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PERSPECTIVE

A regulatory 'sandbox' that will turn to quicksand

By Arash Homampour

We've all heard the phrase "If it ain't broke, don't fix it." But attempting to do so can backfire and cause more harm than good. Allowing nonlawyers into the legal profession will introduce the virus of profits over safety, which lawyers fight to eradicate. Clinical trials should take place before we allow nonprofessionals in.

We are being asked to accept the "Widget Theory" of legal services, where law firms become manufacturing companies and legal matters are widgets. But legal matters are not widgets. People need legal help from trained professionals with a fiduciary duty, not from one-size-fits-all nonprofessionals with no fiduciary duties. This is exactly what will happen if we allow the "Widget Theory" to rewire the practice of law.

In May 2020, the State Bar of California's board of trustees gave the green light to the formation of a sandbox working group to examine permitting nonlawyer ownership of law firms and fee-sharing, among other rule changes. The decision followed a June 2019 State Bar proposal to allow nonlawyers to give legal advice, authorize fee-sharing with nonprofit organizations, and let insurance companies and other non-legal businesses invest in law firms. The ostensi-

ble purpose of these changes, according to the task force on Access Through Innovation of Legal Services, or ATILS, was to improve access to justice by allowing "technology-driven delivery systems to engage in authorized practice of law activities."

ATILS issued its final report and recommendations in March 2020 after inviting public comment, holding meetings with experts, conducting a public hearing, meeting with local bar associations, and sponsoring stakeholder discussion forums. The report focused on seven of the 16 proposals originally up for review.

Recommendation No. 5, approved by the State Bar, has this charter: "Form and Appoint a New Working Group to Explore Development of a Regulatory Sandbox that Can Provide Data on Any Potential Benefits to Access to Legal Services and Any Possible Consumer Harm if Prohibitions on Unauthorized Practice of Law, Fee Sharing, Nonlawyer Ownership, and other Legal Restrictions are Relaxed or Completely Suspended for Authorized Sandbox Participants."

ATILS acknowledged the universally unfavorable comments its plan had received: "The proposal that received the most comments was the concept of an exception to UPL for regulated individual nonlawyers to provide

specified legal services. This proposal received about 610 comments with 506 of those opposed."

Among concerns cited by respondents 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, a model designed to allow participants "to test innovative business models or offer products and services in a controlled environment under a regulator's supervision."

Most telling in the ATILS report is this disclaimer: "The Task Force recognizes that any entity willing to participate in a sandbox might reasonably expect the sandbox to be structured and administered in a manner that facilitates a transition to a more permanent model under the oversight body, so long as it is performing as intended and not harming the public."

Barring a miracle, the State Bar's regulatory sandbox is on

track to become a giant quicksand pit for California lawyers and consumers.

Independence, Accountability
Opening the door to nonlawyer provision of legal services could destroy one of the strongest bulwarks against unaccountability that results from concentrated power, namely, trial lawyers.

Big corporations, through lobbyists and political donations, control Congress and state legislatures, stack the judiciary with ideologically biased jurists, and hold sway over federal and state administrative agencies. Trial lawyers and impartial civil juries are among the last lines of defense against a plutocratic oligarchy that threatens our democracy.

Access to Justice

Instead of expanding the reach of legal services, nonlawyer provision of services will erode access to justice for the indigent and other vulnerable populations by consolidating firm ownership and driving up legal fees.

When hedge funds and insurance carriers have a piece of the market, legal services will change to maximize profits, leading to consolidation of firms and focus on the bottom line. Costs will increase over time as insurance companies establish their own firms, with attorneys beholden to them for their work. Like every

business, the business of law will be driven by profits.

Professional Advice

Professional legal advice comes at a cost for good reason. Attorneys undergo a rigorous course of study, pass a difficult exam, comply with ethics rules, and must maintain educational credits in order to remain licensed. AI programs, in contrast, churn out cookie-cutter solutions that bear no resemblance to thoughtful, individualized legal advice tailored to a client's unique needs and concerns. No standardized questionnaire can parse the nuances of wills versus trusts or offer experienced guidance on plea bargaining versus going to trial. Software programs provide no professional liability coverage when a client is harmed by the wrong choice.

Clients whose law firms are owned by insurance carriers are deprived of any chance of a good outcome. The insurer benefits from telling the client he has no case, and the client does not know he is receiving inadequate representation because the lawyer is obligated to make sure the client does not recover much.

Conflicts of Interest

The biggest quagmire of the sandbox is the conflict of interest at its heart. Law firms

owned by Amazon, Facebook and Google will not sue Amazon, Facebook or Google, nor will their attorneys take positions that might hurt those companies, especially when they involve workers comp, product liability, employee classification, and wage and hour issues.

Firms owned by insurance carriers will work to keep the cost of claims low, including working with other insurer-owned firms to go easy on their cases. It's a win-win for the insurance companies, but a loss for their clients.

Big Business

Imagine, if you will, that your personal injury practice must compete against a PI firm owned by Facebook or Google. Will your firm's website stand a chance against theirs? Will your firm show up in internet searches? These companies will have attorneys everywhere and such deep pockets that they will be able to spend the entire independent legal market, collectively, into the dirt.

When a client suffers a catastrophic injury with a value of \$8 million, the lawyer's opportunity cost may be \$500,000. A Widget Theory firm trying to maximize profits and minimize costs will settle the matter for \$1 million, spending neither money nor time to get a true value. The injured con-

sumer may never know he has been sold out by the slick national firm owned and funded by nonlawyers looking to make a quick profit through volume.

A World of Nonlawyers

California is not acting in a vacuum. Utah, Arizona and Illinois are considering similar changes to delivery of legal services, and ATILS highlights U.K. and Australia as shining examples of the benefits of this model, stating, "it is well documented that relaxing of nonlawyer ownership and fee sharing provisions in other markets (e.g. the United Kingdom and Australia) has not had any identifiable detrimental impact on consumers."

In fact, in the U.K., where insurance companies, accounting firms, technology companies and retailers like Walmart can own and run law firms, they are concentrated in practice areas with the most potential for profit and the fewest barriers for the poor, such as personal injury, in which contingent fees are the norm. Allowing nonlawyers to join the U.K. plaintiff's bar has had little demonstrable benefit.

Clinical Trials

Clinical trials should focus on those practice areas with demonstrated gaps for underserved California residents.

There is no evidence that tort victims or employees injured on the job or whose workplace rights have been violated are underserved. Clinical trials will show us what does and does not work before we unleash the virus of big business turning law firms into profit centers.

Conclusion

There is no reason to upend a good, albeit not-perfect, legal system. The State Bar's proposals are extremely dangerous, likely to do far more harm than good. If the goal is to improve access to legal services, the bar should provide more funding for Legal Aid and require an annual number of pro bono hours as a condition for keeping a license to practice law. ■

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