



To: ATILS Task Force
From: Joyce Raby and Tara Burd
Date: January 8, 2020
Re: B.1. Recommendations Issued for Public Comment Concerning Exceptions to the Unauthorized Practice of Law, including Consideration of Concepts for Regulation

1) The Recommendation

In an effort to streamline and stay in alignment with current regulatory frameworks, the task force does not recommend developing a brand new certification program or licensing model but rather to take advantage of an existing educational program; specifically the paralegal.

A paralegal is defined as:

6450. (a) "Paralegal" means a person who holds himself or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section 6060, or an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her.

This recommendation seeks to create an additional category of paralegal called an "Independent Paralegal" who would be authorized to provide [limited] legal services in a specific area or areas of practice in which they are registered without attorney supervision pending compliance with specific educational, experience, ethical and certification requirements.

An IP would be a paralegal who:

- may work with clients and create client attorney relationships without direct attorney supervision
- declares a specific area of legal expertise and supports that declaration through at least 3 years of attorney supervised experience working in that area. The areas of expertise open to IP practice may be informed by the Justice Gap study but should not be exclusively limited by that study.
- may provide legal advice to clients in the declared specific area of expertise
- may represent a client in court (?)¹

¹ [KEM: If this were to be permitted, perhaps best to do it by a pilot program in a limited area of law, e.g., family law, similar to what I believe was originally done w/ respect to limited scope representation. That is, I think the availability of limited scope representation occurred first in family court and then was expanded to the rest of the trial courts. Perhaps that should be part of the recommendation. I also think that we might expect a large amount of pushback on this, appearing in court of general jurisdiction being analogous to surgery, which remains the sole province of doctors.]

An IP would also be required to:

- Pass a background check (does the CA Bar do this? Who pays for it?)
- Post a bond (details needed)
- Maintain an increased load of MCLE credits specific to the declared area of expertise

An IP must also maintain compliance with existing paralegal ethics guidelines.

EDUCATION

Currently an individual can become a paralegal in the following ways.

Paralegal Education (Bus. & Prof. Code, § 6450, subds. (c)(1)-(4).)

A paralegal shall possess at least one of the following:

(1) Paralegal Program approved by ABA - A certificate of completion of a paralegal program approved by the American Bar Association.

(2) Paralegal Program Accredited by other Accrediting Agency - A certificate of completion of a paralegal program at, or a degree from a postsecondary institution that requires the successful completion of a minimum of 24 semester, or equivalent, units in law-related courses and that has been accredited by a national or regional accrediting organization or approved by the Bureau for Private Postsecondary and Vocational Education.

(3) A B.A. or B.S. in any subject plus 1 year of law-related experience under a CA attorney who has been in practice at least 3 years plus a declaration from that attorney that the individual is qualified. A baccalaureate degree or an advanced degree in any subject, a minimum of one year of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks.

(4) A High School Diploma plus 3 years of law related activity under an attorney A high school diploma or general equivalency diploma, a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks.

Independent Paralegal Educational Requirement:

An Independent Paralegal has the same educational requirements as outlined above.

Paralegal Ongoing Continuing Education Requirement:

A paralegal must engage in eight (8) mcle credits every two years. Four ethics requirements, four law related/legal courses. These credits must be offered by a certified legal education provider.

Independent Paralegal Ongoing Continuing Education Requirement:

An Independent Paralegal must engage in twelve (12) mcle units every two years. Four ethics units, and eight law related/legal units specific to their declared specialty. These credits must be offered by a certified legal education provider.

A paralegal is required to maintain the same level of client confidentiality as an attorney. An IP would also be required to comply with this duty.²

§ 6453. Paralegal's same duty as attorney

A paralegal is subject to the same duty as an attorney specified in subdivision (e) of Section 6068 to maintain inviolate the confidentiality, and at every peril to himself or herself to preserve the attorney-client privilege, of a consumer for whom the paralegal has provided any of the services described in subdivision (a) of Section 6450.

§ 6450. "Paralegal"; Requirements

(a) "Paralegal" means a person who holds himself or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section

² **[KEM:** The current framework for paralegals works w/ respect to confidentiality, i.e., a paralegal has the same *affirmative* duty not to reveal or use a client's information. There is, however, no specific provision that addresses privilege, which operates to prevent an opposing party from using the subpoena power of the state to compel the lawyer or client to reveal what the client has told the lawyer and what advice the lawyer might have given the client. This protection would be a critical incentive to a person who might engage the services of an IP. There is no provision in the paralegal code provisions because under the current regulatory framework a paralegal provides legal services only "under the direction and supervision of" an active attorney, so presumably the protection of the privilege is afforded by Evid. C. § 952, which defines a "confidential communication" subject to the privilege as follows:

information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added)

Paralegals operating under the direction and supervision of a lawyer would fit within either (i) those "are present to further the interest of the client in the consultation" or those who are necessary for "the accomplishment of the purpose for which the lawyer is consulted." An IP would fit within neither of those.

The proposal should address the concept of privilege in some way.]

6060, or an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her.

Tasks performed by a paralegal include, but are not limited to, case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation.

(b) Notwithstanding subdivision (a), a paralegal shall not do the following:

- (1) Provide legal advice.
- (2) Represent a client in court.
- (3) Select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal.
- (4) Act as a runner or capper, as defined in Sections 6151 and 6152.
- (5) Engage in conduct that constitutes the unlawful practice of law.
- (6) Contract with, or be employed by, a natural person other than an attorney to perform paralegal services.
- (7) In connection with providing paralegal services, induce a person to make an investment, purchase a financial product or service, or enter a transaction from which income or profit, or both, purportedly may be derived.
- (8) Establish the fees to charge a client for the services the paralegal performs, which shall be established by the attorney who supervises the paralegal's work. This paragraph does not apply to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency, or other entity as provided in subdivision (a).

An Independent Paralegal would be authorized to perform the same tasks they currently perform, but without the supervision of an attorney. An Independent Paralegal would further be able to offer legal advice limited to a specific area of practice in which they are registered.

These activities may be provided by individuals, entities that represent groups of such individuals (allowing for a combination of lawyers, paralegals and document preparers).

2) the "pros" of the recommendation; how the recommendation furthers the charge of the task force (anticipated positive outcomes)

By expanding the pool of available legal expertise and at a cost presumably less than a fully licensed attorney; it is anticipated that many more Californians in need of legal advice and assistance will be in a position to secure that assistance. The purpose of this recommendation is to increase effective and meaningful access to the justice system through a greatly expanded resources.

Additionally, the concept of an “independent paralegal” is less likely to be confusing to consumers who are already familiar with the concept of a “paralegal”. Introducing entirely new titles such as a “Limited Licensed Legal Technician,” is likely to confuse consumers.

Further, by expanding on the *existing* paralegal profession, we can take advantage of the 27,000 existing professionals who would already have the education and experience to qualify for this new role.

3) the "cons" of the recommendation (any potential negative outcomes)³

- The use of the term “Independent Paralegal” may be confusing to consumers and to lawyers and judges because it is term that is associated with so-called [freelance paralegals or contract paralegals](#) who operate only under the supervision of a lawyer but who are not permanent full-time employees of a single law firm.
- The concept that an IP “would be authorized to perform the *same tasks* they currently perform, but without the supervision of an attorney” may be inherently difficult to apply or regulate given the California case law which generally holds that paraprofessionals, such as traditional paralegals or law clerks, can perform many functions of an attorney provided that an attorney’s supervision effectively adopts the work product of the paraprofessional. (*Crawford v. State Bar* (1960) 54 Cal.2d 659 at p. 688 [The California Supreme Court, quoting from a Supreme Court of Washington decision, stated: “The line of demarcation as to where their work begins and where it ends cannot always be drawn with absolute distinction or accuracy. Probably as nearly as it can be fixed, and it is sufficient to say that it is work of a preparatory nature, such as research, investigation of details, the assemblage of data and other necessary information, and other such work as will assist the attorney in carrying the matter to a complete product, either by his personal examination and approval thereof or by additional effort on his part. The work much be such, however, as it loses its separate identity and becomes either the product, or else merged in the product of the attorney himself.”].)
- The concept that an IP can “create client attorney relationships” would require clarification as to whether all of the legal duties and privileges of bona fide attorney-client relationships are intended.
- Currently, paralegals are not subject to discipline by the State Bar as attorneys bear the responsibility to supervise a paralegal under Rule of Professional Conduct 5.3 and case law. The registration program contemplated for these new providers of legal services would likely require development of appropriate professional conduct standards and a new disciplinary or other compliance enforcement system.

4) how this recommendation responds to public comments (if it does)

By limiting the IP’s area of practice, it will limit the risk to the consumers. Requiring a bond will also help to protect consumers as well.

5) any alternatives to this recommendation that were considered

³ Cons section was provided by Staff and Prof. Mohr for the drafting teams consideration.

We looked at Washington's LLLT program and noted that the biggest problem with it is that there are not enough individuals acting as LLLT. The reports from Washington further explain that the education and training for LLLTs is costly for the schools to offer and so there are not many LLLT educational opportunities. This is why we would like to build from existing educational opportunities and the existing paralegal programs and MCLE programs seemed like the best fit.

We also considered a tiered approach where certain tasks which contain minimal risk, but might currently be considered the unauthorized practice of law, could be performed by individuals who are not licensed as California attorneys. The lowest risk tasks we identified primarily consisted of offering more information to individuals: helping consumers to identify their legal programs, directing them to appropriate resources and providing very general legal advice. The second tier consists of tasks that involved giving limited but practice-area specific legal advice. The tiered approach ultimately was too complicated, which would likely only confuse consumers.



To: ATILS Task Force
From: Joanna Mendoza, Bridget Gramme, and Andrew Arruda
Date: December 26, 2019
Re: Regulatory Sandbox

Assignment: Prepare a regulatory sandbox description, including a section on “tripwires.” The description of the sandbox should generally address the oversight/enforcement issues of the laws regarding: fee-sharing with non-lawyers, nonlawyer ownership, multidisciplinary practices, alternative business structures.

ATILS Recommendations Regarding Fee Sharing and Non-Lawyer Ownership

What is a Sandbox?

A regulatory sandbox is a framework set up by a regulator that allows startups and other innovators to conduct live experiments in a controlled environment under a regulator’s supervision. Unlike general purpose sandboxes, thematic sandboxes are designed to advance more focused policy objectives – typically, by limiting admission to firms that are developing specific types of technologies, products or business models not otherwise allowed by existing rules and statutes. The sandbox model allows for the gathering of data to assess impact and protect against consumer harm. If the data is promising, changes to rules and statutes will then be considered more generally.

The regulatory authority over the sandbox would include the ability to certify and decertify each entity/service and to impose the necessary certification and data collection requirements.

Sandbox Scope and Process

Any business model, service or product that cannot be offered under the current rules and statutes will be able to apply and be considered by the oversight body. The oversight body will give priority and a reduced fee structure to non-profits as well as for-profit entities that propose providing services specifically designed to address areas of most need as identified by the 2019 California Justice Gap Study. Other entities/services may be considered by the oversight body as well, but the priority and fee structure preference shall be with the formerly mentioned entities/services.

With an effort to ensure that the regulatory burdens are not too onerous, requirements for participation in the sandbox should include, but not be limited to, the following:

- Disclosure to consumers that the entity/service is part of the sandbox and referring consumers to the oversight body where they can learn more and provide feedback or complaints;
- Informed consent by consumer acknowledging that service is not provided by a licensed attorney;
- Confidentiality, which shall include a prohibition against data sharing with any but the oversight body;
- Data collection and reporting to the oversight body to determine if the entity/service is performing and being used by the public, as well as the scope of the impact on providing legal services to the public and whether there are unexpected harms (see below);
- Transparency, including credentials of service providers;
- Compliance with accessibility and usability standards to be set by the oversight body;
- Mitigation of bias and other negative effects when deploying algorithmic systems, as well as “dark patterns,” with respect to technology services;
- Corporate entities and LLCs must be either a California entity or registered foreign entity, requiring an annual statement of information that identifies officers and directors and registered agent for service of process. Partnerships would provide partner information and registered agent to the oversight body;
- Liability insurance at levels to be set by the oversight body;
- Prohibit arbitration clauses or limitations of liability in the terms of service;
- Training requirements to be determined by regulator.

Data Requirements

The regulatory strategy of the sandbox oversight body is to assess the risk of three possible harms to consumers of the legal services provided by sandbox participants.

The harms are:

- Receiving inaccurate or inappropriate legal services.
- Failing to exercise legal rights through ignorance or bad advice.
- Purchasing unnecessary or inappropriate legal services.

A partial but suggestive list of data collection strategies and data sets include:

- Consumer complaints
- User surveys
- Rate of service error fixes
- Level/rates of services provided
- Legal and financial outcome data

Although the sandbox oversight body would be interested in the absolute absence of consumer harms by a sandbox participant, the more important criterion is the relative rate or risk of harm compared to the experience a consumer would have received absent the legal services provided. To make that comparison, information must be known about the consumers of the legal services provided in the sandbox. This kind of demographic data is again most easily provided by sandbox participants. Some possible useful data for this purpose might include:

- Income level
- Education level
- Geographical location
- Race/ethnicity

Removal from Sandbox

If an entity/service fails to comply with the requirements set by the oversight body, including providing appropriate supporting data to establish the value of the services provided, it will lose its authority to operate within the sandbox structure and, as a result, will be subject to all existing rules and statutes regulating the practice of law. However, so long as the value of the service outweighs any risk of harm to consumers, the entity/service shall be allowed to continue operating.

Post Sandbox Activity

A sandbox is not set up as a permanent regulatory structure. Critical to entities/services that would participate in a sandbox is that they be allowed to continue providing their services so long as it is performing as intended and not harming the public. Therefore, a crucial condition of the sandbox model is that a structure is set up after the sandbox is concluded that will allow the services to continue under those conditions. No permanent regulatory structure or rule changes are proposed at this time as any such proposals will need to be informed by the sandbox experience and data derived therefrom.

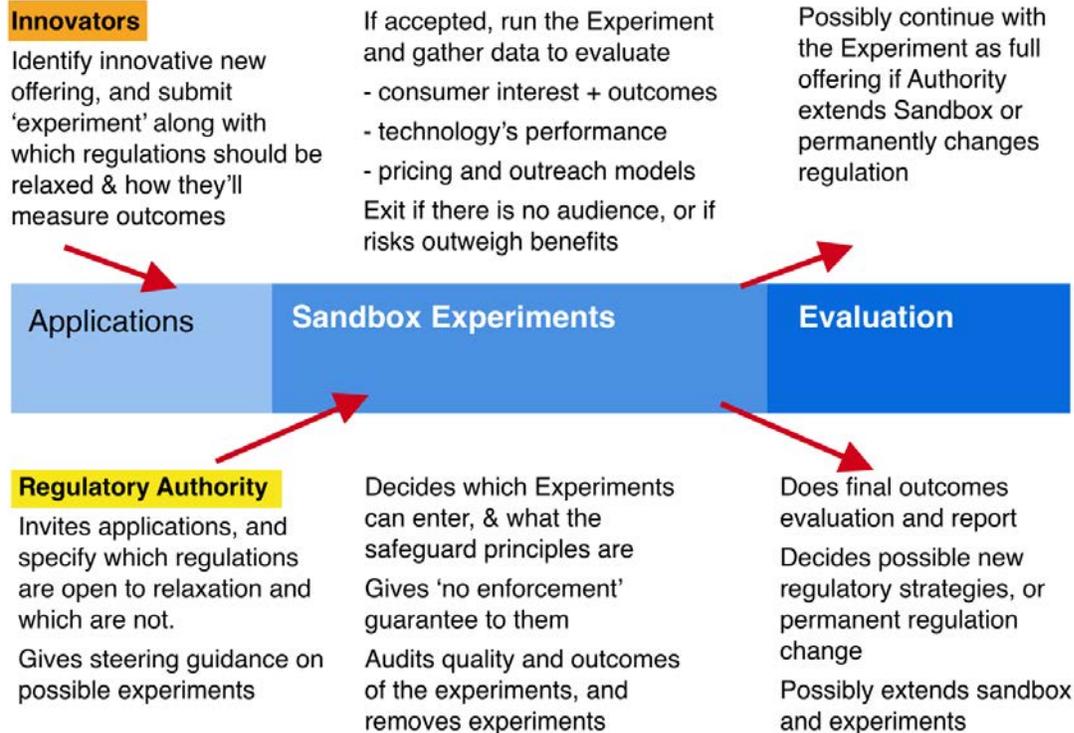
Funding

This Program would be entirely funded by licensing fees each applicant pays to enter the sandbox. The fees will be set to ensure sufficient resources for the administrator of the sandbox to effectively manage the applications, screen to ensure all requirements are met, monitor the progress, and remove any applicant from the sandbox that is causing consumer harm as identified by the administrator.

Regulatory Sandbox Model Diagram

Below is a diagram of a regulatory sandbox model as presented within the Utah Task Force report from August 2019.

A Regulatory Sandbox Model



Ensuring Access to Justice

ATILS believes that this regulatory sandbox proposal fulfills its charge to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others, and effectively balances our dual goals of consumer protection and increased access to legal services.

In order to ensure that the proposed loosening of existing restrictions will actually impact California's justice gap, we recommend the following incentives to encourage applicants to innovatively develop systems to target the areas of greatest need:

- Discounted licensing fees (possibly on a sliding scale depending on the size and expected revenue of the applicant) as discussed above
- An access incubator/accelerator (a formalized network of funders, technologists, strategy, business, and marketing advisors that brings in classes each year to help them refine concept and launch). This could be a program run independently from the regulator-- perhaps in partnership with universities.

Utah Implementation Task Force on Regulatory Reform

(Excerpt from: <https://sandbox.utcourts.gov/>)

The Task Force's Mandate

In 2018, the Utah Supreme Court, at the request of the Utah State Bar, authorized a work group to study and make recommendations about optimizing the regulatory structure for legal services. That work culminated in a report: *Narrowing the Access-to-Justice Gap by Reimagining Regulation*. In August 2019, the Utah Supreme Court adopted the Report and authorized a task force to implement the Report's recommendations.

The Task Force's core mission is—by implementing the Report's recommendations—to optimize the regulatory structure for legal services so as to foster innovation and other market forces and to increase access to and affordability of legal services.

The Work of the Task Force

The task force will carry out its mission by focusing on two aspects of legal regulation. Track A will focus on loosening the restrictions on lawyers. Track B will zero in on creating a new supervisory body. Each track is critical to successful reform.

Track A: Freeing Up Lawyers to Compete By Easing the Rules of Professional Conduct

Restrictions on lawyer advertising, fee sharing, and ownership of and investment in law firms by nonlawyers are concepts that need serious amendment if we are to improve competition and successfully close the access-to-justice gap.

First, lawyer advertising and solicitation rules need revision. The main concern there should be the protection of the public from false, misleading, or overreaching solicitations and advertising. Any other regulation of lawyer advertising seems to serve no legitimate purpose; it is blunt, ex ante, and neither outcome-based nor risk appropriate.

Second, Utah Rule of Professional Conduct 7.2 prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services or for channeling professional work to the lawyer. But use of paid referrals is one method that helps clients find needed legal services and one of the ways that lawyers can find new clients. Again, this rule should be amended to balance the risk of harm to prospective clients with the benefit to lawyers and clients through an outcomes-based and risk-appropriate methodology.

Third, nonlawyers have traditionally been prohibited from owning and controlling any interest in law firms. See Utah Rule of Professional Conduct 5.4. We view the elimination or substantial relaxation of Rule 5.4 as key to allowing lawyers to fully and comfortably participate in the technological revolution. Without such a change, lawyers will be at risk of not being able to engage with entrepreneurs across a wide swath of platforms.

Utah Implementation Task Force on Regulatory Reform

(Excerpt from: <https://sandbox.utcourts.gov/>)

Track B: Creating a new supervisory body

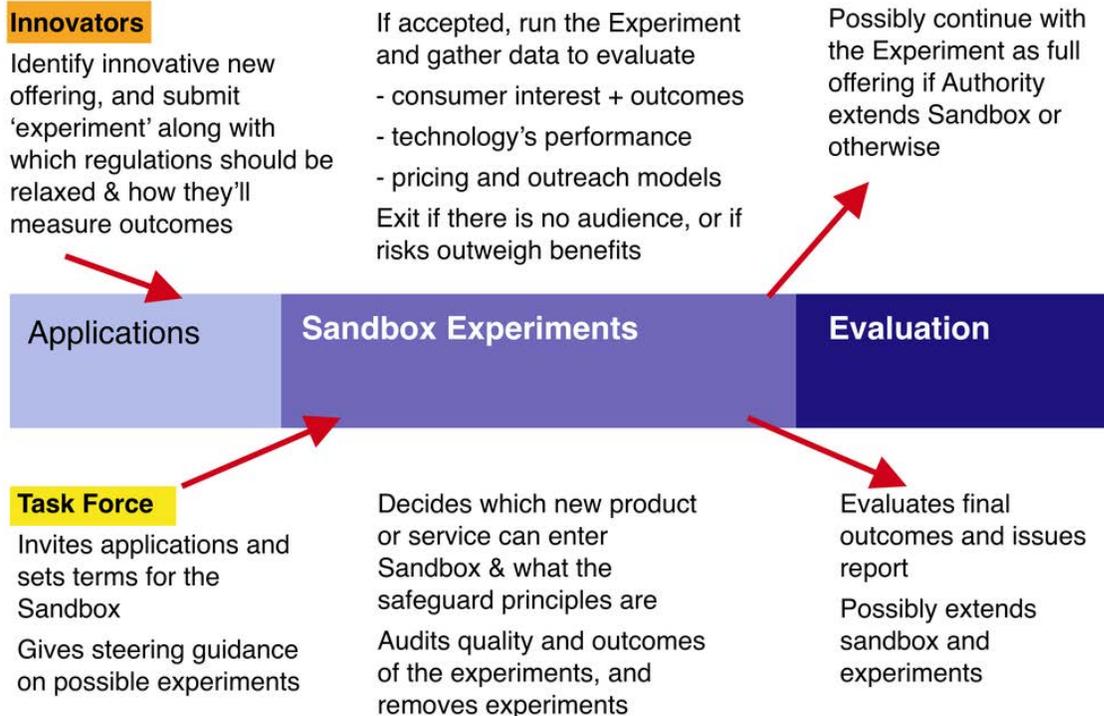
Alongside the proposed revisions in Track A, Track B develops a new supervisory body for legal services in the State of Utah. Track B will have two phases. In Phase I, the Task Force will run a legal regulatory sandbox, from which the Task Force will develop and refine a data-driven regulatory framework focused on the identification, assessment, mitigation, and monitoring of risk to consumers of legal services, and an enforcement approach designed to respond to evidence of consumer harm as appropriate to support the core objective of improving access to justice. In Phase II, the Task Force will use what it learns in Phase I to implement a regulatory approach across the Utah legal market more broadly.

Phases of the Task Force's Work

Phase I: Sandbox R&D

The goal of Phase I is to design a “regulatory sandbox” that will allow participants to create high-quality, innovative legal services products based on market demand. The sandbox will allow technology and innovation to flourish while addressing risk and generating data to inform the regulatory process.

Legal Innovation Sandbox



Utah Implementation Task Force on Regulatory Reform

(Excerpt from: <https://sandbox.utcourts.gov/>)

In Phase I, the Task Force will oversee sandbox participants. The Task Force will likely include a director, a senior economist, a senior technologist, support staff (operations, development, communications), and a volunteer board of advisors. The Task Force will be funded through grants and sandbox participants.

The Task Force will establish rules and standards for operating inside the sandbox, including monitoring and assessing risk. The Task Force will focus mainly on whether consumers (1) achieved a satisfactory legal result, (2) were informed of and exercised their legal rights, and (3) purchased a service that was necessary and appropriate for resolving legal issues. The Task Force will be responsible for licensing and monitoring sandbox participants and for enforcing the rules and standards that are developed in Phase I.

In Phase I, the Task Force will solicit nontraditional sources of legal services, including nonlawyers and technology companies, and will allow them to test innovative legal services models and delivery systems through the sandbox. Phase I is expected to run approximately two years, at the end of which the Task Force will potentially establish a permanent supervisor.



Phase II: Independent Supervisor Established

In Phase II, we anticipate some form of an independent, nonprofit supervisor with delegated regulatory authority over some or all legal services. But what happens in Phase II will be determined by the outcome of Phase I. Phase II could proceed in multiple different directions as long as the objectives-, risk-based approach remains its key characteristic.

Utah Implementation Task Force on Regulatory Reform

(Excerpt from: <https://sandbox.utcourts.gov/>)

Outcomes and Work Product

By the end of Phase I, Utah will have at least two years of data and experience in allowing market participants to enter a traditionally closed market and serve traditionally unserved and underserved clients. The goal of this project is to use that data and experience to design viable, sustainable, high-quality solutions for narrowing the access-to-justice gap.

At the end of Phase I, we will have answers to several important questions, including:

- What is the effect of modern technology on the current rules?
- Does nonlawyer investment and ownership in entities providing legal services increase accessibility to legal services?
- Do previously prohibited flat fee and other alternative fee arrangements broaden the availability of legal services?
- Do the rules against direct solicitation protect or harm consumers?
- Does the rule against referral fees benefit consumers, and if not, how can we permit referral systems?
- How have other jurisdictions and organizations—including Arizona, California, Oregon, Illinois, and the American Bar Association— advanced in their approaches to narrowing the access-to-justice gap?

**Proposed Regulatory Scope for
Task Force on Regulatory Reform and Sandbox**

December 2019

Disclaimer: This document is subject to change.

This pilot is focused on allowing and encouraging new ways of practicing law while protecting consumers. The Utah Supreme Court’s Task Force on Regulatory Reform (“Task Force”) seeks to make a careful assessment of innovative business models, products, or services, whether proposed by lawyers or others, to ensure that overall consumer risk is not increased.¹ The regulatory sandbox allows us to do this in a relatively controlled environment. The principles and examples below, outline our approach to what kinds of models, products, and services will be within the scope of the sandbox and thus required to register with the sandbox. This is not a rigid or technical approach. Objectives-based regulation is meant to be flexible and responsive to evidence of risk. Thus, the initial requirement is a minimal one—simply notifying the Task Force about what the provider is proposing to do in general terms. What happens after notification will depend on the Task Force’s determination of relative risk to the consumer. If you, as a provider, are unsure, then you should notify the Task Force.

Working Principles:

ONE: If you could not do it under the current Rules of Professional Conduct (a few exceptions described below), then you need to notify the Task Force. Depending on what you are proposing, you may be required to register as part of the sandbox.²

TWO: Lawyers or firms partnering with, contracting with, or employed by Task Force approved entities do not have to separately take any action, including notification. Those who partner with non-approved entities need to notify the Task Force of the arrangement. Notification is how we keep track of what is happening under the new system.

Details:

- I. OUTSIDE THE REGULATORY REGIME
(these individuals/entities do not need to do anything)
 - A. Conventional 100% lawyer-owned, managed, and financed law partnerships, professional law corporations, and individual lawyers with an active Utah license using new advertising or solicitation approaches as contemplated by the revised Rules of Professional Conduct.

¹ For purposes of this document, the term “lawyer” includes Licensed Paralegal Practitioners (“LPPs”).

² Those services currently authorized under Rule 5.3 such as legal support services and legal practice outsourcing offered to lawyers are outside the scope of the Task Force.

- B. Conventional 100% lawyer-owned, managed, and financed law partnerships, professional law corporations, and individual lawyers with an active Utah license:
- I. Offering traditional legal services as permitted under the old Rules of Professional Conduct.
 2. Entering into employment, contract for services, joint-venture, or other partnership (fee-sharing) with a **Task Force-approved** non-lawyer owned entity to offer legal services.
 - Example: Lawyer Larry is hired by LawSwoosh, an online legal platform offering services to the public. Larry is hired to be a staff attorney, providing legal services to LawSwoosh customers. LawSwoosh has been approved to offer legal services in Utah by the Task Force. Larry does not need to notify.
 - Example: Amy Attorney is hired by SavMart, a big box store chain, to offer flat fee legal services to customers of the store via a small office or kiosk. SavMart has been approved to offer legal services in Utah by the Task Force. Amy does not need to notify.
 - Example: Lawyer Larry is hired by BigAccountingFirm to provide mergers and acquisitions legal advice and strategy to its clients. BigAccountingFirm has been approved to offer legal services in Utah by the Task Force. Larry does not need to notify.
 - Example: Attorneys at Law LLP enters into a joint venture with LawSwoosh, an online legal platform offering services to the public, through which its attorneys offer legal assistance and advice to LawSwoosh customers. LawSwoosh has been approved to offer legal services in Utah by the Task Force. Attorneys at Law LLP does not need to notify.

II. REQUIRED TO NOTIFY TASK FORCE

- A. Conventional 100% lawyer-owned, managed, and financed law partnerships, professional law corporations, legal services non-profits, or individual lawyers with an active UT law license:
- I. Offering legal service options not previously authorized, whether directly or via a joint-venture, subsidiary, or other corporate structure.
 - Example: Attorneys-at-Law LLP, an old Salt Lake firm, offers an online tool providing information and guidance, including legal advice via chat-bot or similar technology, around corporate formation.
 - Example: Attorneys-at-Law LLP decides to launch the online corporate formation tool as a subsidiary technology company.

- Example: LawNetwork, an online legal network connecting consumers to lawyers and offering flat fee legal services.
 - Example: BigConsulting purchases Attorneys at Law LLP to operate the firm as its legal service arm in Utah.
 - Example: BigConsulting hires Amy Attorney to provide legal advice on Utah incorporation law to its clients.
 - Example: Women's Shelter, a domestic violence non-profit, offers legal assistance to its clients through its non-lawyer staff, including assistance completing protection orders, divorce, and custody proceedings.
2. Practicing law through business partnership or contract with individual lawyers or firms in which the services are advertised as part of the provider's brand and in which the contract for services is between the entity (not the lawyer or the firm) and the consumer.
- Example: Bank enters into business partnership with Attorneys-at-Law LLP or individual lawyer in which Bank advertises legal help as part of its services/products. Fees are earned through a contract for services between Bank and customer.
 - Example: SavMart enters into a joint-venture with Attorneys-at-Law, LLP through which the firm's attorneys offer legal services to SavMart's customers, either in their stores or via online platforms. The services are advertised under SavMart's brand and fees are earned through a contract for services between SavMart and the consumer.

Data Collection Requirements for Sandbox Participants

December 2019

Disclaimer: This document is subject to change.

The regulatory strategy of the sandbox administrator is to assess the risk of three possible harms to consumers of the legal services provided by sandbox participants. The harms are:

- Receiving inaccurate or inappropriate legal services.
- Failing to exercise legal rights through ignorance or bad advice.
- Purchasing unnecessary or inappropriate legal services.

The sandbox administrator needs several kinds of data on legal outcomes to assess the likelihood of consumers experiencing these harms. Sandbox participants can raise their chances of admittance into the sandbox by providing as much of the required data as possible. A partial but suggestive list of data collection strategies and data sets are:

- Consumer complaints
- User surveys
- Rate of service error fixes
- Level/rates of services provided
- Legal and financial outcome data

Although the sandbox administrator is interested in the absolute incidence of consumer harms by a sandbox participant, the more important criterion is the relative rate or risk of harm compared to the experience a consumer would have received absent the legal services provided. To make that comparison, information must be known about the consumers of the legal services provided in the sandbox. This kind of demographic data is again most easily provided by sandbox participants. Some possible useful data for this purpose might be:

- Income level
- Education level
- Geographical location
- Race/ethnicity

The sandbox administrator will negotiate the actual data collection requirements individually with each sandbox participant, but the administrator will attempt to establish and maintain data sets as consistent with the guidance above as possible. Because the administrator has limited resources to separately collect such data, applicants to the sandbox are advised to provide as much of the required data as possible.

Data Policies

No data provided by sandbox participants will be shared with any other organizations for any reason. Data provided by sandbox participants should be anonymized before submission to the sandbox administrator. Data provided will be kept confidentially and deleted from administrator databases after analysis. The administrator may choose to share provided data to independent evaluators of the sandbox pilot after receiving permission by the data provider. If so, such evaluators will be contractually required to also keep the data confidentially and delete it after analysis is completed.



To: ATILS Task Force
From: Dan Rubins, Mark Tuft and Kevin Mohr
Date: December 23, 2019
Re: ADA Accessibility Recommendation

Recommendation

Technology providers engaging in authorized practice of law activities (“Legal Service Technology Providers” or “LSTPs”) must comply with both existing law and best practices applying to individuals regarding accessibility and usability. LSTPs must make reasonable efforts to mitigate or eliminate bias and other potential negative effects when deploying algorithmic systems. Consumers of services provided by LSTPs should have recourse to remedies comparable to those available to consumers of services provided by individual attorneys.

1. Legal service technology accessibility standards

Just as a physical law office, courthouse, or legal clinic must be located in an accessible building, LSTPs must satisfy technical accessibility standards, such as [WCAG 2.0 Level AA](#), to provide assurance of the widest availability of the services being offered. The specific standard(s) required may be changed by the entity regulating LSTPs as standards and technologies change.

2. Augmenting the user experience through accessible language and design

Compliance with general technology standards covers only some accessibility issues, e.g., ensuring compatibility of technology with screen reader software, avoiding small fonts, and ensuring adequate color contrast. Adherence to technology standards alone will not be sufficient to provide a broadly usable legal service with the same flexibility and responsiveness to diverse human conditions as a lawyer would provide. To avoid creating a legal system in which only part of the population can access effective and less expensive legal services, technology providers delivering legal services must ensure that their technology meets or exceeds the utility of human-provided legal services. One of the most essential functions that lawyers in our society perform is the ability to translate complicated and dense legal language and convoluted legal processes into language and discrete instructions that the public can understand and use. When LSTPs deliver a legal service to the public, they should use plain language and accessible design patterns.

3. Prohibition against use of “dark pattern” marketing

"Dark Patterns" are a broad class of technology language and design choices in marketing that when adopted tend to coerce people into actions against their will or self-interest, add unnecessary products or services, or have other negative effects. These dark patterns have “the purpose or substantial effect of subverting or impairing user autonomy, decision-making, or choice, or of cultivating compulsive

usage.”¹ Examples include the use of double-speak on opt-out screens, hard-to-find or hidden cancellation buttons, so-called “confirm-shaming” (e.g., “No, I don’t want to know the secrets of saving money,” or “I am too well-off to be concerned with discounts,” or “Coupons? I don’t need to save”), false-urgency notifications (e.g., “38 people are looking at this flight”), more visible color choice for a less desirable option, intentional mismatch between written instructions and available actions. In California, many dark patterns from previous eras are already banned by laws like the Consumers Legal Remedies Act, Automatic Renewal Law, California Consumer Privacy Act, the Unfair Competition Law, and at the Federal level, the Federal Trade Commission Act, Fair Credit Reporting Act, Truth in Lending Act, Restore Online Shoppers’ Confidence Act, and Fair Debt Collection Practices Act. That so many consumer protection laws have been required illustrates the tech industry’s creativity in developing dark patterns to increase profitability. LSTPs engaging in authorized practice of law activities must avoid employing dark patterns in their products (perhaps a ban on such behavior should include lawyers as well). To aid technology providers, the regulator should publish, partner to distribute, or otherwise encourage education on dark patterns.

4. LSTP duties and prohibitions should be analogous to duties and prohibition in legal services provided by individuals

Mandatory binding arbitration is an example of a legal dark pattern that is commonly used by providers of goods and services to lower transaction and insurance costs of mass-market technology products and services. It would not be in the public interest to allow LSTPs to provide legal services to the public with a lower level of accountability than licensed individual attorneys. Similarly, consumers of such services should be provided with reasonable recourse to remedies if the services provided by an LSTP is substandard. LSTPs engaging in authorized practice of law activities thus should not be permitted to include mandatory and binding arbitration clauses in their terms or contracts for legal services if the effect of such clauses is to compromise rights and remedies to which a person using the services of an individual attorney would have recourse. In addition, careful study must be given to determine the reasonableness of any caps on liability or other limitations on client recourse that might be otherwise warranted based on the type of service being provide, e.g., where the scope services is limited to a particular discrete task.. While some prohibited practices might increase the exposure LSTPs to liability -- and therefore the cost -- of insuring LSTPs engaging in authorized practice of law activities, it is important that the LSTPs be accountable and clients have remedies when using a technology-provided legal service comparable to those available when using human-provided legal services.

An example of a consumer-protective affirmative duty imposed on lawyers would be the requirement in California that lawyers must disclose when they do not carry malpractice insurance. A similar requirement could be imposed on LSTPs to disclose to their clients if they do not carry General Liability and Errors & Omissions insurance, with limits to be set by the Regulator.

Finally, in addition to the foregoing considerations, an additional consumer-protection would be the imposition of a confidentiality duty on the LSTPs. Such a duty, how it is monitored and regulated, will require careful study. At a minimum, however, whatever mechanism to protect LSTP confidentiality should preclude the use of a consumer’s information without their consent and provide some mechanism, similar to California mediation confidentiality, that will protect such information from subpoena or discovery.

¹ Deceptive Experiences To Online Users Reduction Act, S. 1084, 116th Cong. (2019)

5. Careful implementation of algorithmic systems

It is possible that legal technology services could help provide a wider array of legal services in more languages and situations than lawyers currently deliver. The effect of these advances on Access to Justice should not be understated. However, many algorithmic systems are, by definition, only a model of the situation. As an example, automated translation systems have apparent defects, often providing a *translationese* that differs substantially from the idiom of a native speaker. In high-stakes legal situations, such algorithmic defects could present unwanted and negative results. Accordingly, both technology provider and regulator should carefully weigh the risks and benefits of the proposed service. Legal situations with potential for irreversible harm (e.g., criminal matters, immigration issues involving asylum or deportation, etc.) might not be a good fit for algorithmic systems and should be approached with the utmost care, if at all.

6. Regulatory authority

The regulatory entity of LSTPs should have the authority to reject, hold, or cancel an LSTP's certification/license/approval to provide authorize practice of law products and services that violate any of the foregoing principles, subject to administrative appeal. LSTPs that continue to operate would no longer be eligible for the proposed safe harbor and would therefore be subject to existing rules and statutes regarding Unauthorized Practice of Law, including criminal prosecution.