



To: Scope Subcommittee
From: Tom Greene and Becky Sandefur
Date: March 26, 2021
Re: II.A. Subcommittee Recommendation for the Scope of a Regulatory Sandbox

Draft Scope Recommendation Document

The subcommittee members are assigned to continue work on drafting a Scope Recommendation Document which includes the broad identification of the types of innovative legal services delivery systems that would be permitted to participate in the regulatory sandbox. Based on initial discussions in the subcommittee and the February CTJG Working Group meeting, the co-chairs propose the following language for discussion. The proposed language is meant to reflect the co-chairs attempt at summary of the groups' discussions, not necessarily their own views. Because their summaries of the discussions do not always agree, they have sometimes included alternate versions of different aspects of the conversation (called out here as "Approach 1" and "Approach 2"). The ultimate goal is a draft statement of scope that can be discussed by the full CTJG at its next meeting.

A. Purpose of the Sandbox

Approach 1

The purpose of the sandbox is to generate information on the performance of alternate models for the delivery of legal services [to unserved and underserved residents of California] that cannot be provided under current under California statutes, state procedural rules or the California Rules of Professional Conduct. This information should be sufficient to help the California Bar, the Legislature and the public to knowledgeably address potential changes in law, regulatory systems and ethics rules to advance access to justice in California.

Approach 2

The purpose of the sandbox is to test whether relaxation of rules about nonlawyer participation in the practice of law – whether through ownership of legal services-producing organizations, profit from the sale of legal services, or production and delivery of legal services – is in the public interest. The aspects of the public interest to be considered are:

- Expanding access to justice
- Consumer protection

B. Intended Access Benefits to be Achieved

Approach 1

The intended primary beneficiaries of this process are residents of California who are unserved or underserved as delineated in the 2019 California Justice Gap Study sponsored by the California Bar. [However, sandbox candidates may provide services to non-unserved or underserved residents if such services result in services also being provided to unserved or underserved residents of California.]

Approach 2

The intended primary beneficiaries of the sandbox are residents of California who are currently underserved. It is recognized that the well-known justice gap extends beyond low-income persons to middle-income people and small businesses, who are also currently also often unable to access civil legal services.

C. Primary Public Protection Objectives

Approach 1

Efficacy

- a. Candidates for admission to the sandbox must provide services that provide efficacious services to California residents.*
- i. No guinea pig rule: Experimental services that cannot demonstrate likely efficacy should not be admitted to the sandbox.*

Transparency

- b. Candidates for participation in the sandbox will provide understandable information to consumers on the strengths and weaknesses of their proposed services and service models. Where appropriate, candidates should advise consumers about when their offerings may not be relevant or efficacious.*
- c. Candidates will provide full disclosure of any conflicts of interests between those of the consumer and the alternate entity or its owners.*

Privacy

- d. Alternate Provider candidates will either secure and protect the privacy of their customers/clients or secure knowing waivers if the use of their data defrays the costs of the services they receive.*

Relevance

- e. *Candidates shall provide information on the efficacy and operation of their services that will be relevant to subsequent consideration of new legislation or amendment or waivers of procedural or ethics rules.*

Approach 2

California consumers should have expanded access to competent, effective, affordable legal services. These services should be described and marketed in understandable ways, so that members of the public understand what they are and are not getting through purchase or use of a service.

D. Eligibility for entry and scope of regulation

Approach 1

Generally open but subject to reasonable constraints and oversight to insure efficacy, transparency, privacy and relevance

Approach 2

Because the sandbox is an experiment in innovation, it is open to a wide variety of models and providers. However, the following are not permitted:

- *Lawyers not licensed to practice in California may not use the sandbox to circumvent rules requiring that they be licensed in California in order to personally practice law in California. (They may, however, participate in sandbox entities in other ways)*
- *Disbarred lawyers may not provide legal services, manage the work of those providing legal services, or own more than 10% of any sandbox entity.*

E. Possible preference for particular service areas

Approach 1

Firms or non-profits providing necessary services to the most unserved or underserved residents of California shall be given preferred admission to the Sandbox. For example, services directed at assisting unserved or underserved individuals in family court would get preference over firms offering services to prevent less dire consequences for individuals or families.

Approach 2

If regulatory resources are insufficient to manage regulation of all entities interested in and eligible to participate, priorities may be imposed on admission. These include priorities related to:

- *Areas of law in which services will be offered*
- *Possible impacts on access to justice for groups in the population that currently have little access to legal services (low-income people, middle income people, and small businesses)*

F. Types of models eligible for consideration to enter the sandbox

Any combination of

- *Use of nonlawyer human or technology to produce and deliver legal services*
- *Nonlawyer investment in or ownership of organizations that produce legal services*
- *Fee-sharing between lawyers and nonlawyers*

Lawyers participating in the sandbox are subject to all of the professional requirements of their role except those expressly relaxed in their authorization to participate in the sandbox.

In their roles as lawyers, lawyers continue to be subject to discipline by the bar.

Activities that are already regulated by other regulators (e.g., by federal regulators or other state regulators), are subject to the discipline of those regulators.

G. Details yet to be addressed

Approach to types of proposals that can be evaluated in the sandbox

- Technology or nonlawyers to provide legal services
- Partnership or fee sharing between lawyers and nonlawyers, or other ABS
- Open approach (i.e., sandbox open to any proposal that is not permitted under the current law and is designed to increase access to justice and has sufficient protections to protect against consumer harm)
- Structured approach (like the open approach, but with criteria for determining whether a proposal increases access to justice and/or non-waivable requirements for protecting against consumer harm)

Key policy considerations or public protection limitations for scope

- Prioritization of delivery systems likely to serve those most in need
- Requirement for participation of a licensed CA lawyer
- Requirements to abide by ethical rules and fiduciary obligations of the types imposed on lawyers
- Moral character of participants (e.g., disbarred lawyers, felony, or fraud)
- Out-of-State or foreign licensed lawyers

The scope document should explain the reasons for the preferred approach, but also flesh out potentially attractive alternative approach(es) or fallback positions.

March 18, 2021 Toby Rothschild and Patricia Squitiero to SCOPE Subcommittee:

How should we think about quality issues? Should there be a minimum level?

The primary aim in addressing quality of service by applicants should be to measure the accuracy and timeliness of the service against that offered by attorneys. It has been argued that for many people the choice is between an alternative form and no legal advice, and that something is better than nothing so the quality doesn't need to be as high. However, many clients who would otherwise get a lawyer may choose an alternative without fully understanding their options and the trade-offs they are making.

How should we balance quality concerns with being open to truly new models?

The fact that a model is new doesn't mean it should be allowed to provide a lesser level of quality. We should be open to a wide variety of new delivery methods and forms of service delivery that provide quality service to clients. Because something is new does not mean it should be allowed to offer lesser quality service than existing services. The application should address how quality will be addressed in the sandbox offering. In assessing quality with new service delivery methods it is important to carefully assess the risks the new model poses and to look at ways to minimize and protect against such risks.

How should we think about these questions in light of the distinctive needs and circumstances of different populations, including people with disabilities and people whose first language is not English?

If the purpose of the sandbox is to test methods to increase access to justice, special attention should be paid to those with difficulty obtaining access. The application should address how such special populations will be addressed by the applicant. This includes people with disabilities and those whose first language is not English but also low and moderate income individuals, rural residents, those with limited education, and those without adequate broadband access as well as small businesses. Part of the assessment of the application should include reviewing whether the proposed service will, in fact, expand access to these groups.

Review of "Sandbox Application Concepts/Issues".

The topics listed on this document seem to address the required issues for the application with a few modifications. There should be a greater emphasis on quality, possibly adding it more clearly in topic 5. In addition, the overview should make clear that the applicant will be required to comply with the California Consumer Privacy Act and the California Privacy Rights Act, and that there will be no sharing or selling of consumer data in any form to third parties.

At the end of topic 3, the item should be expanded to include information on provision of such services in other jurisdictions, with or without a sandbox or pilot, which would be within the sandbox in California. For example, if other states permit activities that California does not, how are the services being delivered in those jurisdictions?

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In looking at the Utah application's listing of service categories, veterans issues should be added and there should be an open text box for "other".

March 19, 2021 David Engstrom to SCOPE Subcommittee:

For Assignment 2, developing criteria for eligibility and an application process, what are specific issues that arise in the legal technology space?

I'll kick part of the answer to this question to the second question, below, on legal tech's strengths and weaknesses.

Instead, I'll make a more general point: A key question we face as a group is whether we think tech-based delivery models should be treated differently from non-tech-based delivery models. And the answer to that question turns in significant part on the chosen regulatory approach. In one of the articles that circulated to the group, Deborah Rhode and Gillian Hadfield identify the three primary regulatory approaches one could adopt in regulating legal tech: (i) prescriptive approaches (i.e., ex ante, command-and-control rules that govern entry into the market or, in our case, the sandbox); (ii) performance- or outcome-based approaches (i.e., ex post, effects-based regulation focused on identifying and remedying harms); (iii) systems- or management-based approaches (i.e., a set of procedures — for instance, regular internal review of processes and outcomes — that regulated entities must perform).

If the dominant regulatory approach is the first or third of these, then sandbox regulators will likely need lots of tech-specific rules and/or procedures. If California were to adopt a prescriptive approach, the sandbox regulators might require up-front validation that a piece of software does what its operator says it does, or that the software doesn't, whether because of its data or its analytic approach, perpetuate various forms of bias on the basis of various ascriptive characteristics (race, ethnicity, gender, etc.). Given concerns about the opacity of algorithmic systems, the sandbox regulator might even require that an entity make a showing that its use of more sophisticated analytics — for instance, neural nets, which often generate greater accuracy than other machine learning or expert-system approaches but only at the cost of explainability — are justified for the particular use case. Similarly, if California were to adopt a systems- or management-based approach, then the sandbox regulators might require that an entity put into place a set of internal review structures. This could mean attorney review of all case-level outputs—a "human in the loop" requirement. It might also involve regular system-level review or auditing of a technical system and its outputs, or the appointment of an ombud within the organization who has responsibility for doing system audits, deciding whether a particular tool (say, a machine learning approach) is still serving the purposes for which it was adopted in the first place. There's a large and growing literature on the various ways one can structure an organization to reflectively use new and powerful tech tools, and also make key decisions such as when to decommission a tool that isn't working or no longer serves its initial purposes. Note what all of this means: Sandbox regulators will have to have technical capacity and know-how.

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By contrast, the second, performance-based approach raises fewer (if any) tech-specific concerns. Instead, the same or very similar approach would be used to gauge outcomes whether the legal services provider under scrutiny is a piece of software providing one-to-many services or a human-based provider (say, a new multi-disciplinary firm with paraprofessionals rather than lawyers). The question in both software and human contexts is: As we look across the full set of clients who have received these services, are there consumer harms or other quality concerns in evidence?

This question is important because the sandbox, some say, should treat human and non-human providers *neutrally*. Indeed, if you talk to tech evangelists, who believe that tech holds a lot of A2J promise but has been systematically stymied by the organized bar, you'll hear that California already is a regulatory sandbox because of Silicon Valley and the incredible innovation it generates. California, in that sense, is fundamentally different from Utah. The risk, according to some, is that California will create a regulatory sandbox with the aim of spurring innovation, but the sandbox will instead suck up a lot of innovations that are already happening and thus make it harder, not easier, for those entities to develop their business models and their services. The sandbox could end up stymieing, rather than spurring, innovation.

What are legal tech's strengths and weaknesses?

This is a huge question, but let me try to corral it with a couple of thoughts.

Start with the varieties of tools. Becky's report (circulated to the group previously) does the best job I've seen of canvassing access to justice (A2J) focused legal tech tools. The tools perform a variety of tasks: (i) provide legal information (e.g., where to look on a court website, when to show up in court); (ii) diagnose legal problems (e.g., so-called QA systems in which a person can ask a question in natural language and get a response back regarding legal rights and obligations); (iii) collect and compile evidence (e.g., preserve evidence of domestic abuse with time-stamped pictures); (iv) assemble legal documents (e.g., a will, a corporate registration, a court filing); (v) find a lawyer (e.g., various matchmaker services); (vi) help negotiate a resolution of a dispute (e.g., online dispute resolution, or ODR, platforms); (vii) contest or otherwise prosecute a legal action (e.g., DoNotPay systems that help individuals contest speeding tickets or other fine-based impositions).

Some of these, of course, are more advanced than others. QA systems are still in their infancy. They only work well in relatively narrow, self-contained areas of law because of the limits of natural language processing (the branch of machine learning that performs text analytics) and the difficulties of translating legalese into language that is understandable to lay people. The result is that lawyer-driven legal tech—that is, tech tools that *augment* what lawyers do—is far more advanced than legal tech that *substitutes* for lawyers. In other words, the sandbox idea seeks to spur innovation on the side of legal tech that is less advanced at the moment.

(As an aside, this also raises the question of whether we are proposing limits on the types of legal tech tools that can seek entry to the sandbox. Do matchmaking tools count? Some of the

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wordings in the assignment for this meeting suggest that the purpose of the sandbox is to test new approaches to the “production and delivery of legal services.” That might exclude matchmaking. But matchmaking, some believe, has some of the greatest A2J potential. It’s also where the battles between legal tech and the organized bar have been fiercest — for instance, litigation and disciplinary actions involving Avvo.)

What do A2J-focused, lawyer-substituting legal tech systems do well? They operate at scale. They can be quite consistent—and can achieve a kind of horizontal equity across users in the sense that everyone gets the same thing. Compare this to a human service provider where the quality of the service a client receives depends on which person within the entity provides it. Legal tech also generates data in ways that human-provided services might not. This is a point that Richard Susskind, a leading thinker on legal tech has made really well: Individual outputs (why a QA system arrived at the response it did) may be opaque in advanced machine learning systems, but digitized systems of all sorts produce lots of system-level information we might not otherwise have. This allows us to evaluate outcomes in a way we might not otherwise be able to. Perhaps counter-intuitively, the digitization that is all around us may, despite constant hand-waving references to “black box” AI systems, yield greater transparency. All of this leads to a final key point about legal tech: Because legal tech systems operate at scale and generate data about their workings, they may be more perfectible than human-based systems. It may be easier to tweak an algorithm than to herd dozens of dispersed, line-level human staff in a new direction.

The weaknesses are, in many ways, the other side of the same coin. Because they operate at scale, legal tech tools can compound errors and bias. Tools that rely on advanced analytics may not be explainable; even their engineers may not know why the system produces the results it does. Finally, legal tech tools are part of the wider trend toward the decomposition and multi-sourcing of legal work. Old timey law meant a single lawyer or firm ushering a client's dispute through a process, including litigation in court, from start to finish. Nowadays different providers do different pieces of the handling of a dispute. For A2J tools, the tool might only do one very small thing in a much broader dispute. That makes it harder to gauge consumer harm or to draw inferences about the particular tool's contribution to a set of observed outcomes.

How should we think about an offering with little or no track record?

Here is where I think it’s important not to hive off tech and non-tech innovations. The sandbox is, by definition, trying to spur innovation in legal service delivery. By construction, many (most? all?) would-be entrants will not have a track record, and this will be true of tech and non-tech innovations alike. Asking applicants to show a track record, or asking them to make showings that their approach doesn’t cause consumer harm, requires something that is famously hard in law and regulation: proving a negative. Even once up and running, gauging harm may be difficult because of long lag times. Will contests don’t typically happen right away. Nor do defects in corporate registrations surface immediately. This feels like a punt, but I think the regulatory sandbox involves a leap of faith. It’s a perfectly reasonable leap. But we won’t be able to rely upon extensive track records. The point is to create track records.

How should we consider the privacy implications of different business models?

There are three branches to this. One is attorney-client privilege—which can be thought of as a privacy policy. The second is data commercialization. The third is cybersecurity.

The attorney-client privilege creates a zone of privacy where a lawyer and client can communicate in unguarded ways. The key question is whether non-lawyer service providers are covered. That's a big question that I'm guessing the paraprofessional group is working on as well. We have legal ethics experts on the working group, so I might defer to them about how to think about this.

Data commercialization is probably the greatest threat here. Legal tech providers will collect lots of client-based information for which there are commercial uses and so could plausibly be sold to other vendors. There are several dimensions to this. For starters, this would be forbidden if the attorney-client privilege applied—or would at the least require knowing consent on the part of clients. Other privacy rules might come into play as well—such as HIPAA for health-related information. And in California, data sales would be covered by the California Consumer Privacy Act, which contains notice requirements (i.e., entities must tell a data subject that they're collecting information about them) and opt-out rights (i.e., a data subject can request that a business not sell information). A key question for the group is whether to go above this floor of consumer privacy protections—by, for instance, conditioning entry on an provider's agreement not to sell data, or beefing up regulations by, for instance, flipping the CCPA's opt-out right to an opt-in system. There are plenty of examples to work from, some of which appear in the circulated materials. LegalZoom has entered into various agreements with regulators—for instance, the Washington State AG, which forbids sale of data to third parties absent opt in and many see as a model.

When I say cybersecurity, I mean security against unauthorized access to or use of client data—i.e., hacking and data breaches. Here again, the CCPA (and an earlier data breach notification law) governs, as do various other laws (including common law torts, etc.) that govern data breaches. Here again, the question would be whether the group would want to propose more stringent rules as a condition of entry. This would take the form of prescriptive or systems- and management-based regulation: requirements in terms of cybersecurity systems (encryption, firewalls), or ongoing processes for reviewing and gauging the sufficiency of same.

Massachusetts has a consumer privacy law that has an extensive list of technical, physical, and administrative security protocols aimed at protecting personal information.