



The State Bar of California

II.D. SAGE Recommendation
02-19-21 Meeting
Open Session

Closing the Justice Gap Working Group

To: Closing the Justice Gap Working Group
From: SAGE Subcommittee
Date: February 11, 2021
Re: SAGE Subcommittee – Initial List of Issues for Meeting 2/19/21

The SAGE committee (Structure and Governance, Evaluation/Enforcement) has been tasked with formulating a “Structure and Governance” document addressing the proposed regulatory structure of a sandbox, including funding, staffing, and governance, and conflicts of interest for members of any governing body. This is the Committee’s initial draft as a first step towards completing that task. This memo reflects the discussion and input by members of the committee and others at the committee meeting on February 9, 2021.

We have identified the following issues relevant to structure and governance:

1) Creation and External Oversight of the Sandbox

- a) The sandbox could be created by the Supreme Court or through legislation (with a sunset provision) or both. Need to determine options for both as well as legal requirements and advantages/disadvantages (including access to funding).
- b) Its defined function will be to assist the Court in exploring nontraditional models for the provision of legal services and whether innovative approaches to providing legal services can make those services more available and more affordable to California consumers without creating unacceptable risks of harm to those consumers.
- c) May want to avoid term “Pilot Program”, which may dissuade investment by possible participants. Other possibilities: project, an initiative, a task force, a commission, an office?
- d) **Reporting and direct oversight:** One option is to set up the sandbox as relatively stand-alone body to permit a nimble, adaptable approach. Options include “dotted line” reporting structure from sandbox to the legislature and State Bar, as well as direct reporting to the Court.
- e) **Discipline:** While perhaps not strictly a part of the initial structure and governance document, the question of how to ensure consumer protection is a critical concern that could drive governance and structure decisions. Some issues to consider:

- i) The role of the State Bar in disciplining attorneys and nonlawyers participating in the sandbox
- ii) Adequacy of protections provided by consumer protection and unfair practices laws and remedies
- iii) The need to monitor consumer harm.

2) Structure and Composition of Volunteer Board

- a) **Members:** ATILS identified a list of possible types of people whose expertise and perspective would be valuable on a volunteer oversight board: (1) consumer representative; (2) economist; (3) legal ethics expert; (4) technology expert; (5) legal services organization administrator; (6) trial court judge; (7) court administrator; and (8) an academic with regulatory reform expertise.
- b) **Conflict of interest:** One of the specific issues we were asked to look at is a conflict of interest policy for members of the Sandbox governing board. As an initial approach we recommend that a conflict policy be adopted that is based on organizational or government conflicts rules and principles.
- c) **Antitrust considerations:** Antitrust law needs to be considered. One possibility: to have the majority of the Board be non-lawyers. This might have the added benefit of lessening apprehension of non-lawyer potential innovators.

3) Staffing

- a) Staffing needs: number of staff and types of staff necessary
- b) How to pay for staffing: this may help drive considerations of structure and governance, i.e. who will employ and pay for staff.

4) Funding:

- a) Funding, even for the initial project, will be a key concern for the Court. Grant mechanisms might work if the entity is operating under the flag of the Court system; but that needs to be investigated. And one aspect to investigate is whether the way the entity is set up would matter to potential supporters, such as foundations that are set up to support only 501(c) entities.
- b) Effort should be made early to determine possible sources of funding.

February 2, 2021 Bridget Gramme to SAGE Subcommittee:

I think the key issues I would like to focus on are those that we set forth in the ATILS report--

- 1) who will be the regulator?
- 2) how will this be funded?
- 3) how do we build in consumer input into the governance structure?
- 4) How will this be enforced/ what does discipline look like?

I also think we need a good discussion / primer on risk based regulation (perhaps John can give this to us based on his Utah experience). Everything I've read and studied about prior models is that our existing prescriptive model of regulation is not going to work here. We need to be clear about the regulatory objectives of assessing harm to consumers and not focus on everything that is allowed/not allowed. To me I see this across all professions. Regulation cannot keep up with technology. We can't proactively think about what kinds of new things might be coming. Thinking about how to audit and proactively regulate the market for legal services and target areas of harm seems like a more efficient and better process than trying to keep up with who is allowed in and then relying on complaints/ investigations once harm has occurred.

Please let me know if you'd like me to provide more info or clarify these comments.

February 2, 2021 Jim Sandman to SAGE Subcommittee:

I have the following recommendations:

1. I believe the subcommittee should start with Utah's sandbox model. The Utah model is thoughtful, well-developed, pragmatic, and efficient. It is not overly bureaucratic or complicated. It strikes an appropriate balance between encouraging innovation in the delivery of legal services and protecting the public. I don't see any obvious deficiencies in the Utah model and think the subcommittee should avoid reinventing the wheel.
2. To the extent that the ATILS sandbox recommendations are not already included in the Utah model, I would incorporate them.
3. In assessing the cons of a sandbox, as required by the CTJG charter, I recommend that the subcommittee consider the approach Arizona has taken, which avoids a sandbox in favor of direct reporting to and oversight by the state Supreme Court. I question, however, whether the Arizona approach is feasible in a state the size of California.



The State Bar of California

Closing the Justice Gap
Working Group

To: SAGE Subcommittee
From: State Bar Staff
Date: January 22, 2021
Re: SAGE Subcommittee Assignments for the February 19, 2021 Meeting

Assignment: The SAGE subcommittee is assigned to prepare a Structure and Governance Recommendation Document which should describe the proposed regulatory structure of a sandbox, including funding, staffing, and governance, and conflicts of interest issues for members of any governing body.

The subcommittee members should consider the following assignment materials:

- CTJG Feb 2021 Assignment Materials for a Structure and Governance Document
 - CTJG Charter Excerpt
 - ATILS Final Report Excerpts
 - Utah Supreme Court Standing Order No. 15 Excerpt
 - ATILS/Mark Tuft memo dated 1/7/19 re California regulation of the practice of law
- Utah Supreme Court Innovation Office Manual
- Daily Journal Article: California to create its own Consumer Financial Protection

Following your review of the attached assignment materials, please submit to staff your input and recommendations for the issues that ought to be considered by the working group in developing a structure and governance document. Please also share any preliminary thoughts you have on these issues. You may email your submission to: CTJG@calbar.ca.gov.

Staff will compile all submissions for consideration by the subcommittee co-chairs. The co-chairs will be asked to review and consolidate the responses to generate a single memorandum with an issues outline to present to the entire working group at the February meeting. The memorandum will be posted with the online meeting agenda and all CTJG members will be encouraged to comment on that memorandum by sending email messages to staff prior to the meeting. An email compilation will be created for consideration at the February meeting.

Deadline: The deadline for subcommittee members to provide their input to staff is **Tuesday, February 2 at 5:00 pm**. The deadline for co-chairs to submit a memorandum to staff for the February meeting agenda posting is **Friday, February 12 at 12:00 pm**.

CTJG FEBRUARY 19, 2021 MEETING – ASSIGNMENT MATERIALS FOR SAGE DOCUMENT

- **CTJG Charter Excerpt**
- **ATILS Final Report Excerpts**
- **Utah Supreme Court Standing Order No. 15 Excerpt**
- **ATILS/Mark Tuft memo dated 1/7/19 re California regulation of the practice of law**
- **Utah Supreme Court Innovation Office Manual**
- **Daily Journal Article: California to create its own Consumer Financial Protection Bureau**

CTJG Charter Excerpt

The working group will develop specific recommendations regarding the following:

1. A regulatory sandbox. Related recommendations will include an assessment of the pros and cons of a sandbox as a way to foster experimentation with innovative legal services delivery systems in a manner that protects the public and allows for the collection of data to assess the impact on access to legal services of possible changes in the laws and rules regulating the practice of law in California. Sandbox recommendations should specifically address:

(1) Scope and regulatory structure of a sandbox, including funding, staffing, and governance, and conflicts of interest issues for members of any governing body;

[END OF EXCERPT]

ATILS Final Report Excerpt (pp. 34 – 35)

A. Oversight Body Composition and Functions

The appointed volunteer oversight body created under this proposal is another issue to explore. This body could operate as other professional licensing boards function, with the assistance of full time staff to support its work. The body should be limited in size as appropriate and should include, but not be limited to, the following types of individuals: (1) consumer representative; (2) economist; (3) legal ethics expert; (4) technology expert; (5) legal services organization administrator; (6) trial court judge; (7) court administrator; and (8) an academic with regulatory reform expertise.

1. Antitrust Considerations

When establishing the final composition and function of the oversight body, it is important that state and federal antitrust laws be considered. See, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015).¹ Such considerations include the Supreme Court's role in overseeing the sandbox, and whether or not the members of the

¹ See also the Federal Trade Commission's Staff Guidance on Active Supervision of State Regulatory Board Controlled by Active Market Participants, https://www.ftc.gov/system/files/attachments/competition-policyguidance/active_supervision_of_state_boards.pdf.

oversight body might be considered active market participants in the delivery of legal services.²

2. Additional Measures to Safeguard Consumer Protection within the Sandbox

Additional consumer protection measures should be considered as part of the exploration of the establishment of an oversight body. For example, in the United Kingdom, the Legal Services Act of 2007 established a Legal Services Consumer Panel, an independent arm of the Legal Services Board, comprised of eight nonlawyers appointed by the government.²⁵³ The panel provides evidenced-based advice to the Legal Services Board, in order to help them make decisions that are shaped around the needs of users. Consideration of such a model could be very useful to the oversight body in evaluating the utility and harm of the entities applying for and operating in the sandbox.

3. Duty of Regulator to Provide Guidance

To promote access to legal services to those who are under-served by the legal system, the working group might conclude that an oversight body that should collaborate with technologists, people with disabilities, lawyers, language access advocates, low-income individuals and other stakeholders to provide guidance on technology and usability for technology-delivered legal services models.⁴ For example, in order to further the regulator's goal of public protection and encourage compliance, a collaborative conference or working group could be called or organized by the regulator to produce best-practice guides to ensure that legal services technology providers understand how to implement the regulations.

In addition to providing guidance to technology delivered legal service providers, the regulator should support an access incubator/accelerator (a formalized network of funders, technologists, strategy, business, and marketing advisors that brings in classes each year to help them refine a concept and launch it). This could be a program run independently from the regulator, perhaps in partnership with universities.

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ATILS Final Report Excerpt (pp. 40 – 41)

H. Funding

It is critically important to consumer protection that the administrator of the sandbox be appropriately resourced to effectively manage the applications, screen to ensure all

² Some jurisdictions view this concern as a basis for considering an “independent regulator.” But this is not regarded as independence from the authority of the state supreme court over the practice of law. See August 2019 Report and Recommendation of the Utah Work Group on Regulatory Reform, p. 21 at footnote no. 58. <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>

³ <https://www.legalservicesconsumerpanel.org.uk/about-us>

⁴ As a potential template for the type and structure of materials, the United States Digital Service, or 18F, provides guides on Accessibility, Agile Development, Content, Design Methods, Engineering, and Product Management on its website: 18f.gsa.gov as well as the Digital Services Playbook available at playbook.cio.gov.

requirements are met, monitor the progress and risks of harm, and remove any participant from the sandbox that is causing consumer harm as identified by the administrator. Ultimately this program would be funded by application and licensing fees each applicant pays to enter and maintain practice within the sandbox. In the United Kingdom, for example, licensing fees of regulated entities (there, “Alternative Business Structures,”) are calculated as a percentage of their total annual revenue. The oversight body is encouraged to consider a fee structure that takes into account similar revenue considerations while also incentivizing innovation in particular areas of need.

In order to establish a well-resourced regulatory structure from inception, however, grant funding will likely be needed. In Utah, for example, funds to start up and establish the sandbox have come from the Administrative Office of the Courts (via court staff time), the National Center for State Courts, and the Institute for the Advancement of the American Legal System. The Task Force recommends that the State Bar convene a funder’s summit to explore the feasibility of philanthropic start-up funding as well as to advocate for a streamlined and coordinated grant application and reporting process.

[END OF EXCERPT]

Utah Supreme Court Standing Order No. 15 Excerpt, Sections 1 –2.3

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.⁵ To this end, and subject to Supreme Court oversight, the Innovation Office will establish and administer a pilot legal regulatory sandbox (Sandbox)⁶ 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 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.

⁵ 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).

⁶ 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.

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.⁷ 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 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.⁸

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.⁹ 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

⁷ 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.

⁸ Innovation Office resources may limit the number of Sandbox entrants.

⁹ 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.

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 (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 3.¹⁰

¹⁰ The Implementation Task Force on Regulatory Reform has already established an Innovation Office Manual. A

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.

[END OF EXCERPT]

copy of that manual may be viewed at sandbox.utcourt.gov.



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Alternative Business Structures / Multi-Disciplinary Practices

To: Subcommittee on Alternative Business Structures/Multi-Disciplinary Practices
From: Mark Tuft
Date: January 7, 2019
Re: Why Lawyers are Regulated Under the Judicial Branch and to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar

This memo addresses these issues by briefly examining the role of the Supreme Court, the Legislature, and the State Bar in the regulation of the practice of law.

The Supreme Court

The California Supreme Court has the exclusive power to regulate attorney admission to practice law in California. “In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts” (Article VI §1 of the California Constitution). *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 592. Such power of regulation means that the Court is vested with the inherent authority to control the admission, discipline and disbarment of persons entitled to practice law in this jurisdiction. *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543. Virtually every state recognizes that the power to admit and discipline lawyers rests with the judicial branch of government, mainly because an attorney is viewed as an officer of the court and whether a person is authorized to practice law is considered a judicial and not a legislative matter. *In re Attorney Discipline System*, supra, 19 Cal. 4th at 592; and see *Restatement Third The Law Governing Lawyers* (ALI 2000) §1, Comments b and c.1 Hence, the Court’s inherent authority to regulate lawyers is considered a judicial function under the constitutional doctrine of separation of powers.

Lawyers have traditionally been distinguished from other professions and commercial purveyors of non-professional services who are not part of the judicial branch of government.

The right to practice law not only presupposes that the person possesses sufficient integrity, learning, and fitness to practice but also that the person acquires a special privilege and obligation to carry out a public trust in protecting the integrity of the legal system and promoting the administration of justice and confidence in the legal profession. Recent amendments to the California Rules of Professional Responsibility include these obligations in stating the purpose of the rules. California Rule of Professional Conduct 1.0(a). The concept of lawyers as “officers of the court” envisions more than simply providing legal services to a client. “A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the equality of justice.” California Rule of Professional Conduct 1.0, Comment [5]; and see the ABA Model Rules of Professional Conduct, Preamble ¶ 1.

¹ According to several authorities, the judiciary’s authority to regulate and control the practice of law is universally accepted and dates back to the year 1292. *In re Shannon* (AZ 1994) 897 P. 2d 548, 571; and see Martineau, *The Supreme Court and State Regulation of the Legal Profession (1980-1981)* 8 Hastings Const. L.Q. 199.

Despite the special role that distinguishes lawyers from other service providers, the Supreme Court has acknowledged on occasion that there are certain realities about modern law practice and economic circumstances that influence the delivery of legal services. The Court recognized in *Howard v. Babcock*², for example, that the traditional view of law firms as stable institutions is no longer the case and that lawyers are increasingly mobile and make career decisions based on the market place rather than duties to the system of justice. The Court held in that case that there is no longer any legal justification for treating partners in a law firm differently when it comes to restrictive covenants in law firm partnership agreements than other businesses and professions.

The Court's inherent authority to regulate lawyers is not exclusive. Practice in federal court is governed entirely by federal law and federal court rules of admission and professional conduct. Federal courts and many federal agencies regulate the conduct of lawyers appearing before them. At the same time, the power of federal courts and administrative agencies to discipline attorneys appearing before them does not pre-empt California's disciplinary authority if a member of the State Bar commits acts in federal court or before a federal agency that reflect upon the lawyer's integrity and fitness to practice in California. Federal courts in California typically incorporate California's Rules of Professional Conduct and the State Bar Act as standards governing the practice of law before that tribunal. Federal agencies, such as the U.S. Patent and Trademark Office and the Internal Revenue Service, adopt and enforce standards of practice that are patterned after the ABA Model Rules.

The Court's inherent authority includes defining what constitutes the practice of law in California (*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court (ESQ Business Services, Inc.)* (1998) 17 Cal. 4th 119, 128-129) and deciding who, besides members of the California State Bar, may practice law in California (California Rules of Court 9.40 – 9.48) and in what form. *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23, 50 - Court is empowered to authorize and impose restrictions on the practice of law by nonprofit "advocacy" corporations.

The Legislature

The Supreme Court has historically recognized the Legislature's authority to adopt measures regarding the practice of law. "[T]he power of the legislature to impose reasonable regulations upon the practice of law has been recognized in this state almost from the inception of statehood." *Brydonjack v. State Bar* (1929) 208 Cal 439, 443. For example, the "duties of attorney" currently found in Business and Professions Code §6068(a) – (h), including the duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client" (§6068(e)(1)), have been integral to lawyer regulation since their enactment in 1872. The Supreme Court has long acknowledged this "pragmatic approach" to lawyer regulation and has respected the exercise by the Legislature, under the police power, of "a reasonable degree of regulation and control over the profession and the practice of law... in this state." *Santa Clara County Attys Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543-544 – "In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation;" *O'Brien v. Jones* (2000) 23 Cal. 4th 40, 48-57 – appointment of State Bar Court judges by the Governor, the Assembly Speaker and Senate Rules Committee did not violate the separation of powers doctrine.³

² 6 Cal. 4th 409 (1993)

³ The California State Bar is the only State Bar in the country with independent professional judges dedicated to ruling on attorney discipline cases.

The Court's traditional respect for legislative regulation of the practice of law is not viewed as an abdication of the Court's inherent responsibility and authority over the regulation of lawyers. The Court has on occasion invalidated legislative enactments that materially impair the Court's inherent power, including provisions that authorize another entity to discipline an attorney. *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 339-341 – invaliding statute authorizing Workers' Compensation Appeals Board to remove or suspend attorneys licensed to practice before it; *Merco Const. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727-733 – invalidating law permitting a corporation to appear in an action through a person who is not a lawyer; *In re Lavine* (1935) 2 Cal. 2d 324, 328-331 – invalidating law requiring automatic readmission of attorneys pardoned after disbarment for felony convictions.

The Court has generally respected laws enacted by the Legislature to regulate the practice of law unless the Court determines that the legislation defeats or materially impairs the Court's inherent authority over attorney admission, discipline, and disbarment. *Santa Clara County Counsel Attys. Assn. v. Woodside*, supra, 7 Cal. 4th at 544. Ultimately, the Court has the inherent power to provide higher standards of attorney conduct than the standards prescribed by the Legislature. *Id.*; *Emslie v. State Bar* (1974) 11 Cal. 3d 210, 225.

In addition to regulating lawyers, the Legislature has enacted statutes regulating non-lawyer service providers in providing services that do not constitute the practice of law. See, e.g., Business and Professions Code §6400 et. seq. (legal document assistants and unlawful detainer assistants); §6450 et. seq. (paralegals); §22440 et. seq. (California immigration consultants).

The State Bar

The California State Bar originally was created by the Legislature in 1927 as a public corporation by statute (Business and Professions Code §6001). Subsequently, in 1960, the State Bar became and remains today a constitutional entity within the judicial article of the California Constitution (Article VI, §9). The State Bar Act did not delegate to the State Bar, the Legislature or the executive branch, or any other entity, the Supreme Court's inherent judicial authority over the regulation of lawyers. *In re Attorney Discipline*, supra, 19 Cal. 4th at 601.

In adopting the State Bar Act, the Legislature expressly recognized that the Court retained the same inherent authority it had prior to the Act. Business and Professions Code §6087 – “Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of (the State Bar Act).”⁴ The State Bar Act contains other provisions confirming the Court's inherent authority over the practice of law. (Business and Professions Code §6075 – the State Bar's assistance in matters of admission and discipline of attorneys is a method that is alternative and cumulative to the Court's inherent power; §6076 – requiring the Court's approval of the State Bar's formulation and enforcement of rules of professional conduct; §6100 – confirming the Court's inherent power to discipline attorneys, including summary disbarment.

The law governing lawyers in California is not confined to the Rules of Professional Conduct and the State Bar Act. Lawyers are also bound by other applicable law including opinions of California courts. California Rule of Professional Conduct 1.0(b)(2); *Santa Clara County Attys. Assn. v. Woodside*, supra, 7 Cal.

⁴ “[S]ection 6087's express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act.” *In re Attorney Discipline*, supra, 19 Cal. 4th at 600; and see *Brydonjack v. State Bar* (1929) 208 Cal. 439, 443.

4th at 548 – the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and the rules are not intended to supersede the lawyer’s duty of loyalty recognized in the common law. Statutory provisions regulating lawyer conduct appear in many state and federal codes and regulations as well as in rules of courts and other tribunals.

The State Bar acts as an administrative arm of the Supreme Court in admission and discipline matters. The Supreme Court has delegated to the State Bar the power to act on its behalf in such matters, subject to the Court’s review. The Court retains the power to control any disciplinary proceeding and its judicial authority to disbar or suspend attorneys. *In re Attorney Discipline*, supra, 19 Cal. 4th at 599-600.

Protecting the public is the State Bar’s highest priority in exercising its licensing, regulatory and disciplinary functions. Business and Professions Code §6001.1. Every person admitted and licensed to practice law in California is required to be a member of the State Bar. Art. 1 §9 of the California Constitution; Business and Professions Code §6001, 6002. Non-admitted lawyers authorized to practice law in California are, with rare exception, required to comply with California’s rules and law regulating lawyer conduct in practicing law in California.

The question to what extent, if any, should non-lawyers or entities participating in the rendering of legal services be regulated by the State Bar raises structural and policy issues that are yet to be considered. As a starting point, the State Bar currently regulates lawyers with managerial and supervisory authority over non-lawyer assistants in the provision of legal services. California Rule of Professional Conduct 5.3. This may include the lawyer’s duty to supervise paralegals to ensure compliance with the regulatory provisions of Business and Professions Code §6400 – 6456. However, it is not apparent that the State Bar currently has primary enforcement authority over paralegals, legal document and unlawful detainer assistants and immigration consultants. The State Bar might become involved if the unauthorized practice of law is the primary issue.

Although the State Bar has the ability to enforce registration requirements for professional law corporations and other forms of law practice, the State Bar is not currently empowered to discipline law firms or other entities authorized to render legal services. California Rule 1.0.1(c) defines “law firm” to mean a law partnership, a professional law corporation, a lawyer acting as a sole proprietorship, an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

Depending on the structure and nature of non-lawyer participation in the delivery of legal services, and whether from a policy perspective the State Bar or another agency should regulate non-lawyers or entities rendering legal services in California, the Supreme Court will likely have the ultimate say over the matter.



OFFICE OF LEGAL SERVICES INNOVATION

An Office of the Utah Supreme Court

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 ¹ with lawyer involvement ² - 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 ³	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

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

² "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.

³ "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 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

REQUIRED AS APPLICABLE⁴

- **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.

⁴ 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
General	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
General	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
General	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
General	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
Specific consumer service	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
General	General	All services	Number of people served	Monthly
			Geographic info	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
Specific consumer service	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
General	General	All services	Number of people served	Monthly
			Geographic info	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
Specific consumer service	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

California To Create Its Own Consumer Financial Protection Bureau

By Stella Padilla Ilan Isaacs | Feb. 10, 2020

Administrative/Regulatory

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Feb. 10, 2020

California to create its own Consumer Financial Protection Bureau

With Gov. Gavin Newsom's view that "California's economy and its people thrive when predatory business practices are policed," California now joins the growing list of states opting to create what have recently been dubbed, "mini-CFPBs."



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It comes as no surprise that as the idea has taken hold that (under the Trump administration) the Consumer Financial Protection Bureau has rolled back its regulation of consumer financial services, a growing number of states have opted to expand their own regulatory reach within state lines. These states have been motivated by a particular emphasis on consumer financial services providers that have, until recently, gone unregulated or have been viewed as being underregulated by these individual states. With Gov. Gavin Newsom's view that "California's economy and its people thrive when predatory business practices are policed," California now joins the growing list of states opting to create what have recently been dubbed, "mini-CFPBs."

At the start of this new year, California's Newsom proposed expansions to the State's regulatory oversight of consumer financial services in his 2020-21 Budget Summary. Given Newsom's reasoning -- a belief that "[t]he federal government's rollback of the CFPB leaves Californians vulnerable to predatory businesses and leaves companies without the clarity they need to innovate" -- it is not surprising that California has decided to join the wave of expanded regulation at the state level via its own mini-CFPB. This proposed mini-CFPB includes several notable changes to California's regulation of consumer financial services providers, including a renewed focus on not only currently unregulated consumer financial services providers, but also on industries which California (and other states, for that matter) has had a hard time regulating.

Currently, California's Department of Business Oversight is the state department tasked with the job of licensing and regulating traditional financial services providers, including securities brokers and dealers, investment advisers, payday lenders, mortgage lenders, escrow agents, student loan servicers, and other commercial and consumer lenders. The Department of Business Oversight also regulates state-licensed financial institutions, banks, credit unions and money transmitters. The Department of Business Oversight currently does not regulate debt collectors, credit reporting agencies or many types of Financial Technology companies. And in actuality, the Department of Business Oversight has struggled to fit innovative financial

California To Create Its Own Consumer Financial Protection Bureau

By Stella Padilla Ilan Isaacs | Feb. 10, 2020

services providers within its regulatory framework, particularly with regard to fintech companies, which offer products and direct services to assist consumers with new market needs. Because fintech companies provide financial products which, until very recently, have not existed, finding where to fit these products into its regulatory framework has proven to be a convoluted process for California, just like it has proven to be hard for many individual states -- with many states attempting to lump fintech consumer financial services providers along with payday lenders, money transmitters or other regulated industries which are inapplicable to the products offered. Given the view that the CFPB is backtracking on its regulation of debt collectors and credit reporting agencies, and that there is a necessary under-regulation of fintech companies created by outdated frameworks, it is not shocking that California wants to "expand[] the [DBO]'s authority to pursue unlicensed financial services providers not currently subject to regulatory oversight," including those very debt collectors, credit reporting agencies and fintech companies that can foster "predatory business practices" when unregulated.

California's proposed mini-CFPB would expand the Department of Business Oversight's authority by renaming the Department of Business Oversight and converting it into the new Department of Financial Protection and Innovation. Working in conjunction with a new implementing regulation -- the California Consumer Financial Protection Law, or "CCFPB," which has not yet been administered or otherwise established by the legislature -- the Department of Financial Protection and Innovation would have regulatory powers and responsibilities the current Department of Business Oversight does not.

Specifically, the new Department of Financial Protection and Innovation would be responsible for:

- (1) the implementation of "services" to "empower and educate consumers, especially older Americans, students, military service members, and recent immigrants" against unfair, deceptive and abusive practices "when accessing financial services and products";
- (2) the licensing and examination of "new industries that are currently under-regulated," including, as mentioned above, debt collectors, credit reporting agencies and fintech companies;
- (3) the explicit expanded authority for the enforcement against unfair, deceptive and abusive practices;
- (4) the "[a]nalyz[ation] [of] patterns and developments in the market to inform evidence-based policies and enforcement";
- (5) the establishment of a new Financial Technology Innovation Office that would assist in the "responsible development" of new consumer financial products; and
- (6) offering legal support for the administration and implementation of the CCFPB, which is meant to "provide consumers with more protection against unfair and deceptive practices" as to consumer financial services products.

Of course, this ambitious re-working of the state's consumer financial services regulatory framework must have a cost. So, in order to overhaul the Department of Business Oversight and turn it into the Department of Financial Protection and Innovation, Newsom's budget includes a \$10.2 million "Financial Protection Fund" and the addition of 44 positions in the department in the 2020-21 fiscal year, with the Financial Protection Fund growing to \$19.3 million within the following two fiscal years, inclusive of the addition of 90 positions to the department. Initial costs for the new Department of Financial Protection and Innovation, and its implementing

Daily Journal Article: California to Create Its Own Consumer Financial Protection Bureau

regulation -- the CCFPB -- would be covered by "available settlement proceeds in the State Corporations and Financial Institutions Funds." Future costs would be covered by fees paid by the "newly covered industries" (debt collectors, credit reporting agencies and mostly likely a notable portion of fintech companies) and increased fees on "existing licensees" (securities brokers and dealers, investment advisers, payday lenders, mortgage lenders, escrow agents, student loan servicers, and other currently state-licensed commercial and consumer lenders).

Given that California is the most populous state in the nation and is also, more recently, in the forefront of progressive legislation, its self-inclusion in the recent push for expanded state-level regulation of consumer financial services providers is of particular significance. California's decision to implement its own mini-CFPB will likely impact other states' decisions in joining the bandwagon. This could have significant impact on banks, debt collectors, fintech companies and other consumer financial services providers. Governor Newsom's proposal, which has been submitted to California's legislature, is currently being promoted by former CFPB Director Richard Cordray, as well as many other former CFPB officials. The legislature has until June 15, 2020, to pass, or decline to pass, the proposed creation of the California CCFPB. □