



The State Bar of California

CLOSING

II.A. Regulatory Authority
08-11-21 CTJG Meeting
Open Session

WORKING GROUP

DATE: August 4, 2021

TO: Closing the Justice Gap Working Group

FROM: State Bar Staff

SUBJECT: II.A. Discussion and Possible Action on a Subcommittee Recommendation for the Structure and Governance of a Sandbox Regulatory Authority

For Closing the Justice Gap Working Group August 11, 2021 meeting agenda item II.A. – Discussion and Possible Action on a Subcommittee Recommendation for the Structure and Governance of a Sandbox Regulatory Authority, the following materials are provided for your review and preparation:

- July 12, 2021 Memo from Brady Dewar, Assistant General Counsel, concerning the legal Considerations Regarding Potential Structures for Sandbox Entity; and
- August 4, 2021 Memo from SAGE to CTJG with proposed regulatory recommendations.



The State Bar *of California*

OFFICE OF GENERAL COUNSEL

Date: July 12, 2021

To: Members, Closing The Justice Gap Working Group - Subcommittee on the Structure and Governance, Evaluation-Enforcement for a Regulatory Sandbox

From: Brady Dewar, Assistant General Counsel

Subject: Legal Considerations Regarding Potential Structures for Sandbox Entity

I. Executive Summary

The Closing the Justice Gap Working Group (CTJG) and its Subcommittee on the Structure and Governance, Evaluation-Enforcement for a Regulatory Sandbox are evaluating recommendations regarding the proposed structure of the entity that would oversee the regulatory sandbox (Sandbox Entity) being considered by CTJG. As of its April 9, 2021 meeting, CTJG had identified three potential structures for further consideration: a new government entity under the judicial branch, akin to a “sister agency” of the State Bar; an office or subentity with the Judicial Council of California (Judicial Council), which is itself a government entity within the judicial branch; or an independent nonprofit organization. Under any of the structures under consideration, the Sandbox Entity would presumably be immediately overseen by a governing board, likely comprised of volunteer attorneys, legal technologists, and/or other stakeholders.

To assist in its further consideration of these issues, CTJG has asked the Office of General Counsel (OGC) to address seven legal concerns, including analysis of these issues’ impact on the potential structure of the Sandbox Entity and/or the division of authority between the Sandbox Entity and the Supreme Court or other government actors.

OGC has analyzed these issues as follows:

- (1) **Do antitrust issues require a particular structure or division of authority?** Because the Sandbox Entity will likely make decisions that impact competition by controlling who is

permitted to engage in practice of law activities and who is not, it may raise antitrust issues. To avoid antitrust liability, the Sandbox Entity need not take any particular structure. Rather, under any structure, to avoid antitrust liability, the Sandbox Entity should operate only under active state supervision and pursuant to policies that are clearly articulated by the Supreme Court and/or Legislature. (See Part II, below.)

(2) Would separation of powers and delegation principles permit the Sandbox Entity to engage in regulatory activities? Pursuant to Article VI, Section I of the California Constitution, the judicial power of California is vested in the courts. This power has consistently been held to include the primary authority to regulate the practice of law, though the Legislature has some overlapping authority. Delegation of rule-making authority regarding practice of law activities by sandbox participants to the Sandbox Entity, if structured as a government entity, would likely be permissible so long as the judiciary resolved fundamental policy issues and provided adequate guidance to the Sandbox Entity for its regulatory activities. If the Sandbox Entity were structured as a non-profit organization, however, it could make only recommendations regarding regulations, which would then be subject to approval and enactment by a government entity. Further, the Sandbox Entity's quasi-judicial activities (i.e., applying regulations to grant or revoke licenses to engage in practice of law activities) must be subject to some judicial review. If the Supreme Court were to follow its approach to licensing attorneys, it could require that sandbox licensing decisions by the Sandbox Entity be merely advisory, effective only upon order by the Supreme Court. (See Part III, below.)

(3) Would the Supreme Court be required to recuse itself from future cases involving sandbox participants or donors? While Supreme Court justices are required to recuse themselves from cases where a reasonable person would doubt their ability to be impartial, available authority does not suggest that the Court's interest in the success of the regulatory sandbox would necessitate its recusal from cases involving sandbox participants. A somewhat stronger argument could be made that recusal may be necessary in cases involving donors to the Sandbox Entity, should donations be accepted. Decisions regarding recusal would ultimately be up to the Court, and the Court could determine that recusal is required in the interests of justice or for subjective reasons, even if there is no conflict under the reasonable person standard. Should the Court determine that recusal issues are a concern and that the risk that the Court may need to recuse itself in a future case should be minimized, recusal risks could be addressed by lessening the Court's direct involvement in the Sandbox Entity while maintaining the judicial branch oversight required to avoid antitrust issues and/or illegal delegation of judicial power. (See Part IV, below.)

(4) Would the Sandbox Entity be permitted to contract with other government agencies for services under any particular structure? It would be legally permissible for the Sandbox Entity to contract with other government entities for support services, regardless of the structure it takes. However, government agencies are not required to provide such services. To the extent the Sandbox Entity will need to hire services from other entities rather than hiring employees of its own, the Sandbox Entity should identify the services needed and ascertain the availability and willingness of particular state agencies to provide those services. (See Part V, below.)

(5) Would the Sandbox Entity be permitted to accept donations from private sources under any particular structure? No existing law would prohibit the Sandbox Entity from accepting donations from private sources under any of the potential structures under consideration. However, accepting private donations may give rise to the appearance of conflicts and undermine public trust in the Sandbox Entity. (See Part VI, below.)

(6) Would the Sandbox Entity be entitled to immunities under the Government Claims Act and/or the Eleventh Amendment? If structured as a government entity, either as a sister agency to the State Bar or as part of the Judicial Council, the Sandbox Entity would be protected from liability for certain claims under the Government Claims Act and it would most likely be protected from suit in federal court by the Eleventh Amendment, as are the State Bar and the Judicial Council. However, if structured as a private nonprofit organization, the Sandbox Entity probably would not be entitled to protection under the Government Claims Act and likely would not be entitled to immunity under the Eleventh Amendment. (See Part VII, below.)

(7) Does the Constitutional provision that “[e]very person admitted and licensed to practice law in [California] is and shall be a member of the State Bar” require any particular structure for the Sandbox Entity? This Constitutional provision likely applies only to attorneys admitted to practice law in California, and thus has no application to the regulatory sandbox. (See Part VIII, below.)

II. Active State Supervision and Clear Articulation of State Policy is Advisable to Protect the Sandbox Entity from Potential Antitrust Liability

Although focused on private conduct, antitrust laws including the Sherman Antitrust Act, 15 U.S.C. § 1, may apply to public entities under certain circumstances. To ensure that the Sandbox Entity is not potentially liable under the antitrust laws, the governing framework should ensure that the Sandbox Entity is subject to active state supervision and acts pursuant to clearly articulated state policy.

A. Regulatory board controlled by market participants may be subject to heightened antitrust scrutiny

Regulation of market activity by the State has generally been understood to be exempt from the antitrust laws based on longstanding precedent holding that sovereign bodies of the State (such as the State Legislature or State Supreme Court) enjoy “State Action” immunity, notwithstanding any impact of their policies on competition.

However, this immunity is not available to government bodies controlled by market participants unless it is shown that the body’s activities are pursuant to clearly articulated state policy and subject to active state supervision.

In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), the United States Supreme Court held that the Sherman Act does not “bar States from imposing market restraints as an act of government” because the Act was not “intended to restrict the sovereign capacity of the States to regulate their economies.” *Chamber of Commerce of the United States of Am. v. City of Seattle*, 890 F.3d 769, 781 (9th Cir. 2018). Following *Parker*, the Supreme Court has extended immunity from federal antitrust laws to “nonstate actors carrying out the State’s regulatory program,”¹ albeit only “under certain circumstances.” *Id.*

But antitrust scrutiny increases when market participants are empowered with regulatory authority. The United State Supreme Court recently clarified that when the State delegates its authority to a regulatory board controlled by market participants, the board may invoke the State Action defense only when two requirements are satisfied: first, the challenged restraint must be pursuant to clearly articulated state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (“*NC Dental*”).

Thus, if market participants control the governing board of the Sandbox Entity, then the activities of the Sandbox Entity may implicate the antitrust laws if the Sandbox Entity enacts regulations or makes decisions that could impact competition or be an unreasonable restraint of trade. Potential Sandbox Entity activities that could qualify as unreasonable restraints on trade include limiting participation in the Sandbox, setting prices, or otherwise regulating or restricting market activity. Any activity that has the effect of raising price, reducing output,

¹ Because State Action immunity is available to nonstate actors as well as state actors, the form of entity is not determinative for purposes of antitrust law.

diminishing quality, limiting choice, or creating, maintaining, or enhancing market power, may be considered an unreasonable restraint on trade under the antitrust laws.

B. State Action immunity

Accordingly, if the Sandbox Entity's board is comprised of a controlling number of market participants and the Sandbox Entity engages in activity that unreasonably restrains trade, it may be subject to potential antitrust liability unless its actions are (1) pursuant to clearly articulated state policy and (2) actively supervised by a state official that is not a participant in the market that is being regulated.

1. Clearly articulated policy

To confer State Action immunity on the Sandbox Entity, the State must specifically authorize and intend the anticompetitive effects of the conduct by clearly articulating the policy at issue.

The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature [or Supreme Court acting in a legislative capacity]². In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* at 1013

Thus, when the Legislature and/or Supreme Court enacts regulations empowering the Sandbox Entity to take actions that could be anti-competitive, it should ensure that it demonstrates that the potential anti-competitive results are specifically intended. Such intent can be demonstrated in legislative and rulemaking history evidencing the State's intention to regulate the market at issue and to authorize the Sandbox Entity specifically to engage in the activity that could be construed as anti-competitive.

2. Active state supervision

To meet the active state supervision requirement of the state action immunity doctrine, a state actor that is not controlled by market participants must "review and approve interstitial policies made by the entity claiming [antitrust] immunity." *NC Dental*, 135 S. Ct. at 1112. The active state supervisor (for example, the Judicial Council or Supreme Court) must be empowered with

² See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (a state Supreme Court acting in a legislative capacity when it enacts Rules of Professional Conduct is entitled to the same degree of State Action immunity as a state Legislature).

the authority to independently review decisions and regulations proposed by the Sandbox Entity. “[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control” such that the details of the regulatory scheme “have been established as a product of deliberate state intervention” and not simply by agreement among the members of the state board.” *Federal Trade Commission v. Ticor Title Ins. Co.*, 504 U.S. at 634-35.

Alternatively, the active state supervision requirement is met when the applicable statute or Rule of Court is so detailed and prescriptive as to remove the Sandbox Entity’s discretion. Where the statute or Rule of Court prescribing an action of the Sandbox Entity is sufficiently detailed, such detailed legislation itself satisfies the supervision requirement.

It would thus be preferable for the active state supervisor (Judicial Council or Supreme Court) to have the power to enact regulations governing the Sandbox Entity’s activity rather than to delegate to the Sandbox Entity independent authority. If the Sandbox Entity is granted independent authority, however, then the state supervisor must actually exercise active oversight and control over the Sandbox Entity’s functions; mechanisms simply making available review by the state supervisor are not sufficient. *N.C. Dental*, 135 S. Ct. at 1116 (“mere potential for state supervision” is inadequate).

III. Separation of Powers Principles and the Delegation Doctrine Require Judicial Oversight of the Sandbox Entity; If the Sandbox Entity is a Private Nonprofit, It Can Only Recommend Regulations

A. The judiciary has primary and inherent authority over the practice of law

The judicial branch holds the inherent power to regulate the practice of law. In *In re Attorney Discipline System*—a case in which the Supreme Court ordered members of the State Bar to pay fees to support the State Bar’s attorney discipline system when the Legislature and Governor failed to pass a fee bill—the Court explained its powers as follows:

Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, and municipal courts. Since the courts are set up by the Constitution without any special limitations on their power, they have ... all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. 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....

Witkin has described our authority in this area as follows: “The important difference between regulation of the legal profession and regulation of other professions is this: Admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power.”

In re Attorney Discipline System, 19 Cal. 4th 582, 592-92 (1998) (internal quotations and citations omitted) (emphasis added).

At the same time, the Legislature has enacted many statutory provisions regulating the practice of law, including many sections of the State Bar Act. While the Legislature may have a role in regulating the practice of law, however, the Court’s role is primary. For example, the judiciary has the “exclusive right to determine who is qualified to practice law.” *Merco Constr. Engineers, Inc. v. Municipal Court*, 21 Cal.3d 724, 727 (1978). “[L]egislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary. When conflict exists, the legislative enactment must give way.” *Id.*, 21 Cal.3d 724, 728-29 (1978).

Specifically, the Legislature’s authority to regulate the practice of law must not defeat or materially impair the judiciary’s own exercise of its regulatory authority:

This court has respected the exercise by the Legislature under the police power, of a reasonable degree of regulation and control over the profession and practice of law in this state. The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.

Santa Clara County Counsel Attys. Ass’n v. Woodside, 7 Cal. 4th 525, 543 (1994) (internal citations and quotations omitted).³

³ Due to this shared authority over the regulation of the practice of law, it is anticipated that a Sandbox Entity will be created only if authorized by both the Supreme Court and the Legislature.

- B. The Article VI courts can delegate rule-making authority to a Sandbox Entity only if the courts resolve fundamental issues, create safeguards to prevent abuse of the delegated authority, and provide adequate direction for implementation; moreover, private entities can make only recommendations regarding regulations**

The Sandbox Entity being considered by CTJG, in whatever form it takes, would presumably engage in regulation-making regarding practice of law activities by Sandbox Participants. As such, the Sandbox Entity would be making regulations in an area where the Article VI courts have primary regulatory authority, shared with the Legislature.

While the Article VI courts have regulatory authority over the practice of law, under the California Constitution, legislative power generally belongs to the Legislature, and constitutes “the authority to make laws.” *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 254, 267 P.3d 580, 596 (2011) (citing Cal. Const., art. IV, § 1). This legislative power may be delegated by the Legislature, but only to a certain extent and if certain safeguards are present. The courts have described the limitations on the delegation of legislative authority as follows:

It has repeatedly been held that (1) **truly fundamental issues should be resolved by the Legislature**, and (2) that **any grant of legislative authority must be accompanied by safeguards adequate to prevent its abuse**. Lacking the required safeguards such a grant of authority is an unconstitutional delegation of legislative power.

Bayside Timber Co. v. Bd. of Supervisors, 20 Cal. App. 3d 1, 11 (1971) (emphasis added). Additionally, to permissibly delegate authority, the Legislature must “**provide adequate direction for implementation**” of the fundamental policy set by the Legislature. *Carson Mobilehome Park Owners’ Assn. v. City of Carson*, 35 Cal. 3d 184, 190 (1983) (emphasis added).

While we have been unable to find any cases applying this delegation doctrine directly to the judiciary’s authority to regulate the practice of law, the same reasoning applies to delegation of the judiciary’s rulemaking authority. Just as delegation of the legislative power is permitted only where the Legislature resolves all fundamental issues, provides safeguards to prevent the abuse of the delegated power, and provides adequate direction for implementation *because the Constitution vests in the Legislature the legislative power*, because the Constitution vests in the courts the power to regulate the practice of law (i.e., the legislative power with respect to the practice of law), that regulatory power can be delegated only to the same extent as the Legislature’s regulatory power. There appears to be no principled basis on which to permit the

delegation of the regulatory power held by the courts to a greater or lesser extent than the regulatory power held by the Legislature.

Satisfaction of these limits on delegation would be sufficient if the Sandbox Entity were structured as an administrative agency within the Judicial Council or as a sister agency to the State Bar. If, however, the Sandbox Entity were structured as a private non-profit, its rulemaking activities could only be advisory; the courts (or the Legislature, so long as it did not materially impair the courts' authority) or a regulatory agency with delegated authority would need to have final say over any regulations proposed by a private Sandbox Entity. *See Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1491 (2014) ("the doctrine of unlawful delegation requires the Legislature or a regulatory agency to exercise the final say over whether any particular regulation becomes law."); *Int'l Assn. of Plumbing and Mech. Offs. v. California Bldg. Stds. Com.*, 55 Cal. App. 4th 245, 254 (1997) ("[W]hile the Legislature can provide for and encourage the participation of private associations in the regulatory process, it must stop short of giving such groups the power to initiate or enact rules that acquire the force of law.").

C. Delegation principles would require some judicial review of Sandbox Entity licensing decisions; the Supreme Court may require that Sandbox Entity licensing determinations be merely advisory

In addition to making regulations, the Sandbox Entity will presumably make licensing decisions—deciding, based on a determination of facts, interpretation of the law, and application of law to facts, whether to grant a sandbox applicant a license to engage in specified practice of law activities and, potentially, whether to suspend or revoke such a license for violation of the law. Such activity by administrative agencies is generally considered “quasi-judicial.”⁴ Administrative hearings by private parties, such as hospitals and professional

⁴ The Court of Appeal has explained the concept of quasi-judicial activity as follows:

Agency actions can fall into one of two broad categories: (1) “quasi-judicial” actions, where the agency settles the rights of the parties before it as to past transactions; and (2) “quasi-legislative” actions, where the agency exercises its “discretion governed by considerations of the public welfare” as to prospective events or actions.

Santa Clarita Org. for Plan. & Env't v. Castaic Lake Water Agency, 1 Cal. App. 5th 1084, 1103 (2016), *as modified on denial of reh'g* (Aug. 16, 2016).

The issuance of licenses by the Sandbox Entity would constitute a quasi-judicial function. *See Sommerfield v. Helmick*, 57 Cal. App. 4th 315, 320 (1997) (“The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function. The exercise of a quasi-judicial power requires an impartial decision maker and must satisfy at least minimal requirements of procedural due process.”); *Martin v. Bd. of Sup'rs of Lake Cty.*, 135 Cal. App. 96, 100 (1933) (“When a board of supervisors is charged by law with the duty of issuing licenses

associations, are also considered quasi-judicial and may be subject to mandamus review by courts. *See generally Westlake Cmty. Hosp. v. Superior Ct.*, 17 Cal. 3d 465, 483 (1976).

While the judicial power of the state is vested by the Constitution in the Article VI courts (see Cal. Const. art. IV, sec. 1), as long as there is at least some limited judicial review of quasi-judicial licensing decisions, such as through mandamus proceedings, allowing agencies to make licensing decisions has generally been held not to violate the separation of powers:

It is well established, for example, that administrative agencies with licensing power also have the authority to revoke or suspend licenses..... We expressly “conceded” in *Suckow v. Alderson* ..., a medical licensing case, that exercise of power to revoke a license is “judicial in its nature,” and “quasi-judicial.” ... Nevertheless, we concluded that such power did not violate article VI, section 1, because administrative boards “are not courts in the strict sense; they are not exercising ‘the judicial power of the state’ as that phrase is used in the constitution conferring judicial power upon courts, and ... statutes creating such boards and conferring upon them such powers are constitutional.”

In subsequent professional license revocation cases we rejected other “judicial power” challenges to administrative action. In so doing, we implied that so long as appropriate judicial review was available, the challenged administrative determination was not subject to attack on the ground of unlawful delegation of judicial power. (See, e.g., [*Drummey v. State Bd. of Funeral Dirs. & Embalmers*, 13 Cal.2d 75, 84–85 (1939)] (“It is the essence of judicial action that finality is given to findings based on conflicting evidence. If the statute be so construed it would violate the state Constitution.... [¶] In view of these principles, it necessarily follows that the court ... must exercise an independent judgment on the facts”); [*Laisne v. State Bd. of Optometry*, 19 Cal.2d 831, 840] (“[A vested property right] cannot be finally destroyed by a nonjudicial body if the action of that body is questioned in a court of law in a mandate proceeding. [¶] [I]f finality were given to the action of an administrative agency, such would be an unconstitutional exercise of judicial power”).) These decisions recognized—as a limiting condition on administrative power—what Professor Davis has later termed the “principle of check”:

“In the organic arrangements that we have been making in recent decades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of power in the same agency; we have had much more concern for *avoiding or minimizing unchecked*

upon specified terms and conditions, that tribunal becomes a quasi judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty.”)

power. The very identifying badge of the modern administrative agency has been the combination of judicial power (adjudication) with legislative power (rule making)....”

McHugh v. Santa Monica Rent Control Bd., 49 Cal. 3d 348, 361–62 (1989) (internal citations and quotations omitted).

Because licensing decisions of the Sandbox Entity will involve the exercise of quasi-judicial power, they will thus need to be subject to some level of judicial review, regardless of the structure of the Sandbox Entity.

It is not clear, however, whether the Supreme Court would permit the Sandbox Entity to issue final decisions regarding licensing of sandbox participants to engage in certain practice of law activities, subject only to judicial review in a mandamus-type proceeding. Given the judiciary’s primary and inherent authority over the practice of law, including the admission and discipline of attorneys, the Supreme Court has never granted the State Bar (nor has the Legislature purported to grant it) the ability to admit or disbar attorneys; rather, the State Bar makes recommendations regarding licensing or disbarment that take effect only upon Court order:

Although disciplinary proceedings in the State Bar Court include quasi-judicial evidentiary hearings and decisions rendered by official adjudicators, the State Bar Court is not an ordinary administrative agency. The State Bar Court is not an administrative board in the ordinary sense of the phrase. It is *sui generis*.... In matters of discipline and disbarment, the State Bar Court is but an arm of this court, and ... this court retains its power to control any such disciplinary proceeding at any step.

...

Statutory provisions for our review of State Bar Court decisions reflect a legislative acknowledgment that we exercise original jurisdiction over disciplinary proceedings, and that the State Bar’s determinations are advisory only.... Because the State Bar is subject to our expressly reserved, primary and inherent regulatory authority over attorney discipline, we properly may utilize the State Bar Court to conduct the preliminary investigation, hearing, and determination of complaints.

In re Rose, 22 Cal. 4th 430, 439-442 (2000) (internal quotations and citations omitted).

While general separation of powers principles suggest that the Sandbox Entity could be granted authority to conduct licensing proceedings subject only to mandamus-type review by the courts, the Supreme Court’s primary authority over the practice of law may accordingly lead it

to decline to delegate licensing decisions. In practical terms, however, if the Court were to reserve to itself the ability to license participants into the regulatory sandbox (and to revoke such licenses), that may not result in extensive Court involvement in the decisionmaking process. Even in the area of attorney licensing and discipline, the Court routinely summarily approves and/or denies review of State Bar recommendations. *See, e.g. Rose*, 22 Cal. 4th at 448 (“In sum, our denial of a petition for review of a State Bar Court disciplinary decision is a final judicial determination on the merits for purposes of establishing federal jurisdiction and res judicata. Furthermore, the circumstance that we may summarily deny such a petition does not preclude an attorney from having an adequate opportunity to litigate federal claims in this court.”); *see also In re Silverton*, 36 Cal. 4th 81, 89 (2005) (“In attorney discipline matters, we generally accord great weight to the Review Department's recommendation.”)

IV. Supreme Court Authorization, Oversight, and Review of the Sandbox Entity Would Most Likely Not Cause Recusal Issues for the Supreme Court

Given that the Supreme Court action will be required to authorize the regulatory sandbox and that antitrust and separation of powers principles will likely require judicial oversight of the Sandbox Entity and review of its decisions (or adoption or rejection of its recommendations), the question has arisen whether Supreme Court involvement in the regulatory sandbox would necessitate its recusal from litigation involving sandbox participants or, if gifts are accepted, from donors supporting the Sandbox Entity.

After a review of the California Code of Judicial Ethics rules applicable to appellate justices, as well as substantially similar Code of Civil Procedure recusal provisions applicable to trial court judges, and caselaw and decisions of the California Supreme Court Committee on Judicial Ethics Opinions interpreting the same, OGC has concluded that it is unlikely that Supreme Court involvement in the Sandbox Entity would necessitate its recusal from later cases involving sandbox participants. There is a greater risk that recusal would be necessary in cases involving donors to the Sandbox Entity, if donations were accepted.

A. Applicable recusal standard

Disqualification standards for appellate justices are set forth in Canon 3E of the California Code of Judicial Ethics. These standards mandate recusal largely based on personal interests of justices, such as interests arising from a justice's service as a lawyer prior to joining the bench, justices' financial interests in parties to litigation, or justices' receipt of campaign contributions of \$5,000 or more from parties or attorneys appearing before the court. *See* Cal. Code Jud. Eth., Canons 3E(5)(a), 3E(5)(d), 3E(5)(j).

However, the Code of Judicial Ethics also generally requires recusal where the justice subjectively believes recusal is necessary or, as most relevant here, where the justice's impartiality would objectively be in doubt. Specifically:

An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

- (a) the justice believes his or her recusal would further the interests of justice; or
- (b) the justice substantially doubts his or her capacity to be impartial; or
- (c) *the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.*

Cal. Code Jud. Eth., Canon 3E(4) (emphasis added). "Impartial" means "the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge." Cal. Code. Jud. Eth., Terminology.

In evaluating whether recusal is required under the objective test set forth in Canon 3E(4)(c), "the reasonable person is not someone who is hypersensitive or unduly suspicious, but rather is a well-informed, thoughtful observer." *Wechsler v. Superior Court*, 22 Cal. App. 4th 384, 391 (2014) (internal quotations omitted). "Moreover, the reasonable person must be viewed from the perspective of the reasonable layperson, someone outside the judicial system, because judicial insiders... may regard asserted conflicts to be more innocuous than an outsider would." *Id.* (internal quotations omitted). However, the reasonable person standard must not be applied too broadly:

The California Supreme Court has cautioned that a party raising the issue has a heavy burden and must clearly establish the appearance of bias. The appearance-of-partiality standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. A judge has a duty to decide any proceeding in which he or she is not disqualified. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.

Id. (internal quotations and citations omitted).

B. Potential conflict resulting from litigation involving sandbox participants

With respect to a potential conflict involving participants in the regulatory sandbox, a potential conflict could come before the Court in one of two ways.

First, litigation could arise concerning a sandbox participant that concerns the validity, interpretation, or application of the regulations governing the Sandbox Entity. One could conceive of someone arguing that, because of the Supreme Court's creation, review and/or approval of such rules, its justices could not be partial in later litigation challenging or even interpreting these rules. However, justices' involvement in rulemaking is not grounds for recusal when those rules are later challenged or applied.

In *Curran v. Mount Diablo Council of the Boy Scouts*, the Court considered whether its adoption of a Code of Judicial Ethics provision barring judges from membership in organizations that discriminate on the basis of sexual orientation could give rise to a reasonable appearance of conflict precluding the Court's consideration of a challenge to the Boy Scouts's rejection of an applicant to become an assistant scoutmaster based on his sexual orientation. The Court explained:

. . . even if the court's action in adopting the code were to have reflected a legal conclusion on an issue relevant to these proceedings, the adoption of the code still would not give rise to a conflict of interest that would affect the justices' participation in these cases. **Courts routinely are called upon to apply, modify, or reconsider prior legal determinations in subsequent litigation, and a judge's participation in a prior decision involving a related legal issue has not been viewed as creating a conflict of interest or providing a basis for recusal in the later proceeding.**

Curran v. Mount Diablo Council of the Boy Scouts, 17 Cal. 4th 670, 684 fn 10 (1998) (emphasis added).

And, recently, the California Supreme Court Committee on Judicial Ethics Opinions applied *Curran* and other reasoning to determine that an appellate justice's involvement in the Judicial Council's promulgation of emergency COVID court rules did not give rise to a conflict of interest requiring the justice's recusal from litigation challenging the validity of those court rules. The Committee explained:

In concluding there was no conflict, the *Curran* court distinguished the court's function of administering the conduct of judges from an individual justice's

adjudicatory duties. This distinction follows more direct authority from other jurisdictions, as noted by a leading commentator on judicial disqualification, Professor Richard Flamm. When a judge has both adjudicative and administrative duties, “courts have held that the dual responsibilities of diligent administration and impartial adjudication do not create a substantial conflict; and . . . judges have routinely declined to recuse merely because a litigant challenges a court’s administrative directive.” (Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (2007) § 10.6, p. 270, citing *N.Y. State Assn. of Crim. Defense Lawyers v. Kaye* (2000) 95 N.Y.2d 556, 559-560 [reasoning that just as a court may reconsider its own rulings, so too may it rule on the validity of its own administrative orders and the judges who comprised the court when it issues the challenged order are not disqualified].)

The leading California commentator, Judge David Rothman, notes that in this state, participation in efforts to draft, pass or defeat laws are expressly not a valid ground for disqualification in circumstances where the meaning, effect, or application of the law is at issue in a matter before the judge, “unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.” (Code Civ. Proc, § 170.2, subd. (c); Rothman, *supra*, § 7:16, pp. 410-412.) For appellate justices, this nonground for disqualification is provided in canon 3E(6)(c) [it shall not be a ground for disqualification that a justice has, as a public officer, participated in the drafting of laws when the meaning, effect, or application of those laws is before the justice, unless the justice believes that his or her prior involvement was so well known that it raises reasonable doubt in the public mind as to impartiality].)

Applied here, this canon supports *Curran’s* distinction between administrative rulemaking and adjudicatory duties and exempts this inquiring justice’s involvement in the adoption of emergency rules as a ground for disqualification.

California Supreme Court Committee on Judicial Ethics Opinions Oral Advice Summary 2020-036 (Aug. 7, 2020), *available at* <https://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Oral-Advice-Summary-2020-036.pdf> (last visited July 6, 2021).

Based on *Curran* and the reasoning of the California Supreme Court Committee on Judicial Ethics Opinions, the Supreme Court’s involvement in the Sandbox Entity’s rulemaking would not necessitate recusal by Supreme Court justices in later litigation involving those rules.

Second, litigation could arise involving sandbox participants having nothing to do with the sandbox regulation. The question has been raised whether the Supreme Court, by virtue of its authorization of the regulatory sandbox and its resulting interest in seeing the sandbox program succeed, might need to recuse itself from litigation involving sandbox participants. For example, if a large tech company were granted permission to participate in the sandbox and later had major litigation before the Supreme Court, would the Supreme Court justices need to recuse themselves from hearing the litigation on the theory that the Supreme Court would not want to cause monetary harm to a sandbox participant?

OGC has been unable to locate any authority suggesting that such a general institutional interest in the success of a judicial branch program would constitute “circumstances such that a reasonable person aware of the facts would doubt the [Supreme Court’s] ability to be impartial,” thus requiring recusal from any cases involving sandbox participants. Rather, it appears that such an interest is more speculative and attenuated such that recusal would not be required.

OGC has not found any authority addressing whether a justice’s general interest in the success of the judiciary can give rise to a conflict. Courts have, however, considered and rejected the notion that institutional affiliations in general, standing alone, give rise to a conflict. *See Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 99 Cal. App. 4th 880, 885–86 (2002) (“We will not presume that state-employed professional ALJ’s cannot, will not, or do not bring a constitutional level of impartiality to the cases they hear, even if one side is the agency that directly employs them. The procedure here was constitutionally permissible.”) Similarly, courts have held that the fact that a judge is an alumnus of a university would not give rise to reasonable doubts as to impartiality necessitating recusal. *See, e.g., Leland Stanford Junior University v. Superior Court*, 173 Cal. App. 3d 403, 408 (1985).

And, while the issue of recusal has not been addressed in these decisions, the Supreme Court has often heard cases involving the State Bar or the Judicial Council as a party. *See, e.g., Barry v. State Bar of California*, 2 Cal. 5th 318, 320–21 (2017) (ruling that superior court had jurisdiction to award State Bar attorney fees under anti-SLAPP statute notwithstanding that superior court lacked jurisdiction to hear entire case against State Bar). Presumably, the Supreme Court has at least the same level of institutional interest in the success of the State Bar, its “administrative arm ... for the purpose of assisting in matters of admission and discipline of attorneys,” *In re Rose*, 22 Cal. 4th at 438 (internal citations omitted), as it would in the success of a regulatory sandbox program.

Finally, even if the Court’s institutional interest in the success of the sandbox entity could be a ground for doubting the partiality of the Court in considering litigation that could impact the

success of the Sandbox Entity, it is difficult to conceive of litigation where the Court's decision on matters unrelated to the regulatory sandbox would have a foreseeable impact on the success of the program. For instance, in the case of a major technology provider who is a sandbox participant and then has unrelated litigation before the Court, there appears no clear causal link between the Court's decision on that litigation and the success of the regulatory sandbox. The technology provider presumably would have participated in the regulatory sandbox because doing so was in its best interests. That decision would be unaffected by whether the Court later ruled for or against the sandbox participant on an unrelated matter. This lack of causation sets the potential conflict caused by the Court's oversight of the regulatory sandbox apart even from the *Barry* and *Stanford* cases discussed above, where no conflict was found. In those cases, if one were to accept the proposition that the judge had a disqualifying interest in Stanford's or the State Bar's monetary gain, that interest would have been directly impacted by the court's decision in those cases. By contrast, the effect of a Supreme Court decision regarding a sandbox participant in litigation unrelated to the sandbox would be highly speculative.

For these reasons, it is unlikely that the Supreme Court would need to recuse itself from hearing cases involving sandbox participants due to its involvement in overseeing the regulatory sandbox.

C. Potential conflict resulting from litigation involving sandbox donors

As discussed above, it is unlikely that the Supreme Court would need to recuse itself from hearing cases that involve sandbox participants. However, a stronger argument could be made that a reasonable person would doubt the Court's ability to be impartial in a case involving a party that had donated to support the Sandbox Entity, thus requiring recusal. As mentioned above, we have been unable to find any authority addressing whether the judiciary's general interest in the success of the judicial system could give rise to a conflict, and the Supreme Court's hearing of litigation against the State Bar and Judicial Council suggest that the Court can hear cases in which parts of the judicial system have strong interests. But, if such an institutional interest in the Sandbox Entity could give rise to a conflict, that interest would be more directly implicated in cases in which a donor to the Sandbox Entity was a party; conceivably, an adverse decision could make the party less likely to continue offering the Sandbox Entity voluntary support.

D. Court will ultimately decide whether potential conflict exist

As discussed above, the available authority does not suggest that the Supreme Court would be required to recuse itself from cases involving sandbox participants, though a stronger argument

could be made that the Court should recuse itself from cases involving donors to the Sandbox Entity, should donations be accepted.

On the other hand, there is no authority clearly stating that the Court would *not* have a conflict in these cases, and ultimate determination of recusal issues would be up to the Court. Further, even if the Court did not find that a reasonable person would doubt its ability to be impartial in cases involving sandbox participants, thus requiring recusal under the objective standard set forth in Canon 3E(4)(c) of the Code of Judicial Ethics, justices could nonetheless conclude that recusal would further the interests of justice or they could substantially doubt their own ability to be impartial in any particular case, and recuse on that basis. See Cal. Code Jud. Eth., Canon 3E(4)(a), 3E(4)(b).

Should the Court determine that recusal issues are a concern and that the risk that the Court may need to recuse itself in a future case should be minimized, recusal risks could be addressed by lessening the Court's direct involvement in the Sandbox Entity while maintaining the judicial branch oversight required to avoid antitrust issues and/or illegal delegation of judicial power. This may be achieved through the use of special masters or other judicial officers to perform court functions related to the Sandbox Entity. Cal. Code Jud. Eth., Canon 3E(4)

V. No Law Would Preclude the Sandbox Entity from Contracting with Other State Entities, Regardless of Its Structure

In identifying potential legal issues related to its consideration of structures for the Sandbox Entity, CTJG has inquired whether the Sandbox Entity, taking the form of any of the three structures currently under consideration, would be barred from contracting with other state agencies for support services.

OGC has researched applicable law and determined that there would be no legal barrier to the Sandbox Entity contracting with other government agencies for services under any of the contemplated structures. If established within the Judicial Council, the Sandbox Entity's contracting activities would be governed by the California Judicial Branch Contract Law ("CJBCL"), Cal. Pub. Cont. Code §§ 19201, *et seq.* The Judicial Branch Contracting Manual, promulgated pursuant to the CJBCL, specifically provides that judicial branch entities, including the Judicial Council, "may enter into Memoranda of Understanding (MOUs) with other governmental entities for goods or services." Judicial Branch Contracting Manual § 1.1.B.2 (Judicial Council of California 2020), *available at* <https://www.courts.ca.gov/documents/jbcl-manual.pdf> (last visited July 6, 2021). If, on the other hand, the Sandbox Entity were structured as a new agency within the judicial branch, akin to the State Bar, the enacting legislation could grant contracting authority to the Sandbox Entity, just as the State Bar Act grants contracting

authority to the State Bar. *See, e.g.,* Cal. Bus. & Prof. Code §§ 6001(a), 6008.1, 6008.4, 6008.6. Under this authority, the State Bar contracts with government agencies, including, for example, with the California Department of Justice for fingerprinting services. A Sandbox Entity established with similar authority would also be able to contract with other government agencies.

Finally, there would be no bar on a Sandbox Entity structured as an independent nonprofit from contracting with other government agencies. A recent example of the creation by the Legislature of an independent non-profit organization was the 2018 spin-off of the California Lawyers Association pursuant to California Business and Professions Code section 6056, which provided in relevant part:

The State Bar, acting pursuant to Section 6001, shall assist the Sections of the State Bar to incorporate as a private, nonprofit corporation organized under Section 501(c)(6) of the Internal Revenue Code and shall transfer the functions and activities of the 16 State Bar Sections and the California Young Lawyers Association to the new private, nonprofit corporation, to be called the California Lawyers Association. The California Lawyers Association shall be a voluntary association, shall not be a part of the State Bar, and shall not be funded in any way through mandatory fees collected by the State Bar. *The California Lawyers Association shall have independent contracting authority and full control of its resources.*

Cal. Bus. & Prof. Code § 6056(a) (emphasis added). Once established, the CLA entered into an employee leasing agreement pursuant to which it reimbursed the State Bar for services provided by certain State Bar employees to the CLA during an initial transition period.

While there exists no blanket prohibition on the Sandbox Entity, in whatever form it takes, from contracting for services from other state agencies, such agencies may not have the capacity to or be willing to provide such services. In the case of the CLA's employee leasing agreement with the State Bar, for instance, the employees at issue were available because their State Bar work was focused on the CLA prior to the spin-off; some of the covered employees subsequently joined the CLA as employees. To the extent the Sandbox Entity will need to hire services from other entities rather than hiring employees of its own, the Sandbox Entity should identify the services needed and ascertain the availability and willingness of particular state agencies to provide those services.

VI. No Law Would Prohibit the Sandbox Entity from Accepting Donations from Private Sources, Regardless of Its Structure

CTJG also inquired whether any law would preclude the Sandbox Entity from accepting donations from private sources.

No existing law would prohibit the Sandbox Entity from accepting gifts from private sources, as state agencies and private nonprofits are generally permitted to accept gifts. For instance, if the Sandbox Entity were structured as part of the Judicial Council, it would be subject to the California Rules of Court pertaining to the Judicial Council, which specifically provide that the Judicial Council's Administrative Director may accept gifts on behalf of the Judicial Council "if the gift and any terms and conditions are found to be in the best interest of the state." Cal. R. Ct., rule 10.102(a). Or, if the Sandbox Entity were structured as a new agency under the judicial branch, the Legislature could specifically grant it the authority to accept gifts, as it did for the State Bar in the State Bar Act. See Cal. Bus. & Prof. Code § 6001(e) (State Bar may "acquire by gift, bequest, devise or otherwise, any real or personal property or any interest therein.")

While it would be legally permissible for the Sandbox Entity to accept gifts from private sources, doing so may raise the appearance of a conflict of interest, depending on the source, timing, and terms of the gift or gifts accepted. Gifts to government agencies, while generally permissible, have been publicly criticized as attempts to procure access. See, e.g., Melody Guitierrez, How a \$1-million donation on behalf of Newsom was hidden in plain sight, L.A. Times, April 30, 2021, available at <https://www.latimes.com/california/story/2021-04-30/charity-contributions-california-lawmakers-hidden-donor-advised-funds-nonprofit> (last visited July 6, 2021). Acceptance by the Sandbox Entity of donations from entities that are participating or wish to participate in the regulatory sandbox may be viewed as attempts to curry favor with the Sandbox Entity. And, as discussed above in Part IV(c), if the Sandbox Entity accepts gifts from private parties, those gifts may later cause recusal issues for the Supreme Court if the donors are parties to litigation before the Supreme Court. Regardless of the structure the Sandbox Entity takes, careful consideration should be given to whether gifts should be accepted and, if so, under what terms. Further, if gifts are accepted, they should be fully disclosed to promote transparency and public faith in the Sandbox Entity.⁵

⁵ Gifts made at the behest of elected officials would be subject to disclosure under the Political Reform Act. See Cal. Gov. Code § 84224.

VII. If Structured as an Independent Non-Profit Entity, the Sandbox Entity Would Most Likely Not Be Protected by Immunities Under the Government Claims Act and May Not Be Entitled to Immunity Under the Eleventh Amendment

In California, claims for damages against public entities and public employees are governed by the Government Claims Act. Cal. Gov. Code §§ 810, *et seq.* The Government Claims Act immunizes public entities and employees against damages based on various types of claims including, as potentially relevant to the Sandbox Entity: liability based on instituting or prosecuting administrative proceedings; liability based on issuing, denying, suspending, or revoking, or failing to issue, deny, suspend, or revoke any license or permit; and liability based on the exercise of discretion by public employees.⁶ Where liability against a public entity is permitted, the Government Claims Act provides procedural protections, including the requirement that claims be presented to the public entity for review and approval or denial prior to the filing of a lawsuit in court.⁷

For purposes of the Government Claims Act, “public entity” is defined as “the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and *any political subdivision or public corporation within the state.*” *Id.* § 811.2 (emphasis added). A “public employee,” for purposes of the Government Claims Act, means “an employee of a public entity.” *Id.* § 811.4. The Government Claims Act thus protects the State Bar, a public corporation, and its employees. *See also Rosenthal v. Vogt*, 229 Cal. App. 3d 69, 74-75 (1991) (various tort claims against State Bar and its employees barred by Government Claims Act). The Judicial Council and its employees are likewise covered by the Government Claims Act. *See* Cal. Gov. Code § 900.3 (“A ‘judicial branch entity’ is a public entity and means any superior court,

⁶ *See* Cal Gov. Code § 821.6 (“A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.”); *id.* § 815.2 (“Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.”); *id.* § 818.4 (“A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.”); *id.* § 821.2 (providing to public employees immunity substantially identical to that provided to public entities by California Government Code section 818.4); *id.* § 820.2 (“Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”).

⁷ *See* Cal. Gov. Code § 905 (requiring presentment of all claims for money or damages against a “local public entity,” subject to various exceptions); *id.* § 900.4 (“‘local public entity’ includes any “political subdivision or public corporation in the State”); *id.* § 945 (“[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon . . . or has been deemed to have been rejected[.]”).

court of appeals, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts.”)

Thus, if the Sandbox Entity were structured as part of the Judicial Council or as a sister entity to the State Bar, the entity and its employees would be protected by the Government Claims Act as are the Judicial Council and State Bar and their employees. However, an independent nonprofit organization would most likely not be protected by the Government Claims Act as there exists no authority suggesting that such an entity could be a “public entity” under the statute. *Cf. Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1130 (9th Cir. 2002) (holding that California Interscholastic Federation, a voluntary, non-profit association made up of both public and private members, is not a “local public entity” within the meaning of the Government Claims Act: “[T]he CIF has cited no case, and we have been unable to find any, which holds, or even suggests, that a voluntary, non-profit association, made up of both public and private members, is a ‘local public entity’ within the meaning of the California Tort Claims Act, and we decline to so hold.”).

Further, state agencies and their employees acting in their official capacities are immune to suit in the federal courts pursuant to the Eleventh Amendment. Both the State Bar and the Judicial Council have been recognized as state agencies immune to suit in federal court. Thus, the Sandbox Entity and its employees acting in their official capacities would likely be entitled to immunity in federal court were the Sandbox Entity structured as part of the Judicial Council or, like the State Bar, as a public corporation under the judicial branch. *See Hirsh v. Justices of Supreme Court*, 67 F.3d 708, 712, 715 (9th Cir. 1995) (holding State Bar of California is a “state agency” entitled to Eleventh Amendment immunity); *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (affirming dismissal on Eleventh Amendment grounds of suit against State Bar of California), *cert. denied*, 474 U.S. 916 (1985); *Taylor v. Kelety*, No. 20-CV-1987-DMS-AGS, 2021 WL 1733386, at *5 (S.D. Cal. May 3, 2021) (Judicial Council immune under Eleventh Amendment); *see also Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004) (stating Judicial Council “is clearly a state agency”). Whether or not the Sandbox Entity would be entitled to immunity from federal suit under the Eleventh Amendment would depend on the particular details of the entity and its relationship with the state. *See generally Crowe v. Oregon State Bar*, 989 F.3d 714, 731 (9th Cir. 2021) (holding that Oregon State Bar not entitled to immunity under the Eleventh Amendment pursuant to *Mitchell* test, which considers: “[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.”). Organization as a non-profit would not automatically preclude Eleventh Amendment immunity. *See, e.g., Doe ex rel. Kristen D. v. Willits Unified Sch. Dist.*, No. C 09-03655 JSW, 2010 WL 890158, at *4 (N.D. Cal. Mar. 8, 2010) (holding that charter school operated by nonprofit is protected by Eleventh Amendment, primarily because a money judgment against it would be satisfied out of state funds).

VIII. Article VI, Section 9 of the California Constitution Most Likely Does Not Bar Any of the Potential Structures for the Sandbox Entity

Finally, CTJG has inquired whether Article VI, Section 9 of the California Constitution would require sandbox participants to be members of the State Bar. OGC has reviewed this issue and concluded that this provision most likely does not apply to sandbox participants at all. The provision at issue states:

The State Bar of California is a public corporation. *Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar* except while holding office as a judge of a court of record.

Cal. Const. art. VI, § 9 (emphasis added).

Because CTJG will be considering recommending the creation of a regulatory sandbox that would permit participants to provide defined practice of law services, the question has arisen whether this provision requires sandbox participants to be members⁸ of the State Bar (and thus whether the provision would require the regulatory sandbox to be overseen by the State Bar). For this provision to require sandbox participants to be members of the State Bar, it would need to be read very broadly as requiring every person or entity who practices law in California, even to a limited extent, to be members of the State Bar. Such a broad interpretation would mean that numerous provisions of the California Rules of Court that permit limited practice of law in California by persons who are *not* members of the State Bar are invalid. See Cal. R. Ct., rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.41.1. (registered military spouse attorney), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel), 9.44 (registered foreign legal consultant), 9.45 (registered legal aid attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing law temporarily in California as part of litigation), 9.48 (nonlitigating attorneys temporarily in California to provide legal services).

While we have been unable to find any cases interpreting the meaning of the Constitutional provision that “[e]very person admitted and licensed to practice law in this State is and shall be a member of the State Bar,” if the proper interpretation were that any person engaged in even limited practice of law activities must be a member of the State Bar, it is unlikely that the Supreme Court would have approved the many rules allowing non-members of the State Bar to practice law in California on a limited basis. Rather, the best interpretation of the provision is

⁸ Following the spin-off of the associational/membership aspects of the State Bar (i.e., the Sections and California Young Lawyers Association), attorneys licensed by the State Bar are no longer referred to as “members,” but rather as “licensees.” Cal. Bus. & Prof. Code § 6002(b) (“As used in this chapter or any other provision of law, ‘member of the State Bar’ shall be deemed to refer to a licensee of the State Bar.”)

that it simply states that fully admitted California attorneys are members of the State Bar. This was the interpretation set forth in a formal opinion of the Attorney General, which considered whether the Rule of Court permitting limited practice by registered foreign legal consultants—non-members of the State Bar—violated the provision. In opining that allowing practice of law by registered foreign legal consultants did not violate this provision, the Attorney General reasoned as follows:

This section was enacted in November 1960 as article VI, section 1c, to constitutionalize the “integrated bar”, i.e., a compulsory association of attorneys that conditions the practice of law in a particular state upon membership and mandatory dues payments, as established in 1927 upon the adoption by the Legislature of the State Bar Act (Bus. & Prof. Code, § 6000 et seq.).¹ (*Cf. Keller v. State Bar* (1989) 47 Cal.3d 1152, 1159.) **However, section 9 by its express terms applies only to those who are admitted and licensed to practice law in this state. Consequently, the section provides no impediment to the registration of those, such as RFLCs, who are neither admitted and licensed nor qualified for admission and licensure to practice law, e.g., by examination (see discussion, post), and taking of an oath to support the Constitution of the United States and the Constitution of the State of California** (Bus. & Prof. Code §6067).

73 Ops.Cal.Atty.Gen. 172 (1990) (emphasis added).

In other words, this provision simply states that those who have been fully qualified and admitted to practice law in California are members of the State Bar.

The Attorney General’s interpretation is also consistent with the ballot materials for the proposition, which do not indicate an intent other than Constitutionalizing the status quo of State Bar membership by California attorneys. Specifically, the ballot pamphlet argument in favor of the proposition (there was no argument opposed to it) stated:

Inasmuch as the measure provides that the State Bar shall appoint the four lawyer members of the Judicial Council and the two lawyer members of the Commission on Judicial Qualifications, both of which are created by the State Constitution, it is thought advisable to include a provision giving the State Bar, which is now a statutory entity, the status of a constitutional body too. The Legislature, however, will continue to have power to regulate the administration of the State Bar by statute as it now does.

Administration of Justice, California Proposition 10 (1960), *available at* http://repository.uchastings.edu/ca_ballot_props/618 (last visited July 6, 2021). There is no indication in the ballot materials that the provision was intended to require that non-attorneys, including providers of technologies performing limited practice of law activities—a concept that would have been in the realm of science fiction when the provision was enacted in 1960—would need to be members of the State Bar in order to perform limited practice of law activities.

Consistent with the Attorney General opinion and the longtime existence of Rules of Court permitting practice of law activities in California by non-members of the State Bar, Article VI, Section 9 of the California Constitution most likely does not require sandbox participants to be members of the State Bar or compel any particular structure for the Sandbox Entity.



DATE: August 4, 2021

TO: Closing the Justice Gap Working Group

FROM: SAGE Subcommittee

SUBJECT: II.A. Discussion and Possible Action on a Subcommittee Recommendation for the Structure and Governance of a Sandbox Regulatory Authority

For Closing the Justice Gap Working Group August 11, 2021 meeting agenda item II.A. – Discussion and Possible Action on a Subcommittee Recommendation for the Structure and Governance of a Sandbox Regulatory Authority, the SAGE Subcommittee will present the resolutions set forth below for consideration by the Working Group.

RESOLVED, that the structure of the Sandbox Regulator will have the following features:

1. The Sandbox Regulator will be established by the Legislature as a [public corporation] within the judicial branch of government, serving as an arm of the California Supreme Court.
2. As with all existing occupational licensing regulatory bodies in California, the Sandbox Regulator will eventually be funded primarily by applicant fees. However, reliable start-up funding will be necessary to ensure adequate resources for monitoring, data collection and analysis, and consumer protection. Ideally, this start-up funding would be funded by the general fund as a pilot program with the possibility of appropriate grants and other such funding as supplementation. We envision that the Legislature might continue to appropriate funds to subsidize applicants who are working specifically to provide legal services to those who cannot currently afford them.
3. The Sandbox Regulator is subject to active supervision by the Supreme Court and must act pursuant to clearly articulated state policy. The Sandbox Regulator should make recommendations to the Supreme Court concerning the licensing and discipline of sandbox participants. However, as with attorneys, the Court should reserve to itself the authority over licensure of sandbox participants and approval of any governing principles it employs. The Supreme Court shall exercise that authority as it deems most efficient and appropriate.
4. The Sandbox Regulator should have a volunteer board with responsibility for all operations of the office, including licensing and discipline recommendations made to the Supreme Court.

The Sandbox Regulator should also have a staff which handles routine operations, makes assessments, and monitors sandbox participants under the Board's supervision.

5. The Sandbox Regulator board should consist of 7 public members and 6 legal services providers, with the Senate and Assembly each nominating one public member, the Governor nominating the remaining public members, and the Supreme Court nominating the legal services providers. The Governor's nominees must include an economist, a technologist, and a nonlawyer provider of services to communities with significant unmet legal needs. The Supreme Court's nominees must include at least one each of individuals with legal ethics, legal services, and court self-help experience.
6. The Sandbox Regulator should be established for an initial period of 7 years. If the Legislature does not approve a continuation of the office at that time, then the Supreme Court should make provision for active sandbox participants that seek to continue providing their authorized service to do so under such terms and conditions as the Supreme Court deems appropriate.