supreme Court to meet this aspiration potentially might miss the mark, and potentially might not succeed in addressing the goal of increasing access to justice without careful and discrete criteria for approvals of applications by the regulator. This Committee also has received not only anecdotal, but concrete expressions of concern from supporters and proponents of regulatory reform that the Utah State Bar and its members are somehow reacting, or will react to proposed regulatory changes, in a manner that has been described as "protectionist" or "self-serving." Based upon what we have observed, this Committee and, we believe, the Utah State Bar as a whole, categorically reject the argument that criticisms and concerns respecting the proposed regulatory changes (and again, not the aspirations) are primarily, substantially, or even moderately motivated by self-interest. Our Committee believes that such arguments discount the substantial commitment lawyers in Utah have made and are continuing to make to increasing access to justice for the poor and indigent,

and the countless tens of thousands of hours spent by Utah lawyers on pro bono and other voluntary legal services. There is general acknowledgement that the generous education efforts of reform proponents have not reached every quarter, and thus some criticisms and concerns regarding reform may not be well founded. It also is true, however, that as recently as June 15, 2020, there was information about potential participants in the Sandbox that had been withheld out of concern for proprietary interests, which withholding complicated the Committee's understanding of the nature of proposals the regulator was evaluating or receiving. Recently, that has changed, and this Committee was provided with some information concerning some applications to the regulatory Sandbox. Given the need for transparency in satisfying the goal of serving access to justice, one certain recommendation this Committee makes is that the Bar continue to press for transparency as to the players, investors, and owners who, by virtue of the approval of the Utah Supreme Court, will be allowed into the Sandbox with an opportunity to profit from those who need increased access to justice. Based upon the vast amount of input we have solicited and reviewed, we believe that there are well-motivated, and well-founded concerns about some specific proposals being advanced, while others truly appear to be aimed at improving access to justice.

### **SPECIFIC, ARTICULATED CONCERNS AND SUGGESTIONS**

Without citing every example and offering, we believe the following are frequent and shared concerns and suggestions to explain and provide a foundation for the recommendation that this Committee is making to the Bar Commission.

- No requirement to help people of limited means<sup>1</sup>: In spite of the often-cited statistic of 93% of litigants in courts having no lawyer, the Proposal as currently drafted is not conditioning participation in the Sandbox expressly upon serving that indisputable and critical need.
- More transparency: The Proposal places a great deal of responsibility with a selected body of people, the selection criteria for which are unknown. The consideration process for applicants to the Sandbox is closed to the public. The reasons for this have been to protect applicants, yet it is the public whose interests the legal profession is tasked to protect. Consequently, there is concern in our Committee that non-lawyers with financial interests in or managerial authority over law firms might have little accountability.
- The money has to come from somewhere: Our Committee believes that it is realistic to assume that Sandbox players are not applying out of the goodness of their hearts. Innovators are generally motivated by potential returns on investment. Doubtless, the people applying for permission to come into the Sandbox will expect a return on investment. Where is that money coming from, if not from people who are assumed

---

<sup>1</sup> We happily note that very recently the Task Force has shared details of the first six applicants to participate in the Sandbox, which of itself is an important step in assuaging well-intentioned concerns. More importantly, however, we note that many of the six first-comers have expressed their intention to increase access to justice specifically to people of limited means. Whether this happened by design or accident, the Committee believes it should be a *requirement*.

to have limited means to access justice, or other segments of the legal services industry?

- No sunset: The hallmark feature of the Proposal is that the Sandbox, with an expected lifespan of two years, during which data will be evaluated in a controlled environment, will nevertheless grandfather in for perpetual existence accepted applications. The Proposal has no provision spelling out how individuals and entities with proprietary interests will be removed from the Sandbox if their proposals fail or stray from access to justice or other requirements.
- No insurance requirement: The Proposal does not condition participation in the Sandbox upon a bond, or malpractice or other insurance requirement to financially protect consumers in the event of misfeasance or, worse, malfeasance.
- Attributes of Professionalism: The Proposal may imply, but it should express the hallmarks of providing legal services, namely that it is a privilege that carries with it obligations and responsibilities to be professional. Whatever AI comes along should have some humanity incorporated.
- Quality of legal service or product. The Proposal appears weighted toward lowering the cost of legal services and products without significant regard to the quality of such services and products.

### **RECOMMENDATIONS**

We recommend that the Bar Commission respond to the Utah Supreme Court with wholehearted support for their hard work and admirable efforts to increase access to justice and in support of a limited and controlled environment like the Sandbox, where innovations to increase access to justice can be entertained, experimented with, and hopefully proven successful. The Utah Supreme Court is a leader in taking concrete action to address the lack of access to lawyers for the indigent and poor, and our Committee applauds their hard work and countless hours put into the Proposal. No one can credibly oppose these aspirational objectives and the wisdom of a controlled environment that with proper oversight, regulation, and reporting, will protect the consumers of these legal services. Putting a corral around the unintended and unanticipated consequences, however, that may be injurious or damaging is and should be an essential aspect of the Sandbox.

The current failure to provide specific safeguards in the way of 1) express identification of access needs being met; 2) transparency, 3) disclosure of ownership and managerial interests, 4) sunset provisions, 5) requiring financial sureties, and 6) requiring applicants to demonstrate they will deliver high-quality legal services and products to Utah clients/consumers under the sandbox are all legitimate and honest concerns shared by most of the individuals the Utah Supreme Court has already entrusted with the practice of law.

To ignore these concerns for protection of the public creates too great a concession to the monied interests being invited to play, and potentially is antithetical to the goals of helping people with limited means. A license to play in the sandbox should incorporate and require also

the more human elements of responsibility and obligation attendant to taking responsibility for others' problems. Perhaps most important, our Committee believes and recommends that the Bar should recommend that the most glaring gap in the Proposal be filled by requiring that all innovators coming forward and applying for a license to play in the Sandbox be required to specifically identify the legal needs they purport to serve; for example, the 98% of debtors in debt collection cases and 95% of tenants in landlord eviction cases who currently have no legal help with their needs outside of what a fair-minded judge can offer. There is a reason why the Utah Supreme Court is constituted exclusively of lawyers. We believe the emphasis thus far, upon *academic* and *technological* aspects of reform are too heavy, without sufficient participation by or input from practicing lawyers who have been playing in the legal sandbox for decades. Accordingly, we recommend that the Bar applaud the goals and aspirations of the Proposal, and encourage the Supreme Court to:

- require applicants to address an access to justice need for the poor;
- make the approval process more transparent;
- require disclosure of ownership and managerial interests in sandbox participants;
- require malpractice or other appropriate insurance for protection of the public; and
- provide for appropriate mechanisms for terminating projects that do not satisfy or stray from these requirements;
- require applicants to demonstrate they will deliver high-quality legal services and products to Utah clients/consumers under the sandbox.

## **CONCLUSION**

We should mention, too, that we believe there has been somewhat of a rush, albeit very well-intentioned, to become a “first” or “leader” in the regulatory reform movement. Yes, someone has to lead out, and who better than Utah. This Committee believes the Utah State Bar and the Utah Supreme Court have a beautiful partnership that has been as farsighted and bold as any Bar in the country to adapt to changes in the economy and in society concerning the provision of legal services. But being “first” or a “leader” should take a backseat to considered and objective evaluation, particularly where there is the potential for public harm. This includes welcoming and embracing constructive criticism and dialogue. Going first should not be the goal, but rather a consequence of merely being first to recognize potential shortcomings in the current system and taking into appropriate account the gravity of what is being proposed -- the consequences of which are neither predictable nor known. Going first involves risks and mistakes that come to any trailblazers on untrod ground. Consequently, we believe that any regulatory reform must retain flexibility, and the ability to alter course, make changes, and even undo particular reforms or licenses, the consequences of which turn out to be unintentionally harmful or damaging to the public. We applaud the Utah Supreme Court for leading out on access to justice, but simply wish to assist the Supreme Court in adopting appropriate tools to serve access to justice in a regulated and confined manner that protects the public from potential harm.