



The State Bar of California

CLOSING

II.E. Scope of Sandbox
09-03-21 Scope Meeting
Open Session

WORKING GROUP

DATE: August 30, 2020

TO: Scope Subcommittee, Closing the Justice Gap Working Group

FROM: David Freeman Engstrom

SUBJECT: I.E. Recommendation for the Scope of a Regulatory Sandbox, including a Sandbox Mission Statement and the Kinds of Innovations to Encourage

A key issue we must address as a group as we move toward a full sandbox recommendation is the scoping question that we've debated on and off, both within the SCOPE subcommittee and as a full working group, from the start: whether and how to limit the providers who can gain entry to the sandbox.

I take seriously the concerns and arguments raised by members of this group and of the public around the question of the sandbox scope—*i.e.*, whether the sandbox should be “judiciously limited” to some subset of providers or “wide open” to all comers. We have had many discussions on this issue and there continue to be important points to be made and addressed. Nevertheless, we have to move forward.

By way of this short memo, I am taking it upon myself—hopefully not in an unwelcome way—to propose a shift in our focus away from the question of the charter and mission statement and into the work of designing the institution of the sandbox. Doing so will, I believe, enable us to move through some of the barriers set up by our differing positions on the sandbox scope and into design work that will require, and can embody, representation and compromise.

Working across our formal charter and also the “fact sheet” that accompanied it,¹ virtually the entirety of the guidance provided to us as a working group is contained in the following enumerations of tasks:

- “Foster experimentation with innovative legal services delivery systems in a manner that both protects the public and yields data to assess the impact on access to legal

¹ State Bar of California, *Closing the Justice Gap Working Group*, <https://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group>.

services of possible changes in the laws and rules regulating the practice of law in California”;

- “Evaluate possible changes to existing laws and rules that otherwise inhibit the development of innovative legal service delivery systems, such as consumer-facing technology that provides legal advice and services directly to clients at all income levels”; and
- “Evaluate changes to laws and rules that inhibit the formation and continuation of delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, and others.”

One thing I think we can all agree on is that, fairly read, nothing in the above suggests, or even so much as hints, that we are to consider *only* innovation that serves the needy. To the contrary, the “fact sheet” statement in the middle bullet point specifically notes that we are to consider services to clients “at all income levels.” At the same time, nothing in the above *forecloses* a sandbox design that limits entry, either. Our charter says we are to evaluate the “pros and cons of a sandbox as a way to foster experimentation.” Having done so, I suppose we could conclude that a limited design, focused on only the neediest Californians, makes the most sense as a way to spur innovation while protecting the public and then convey as much in our recommendation. But that conclusion would be in no way mandated by the terms of our charter.

I take a wider view of all of this and want to make a different point and a broader appeal. As with so many other complex regulatory areas, any policy or institutional design we craft and propose will necessarily be a “common carrier” of multiple purposes and ends.² Our initial effort to craft a “sandbox mission statement” underscored that point.

Two implications follow from this. First, I think we should acknowledge the ambiguity in our charter and move forward, focusing on the task of designing a workable framework for the sandbox. Though our next meeting agenda says we will revisit our “sandbox mission statement,”³ I hope that we do not spend any of our valuable and scarce time together wordsmithing a mission statement, at least not until we come up with a concrete and workable scoping framework. We tried wordsmithing before, and it’s a thankless and, ultimately, a meaningless task. There’s a reason why a statute’s preamble is, at best, a disfavored guide for courts engaged in statutory interpretation.⁴

Second, and for the same reasons, it is unlikely one of our two camps (“judiciously limited” vs. “wide open”) will ever win the argument. We’re stuck with a soup of values and goals: information, innovation, consumer protection, and distributional concerns. In focusing on the task of institutional design, we should commit ourselves to crafting a consensus, compromise

² See *generally* ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001) (noting the presence of multiple and often competing interests behind institutional changes of any import).

³ State Bar of California, *Closing the Justice Gap Working Group - Subcommittee on the Scope of a Regulatory Sandbox Notice and Agenda* (Sept. 3, 2021), <https://board.calbar.ca.gov/Agenda.aspx?id=16386&t=0&s=false>.

⁴ See *Coosaw Mining Co. v. South Carolina ex. rel. Tillman*, 144 U.S. 550, 563 (1892) (“[E]xpress provisions in the body of an act cannot be controlled or restrained by the title or preamble.”).

design—somewhere between fully open and judiciously limited—that gives adequate voice to the concerns of both camps.

The ultimate question for this group is this: How might we build a sandbox structure that permits the widest breadth of legal services innovation but ensures both that the public is protected and that information and data are generated to guide future policymaking?