



## Potential Legal Impediments to Various Sandbox Structures or Divisions of Authority

- 1) Antitrust
- 2) Conflict of Interest
- 3) Doctrine of Unlawful Delegation
- 4) Ability to contract for services from state entities
- 5) Funding from private sources
- 6) Government Claims Act immunities
- 7) Article VI, Section 9 of the California Constitution



## Potentially Countervailing Concerns: Antitrust Issues and Conflicts of Interest for the Court

- Antitrust concerns weigh in favor of closer supervision by Supreme Court
  - If the sandbox entity makes only recommendations to the Court, any resulting anticompetitive decisions are state action; state action does not implicate antitrust laws
  - If the sandbox entity acts on its own, its actions may still be protected as state action, but only if: the action is subject to active state supervision and the action is undertaken pursuant to clearly articulated rules and policies
- Supreme Court staff and Working Group members have identified potential conflicts of interest for the Court related to close Court involvement in sandbox decisions



## Antitrust & Conflicts of Interest (cont.)

- Potential conflicts under consideration
  - In the event private funding is accepted, concern Court would not be able to hear cases involving the funders
  - In the event the Court participates in decisions such as who is accepted into sandbox, concern that Court would not be able to hear cases concerning the sandbox entrants
- Code of Civil Procedure and Code of Judicial Ethics conflicts provisions do not specifically address these potential conflicts, but we are evaluating under general principles, such as the requirement that a judge recuse himself from a proceeding if “a reasonable person aware of the facts would doubt the judge’s ability to be impartial” (Code of Judicial Ethics, Canon 3(E)(4))



## Doctrine of unlawful delegation: would necessitate final review of actions by independent nonprofit

“While private entities can formulate and suggest potential regulation, the doctrine of unlawful delegation requires the Legislature or a regulatory agency to exercise the final say over whether any particular regulation becomes law. In addition, the Legislature cannot “delegat[e] ... regulatory power to agencies composed of interested members of the regulated industries without imposing standards or safeguards adequate to prevent abuse. Absent the required safeguards, such grants of authority constitute unconstitutional delegations of legislative power.”

-- *Light v. State Water Resources Control Bd.*, 226 Cal.App.4th 1463, 1490-91 (2014)



## Update on other areas of inquiry

### 1) Ability to contract for services from state entities

- No blanket prohibition on sharing employees. When the California Lawyers Association spun off from the State Bar, it leased employees for a period.
- On the other hand, there is no existing requirement that state entities share employees or services.

### 2) Funding from private sources

- No blanket prohibition. Examples include public-private partnerships and private donations to public university systems.
- Accepting such funding may create the appearance of conflicts of interest.

### 3) Government Claims Act immunities

- Actions of agency within the judicial branch would be protected by various government immunities. OGC is researching whether immunities could extend to an independent nonprofit.

### 4) Article VI, Section 9 of the California Constitution

- Does not appear to be applicable to the structures under consideration.