

## **DISCUSSION OUTLINE FOR SAGE MEETING MAY 19, 2021**

### **CTJG Charter (6): Program oversight for persons and entities accepted for participation in the sandbox including standards of conduct, processing of client complaints, and enforcement through suspension or removal from the sandbox or other remedies**

1. Program Oversight Goals: To best ensure participants act in a manner designed to minimize risk of identified possible harms.
  - a. ATILS identified possible harms:
    - i. Receiving inaccurate or inappropriate legal services.
    - ii. Failing to exercise legal rights through ignorance or bad advice.
    - iii. Purchasing unnecessary or inappropriate legal services.
2. Program Oversight Tools: To oversee compliance, specific tools may include any of the following: processing complaints, conducting periodic audits, formal and informal investigations, monitoring, surveying consumers who utilize services offered by sandbox participants, suspending or removing participants, and/or resolving suspension appeals, and evaluating participants, including recognition for safe, effective services.
3. Who should be responsible for Program Oversight: options include the staff; the governing board; or third party participants including volunteers (along the lines of the Attorney-Client Fee Dispute Arbitrators, who are volunteers in local bar association MFAA programs). Different functions may be assigned to different oversight groups.
4. Standards of Conduct: The standards participants must adhere to in order to maintain program eligibility must be defined. This may involve any of the following:
  - a. Attorney participants: Attorney participants may continue to be held to the Rules of Professional Conduct, potentially as modified; discipline to be administered by the State Bar.
  - b. Nonattorney participants: Individual nonattorney participants may be required to meet certain standards, such as adherence to duties of confidentiality, compliance with the conflicts rules, and any other defined standards. Example: Professional conduct rules being developed by the California Bar Paraprofessional Working Group.
  - c. Entity regulation: the participant entities may be held to meet certain standards of conduct, which may include adherence to defined rules governing financial relationship with clients, conflicts, cooperation with sandbox reporting obligations and others.
5. Suspension or Removal:
  - a. Need to determine what conduct will subject a participant to removal from the sandbox. Degrees of noncompliance/breach may have different outcomes:

short-term suspension versus permanent removal. Should there be a financial penalty/remedy for actual harm caused?

- b. From the ATILS Report: “If an entity fails to comply with the requirements set by the oversight body, including a failure to provide appropriate supporting data with respect to the services provided, it would be subject to removal from the sandbox. If removed, an entity would lose its authority to operate with the protections of the sandbox rendering it subject to all existing rules and statutes regulating the practice of law. However, when possible, the entity should be given an opportunity to cure the issue of concern and become fully compliant.”
- c. Should there be a means of appeal from suspension or removal, and if so, who would oversee?

## DISCUSSION OUTLINE FOR MAY 19 SAGE SUBCOMMITTEE MEETING

### PROPOSED GUIDELINES FOR COLLECTING AND ANALYZING DATA TO ASSESS THE RISKS OF SANDBOX ENTITIES

- I. What Are the Possible Harms to Consumers of the Legal Services Provided by Sandbox Participants?
  - A. Potential Harms Identified in ATILS Report and Innovation Office Manual of the Utah Office of Legal Services Innovation:
    - The consumer (a) receives inaccurate or inappropriate legal services (ATILS Report) or (b) achieves an inaccurate or inappropriate legal result (Utah Office Manual).
    - The consumer fails to exercise legal rights through ignorance or bad advice.
    - The consumer purchases an unnecessary or inappropriate legal service.
  - B. Are these the appropriate harms to guide risk assessment? Are there others? To what extent should the ease or difficulty of measurement affect identification of the harms to be assessed? (E.g., how to measure whether a consumer failed to exercise legal rights “through ignorance,” particularly as compared to how the consumer would have acted without the services of the sandbox entity?)
- II. What Is the Appropriate Criterion for Assessing the Risk of Harm?
  - ATILS Report: “The relative rate or risk of harm compared to the experience a consumer would have received absent the legal services provided.”
  - Utah Office Manual: “The likelihood that the average person will experience a harm using the applicant’s service *is not greater* than the likelihood that the average person who might use their service will experience harm without the service.”

### III. Creating a Risk Assessment Matrix (ATILS Report Recommendation)

A. Should risk assessment be based on the degree of lawyer involvement with the service provider? See Utah Manual, p. 7, identifying ten service models and assigning level of risk (low to high) based on degree of lawyer involvement, with more lawyer involvement assumed to pose less risk. Is the Utah assumption that lawyer involvement reduces risk valid? Will this approach deter innovation?

#### B. Criteria for Identifying Information to Be Collected

1. Relevance to risk of harm.
2. Reporting burden on sandbox participants relative to the value of information reported.
3. Collection burden on the regulatory body relative to the value of information collected.
4. Review burden on the regulatory body relative to the value of information to be reviewed.
5. Feasibility and burden of collecting information directly from consumers of sandbox services relative to the value of information that might be collected.
6. Correlating information collected to risk posed by the sandbox entity.
  - Should reporting requirements be tied to the service model? See Utah Office Manual, pp. 10-13 (information to be reported and frequency of reporting by sandbox entity depend on degree of lawyer involvement in the entity).

#### C. Manner of Collection

1. Information to be provided by the sandbox applicant with the application.
2. Information to be provided by a successful sandbox applicant after the applicant begins operations.
3. Frequency of reporting by sandbox participant.
4. Mechanics of reporting information.
5. Use of sampling.
6. Information to be collected directly by the regulatory body, e.g., through spot audits correlated with risk or through investigations triggered by consumer complaints.
7. Mechanisms for collecting outcomes data.

#### D. Criteria for Regulatory Body Review and Analysis of Information Collected

1. Correlating level of review with severity of risk.
2. Balancing burden of review relative to value of information collected.