

## **EXCERPT FROM THE UTAH RULES OF PROFESSIONAL CONDUCT**

### **Rule 5.4. Professional Independence of a Lawyer**

(a) A lawyer may provide legal services pursuant to this Rule only if there is at all times no interference with the lawyer's:

- (1) professional independence of judgment,
- (2) duty of loyalty to a client, and
- (3) protection of client confidences.

(b) A lawyer may permit a person to recommend, retain, or pay the lawyer to render legal services for another.

(c) A lawyer or law firm may share legal fees with a nonlawyer if:

- (1) the fee to be shared is reasonable and the fee-sharing arrangement has been authorized as required by Utah Supreme Court Standing Order No. 15;
- (2) the lawyer or law firm provides written notice to the affected client and, if applicable, to any other person paying the legal fees;
- (3) the written notice describes the relationship with the nonlawyer, including the fact of the fee-sharing arrangement; and
- (4) the lawyer or law firm provides the written notice before accepting representation or before sharing fees from an existing client.

(d) A lawyer may practice law with nonlawyers, or in an organization, including a partnership, in which a financial interest is held or managerial authority is exercised by one or more persons who are nonlawyers, provided that the nonlawyers or the organization has been authorized as required by Utah Supreme Court Standing Order No. 15 and provided the lawyer shall:

- (1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and
- (2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

### **Comments**

[1] The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends retention of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements must not interfere with the lawyer's professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent). This Rule does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of being in a business relationship with a lawyer. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.

[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3] Paragraph (c) permits individual lawyers or law firms to pay for client referrals, share fees with nonlawyers, or allow third party retention. In each of these instances, the financial arrangement must be reasonable, authorized as required under Supreme Court Standing Order No. 15, and disclosed in writing to the client before engagement and before fees are shared. Whether in accepting or paying for referrals, or fee-sharing, the lawyer must protect the lawyer's professional judgment, ensure the lawyer's loyalty to the client, and protect client confidences.

[4] Paragraph (d) permits individual lawyers or law firms to enter into business or employment relationships with nonlawyers, whether through nonlawyer ownership or investment in a law practice, joint venture, or through employment by a nonlawyer owned entity. In each instance, the nonlawyer owned entity must be approved by the Utah Supreme Court for authorization under Standing Order No. 15.

Effective August 31, 2020



## Utah Supreme Court Standing Order No. 15

*This Standing Order establishes a pilot legal regulatory sandbox and an Office of Legal Services Innovation to assist the Utah Supreme Court with overseeing and regulating the practice of law by nontraditional legal service providers or by traditional providers offering nontraditional legal services. Unless otherwise provided, this Order shall expire on the second anniversary of its effective date.*

**The Standing Order is effective as of August 31, 2020.**

### **Background**

The access-to-justice crisis across the globe, the United States, and Utah has reached the breaking point.<sup>1</sup> As to how affordable and accessible civil justice is to people, the 2020 World Justice Project Rules of Law Index ranks the United States 109th of 128 countries.<sup>2</sup> As to that same factor, out of the thirty-seven high-income countries, the United States ranks dead last.<sup>3</sup>

To put it into perspective, a recent study by the Legal Services Corporation found that 86 percent “of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.”<sup>4</sup> Similarly, a recently published study out of California “[m]odeled on the Legal Services” study, concluded that 60 percent of that state’s low-income citizens and 55 percent of its citizens “regardless of income experience at least

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<sup>1</sup> Access to justice means the ability of citizens to meaningfully access solutions to their justice problems, which includes access to legal information, advice, and resources, as well as access to the courts. See Rebecca L. Sandefur, *Access to What?*, DAEDALUS, Winter 2019, 49.

<sup>2</sup> WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2020 14, [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf).

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

<sup>4</sup> LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017).

one civil legal problem in their household each year.” The study also found that 85 percent of these legal problems “received no or inadequate legal help.”<sup>5</sup> Closer to home, an in-depth April 2020 analysis of the legal needs of Utahns living at 200 percent or less of the federal poverty guidelines found that their unmet legal needs stood at 82 percent.<sup>6</sup>

For years, the Utah Supreme Court has made combating the access-to-justice crisis confronting Utahns of all socioeconomic levels a top priority. To date, the Supreme Court, along with the Judicial Council and the Utah Bar Association, have worked ceaselessly to improve access to justice through many initiatives: the Utah Courts Self-Help Center, the Licensed Paralegal Practitioner Program, form reform, and the Online Dispute Resolution Program, to name but a few. What has become clear during this time is that real change in Utahns’ access to legal services requires recognition that we will never volunteer ourselves across the access-to-justice divide and that what is needed is market-based, far-reaching reform focused on opening up the legal market to new providers, business models, and service options.

In its boldest step toward bridging the access-to-justice gap, the Supreme Court has undertaken an effort to reevaluate and amend several of the regulations it has historically relied upon in governing the practice of law. This Standing Order and accompanying rule changes implement that effort. The Supreme Court believes that the regulatory reform set out in this Standing Order will shrink the access-to-justice gap by fostering innovation

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<sup>5</sup> STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, FINAL REPORT AND RECOMMENDATION 11–12 (2020) (emphasis added).

<sup>6</sup> UTAH FOUNDATION, THE JUSTICE GAP: ADDRESSING THE UNMET LEGAL NEEDS OF LOWER-INCOME UTAHNS 23 (2020).

and harnessing market forces, all while protecting consumers of legal services from harm.<sup>7</sup>

## **1. General Provisions**

In accordance with its plenary and exclusive authority and responsibility under article VIII, section 4 of the Utah Constitution to govern the practice of law, the Utah Supreme Court establishes the *Office of Legal Services Innovation* (Innovation Office). The Innovation Office will operate under the direct auspices of the Supreme Court and its purpose will be to assist the Supreme Court in overseeing and regulating nontraditional legal services providers and the delivery of nontraditional legal services.<sup>8</sup> To this end, and subject to Supreme Court oversight, the Innovation Office will establish and administer a pilot legal regulatory sandbox (Sandbox)<sup>9</sup> through which individuals and entities may be approved to offer nontraditional legal services to the public through nontraditional providers or traditional providers using novel approaches and means, including options not permitted by the Rules of Professional Conduct and other applicable rules. The Supreme Court establishes the Innovation Office and the Sandbox

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<sup>7</sup> The Supreme Court's decision to pursue changes regarding its governance of the practice of law is in keeping with (1) the Resolution of the Conference of Chief Justices and (2) the Resolution of the American Bar Association's House of Delegates "to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public . . . ."

<sup>8</sup> In Utah, the practice of law is defined by Utah Supreme Court Rule of Professional Practice 14-802. This Standing Order incorporates that definition. For an understanding of "nontraditional legal services providers" and "nontraditional legal services," please refer to Section 3.3 (Regulatory Scope).

<sup>9</sup> A regulatory sandbox is a policy tool through which a government or regulatory body permits limited relaxation of applicable rules to facilitate the development and testing of innovative business models, products, or services by sandbox participants.

for a pilot phase of two years from the effective date of this Standing Order. At the end of that period, the Supreme Court will carefully evaluate the program as a whole, including the Sandbox, to determine if it should continue. Indeed, unless expressly authorized by the Supreme Court, the program will expire at the conclusion of the two-year study period.

## **2. Innovation Office**

In carrying out the responsibilities designated to it by the Utah Supreme Court, the Innovation Office, at all times, will be subject to the Supreme Court's direction and control. Furthermore, the Innovation Office will have no authority to regulate any individuals, entities, or activities that are beyond the Supreme Court's constitutional scope and mandate to govern the practice of law.<sup>10</sup> With these overarching restrictions firmly in mind, the Innovation Office will have responsibility with respect to the regulation of non-traditional legal services provided by traditional legal providers and non-traditional and traditional legal services provided by non-traditional legal providers, including those services offered within the Sandbox and those that have been approved for the general legal market ("exit or exited the Sandbox"). The Innovation Office will be responsible for (1) evaluating potential entrants to the Sandbox and recommending to the Supreme Court which entrants should to be admitted; (2) developing, overseeing, and regulating the Sandbox, including establishing protocols and monitoring nontraditional legal providers and services therein, as well as terminating an

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<sup>10</sup> By way of illustration, the Supreme Court has authorized real estate agents to advise their customers with respect to, and to complete, state-approved forms directly related to the sale of real estate. *See* Rule of the Utah Supreme Court Rules of Professional Practice 14-802(c)(12)(A). Outside of this grant, and the ability to modify it, the Supreme Court has no authority with respect to regulating real estate agents. That authority rests with the legislative and executive branches. By way of further illustration, some attorneys hold both J.D.s and M.D.s. The Supreme Court only governs the ability of these individuals to practice law. It has never interfered with their ability to practice medicine.



entrant's participation in the Sandbox where deemed appropriate and in keeping with the regulatory principles set forth below; and (3) recommending to the Supreme Court which entrants be permitted to exit the Sandbox and enter the general legal market.<sup>11</sup>

The Innovation Office will be funded initially by a grant from the State Justice Institute and in-kind contributions from the National Center for State Courts and the Institute for the Advancement of the American Legal System. The Innovation Office will have the authority to seek additional grant funding and may also be supported through licensing fees as noted in Section 4.9.

The Innovation Office will meet regularly and at least monthly, on a day and at a time and place of its convenience. It will also report monthly to the Supreme Court during one of the Court's regularly scheduled meetings.

## **2.1 Office Composition**

The Utah Supreme Court will appoint the members of the Innovation Office.<sup>12</sup> The Innovation Office will consist of a Chair, Vice-Chair, and nine additional members, all serving on a volunteer basis. Five of the members shall serve as the Executive Committee of the Innovation Office. The Executive Committee shall be composed of the Chair, Vice-Chair, Executive Director, and two additional members appointed by the Court. The Executive Committee will be responsible for setting the Agenda for each meeting of the Innovation Office and for making initial recommendations to the Innovation Office regarding applicants.

In the event of a vacancy, or on its own motion, the Supreme Court will appoint, depending on the vacancy, a new Chair, Vice-Chair, or member. The Court will strive to appoint nonlawyers

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<sup>11</sup> Innovation Office resources may limit the number of Sandbox entrants.

<sup>12</sup> The Supreme Court Task Force on Regulatory Reform shall continue to operate pending the appointment of the members of the Innovation Office. Upon appointment of the members of the Innovation Office, Utah Supreme Court Standing Order 14 shall be vacated in accordance with the terms of that Standing Order.

(public members) as at least five of the members and will prioritize a membership body diverse across gender, race, ethnicity, sexual orientation, socioeconomic background, and professional expertise.

Innovation Office actions will be taken by majority vote by a quorum of the members.

## **2.2 Conflicts of Interests**

The Utah Supreme Court acknowledges that instances may arise in which Innovation Office members may face conflicts of interest between their business or personal affairs and their member duties. A conflict of interest arises when members—or a member of their immediate family—have a financial interest in a Sandbox applicant or participant or in an entity that has successfully exited the Sandbox. For example, a member’s firm may apply to offer services as part of the Sandbox. Recognizing that transparency and public confidence are paramount concerns, the Supreme Court requires that in cases of conflict, the implicated member(s) disclose the conflict to the Innovation Office in writing and recuse from any involvement regarding that particular Sandbox applicant or participant. The Innovation Office will maintain a record of all conflicts and recusals and make all records related to conflicts and recusals publicly available.

## **2.3 Office Authority**

Subject to the limitations set forth in the Standing Order and the ultimate authority and control of the Utah Supreme Court, the Innovation Office will have the authority to oversee the nontraditional provision of legal services (*see* Section 3.3.2 on Regulatory Scope) using an objectives-based and risk-based approach to regulation.

Objectives-based regulation specifically and clearly articulates regulatory objectives to guide development and implementation. Both the Innovation Office and the Sandbox participants will be guided in their actions by specific objectives.

Risk-based regulation uses data-driven assessments of market activities to target regulatory resources to those entities and

activities presenting the highest risk to the regulatory objectives and consumer well-being. Using risk-based regulation enables the Innovation Office to better prioritize its resources and manage risks in the Utah legal services market.

The Supreme Court grants the Innovation Office the authority to develop and propose processes and procedures around licensing, monitoring, and enforcement to carry out its mission in light of the Regulatory Objective and Regulatory Principles outlined in Section 3.<sup>13</sup>

The Innovation Office must submit proposed processes, procedures, and fee schedules to the Supreme Court for approval as they are developed and before they take effect.

### **3. Regulatory Objective, Principles, and Scope**

#### **3.1 Regulatory Objective**

The overarching goal of this reform is to improve access to justice. With this goal firmly in mind, the Innovation Office will be guided by a single regulatory objective: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services. The Utah Supreme Court's view is that adherence to this objective will improve access to justice by improving the ability of Utahns to meaningfully access solutions to their justice problems, including access to legal information, advice, and other resources, as well as access to the courts.

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<sup>13</sup> The Implementation Task Force on Regulatory Reform has already established an Innovation Office Manual. A copy of that manual may be viewed at [sandbox.utcourt.gov](https://sandbox.utcourt.gov).

### 3.2 Regulatory Principles

The Innovation Office will be guided by the following regulatory principles:

1. Regulation should be based on the evaluation of risk to the consumer.<sup>14</sup>
2. Risk to the consumer should be evaluated relative to the current legal services options available.<sup>15</sup>
3. Regulation should establish probabilistic thresholds for acceptable levels of harm.<sup>16</sup>
4. Regulation should be empirically driven.<sup>17</sup>
5. Regulation should be guided by a market-based approach.<sup>18</sup>

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<sup>14</sup> The phrase “based on the evaluation of risk” means that regulatory intervention should be proportional and responsive to the actual risk of harm posed to the consumer, as supported by the evidence.

<sup>15</sup> The phrase “relative to the current legal service options available” means that risk should not be evaluated as against an ideal of perfect legal representation by a lawyer. Risk should rather be measured as against the reality of current market options for consumers. In many cases, that means no access to legal representation or legal resources at all.

<sup>16</sup> The phrase “probabilistic thresholds for acceptable levels of harm” (the chance a consumer is harmed) means the probability of a risk occurring and the magnitude of the harm should the risk occur. Based on this assessment, the Innovation Office will determine thresholds of acceptable risks for identified harms. Regulatory resources should be focused on areas in which, on balance, there is a high probability of harm or a significant impact from that harm on the consumer or the market.

<sup>17</sup> The phrase “empirically driven” means that the regulatory approach and actions must be supported, whenever possible, by data from the legal services market.

<sup>18</sup> The phrase “market-based approach” means that regulatory tactics should seek to align regulatory incentives with increased revenue or decreased costs for market participants in order to encourage desired behavior or outcomes.

### **3.3 Regulatory Scope**

As noted, under the auspices of the Utah Supreme Court, the Innovation Office will be responsible for developing, overseeing, and regulating the Sandbox, including the oversight of nontraditional legal providers and services therein. The Supreme Court offers the following examples to help individuals and entities, lawyers and nonlawyers alike, understand the Innovation Office's regulatory scope. These examples are just that and the list is not intended to be exhaustive.

#### **3.3.1 Outside the Regulatory Scope**

Individuals and entities that carry out the following activities are outside the Innovation Office's regulatory scope, remain under the Utah Bar's authority, and need not notify the Innovation Office:

Partnerships, corporations, and companies entirely owned and controlled by lawyers in good standing; individual lawyers with an active Utah Bar license; and legal services nonprofits:

- (i) offering traditional legal services as permitted under the Rules of Professional Conduct; or
- (ii) using new advertising and solicitation approaches as contemplated by the Rules of Professional Conduct.

### **3.3.2 Within the Innovation Office's Regulatory Scope**

Individuals and entities that carry out the following activities are within the scope of the Innovation Office's regulatory authority and are subject to this Standing Order's requirements:<sup>19</sup>

- (a) Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits sharing or splitting fees with or partnering with a nonlawyer-owned entity not already authorized by the Innovation Office to offer legal services;
- (b) Nonlawyer owned entities, or legal entities in which nonlawyers are partial owners (for profit or nonprofit):
  - (i) offering legal practice options whether directly or by partnership, joint venture, subsidiary, franchise, or other corporate structure or business arrangement, not authorized under the Rules of Professional Conduct in effect prior to [Month] [Date], 2020, or under Utah Supreme Court Rule of Professional Practice 14-802; or
  - (ii) practicing law through technology platforms, or lawyer or nonlawyer staff, or through an acquired law firm.

### **3.3.3 Disbarred Lawyers and Individuals with Criminal History**

**Disbarred Lawyers.** The Utah Supreme Court has determined that lawyers who have been disbarred<sup>20</sup> present a significant risk

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<sup>19</sup> This list is not meant to be exclusive or exhaustive. There may be business arrangements, models, products, or services not contemplated in Section 3.3.2, which are welcome and should come through the Sandbox. The Sandbox is not, however, meant to enable lawyers not licensed in Utah to practice in Utah without authorization from the Utah State Bar.

<sup>20</sup> For purposes of this Standing Order, a lawyer whose license has been suspended qualifies as a disbarred lawyer during the period of suspension.

of harm to consumers if in the position of ownership or control of an entity or individual providing legal services. Therefore, disbarred lawyers are not permitted to gain or hold an ownership interest of greater than 10 percent in any entity authorized to practice law under this Standing Order.

In addition, any entity applying for authorization to offer services in the Sandbox must disclose the following:

- (a) whether the entity has any material corporate relationship and/or business partnership with a disbarred lawyer, and
- (b) whether a disbarred lawyer works with or within the entity, in either an employment or contractual relationship, and is in a managerial role in the direct provision of legal services to consumers.

**Criminal History.** The Supreme Court has determined that individuals with certain serious criminal histories may present an increased risk of harm to consumers if in the position of ownership or control of a legal service entity.

Any entity applying for authorization to offer services in the Sandbox must disclose the following:

- (a) whether any individual holding an ownership interest of greater than 10 percent in the entity has a felony criminal history,
- (b) whether the entity has any material corporate relationship or business partnership with an individual with a felony criminal history, and
- (c) whether an individual with a felony criminal history works with or within the entity, in either an employment or contractual relationship, and is in a managerial role in the direct provision of legal services to consumers.

The Innovation Office, on receipt of any disclosures required above, will incorporate the information into the risk assessment of the entity as appropriate. To the extent permitted by law, the Innovation Office may also conduct independent criminal history checks.

Falsifying any information, including lawyer status and individual criminal history, is a basis for dismissal from the Sandbox and in the event the entity or individual has exited the Sandbox, a basis for loss of licensure. Other criminal and civil sanctions may also apply.

#### **4. The Sandbox**

The Sandbox is a policy tool by which the Utah Supreme Court, through the Innovation Office, can permit innovative legal services to be offered to the public in a controlled environment. The Innovation Office will develop, oversee, and regulate the Sandbox according to the guidance outlined in this Standing Order. Individuals and entities wanting to offer the public nontraditional legal business models, services, or products must notify the Innovation Office. Individuals and entities in the Sandbox will be subject to such data reporting requirements and ongoing supervision as the Innovation Office determines, so long as the requirements fall within its regulatory authority.

##### **4.1 Application**

All individuals and entities that fall within the Regulatory Scope (Section 3.3.2) must apply to the Innovation Office for authorization to enter the Sandbox.

##### **4.2 Application Process**

The objective of the application process is for the Innovation Office to determine that the legal service proposed by the applicant furthers the Regulatory Objective and does not present unacceptable levels of risk of consumer harm. The Innovation Office will develop an efficient and responsive process for intake, review, assessment, and response to applications.

The Utah Supreme Court contemplates that the application process will be iterative and will include communications between the Innovation Office and the various applicants, as necessary.

The Innovation Office will make a determination as to whether an applicant's proposed legal service furthers the Regulatory Objective and does not present an unacceptable risk of consumer



harm. The Innovation Office will make recommendations to the Supreme Court regarding whether an applicant should be authorized and the associated requirements for the applicant (e.g., reporting, disclosure, risk mitigation, insurance requirements). In developing these requirements, the Innovation Office will consider the Regulatory Objective and Regulatory Principles.

If the Innovation Office does not find that an applicant's proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed authorization, and will include a brief written explanation supporting the finding. The Innovation Office will develop a process for appeal of a denial of a proposed authorization to the Supreme Court.

### **4.3 Authorization**

As with the licensing of lawyers and Licensed Paralegal Practitioners, the Utah Supreme Court will ultimately be responsible for approving or denying authorization to nontraditional legal service providers.

An approved application means permission to offer the proposed legal service in the Sandbox as outlined in the approval and under the Innovation Office's authority. Authorized participants and services are deemed authorized to practice law in Utah, albeit on a limited and temporary basis, under Utah Supreme Court Rule of Professional Practice 14-802.

Denial of authorization by the Supreme Court has the effect of returning the application to the Innovation Office. The Supreme Court may include a brief written explanation of the reasons for its decision not to authorize the applicant. This information may guide the applicant in how to potentially resolve concerns and revise its application for reconsideration for authorization. However, to be clear, some (perhaps many) applicants may not be approved to enter or exit the Sandbox.

Additionally, and to be clear, authorization to practice law does not impact any of the other requirements that may be imposed upon an entity (e.g., business license, tax commission registration, etc.).

#### **4.4 Licensing (Exiting the Sandbox)**

Sandbox participants that are able to demonstrate that their legal services are safe—i.e., that they do not cause levels of consumer harm above threshold levels established by the Innovation Office—may be approved to exit the Sandbox and may be granted the appropriate license to practice law by the Utah Supreme Court pursuant to Utah Supreme Court Rule of Professional Practice 14-802. Such providers and services will remain under the regulatory authority of the Supreme Court, through the Innovation Office and subject to such monitoring and reporting requirements as the terms of the license indicate and subject to the enforcement authority of the Innovation Office.

The Innovation Office will develop the process (subject to Supreme Court approval) by which providers and services exit the Sandbox. It is anticipated that this process will generally follow that outlined for application approval, including an assessment of the provider or service, a finding on the consumer safety of the provider or service, and a recommendation to the Supreme Court as to the scope of the license and associated requirements (e.g., reporting). The Innovation Office is authorized to make the licensing assessment, findings, and recommendations at both the individual or entity level and a more categorical level—i.e., to recommend that a category of legal service providers be licensed to practice law in Utah.

If the Innovation Office does not find that a participant's proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed licensure, and will include a brief written explanation supporting the finding. The Innovation Office will develop and propose the process for appeal of a denial of Sandbox exit to the Supreme Court.

#### **4.5 Fees**

The Innovation Office will have the authority to propose a fee schedule to the Utah Supreme Court. Unless otherwise required, fees paid will be used to fund the Innovation Office.

#### **4.6 Monitoring and Measuring Risk**

The Innovation Office will have the authority to develop the measurements by which it assesses and manages risk. The Innovation Office will identify specific harms presenting the most significant risk to the Regulatory Objective. All regulated providers, whether in the Sandbox or after exiting, have a proactive duty to report any unforeseen risks or harms of which they become aware.

As noted, the Innovation Office will have the authority to develop specific data reporting requirements to monitor consumer risk of harm as part of both Sandbox authorization and general licensing of proposed legal services. The Innovation Office will develop processes and procedures for intake, review, and assessment of incoming data at an individual provider level, across different market sectors, and across the market as a whole. The Innovation Office will have the authority to increase or decrease reporting requirements as indicated by the provider's performance in the market and compliance with the Innovation Office's requirements.

The Innovation Office will have the authority to take proactive actions to effect monitoring of providers and the market as a whole, including but not limited to market surveys, expert audits, anonymous testing, and "secret shopper" tests. The Innovation Office will also develop processes and procedures for intake, review, and assessment of information coming from sources such as media, other governmental or nongovernmental institutions, whistleblowers, and academia.

The Utah Supreme Court acknowledges that this regulatory approach does not remove all possibility of harm from the market and, in fact, contemplates that sometimes there may be no regulatory enforcement action even though some consumers may experience harm. Nevertheless, aggrieved consumers may seek relief and remedy through traditional channels of civil litigation or, if applicable, the criminal justice system.

#### **4.7 Consumer Complaints**

The Innovation Office will develop a process by which consumers may directly complain to the Office. The Innovation Office will

develop a process by which individual complaint information is fed into the larger data reporting system to contribute to the assessment of risk.

#### **4.8 Enforcement**

The Innovation Office will develop standards for enforcement authority upon regulated providers in line with the Regulatory Objective and Regulatory Principles. Enforcement will generally be triggered when the evidence of consumer harm exceeds the applicable acceptable consumer harm threshold. The Innovation Office will also develop the range of enforcement mechanisms it deems appropriate, including but not limited to education, increased reporting requirements, fines, and suspension or termination of authorization or license. Last, the Innovation Office will develop a process for appealing enforcement decisions to the Innovation Office, and then to the Utah Supreme Court.

Once the Innovation Office has developed these various processes and procedures, they will be submitted to the Supreme Court for review and, if appropriate, approval. Both the Supreme Court and the Innovation Office will strive to make the enforcement process as transparent, targeted, and responsive as possible.

#### **4.9 Standards of Conduct**

As stated in Rule 5.4, lawyers engaging with the nontraditional provision of legal services, as owners, employees, contractors, or business partners with Sandbox participants or licensed providers are required to uphold their duties as required by the Rules of Professional Conduct.

#### **4.10 Confidentiality**

The Innovation Office shall maintain a commitment to transparency in the execution of its mission. Identities of applicants to the Sandbox and the applications themselves are presumed to be public information and will be shared via the Innovation Office website.

Applicants may designate appropriate, specific information in the application and/or in any data reported as required by the Innovation Office as confidential business information under the

Government Records and Access Management Act (GRAMA). *See* UTAH CODE § 63G-2-305(1)-(2). The Innovation Office will maintain the confidentiality of such designated information and it will be redacted from the publicly released documents. Nothing, however, in this paragraph limits the ability of the Innovation Office to provide aggregate and anonymized data sets to outside researchers, subject to a duly executed data sharing agreement with the Court.

#### **4.11 Reporting Requirements**

The Innovation Office will be responsible for regular reporting to the Utah Supreme Court and the public on the status of the Sandbox, the Sandbox participants, licensed providers, and consumers.

The reports to the Supreme Court must be monthly. Reports to the Supreme Court must include the following:

- The number of applicants
- General information about applicants (e.g., type of legal entity, ownership makeup, target market, proposed type of service, legal need to be addressed, subject matter served)
- Numbers of (along with general information)
  - Applicants recommended for Sandbox entry
  - Applicants denied Sandbox entry
  - Sandbox applicants on hold
  - Applicants recommended to exit Sandbox
  - Applicants not recommended to exit Sandbox
- Numbers and demographic data (as available) on consumers served by the Sandbox and licensed providers
- Identification of risk trends and responses

The Innovation Office will, subject to existing law, have the authority to determine the nature and frequency of its reports to the public, but must, at a minimum, report the information identified above on an annual basis (keeping anonymity and confidentiality as required).

#### **4.12 Jurisdiction**

Entities authorized to practice law within the Sandbox and licensed to practice law on exiting the Sandbox are subject to the jurisdiction of this Court. Any false or misleading statements made by entities or their members throughout the regulatory relationship, whether during application, authorization, reporting, monitoring, or enforcement, whether discovered at the time or at any time afterward, will be independent grounds for enforcement and an aggravating factor in any enforcement proceeding based on other conduct. Any fraudulent or materially misleading statements made by an entity or its members to the Innovation Office or the Court may result in revocation of the entity's authorization to practice law.

#### **4.13 Termination of Pilot Phase**

The Sandbox is a policy tool, adopted by the Utah Supreme Court to develop a new regulatory approach to nontraditional legal services and to inform the Supreme Court's decision-making on rule changes necessary to support the expanded legal services market. The Supreme Court has set out a two-year period of operation for this pilot phase of the Innovation Office and Sandbox.

At the end of the pilot phase, the Supreme Court will determine if and in what form the Innovation Office will continue. Sandbox participants authorized and in good standing at the end of the two-year period and for whom there appears to be little risk of consumer harm will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist. Entities that have successfully exited the Sandbox will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist.



## OFFICE OF LEGAL SERVICES INNOVATION

An Office of the Utah Supreme Court

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# INNOVATION OFFICE MANUAL

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## I. INTRODUCTION

This manual seeks to establish the policies and processes by which the Office of Legal Services Innovation (“Innovation Office”) will execute the mandate of the Utah Supreme Court Standing Order 15: to oversee the nontraditional model of legal services, subject to the ultimate authority and control of the Utah Supreme Court. This manual will guide the Innovation Office, the Utah Supreme Court, Sandbox applicants and participants, and the public on the work of the Office.

This manual is a working document and will be regularly updated or revised according to need. Any decisions or actions by either the Innovation Office or the Utah Supreme Court, while informed by this document, are ultimately based on discretion guided by the Regulatory Objective and Regulatory Principles outlined in Standing Order 15.

## II. APPLYING TO THE SANDBOX

Qualification for the Sandbox is guided by Rule 5.4 and Standing Order No. 15, Section 3.3.2. The Sandbox is the mechanism by which business models or services that have not traditionally been permitted in the Utah legal system may provide legal services.

Such practices may include:

- traditional law firms taking on nonlawyer investment or ownership;
- traditional law firms and lawyers entering into fee sharing relationships with nonlawyers;
- nonlawyer-owned or corporate entities employing Utah-licensed lawyers to practice law;
- firms or companies using technology platforms or nonlawyer service providers to practice law; or
- lawyers or firms entering joint ventures or other forms of business partnerships with nonlawyer entities or individuals to practice law.

There may be many other innovative models or services not permitted under the traditional rules that will apply to the Sandbox.

Any entity wishing to apply to the Sandbox must complete:

1. The Application Form
2. Disclosures around ownership, management, and significant financial investors / partners, including whether any of those controlling individuals are disbarred or have a felony criminal history;
3. Disclosure on whether the entity plans to share or sell consumer data to third parties;



4. GRAMA confidentiality claim for information that is identified as trade secrets or confidential business information.

Applicants may also submit any other relevant supplemental materials.

The Innovation Office will review the application for completeness. The Office does not consider applications submitted until the Office determines the submission is sufficiently complete.

### III. INNOVATION OFFICE REVIEW PROCESS

Once the application is determined complete, the Innovation Office will begin its review. The first level of review is performed by the Executive Committee. The second level of review is performed by the entire Office.

The review process is iterative and applicants are expected to be responsive and engaged with the Office. The Innovation Office will seek to understand the applicant's business model and potential consumer risks therein.

This section includes:

- Outlines the qualifiers the Office must confirm for each applicant
- Articulates common risk assessments
- Sets out and explains the core categories of:
  - Service model
  - Service area
  - Disclosure requirements
  - Data reporting requirements

## A. QUALIFIERS

The Innovation Office must confirm that each applicant meets the following qualifiers:

**Sandbox Qualifier(s):** What aspects of the proposed entity / service qualify for participation in the sandbox.

**Utah Qualifier:** Each entity must affirm that its service conforms to any applicable requirements of Utah law.

**Implementation Qualifier:** Each entity must affirm that it is ready or very close to ready to implement its proposed service.

**Regulatory Objective Qualifier:** Each entity must show that the proposed service will further the Regulatory Objective outlined in Standing Order No. 15: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services.

## B. RISK ASSESSMENT

The Risk Assessment section outlines the risks of consumer harm identified by the Innovation Office. The Innovation Office has grouped consumer risk of harm from legal services into three main areas:

- (1) inaccurate or inappropriate legal result,
- (2) failure to exercise legal rights through ignorance or bad advice, and
- (3) purchase of an unnecessary or inappropriate legal service.

It is the goal of the Office to work toward being able to both assess and measure consumer risk relative to the risk of harm the target consumer population currently faces. For example, suppose an entity is targeting consumers who do not generally access legal help from lawyers. In that case, the Risk Assessment of the proposed services should be against receiving no legal advice or using do-it-yourself tools on the market or from court websites.

## SERVICE MODEL RISK CATEGORY

The Office has developed a model of risk categorization based on the service model(s) proposed by the entity:

Service Model	Risk
Lawyer employed or managed by a nonlawyer	Low
Less than 50% nonlawyer ownership	Low
Software provider <sup>1</sup> with lawyer involvement <sup>2</sup> - legal document completion	Low
50% or more nonlawyer ownership	Low / Moderate
Lawyers sharing fees with nonlawyers	Moderate
Nonlawyer provider with lawyer involvement	Moderate
Software provider with lawyer involvement	Moderate
Nonlawyer provider without lawyer involvement <sup>3</sup>	High
Software provider without lawyer involvement	High

We have categorized the risk across these service models according to the lawyers' involvement in developing and overseeing the nonlawyer

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<sup>1</sup> Provider means legal practitioner: a provider who or which is practicing law, including offering legal advice.

<sup>2</sup> "Lawyer involvement" means a Utah-licensed lawyer both (1) provides guidance and oversight of the provider at the front end, i.e. through developing training materials and overseeing training of providers and developing scripts and/or algorithms, and (2) performs regular spot checks of providers services for quality and accuracy.

<sup>3</sup> "Without lawyer involvement" means either (1) a Utah-licensed lawyer provides guidance and oversight at the front end of the development of the service model only but has no ongoing oversight, or (2) no Utah-licensed lawyer is involved in the development or provision of legal service at all.

model. Essentially, as we get further from our historical norms, the risk level increases because we do not know much about how these models will work. We are relying on the assumption that lawyer involvement should mitigate some of the risks around poor advice or failure to identify issues. However, both moderate and high risk models are subject to robust data requirements giving us the ability to learn more about actual level, scope, and type of risks as we move forward. In the future, as we learn more about the kinds of services offered and the potential risk of consumer harm, we hope to develop more finely tuned categories of risk according to the simplicity / complexity of more specific service offerings (e.g., completing legal documents, advising on process only, representing a consumer in negotiations with an opposing party, representing a consumer in court).

Once an entity is authorized, reported data will be our primary tool to facilitate our regulatory objective while also focusing on consumer protection. As the risk of any proposed service increases, the frequency and scope of reporting increases.

## ADDITIONAL RISK DETAIL

The Innovation Office has identified some risks that repeat across entities. Those risks are discussed in detail in this manual but referred to by a shorthand designation in the recommendation to the Court. As we identify new repeating risks, we will add them to this manual. The Office may also identify risks outside or ancillary to the proposed service model. Applicants are encouraged to interrogate their own models for additional risks and discuss those with the Office.

The following repeating risks are described in detail below:

- (1) nonlawyer investment / ownership,
- (2) lawyers sharing fees with nonlawyers,
- (3) technology and nonlawyer providers,
- (4) user communication, and
- (4) ownership, investment, or management by disbarred lawyers or individuals with felony criminal histories.

## 1. NONLAWYER INVESTMENT / OWNERSHIP

Entities may propose taking on nonlawyer investment / ownership or lawyer employees.

Nonlawyer investment / ownership presents the potential risk that nonlawyer owners / investors, unfamiliar with and unlimited by the legal Rules of Professional Conduct, could undermine the legal services model to the consumer's detriment. It potentially increases the likelihood of implementing business practices that increase the consumer harm risk across all three risk areas. The potential negative impacts of nonlawyer investment / ownership are significantly lower if the nonlawyers have less than majority ownership.

While concern about this risk runs high among lawyers and others unsure about the impact of regulatory reform, data on this risk is relatively limited. Studies from the UK and Australia, each of which have allowed nonlawyer investment / ownership for some time, show no adverse impacts on consumers by legal service businesses with nonlawyer investment / ownership. Given that, we have assigned the following these models to the following risk categories:

Service Model	Risk
Lawyers employed or managed by a nonlawyer	Low
Less than 50% nonlawyer ownership	Low
50% or more nonlawyer ownership	Low / Moderate

There are several ways to address this risk:

- **Rules of Professional Conduct:** All lawyers participating in the sandbox, whether as owners, employees, independent contractors, or business partners, are required to maintain their professional duties, including loyalty to the client and confidentiality. Rule 5.4 both clearly states the lawyer's responsibilities.
- **Identification and Confirmation:** During the assessment process, the Innovation Office notes the lawyers' continuing duties of professional responsibility and independence and may ask the applicant to briefly describe the policies and procedures the applicant will put in place to ensure those duties are maintained.
- **Disclosure Requirements:** The Innovation Office has developed the following disclosure requirements for nonlawyer owned entities:
  - For nonlawyer-owned companies or firms with nonlawyer ownership or investment:
    - **This is not a law firm. / This law firm is owned by nonlawyers.** Some of the people who own / manage this entity are not lawyers. This means that some services / protections, like attorney-client privilege, may be different from those you could get from a traditional law firm.

If you have questions, please contact us at

\_\_\_\_\_.

- **Data Reporting:**

- For less than 50% nonlawyer investment / ownership (low risk), without other risk factors, entities will have minimal reporting requirements. Those requirements include customer complaint data.
- For more than 50% nonlawyer investment / ownership (low/moderate risk), entities will have more fulsome reporting requirements at the outset, to be reduced when [x happens].

## 2. LAWYERS SHARING FEES WITH NONLAWYERS

Under revised Rule 5.4, lawyers proposing to share fees with nonlawyers, whether through basic arms length referral fee transactions or some other model, must enter the Sandbox. The potential risks presented by fee sharing could include compromised lawyer independence and loyalty, conflicts issues, and increased likelihood of the lawyer advancing nonmeritorious claims. There are several mechanisms to address these risks of consumer harm:

- **Rules of Professional Conduct:** All lawyers engaging in fee sharing relationships with nonlawyers are required to maintain their professional duties to their clients and to the court.
- **Disclosure Requirements:** Rule 5.4 requires all lawyers engaging in fee sharing relationships with nonlawyers to disclose the fact of the fee sharing relationship to the affected client. Depending on the model proposed, the Innovation Office may supplement those disclosure requirements or impose timing requirements.
- **Data Reporting:** The Innovation Office has categorized fee sharing models as MODERATE risk but created distinct reporting requirements focused on the particular harms presenting in these arrangements. Entities will be required to submit the following categories of case level data for those clients coming to the entity through a referral fee arrangement:
  - Number of consumers
  - Revenue / receipt
  - Geographic data (requested)
  - Consumer complaints
  - Nonfinancial (legal) outcome
  - Financial outcome

The Innovation Office has the discretion to require an external review of anonymized client files.

## 3. LEGAL PRACTICE THROUGH TECHNOLOGY AND NONLAWYER PROVIDERS

There are several mechanisms through which entities may propose to offer legal services through technology or nonlawyer human providers. We have identified the following models and risk risk categories:

Service Model	Risk
Software provider with lawyer involvement - legal document completion	Low
Nonlawyer provider with lawyer involvement	Moderate
Software provider with lawyer involvement	Moderate
Nonlawyer provider without lawyer involvement	High
Software provider without lawyer involvement	High

Basic automated form completion (software provision of legal forms and information) is already widely available on the market and has been categorized as providing legal information. The Utah Courts offer such a service through OPAC. Such services reach consumers who otherwise would not likely engage with legal rights or services and the relative risk of consumer harm appears low. These include consumers who cannot access lawyers or visit court-based, self-help services due to time or travel limitations (distance), as well as those who cannot afford a lawyer.

We foresee multiple applicants proposing to expand on this model by using tech platforms to provide legal advice and guidance to consumers (e.g., providing basic legal advice through a chatbot and enhancing the platform's ability to actively guide consumers to complete forms and other legal documents). We also foresee multiple applicants proposing to use nonlawyer providers (whether as advisors on legal processes and / or

as subject matter experts) to provide basic legal advice and assistance to consumers.

These services will be new legal service models and potentially present risk of harm if the quality of the legal advice and guidance is poor. Potential concerns include failure to identify material factual or legal issues, mischaracterization of material factual or legal issues, inaccurate legal advice, etc. For this reason, we have categorized the risk of these services based on the extent of lawyer involvement in developing and managing the software or nonlawyer providers. Where lawyers are involved in the development and oversight of the service, the risk category will be lower.

We have developed data reporting requirements focused on surfacing data around the three consumer harms to enable the Office to identify, assess, and address evidence of harm.

These models also may present other risks to consumers based on the fact that these are not traditional lawyer/client engagements. To address that aspect of the risk, the Office will require providers with these service models to make the following consumer disclosure:

- **This service is not a lawyer.** The product / service you have selected is not a lawyer. This means:
  - Someone involved with you or with your legal issue, including people on the other side of this case, could be using this service as well.
  - We could be required to disclose your communications (such as questions and information submissions) to third parties.

If you have questions, please contact us at \_\_\_\_\_.

#### 4. USER COMMUNICATIONS

We are developing a system of entity regulation in which the entity itself is given the authorization to practice law. This development may cause some tension with the traditional rules governing aspects of legal practice. In particular, communications between a user and licensed entities may present novel issues. As it stands, the attorney / client privilege applies only to communications between lawyers and their clients “for the purpose or in the course of obtaining or facilitating the rendition of legal services to the client.” This potential consumer vulnerability raises concerns about consumer harm from communication of sensitive information that is not protected from later discovery because the consumer did not make the disclosure to a lawyer within the definition of Rule 504. For example, a consumer communicating with a chatbot or with a nonlawyer legal advisor may believe their communications are protected because they assume they are getting legal help and find that sensitive information is now subject to disclosure. This concern also potentially applies to communications between consumers and nonlawyer service providers with referral fee relationships to lawyers.

There are currently many legal service options on the market which provide automated legal document completion on matters that do not reach attorney / client privilege. There are good reasons to think that consumers may not need or care about the application of the privilege to many types of legal services. Completing estate planning documents or drafting an employment contract template, for example, may not trigger consumer interest in the privilege. However, most consumers are not knowledgeable enough to draw distinctions around what is, essentially, a rule of evidence and this presents a potentially significant risk.

Further, lawyers practicing law as employees of a nonlawyer-owned entity raise novel issues around the nature of the client engagement, the status of the relationship between the lawyer and the entity, and protection of communications.

To address these issues and the resulting risk of consumer harm, we developed the following disclosure for authorized entities to place on their website, in their terms of service, and at the start of a consumer interaction / engagement:

- **This is not a law firm. / This law firm is owned by nonlawyers.** Some of the people who own / manage this entity are not lawyers. This means that some services / protections, like the attorney-client privilege, may be different from those you could get from a traditional law firm.

If you have questions, please contact us at \_\_\_\_\_.

- **This service is not a lawyer.** The product / service you have selected is not a lawyer. This means:
  - Someone involved with you or with your legal issue, including people on the other side of this case, could be using this service as well.
  - We could be required to disclose your communications (such as questions and information submissions) to third parties.

If you have questions, please contact us at \_\_\_\_\_.

The Innovation Office also notes that lawyers involved in fee sharing ventures or working with or for nonlawyer-owned entities have distinct disclosure requirements under Rule 5.4.

## 5. OWNERSHIP, INVESTMENT, OR MANAGEMENT BY DISBARRED LAWYERS OR INDIVIDUALS WITH FELONY CRIMINAL HISTORIES.

In Standing Order No. 15, the court determined disbarred lawyers present a high risk of consumer harm and, therefore, found that disbarred lawyers may not own or have a financial interest of greater than 10% in any entity participating in the Sandbox. The court also found that individuals with felony criminal histories may present an elevated risk of consumer harm, depending on the nature of that criminal history and their position within the participating entity.

Applicants to the Sandbox must:

- Confirm that no disbarred lawyers owners or controls more than 10% interest in the entity.
- Disclose all persons or entities who wholly or partially direct the management or policies of the proposed entity, whether through ownership of securities, by contract, or otherwise (“controlling persons”).
- List all persons or entities who will wholly or partially (>10%) finance the business of the proposed entity (“financing persons”).
- List any of those controlling or financing persons with felony criminal histories.
- List any persons in a managerial role over the direct provision of legal services who is disbarred or who has a felony criminal history.
- Disclose whether the entity material corporate relationship and / or business partnership with either a disbarred lawyer or individual with a felony criminal history.

The Office will develop a list of specific criminal felonies that could impact its risk assessment of the entity and follow up on any relevant disclosures with a more detailed inquiry. The Office will also incorporate relevant information into its risk assessment and include it in its recommendation to the Court.



## C. AUTHORIZATION PARAMETERS

After conducting the risk assessment, the Innovation Office will develop the outline for its authorization recommendation, including risk category, service area(s), and any additional requirements.

### 1. SERVICE MODELS

The Office will determine which service models it will recommend for Court review and approval. Even after authorization, if an applicant's model changes to include a new model, the applicant must request additional assessment and authorization from the Innovation Office.

Service Model	Risk
Lawyer employed or managed by a nonlawyer	Low
Less than 50% nonlawyer ownership	Low
Software provider with lawyer involvement - legal document completion	Low
50% or more nonlawyer ownership	Low / Moderate
Fee sharing with nonlawyers	Moderate
Nonlawyer provider with lawyer involvement	Moderate
Software provider with lawyer involvement	Moderate
Nonlawyer provider without lawyer involvement	High
Software provider without lawyer involvement	High

## 2. SERVICE CATEGORIES

The applicant identifies the service areas in which they will be working. Even after authorization, if an applicant's model changes to include a new model, the applicant must request additional assessment and authorization from the Innovation Office.

- Accident / Injury
- Adult Care
- Business
- Criminal Expungement
- Discrimination
- Domestic Violence
- Education
- Employment
- End of Life Planning
- Financial Issues
- Healthcare
- Housing (Rental)
- Immigration
- Marriage and Family
- Military
- Native American / Tribal Issues
- Public Benefits
- Real Estate
- Traffic - Civil Actions / Citations

### 3. CONSUMER DISCLOSURE REQUIREMENTS

#### REQUIRED FOR ALL AUTHORIZED ENTITIES

The Innovation Office “badge” is required for all authorized entities to display on their websites as well as brick-and-mortar offices. This will facilitate consumer knowledge and confidence and will provide question / complaint information. Regulators in the UK have developed a similar “badge” for regulated legal service entities.



For more information or to file a complaint,  
please visit [sandbox.utcourts.gov](https://sandbox.utcourts.gov)

#### REQUIRED AS APPLICABLE<sup>4</sup>

- **This is not a law firm. / This law firm is owned by nonlawyers.** Some of the people who own / manage this company are not lawyers. This means that some services / protections, like the attorney-client privilege, may be different from those you could get from a law firm.
  - If you have questions, please contact us at \_\_\_\_\_.
- **This service is not a lawyer.** The product / service you have selected is not a lawyer. This means:
  - Someone involved with you or with your legal issue, including people on the other side of this case, could be using this service as well.
  - We could be required to disclose your communications (such as questions and information submissions) to third parties.

If you have questions, please contact us at \_\_\_\_\_.

### 4. ANNUAL ENTITY REPORTING

Authorized entities will have certain limited annual reporting / certification requirements, confirming the status of their controlling and financing persons and confirming that no disbarred lawyer owns or controls more than 10% financial stake.

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<sup>4</sup> The Innovation Office notes that Rule 5.4 contains its own disclosure requirements applicable to lawyers in fee sharing arrangements and nonlawyer owned entities.

## DATA REPORTING REQUIREMENTS

For each approved service area, the entity will submit case level data as follows. The Innovation Office will provide the entity with a .csv template with specific data fields and corresponding operational and technical definitions.

### NONLAWYER INVESTMENT / OWNERSHIP: LESS THAN 50% - LOW RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services	Number of people served	Quarterly
			Geographic info (requested)	Quarterly
			Revenue / receipt info	Quarterly
			All consumer complaints	Quarterly

### SOFTWARE PROVIDER WITH LAWYER INVOLVEMENT - LEGAL DOCUMENT COMPLETION - LOW RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services	Number of people served	Quarterly
			Geographic info (requested)	Quarterly
			Revenue / receipt info	Quarterly
			All consumer complaints	Quarterly

NONLAWYER INVESTMENT / OWNERSHIP: MORE THAN 50% - LOW TO MODERATE RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services	Number of people served	Monthly
			Geographic info (requested)	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly

FEE SHARING WITH NONLAWYERS - MODERATE RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services under the fee sharing model	Number of people served	Monthly
			Geographic info (requested)	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
<b>Specific consumer service</b>	Consumer achieves an inaccurate or inappropriate legal result.	All services under the fee sharing model	Nonfinancial (legal) outcomes data (% customers that did / did not get the outcome they sought)	Monthly
	Consumer fails to exercise legal rights through ignorance or bad advice.		Financial outcome data (benefit obtained / loss prevented) broken down by outcome (verdict, settlement, etc.)	Monthly
	Consumer purchases an unnecessary or inappropriate legal service.		(Potential) Expert review of redacted case file	As determined

NONLAWYER PROVIDER WITH LAWYER INVOLVEMENT, SOFTWARE PROVIDER WITH LAWYER INVOLVEMENT - MODERATE RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services	Number of people served	Monthly
			Geographic info	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
<b>Specific consumer service</b>	Consumer achieves an inaccurate or inappropriate legal result.	Nonlawyer	Satisfactory legal expert review of representative selection of work product for accuracy and quality.	Nontraditional products / services: submit legal expert review of first 20 consumer interactions.  Office may require additional reporting on review of n interactions selected at random.
	Consumer fails to exercise legal rights through ignorance or bad advice.	Nonlawyer	Nonfinancial (legal) outcomes data (% customers that did / did not get the outcome they sought)	Monthly
	Consumer purchases an unnecessary or inappropriate legal service.	Nonlawyer	Track relevant outcomes across cases assisted by the new services and those not (e.g., was divorce achieved)	Monthly
		Nonlawyer	Track services provided across events with similar outcomes (e.g. what services were provided in this divorce)	Monthly
		Nonlawyer	Financial outcome ( benefit obtained or loss prevented) data broken down by outcome (divorce, custody).	Monthly

# NONLAWYER PROVIDER WITHOUT LAWYER INVOLVEMENT & SOFTWARE PROVIDER WITHOUT LAWYER INVOLVEMENT - HIGH RISK

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
<b>General</b>	General	All services	Number of people served	Monthly
			Geographic info	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
<b>Specific consumer service</b>	Consumer achieves an inaccurate or inappropriate legal result.	Nonlawyer	Satisfactory legal expert review of representative selection of work product for accuracy and quality.	Nontraditional products / services: first 20 consumer interactions to be reviewed by legal experts for accuracy and quality.  Additional monthly reporting on <i>n</i> consumer interactions (to be determined by Office).
	Consumer fails to exercise legal rights through ignorance or bad advice.	Nonlawyer	Nonfinancial outcomes data (% customers that did / did not get the outcome they sought)	Monthly
	Consumer purchases an unnecessary or inappropriate legal service.	Nonlawyer	Track relevant outcomes across cases assisted by the new services and those not (e.g., was divorce achieved)	Monthly
		Nonlawyer	Data on returns for error fixes.	Monthly
		Nonlawyer	Track services provided across events with similar outcomes (e.g. what services were provided in this divorce)	Monthly
		Nonlawyer	Financial outcome ( benefit obtained or loss prevented) data broken down by outcome (divorce, custody).	Monthly

## IV. RECOMMENDATION TO THE COURT

The Court retains complete discretion to review and assess any recommended entity. The Office has developed a recommendation to the court focused identifying potential risks, assigning a general risk level to the entity, and recommending relevant requirements for authorization. The Innovation Office strives to avoid unnecessary verbiage and repetition so as to make the recommendations, application review, and authorization processes as efficient as possible. The individual recommendation documents and Proposed Orders submitted to the court will refer to this manual for the full discussion of risks unless the model proposed presents a unique and novel issue.

Should the court vote to approve the recommended entity, it will enter the Proposed Order, subject to any changes requested by the court. The Proposed Order authorizes the entity as outlined and limited by the scope of the recommendation and the Innovation Office Manual. Once the Order is entered, the Innovation Office will make the application, recommendation, and Order public on its website. Any confidential information will be redacted before these materials are released publicly.

## V. DATA REPORTING AND MONITORING

In addition to providing initial quality review reports and annual confirmation, the Innovation Office will receive regular reporting from participating entities as outlined above. This reporting includes the following fields (subject to updating):

- ☐ Sandbox Participant Code
- ☐ Customer Number
- ☐ Service Provider
- ☐ Consumer Service Category
- ☐ Legal Problem / Matter
- ☐ Start Date
- ☐ Scope of Service Sought
- ☐ Scope of Service Received
- ☐ End Date
- ☐ Legal Outcomes(s)
- ☐ Amount Customer Paid
- ☐ Customer Complaint
- ☐ Customer Geographical Data







OFFICE OF LEGAL SERVICES INNOVATION

An Office of the Utah Supreme Court

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# INNOVATION OFFICE INTERIM UPDATE REPORT

NOVEMBER 20, 2020

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## SUMMARY

This Report is an interim update to the Innovation Office Report “Launch - October 2020.”

The Office has received 33 applications to the Sandbox. The Office has recommended 18 of those applications to the Court for admission to the Sandbox. The Court has authorized 12 entities (in whole or in part) to offer services in the Sandbox. 6 applicants withdrew their applications; 1 has withdrawn but will resubmit its application; 1 applicant was denied by the Office. There are 6 entities currently under active review by the Innovation Office. Applications come in at a rate of approximately 2 per week.

The following entities are currently operational and offering legal services: Blue Bee Bankruptcy, AGS Law, Rocket Lawyer, 1LAW, LawPal, FOCL Law, Law HQ, and Estate Guru. Rocket Lawyer and 1LAW have submitted their first data reports (see Actualized Risk Report below). The remaining entities have upcoming reporting dates as indicated in Table 2.

## OVERALL METRICS

<b>Total Applications Received</b>	<b>33</b>
<b>Applicants Recommended for Admission</b>	<b>18</b>
<b>Applicants Admitted to the Sandbox</b>	<b>12</b>
<b>Applicants Denied, Postponed, or Withdrawn</b>	<b>8</b>
<b>Applicants Recommended to Exit the Sandbox</b>	<b>0</b>

TABLE 1: AUTHORIZED ENTITIES<sup>1</sup>

	10 - Blue Bee	15 - AGS Law	19 - Firmly	04 - Lawpal	05 - Rocket Lawyer	07 - R&R	14 - FOCL	02 - 1Law	03 - LawHQ	12 - Nuttall	13 - Estate Guru	27 - Sudbury		
Risk Level	Low	Low	Low	Low / Moderate	Low / Moderate	Low / Moderate	Low / Moderate	Moderate	Moderate	Moderate	Moderate	Moderate		
Total Categories	1	3	1	4	15	9	1	17	1	5	5	2		
	2	1	1	2	2	2	3	4	3	4	6	1	Total Models	
Accident/Injury	4					X		1	X	X			9	Lawyers employed / managed by nonlawyers
Adult Care	3				X	X		X					4	<50% nonlawyer ownership
Business	8	X	X		17	X		10	X	X	X		6	50% + nonlawyer ownership
Criminal Expungement	3				X			X				X	3	Fee sharing
Discrimination	2				X			X					2	Software provider /w lawyer - doc completion
Domestic Violence	3				X	X		2					5	Software provider w/ lawyer involvement
Education	2				X			X					-	Software provider w/out lawyer involvement
Employment	5				1			2	X	X		X	2	Non-lawyer provider w/ lawyer involvement
End of Life Planning	6	X		X	3	X		X			X		-	Nonlawyer provider w/out lawyer involvement
Financial Issues	6	X		X	X	X		3			X			
Healthcare	4				X	X		X			X			
Housing (Rental)	3			X	16			X						
Immigration	2				X			2						
Marriage and Family	6			X	3	X	X	9		X				
Military	1				X									

<sup>1</sup> Entity case counts reflect reporting through October 31, 2020.

Native American/ Tribal Issues	-														
Public Benefits	3				X	X		X							
Real Estate	4		X		X			X			X				
Traffic Citations	1							3							

TABLE 2: AUTHORIZED ENTITIES REPORTING STATUSES

Entity Name	Risk Category	Launch Date	First Report Due	Frequency
Blue Bee Bankruptcy	Low	10/1/20	1/5/21	Quarterly
AGS Law	Low	10/1/20	1/5/21	Quarterly
Firmly LLC	Low	12/1/20	1/5/20	Quarterly
Rocket Lawyer	Low-Moderate	10/1/20	11/5/20	Monthly
R&R Legal Services	Low-Moderate	11/1/20	12/5/20	Monthly
LawPal	Low-Moderate	11/1/20	12/5/20	Monthly
FOCL Law	Low-Moderate	11/1/20	12/5/20	Monthly
1Law	Moderate	10/1/20	11/5/20	Monthly
LawHQ	Moderate	11/1/20	12/5/20	Monthly
Nuttal Brown	Moderate + Fee Sharing	1/1/21	2/5/21	Monthly
Estate Guru	Moderate	11/1/20	12/5/20	Monthly
Sudbury Consulting / Code for America	Moderate	TBD	TBD	Monthly

TABLE 3: PENDING SUBMITTED APPLICANTS PG. 1/2

		08 - Shumway Van	16 - Efficient Attorneys	22 - Nelson Jones	23 - Off the Record	31 - DSD Solutions	32 - Tanner LLC		
Risk Level		Low / Moderate	Low / Moderate	Moderate	Moderate	Moderate	TBD		
Total Categories		8	1	4	1	12	1		
		1	1	1	2	6	1	Total Models	
Accident/Injury	2	X	X			X		2-	Lawyers employed / managed by nonlawyers
Adult Care	-							-	<50% nonlawyer ownership
Business	3	X		X		X	X	2	50% + nonlawyer ownership
Criminal Expungement	1					X		6	Fee sharing
Discrimination	-							1	Software provider w/ lawyer involvement - doc completion
Domestic Violence	-					X		2	Software provider w/ lawyer involvement
Education	-							-	Software provider w/out lawyer involvement
Employment	2	X				X		1	Non-lawyer provider w/ lawyer involvement
End of Life Planning	3	X		X		X		-	Nonlawyer provider w/out lawyer involvement
Financial Issues	-								
Healthcare	2			X					
Housing (Rental)	1	X				X			
Immigration	1	X				X			
Marriage and Family	3	X		X		X			
Military	-								

Native American/ Tribal Issues	-							
Public Benefits	-				X			
Real Estate	1	X			X			
Traffic Citations	1			X	X			

TABLE 3: PENDING SUBMITTED APPLICANTS PG. 2/2

		24 - Legal Services Link	25 - Michael Loveridge	26 - First Prof.	28 - Pearson Butler	29 - RMPIC	30 - Law on Call	33 - Xira		
<b>Risk Level</b>		<b>TBD</b>	<b>TBD</b>	<b>TBD</b>	<b>TBD</b>	<b>TBD</b>	<b>Moderate</b>	<b>TBD</b>		
<b>Total Categories</b>		<b>19</b>	<b>2</b>	<b>2</b>	<b>14</b>	<b>1</b>	<b>5</b>	<b>19</b>		
		<b>1</b>	<b>1</b>	<b>1</b>	<b>4</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>Total Models</b>	
Accident/Injury	5	X		X	X	X		X	2	Lawyers employed / managed by nonlawyers
Adult Care	3	X			X			X	1	<50% nonlawyer ownership
Business	4	X			X		X	X	-	50% + nonlawyer ownership
Criminal Expungement	2	X						X	5	Fee sharing
Discrimination	3	X			X			X	-	Software provider w/ lawyer - doc completion
Domestic Violence	3	X			X			X	1	Software provider w/ lawyer involvement
Education	3	X	X					X	1	Software provider w/out lawyer involvement
Employment	3	X			X			X	2	Non-lawyer provider w/ lawyer involvement
End of Life Planning	5	X	X		X		X	X	1	Nonlawyer provider w/out lawyer involvement
Financial Issues	5	X		X	X		X	X		
Healthcare	3	X			X			X		
Housing (Rental)	3	X					X	X		
Immigration	3	X			X			X		
Marriage and Family	3	X			X			X		

Military	2	X						X		
Native American/Tribal Issues	3	X			X			X		
Public Benefits	3	X			X			X		
Real Estate	4	X			X		X	X		
Traffic Citations	2							X		



TABLE 4: DENIED, POSTPONED, AND WITHDRAWN APPLICANTS

		01 - PainWorth	06 - Fluent Worlds	09 - Legal Different	11 - Louis Hansen	17 - CBLP	18 - Smith Gold	20 - US Arbitration	21 - Arch Media		
Status		Withdrawn - Unresponsive	Withdrawn - Unresponsive	Withdrawn - Not Qualified	Withdrawn	Resubmit	Withdrawn	Withdrawn	Denied		
Total Categories		1	-	3	3	7	13	4	4		
		3	1	-	-	5	3	4	1	Total Models	
Accident/Injury	2	X					X			3	Lawyers employed / managed by nonlawyers
Adult Care	3						X	X		2	<50% nonlawyer ownership
Business	5			X		X	X	X	X	2	50% + nonlawyer ownership
Criminal Expungement	1					X				-	Fee sharing
Discrimination	1			X						4	Software provider /w lawyer - doc completion
Domestic Violence	1						X			2	Software provider w/ lawyer involvement
Education	1						X			1	Software provider w/out lawyer involvement
Employment	3			X		X	X			3	Nonlawyer provider w/ lawyer involvement
End of Life Planning	3				X	X			X	1	Nonlawyer provider w/out lawyer involvement
Financial Issues	4				X	X	X	X			
Healthcare	3						X	X	X		
Housing (Rental)	-										
Immigration	1						X				
Marriage and Family	2						X		X		
Military	2					X	X				

Native American / Tribal Issues	1						X				
Public Benefits	-										
Real Estate	3				X	X	X				
Traffic Citations	-										



**Passmore**  
Consulting

## Overview of regulation in England & Wales

Crispin Passmore

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1



## What is regulated?

- ◆ There is no unauthorised practice of law regime in England & Wales
- ◆ We regulate via two main routes:
  - ◆ Those with certain protected titles (e.g. solicitor and barrister)
  - ◆ Those entitled to undertake certain reserved activities
- ◆ Notes
  - ◆ Scotland and Northern Ireland have separate regimes
  - ◆ The detail in later slides focuses on solicitors & SRA

2

## Who is regulated?



- ❖ Any individual or entity that wants to be entitled to conduct reserved activities must be authorised
  - ❖ Law firm partnerships, solo practitioners and ABS are all regulated as entities
  - ❖ By virtue of their professional title solicitors and barristers are entitled to undertake reserved activities
  - ❖ Other individuals without those protected titles can also be authorised

3

## Reserved activities



- ❖ The activities reserved to authorised persons are:
  - ❖ Exercising a right of audience
  - ❖ Conducting litigation
  - ❖ Conveyancing (reserved instrument activities)
  - ❖ Probate
  - ❖ Notarial activity
  - ❖ Commissioning oaths
- ❖ Immigration and claims management are restricted in other ways
- ❖ There are some limited exemptions to the requirement to be authorised

4

## Unregulated legal services



- ❖ Non-reserved legal services are not regulated unless conducted by an authorised person
- ❖ Unregulated legal services providers are commonplace
  - ❖ Will writing
  - ❖ Family law advisers (short of litigation)
  - ❖ Corporate legal advice
  - ❖ Small business law (health & safety, employment, data, contract drafting, debt management)
  - ❖ Social welfare law (housing, unemployment, labour disputes, welfare entitlement)
- ❖ This is not same as ABS – this unregulated sector has always existed
- ❖ Reforms in 2019 meant that solicitors can now work in these unregulated businesses – such as Rocket Lawyer

5

## Who regulates?



- ❖ There are ten approved regulators
  - ❖ Solicitors Regulation Authority is biggest
  - ❖ Others focus on barristers, legal executives, notaries, legal executives, trade-mark and patent attorneys, licensed conveyancers, costs lawyers and even accountants – some of these are what US calls ‘para professionals’ or ‘limited licence lawyers’
- ❖ And an oversight regulator – the Legal Services Board
- ❖ Each regulator is authorised by LSB to regulate some of the reserved activities as well having statutory right to regulate specific professional titles
- ❖ Most regulators authorise entities as well as individuals
- ❖ Entities usually employ a mix of different types of lawyer

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## The regulators



- ❖ Some of the approved regulators are part of professional bodies (equivalent to State Bars)
  - ❖ Solicitors Regulation Authority and Bar Standards Board are part of Law Society and Bar Council respectively
  - ❖ But they are statutorily independent of those professional bodies
- ❖ Boards have lay Chairs and lay majorities
- ❖ The LSB holds them to account for performance against regulatory objectives set out in law
- ❖ Competition authority has certain powers

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## The regulatory objectives<sup>1</sup>



- ❖ Regulators must undertake their functions consistent with these:
  - ❖ protecting and promoting the public interest;
  - ❖ supporting the constitutional principle of the rule of law;
  - ❖ improving access to justice;
  - ❖ protecting and promoting the interests of consumers;
  - ❖ promoting competition in the provision of services in subsection (2);
  - ❖ encouraging an independent, strong, diverse and effective legal profession;
  - ❖ increasing public understanding of the citizen's legal rights and duties;
  - ❖ promoting and maintaining adherence to the professional principles.

<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2007/29/section/1>

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## Entities delivering regulated legal services



- ❖ Any model/structure allowable in law of UK
  - ❖ Solo lawyers, lawyer partnerships and LLPs
  - ❖ Multi disciplinary practices (lawyers and other professionals)
  - ❖ Alternative Business Structures (some nonlawyer ownership) since 2012
- ❖ Currently about 1,400 ABS in E&W
  - ❖ Listed on stock market (DWF)
  - ❖ Backed by private equity (Elevate's Elevate Next UK)
  - ❖ Tech platforms (Legal Zoom)
  - ❖ US law firm (Reed Smith)
  - ❖ Alternative providers (United Lex's Marshall Denning)
  - ❖ Global professional services firms (KPMG)
  - ❖ Local multi disciplinary practices (mixing law and other professions/services)
  - ❖ High street law firms (husband/wife or finance director into ownership)

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## How solicitors and firms are regulated (by SRA)



- ❖ [Code of Conduct for Solicitors](#)
- ❖ [Code of Conduct for Firms](#)
- ❖ [Principles](#) – fundamental tenets of ethical behaviour
- ❖ Professional indemnity insurance obligations for firms
- ❖ Independent redress system for complaints - [Legal Ombudsman](#)
- ❖ Not different for ABS (compared to lawyer only firms) other than where law requires
- ❖ SRA supervises firms – ongoing advice about risks and ethical behaviour – based on its market intelligence

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## How ABS are authorised & regulated



- ❖ Same as regular law firms
  - ❖ The firm itself is authorised
  - ❖ Individual owners and managers approved
  - ❖ Corporate owners approved
  - ❖ Anyone with a material interest (10% or significant influence)
- ❖ [Compliance Officer for legal practice](#)
- ❖ [Compliance Officer for finance and accounts](#)
- ❖ Reporting obligations – regular cycle and of potential misconduct
- ❖ Enforcement against firms and individuals
  - ❖ Advice, rebukes, fines, suspension, revocation
  - ❖ SRA can ban non-lawyers from regulated market

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## Economic and ethics rules



- ❖ Reduction of economic restrictions
  - ❖ No ban on advertising but unsolicited approaches are banned
  - ❖ Referrals fees allowed in most market segments, but banned in personal injury and related damages claims
  - ❖ No ban on fee sharing
- ❖ Ethical rules remain and enhanced
  - ❖ Act in best interests of client
  - ❖ Uphold rule of law
  - ❖ Duty to rule of law/administration of justice trumps other principles where conflict
    - ❖ Rule of law over the client's interests or wishes

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## Are ABS different to other law firms?



- ◆ They look the same from the outside – most people wouldn't know
- ◆ Evidence is that non lawyer ownership does not increase risk of unethical behaviour
  - ◆ Backed up by decades of experience of unregulated legal business across E&W legal market
- ◆ Risk of unethical practice is driven by factors unrelated to ownership
  - ◆ Handling client money
  - ◆ Certain types of work
  - ◆ Struggling performance of firm
  - ◆ Unrelated bad business decisions (such as property/head office)
  - ◆ Personal ethics of individuals

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## Evaluation: impact



The Centre for Strategy & Evaluation Services' independent [evaluation](#) for the SRA:

*The impact of these reforms has been gradual and incremental. Early indications show that users of legal services are beginning to see benefits.*

*Introducing ABSs and MDPs, and removing restrictions on firm ownership, have allowed new entrants (including foreign law firms, firms owned by professional services firms, local authority owned firms and retail brands) into the market. This has resulted in improved access, choice and quality of service for legal service users and innovation in provision.*

*There was no evidence to suggest that these reforms have detrimentally impacted, or resulted in a greater risk to, users of legal services.*

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## Evaluation: innovation



[Research](#) into innovation that the SRA conducted with the Legal Services Board in 2015 found that ABS:

- ❖ are more open to new ideas than non-ABS organisations
- ❖ have higher levels of investment in research and development
- ❖ generate a higher proportion of turnover from new services than non-ABS organisations
- ❖ are innovating across more aspects of their activities than non-ABS organisations
- ❖ spend on average more than twice as much of their turnover on reputation and branding than do non-ABS and
- ❖ are nearly three times as likely to be using some form of intellectual property protection

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## Evaluation: innovation



Type of innovation	ABSs (n=93)	Non-ABSs (n=850)	All solicitors (n=943)
	%	%	%
Service Innovation	36.2	24.2	25.3
Radical service innovation	13.0	6.2	6.8
Delivery innovation	29.5	25.3	25.6
Strategic innovation	28.6	15.9	17.0
Management innovation	20.1	18.4	18.5
Organisational innovation	40.6	20.3	22.4
Marketing innovation	57.8	34.5	36.6

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## Evaluation: complaints



In [research](#) into experiences and effectiveness of solicitors' first tier complaints handling processes, it was found that 62 percent of surveyed ABS provide training on identifying and managing complaints, compared to 50 percent of non-ABS.

In addition, 98 percent had a written complaints process as opposed to 84 percent of other firms.

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## Final thoughts



- ❖ [Policy Statement](#) by SRA set out clear rationale for reform
- ❖ Sandbox can be important part of making reform happen
  - ❖ SRA launched [SRA innovate](#) in 2014
- ❖ Temptation is always to over regulate innovation and new models
  - ❖ Lawyers ethics are strong enough to handle them working more closely with non-lawyers
  - ❖ Many jurisdictions have less regulatory restrictions without evidence of consumer harm
- ❖ Alternative providers are growing regardless of regulatory reform
  - ❖ Change is about letting lawyers compete and creating level playing field

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# The State Bar *of California*

## **STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES**

### **FINAL REPORT AND RECOMMENDATIONS**

**March 6, 2020**

**EXCERPT FROM FULL REPORT**

### Recommendation No. 3

#### Issue for Public Comment a New Rule of Professional Conduct 5.7 Addressing the Delivery of Nonlegal Services Provided by Lawyers and Businesses Owned or Affiliated with Lawyers

**Summary of the Recommendation:** ABA Model Rule 5.7 addresses a lawyer's provision of law-related services. It describes when a lawyer's provision of such services would be subject to the rules and when it would not be. California does not have a version of Model Rule 5.7, but the issue of the Rules' application when lawyers provide nonlegal services has been addressed in disciplinary common law, including Supreme Court precedent, and in advisory ethics opinions. Because there is no rule, however, lawyers may be unsure of their duties in such situations and reluctant to explore innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. ATILS recommends issuing a proposed rule 5.7 for public comment. Such a rule would provide greater clarity about those duties and alleviate the obstacle of the uncertainty in the provision of nonlegal services. ATILS received a *Corporate Legal Market Report* finding, in part, that in the corporate sector legal work is being delivered in different ways, by both lawyers and nonlawyers, using new tools, and, in many cases, the work is being provided by entities beyond the scope of traditional lawyer regulation. The *Corporate Legal Market Report* is posted at:

<http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000025230.pdf>. As noted in the report, much of this innovative work is facilitated by each jurisdiction's rule 5.3 (Responsibilities Regarding Nonlawyer Assistance), which permits delivery of services by nonlawyers to organizations where the organization's lawyer supervises the services. Such an option is not available in the PeopleLaw sector. A California version of ABA Model Rule 5.7, however, might facilitate a similar level of innovative delivery systems in that sector. A clean version of ATILS' proposed new rule 5.7 is provided as Appendix 9.

**Discussion:** As stated above, proposed rule 5.7 is intended to provide clarity regarding the obligations attorneys owe when providing nonlegal services. Proposed rule 5.7, however, is not intended to change California law on the application of the Rules of Professional Conduct to a lawyer's provision these services, with one possible exception. The exception is that some interpret the case law as standing for the proposition that a lawyer cannot disclaim an attorney-client relationship. While that is generally true and is supported in cases such as *In the Matter of Gordon* (Rev. Dept. 2018) 5 Cal. State Bar Ct. Rptr. \_\_\_ (2018 WL 5801485), lawyers should be permitted as a matter of public policy to engage in business with nonlawyers in the provision of innovative and cost efficient services to consumers outside the traditional attorney-client relationship where the services themselves are not governed by the Rules of Professional Conduct. Existing policy already permits a lawyer to clarify the scope of the lawyer's duty when the lawyer is engaged in conduct distinct from the practice of law, for example, in situations where a lawyer serves as a mediator or third party neutral. See rule 2.4. There is no reason why lawyers and nonlawyers should not be able to join forces in providing services to consumers outside the traditional attorney-client relationship with adequate notice

and disclosures that the services are not legal and the protections of the attorney-client relationship are not available to the consumer. As provided in the proposed rule, lawyers would still continue to be held to a higher standard under the Rules and State Bar Act depending on the nature of the services being provided. Moreover, the rule also recognizes there may be ethical consequences to the lawyer in performing nonlegal services. These issues are appropriately addressed in comments to the rule.

### **Where a Lawyer's Provision of Nonlegal Services is governed by the Rules of Professional Conduct and the State Bar Act**

Rule 5.7 is not intended to exclude a lawyer's conduct from the application of the Rules or the State Bar Act in circumstances that are not distinct from the lawyer or law firm's provision of legal services to clients. (Paragraph (a)(1)). Thus, a lawyer would still be subject to the rules and the State Bar Act where a lawyer or the lawyer's firm renders legal and nonlegal services to the same client or in the same matter, even if the nonlegal services might otherwise be performed by nonlawyers. *Layton v. State Bar* (1990) 50 Cal.3d 889, 904: ""Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them;" *Alkow v. State Bar* (1952) 38 Cal. 2d 257, 263 – attorney provided collection services; *Libarian v. State Bar* (1944) 25 Cal. 2d 314, 317-18 – attorney provided services as tax preparer, notary and lawyer. See also proposed rule 5.7, Comment [2]. (A summary of other relevant case law concerning the provision of nonlegal services is provided as Appendix 10.)

### **Where Lawyers May Otherwise Be Subject to Discipline in the Provision of Nonlegal Services**

The question of whether a lawyer's conduct in rendering nonlegal services is governed by the rules is distinct from the question of whether the lawyer may be subject to discipline in performing nonlegal services. Lawyers are subject to discipline for conduct outside the practice of law even where the conduct is not governed by the Rules of Professional Conduct. Rule 1.0, Comment [2] – "While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity;" and see rule 8.4(b) and (c) and Comment [1]. The same is true with respect to certain provisions of the State Bar Act (e.g., Bus. & Prof. Code, § 6106 – acts involving moral turpitude, dishonesty or corruption). State Bar Formal Opinions 1995-141, 1999-154.

Proposed rule 5.7 is not intended to change the law in these contexts and a comment to the rule is recommended to make this point clear. See proposed rule 5.7, Comment [3].

### **Other Consequences For Lawyers Providing Nonlegal Services to Clients and Other Persons**

Lawyers may encounter conflicts of interest and other ethical consequences as a result of providing nonlegal services in a law firm or in an organization that is owned and operated with nonlawyers. Rule 5.7 is not intended to immunize lawyers from these consequences. A

comment to this effect is included in the rule (see proposed rule 5.7, Comment [6]).

**Relationship to the ATILS Charter:** As explained above, this recommendation responds to the charter by proposing a new rule that would clarify a lawyer's duties in the provision of nonlegal services. California does not have a version of ABA Model Rule 5.7 and this may be a cause of uncertainty and reluctance for lawyers who might be interested in exploring innovative delivery systems for nonlegal services as well as combined nonlegal and legal services. The PeopleLaw sector would likely benefit from such innovation.

**Public Comment:** This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the Rules of Professional Conduct. It was issued as Recommendation 3.3 as set forth below.

Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.<sup>15</sup>

Recommendation 3.3 received a total of approximately 98 written public comments, 89 in opposition, five in support, and four with no stated position. Public comment themes, along with the Task Force's responses to each, are outlined below.

1. The need for this new Rule of Professional Conduct is unclear because the provision of law related services, including dual profession services, in the context of an attorney-client representation is already addressed in California case law and ethics opinions, and these authorities appear to offer better client protection than the terms of Model Rule 5.7.

**Task Force Response:** Case law and ethics opinions are not as accessible as the rules. As discussed above, a new rule offers the appeal of greater clarity in a lawyer's duties and could facilitate innovative delivery of law related services.

2. Adding this new rule would encourage the provision of law related services and give law firms options to lower costs or provide added value.

**Task Force Response:** The Task Force agrees and has prepared a proposed rule that is recommended for public comment distribution by the Board.

**Conclusion and Next Steps:** Should the Board agree with this proposal, it is anticipated that the proposed new rule 5.7 would be issued for a 60-day public comment period. If ultimately adopted by the Board, the proposed amendment would need to be submitted to the California Supreme Court for approval (see Bus. & Prof. Code, §§ 6076 & 6077).

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<sup>15</sup> Recommendation 3.3 did not include proposed rule language but was presented as a concept for public consideration and comment.



## **Recommendation No. 6**

**Consider Authorizing a Study of Potential Amendments to the Certified Lawyer Referral Service Rules and Statutes, and Amendments to Relevant Rules of Professional Conduct to Ensure that Together They Properly Balance Public Protection and Innovation in Light of Access to Justice Concerns and with a Particular Emphasis on Ascertaining if Existing Laws Impose Unnecessary Barriers to Referral Modalities (including Online Matching Services) that are in the Public Interest**

**Discussion:** ATILS recommends that the Board consider authorizing a study of potential amendments to Certified Lawyer Referral Service (LRS) rules and statutes in light of a recent case<sup>29</sup> that has clarified the scope of what is considered to be referral activity. In addition, lawyer referral services regulations and advertising rules limiting compensation for referrals may not reflect modern expectations for how consumers will find a lawyer. Social media, search engines, and other technology-based marketing needs to be accounted for to avoid an unintended chilling effect on a lawyer's use of technology to provide information about the availability of legal services.

As the provisions of the rules governing lawyer advertising and compensation for referrals are related standards, they should also be addressed. Consideration of the LRS rules and statutes arose as a subtopic of the Task Force's discussion of possible lawyer advertising and solicitation amendments. The regulation of lawyer advertising and solicitation in the rules includes the issue of compensation paid by a lawyer for a client referral. Rule 7.2 in part provides that:

(b) A lawyer shall not compensate, promise or give anything of value to a person for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm, except that a lawyer may:

\* \* \* \* \*

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;

Rule 5.4 in part provides that:

(a) A lawyer or law firm shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

\* \* \* \* \*

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<sup>29</sup> See, *Jackson v. Legalmatch.com* (2019) 42 Cal.App.5th 760 [255 Cal.Rptr.3d 741].

(4) a lawyer or law firm may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California’s Minimum Standards for Lawyer Referral Services; or

\* \* \* \* \*

The foregoing rules establish that a lawyer who pays compensation to an uncertified business or service engaged in a referral activity is subject to discipline. Recently, case law has clarified the scope of what is considered to be referral activity (see *Jackson v. Legalmatch.com* (2019) 42 Cal.App.5th 760 [255 Cal.Rptr.3d 741], petn. for review pending, petn. filed January 6, 2020). The Task Force believes that innovative referral systems, including online modalities, carry the potential of enhancing the ability of consumers to consult with a qualified lawyer, particularly on the basic issue of whether a consumer is facing a civil legal problem, and that existing laws should be reviewed for possible revisions that are in the public interest.

#### **Relationship to the ATILS Charter:**

This recommendation responds to the charter by proposing a study of statutory amendments and rule changes that could enhance access to legal services by expanding permissible lawyer referral activity.

**Public Comment:** An explicit proposal on LRS regulations was not included in ATILS’ request for public comment on various options for regulatory reform.

**Conclusion and Next Steps:** ATILS recommends that a study of possible amendments to the lawyer referral service statutes and rules be undertaken to ensure there is a proper balance between public protection and innovation in light of access to justice concerns and the need of consumers for qualified legal services and to ascertain if existing law imposes unnecessary barriers to referral modalities including online matching services that are in the public interest. Similar to the Task Force’s view of the existing lawyer advertising rules, ATILS believes that a study of the lawyer referral service regulations can lead to revisions that will balance public protection and the free flow of information about the availability of legal services. Should the Board of Trustees agree with this proposal, the next step would be referral of this issue to the anticipated working group that will continue the work of ATILS specifically as related to development of a sandbox proposal. Some members of ATILS believe that LRS reforms could be informed by data generated by the regulatory sandbox because participants could experiment with new delivery systems that might, for example, involve a business offering consumers a combination of online services that include an online matching service. Other members of ATILS believe that sandbox data is not likely to inform LRS reforms because LRS activity ordinarily does not raise UPL or nonlawyer ownership concerns. These differing views seem to presuppose the scope of the sandbox and the kinds of applicants who will be admitted, but these are open issues for the working group. As the precise parameters and timeframe of the anticipated working group have not been set, referring possible LRS changes to that body for consideration is recommended.

## **Recommendation No. 7**

**Consider Recommendations for Amendments to the Rules of Professional Conduct on Advertising and Solicitation Informed by the Current American Bar Association Model Rules, the Proposed Advertising and Solicitation Rules Developed by the Association of Professional Responsibility Lawyers, and Recent Amendments to the Advertising Rules in Other Jurisdictions. In Particular a Reconsideration of the Existing Designation of “Real-Time Electronic Contact” as Prohibited Solicitation**

### **Discussion:**

The regulation of lawyer advertising has traditionally placed restrictions on information regarding the availability of lawyers and legal services in an effort to protect consumers from lawyers actively soliciting business and promoting litigation, especially when consumers are particularly vulnerable. Based on an empirical study initiated by the Association of Professional Responsibility Lawyers (APRL) in 2014-2016 and a subsequent analysis of APRL’s reports and public hearings conducted by the ABA Standing Committee on Ethics Professional Responsibility (SCEPR), the advertising rules were found to be outdated and overly restrictive;<sup>30</sup> and the lack of uniformity and inconsistent enforcement unreasonably restrict the ability of the legal profession to provide useful and accurate information to consumers about the availability of legal services, particularly through the Internet and other forms of electronic media.<sup>31</sup>

The recent amendments to the ABA Model Rules on lawyer advertising streamline and simplify<sup>32</sup> the rules that enable lawyers to use new technologies that can inform consumers accurately and efficiently about the availability of legal services while maintaining the prohibition against engaging in false or misleading communications and adhering to constitutional limitations on restricting commercial speech.

The advent of the Internet and social media has revolutionized the practice of law, including attorney advertising and client solicitation. The current California rules on lawyer advertising and solicitation were adopted before the recent amendments to the ABA Model Rules. Since then several states have or are in the process of modernizing their advertising rules based on APRL’s two reports and the ABA’s recent amendments. Attorneys are increasingly posting, blogging and tweeting more efficiently at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs expands exponentially each year.<sup>33</sup> Under these recent

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<sup>30</sup> Association of Professional Responsibility Lawyers [2015 Report of the Regulation of Lawyer Advertising Committee](#), at pp. 20–25.

<sup>31</sup> [Id. at p. 27.](#)

<sup>32</sup> The ABA Standing Committee on Ethics and Professional Responsibility [Memorandum in Support of Proposed Amendments to ABA Model Rules of Professional Conduct on Lawyer Advertising](#), December 21, 2017, at p. 15.

<sup>33</sup> [Id. at p. 8.](#)

amendments, the legal profession is better able to reach out to a public that has become savvy in the use of social media and the Internet and is in greater need of more, and not less, useful information regarding the availability of legal services. These trends suggest that traditional restrictions on the dissemination of accurate information about legal services hinder the public's access to useful information and may constitute an unconstitutional restraint of trade.

The Task Force believes that amending the lawyer advertising rules to conform to the recent amendments to the ABA Model Rules will better serve the public by expanding opportunities for lawyers to use modern communications technology to increase the public's awareness of and access to information about the availability of legal services, and protecting the public by focusing the State Bar's resources on content that is false or misleading. Consideration of such rule revisions would be complemented by the study of the LRS rules and statutes outlined in Recommendation #6 above as the topic of compensation paid for client referrals is included in the advertising rules.

### **Specific Changes to the Current Rules on Lawyer Advertising and Solicitation**

The Task Force recommends that the Board of Trustees task the working group being recommended for establishment as related to the development of a sandbox proposal with a study of recent amendments to ABA Model Rules 7.1, 7.2 and 7.3, APRL's Report of the Regulation of Lawyer Advertising Committee (June 22, 2015) and APRL's Regulation of Lawyer Advertising Committee Supplemental Report (April 26, 2016), the changes to advertising rules currently under consideration by the State of Washington<sup>34</sup> and other jurisdictions, as well as the impact of the current advertising rules in Oregon, Virginia and the District of Columbia on access to justice and public protection.

The following issues are specific examples<sup>35</sup> of what could be studied:

- Whether provisions on false and misleading communications should be combined into rule 7.1 and its comments, including rule 7.5 [Firm Names and Trade Names] which largely relates to misleading communications.
- Whether specific rules on lawyer advertising should be consolidated into rule 7.2.
- Whether in rule 7.2(c), "office address" should be changed to "contact information" to address technological advances that influence how lawyers may be contacted and how advertising is presented.
- Whether the ban on direct solicitation in rule 7.3 should apply solely to live person-to-person contact, including in person, face-to-face, telephone, and real-time electronic or other communications such as Skype. It is recommended that the rule be changed to no longer prohibit solicitations such as chat rooms, text messages, or any other written

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<sup>34</sup> See: <https://www.wsba.org/for-legal-professionals/rules-feedback>

<sup>35</sup> Additional examples are provided in Appendix 13.

communications to which recipients would not feel undue pressure to respond.

### **Relationship to the Charter**

This recommendation responds to the charter by proposing rule changes that could facilitate enhanced access to legal services by permitting the use of modern communication, including online marketing and social media, to provide truthful and nondeceptive information to consumers regarding the availability of lawyers and law firms to provide legal services. This is especially pertinent to potential innovative online delivery systems that might exclusively use electronic communication for interacting with potential clients.

**Public Comment:** This proposal was included in ATILS' request for public comment on various options for regulatory reform, in particular as a part of several possible revisions to the RPCs. It was issued as Recommendation 3.4 as set forth below.

Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

Recommendation 3.4 received a total of approximately 79 written public comments, 62 in opposition, 11 in support, and six with no stated position. Public comment themes, along with the Task Force's responses to each, are outlined below.

1. The advertising and solicitation rules were revised recently (operative November 1, 2018) and it seems premature to proceed with the implementation of further changes to these rules.

**Task Force Response:** The changes made by the ABA to the Model Rules that were initiated by the study and report of APRL occurred after the Rules Revision Commission's work on its new and amended advertising rules was completed. Other jurisdictions have or are presently considering the ABA's changes. Particularly in the area of online lawyer advertising and solicitation, uniformity among legal ethics standards in all United States jurisdictions is a meaningful goal that promotes lawyer compliance and public protection.

2. Allowing a lawyer's real-time electronic communication with a prospective client should be permitted, especially in the context of online delivery system.

**Task Force Response:** The Task Force agrees that the issue of real-time electronic contact with a potential client should be reconsidered. The existing rule's treatment of this conduct as a form of banned solicitation may be overbroad and an obstacle to the legal profession's interest in exploring innovative online delivery systems.

**Conclusion and Next Steps:** ATILS believes that updates to the lawyer advertising and solicitation rules described above strike the right balance of public protection and the free flow of information about the availability of legal services. This, in turn, can improve consumer access to legal services as well as understanding about problems such as civil justice legal issues. Some members of ATILS believe that advertising rule amendments might be informed by data generated by a regulatory sandbox because participants could experiment with new marketing and communication methods, especially if a participant is a business that exists exclusively online. Other members of ATILS believe that sandbox data would not inform all of the rule amendments proposed because some changes are completely unrelated, such as the amendment to replace “office address” with “contact information.” However, the precise parameters and timeframe of the anticipated working group have not been set so it is uncertain whether the sandbox effort might inform these rule changes. Should the Board of Trustees consider adoption of these rule amendments, referring these rule amendments to that body for consideration is recommended.