



# The State Bar of California

OFFICE OF C

II.C. Separation of Powers  
12-01-21 CTJG Meeting  
Open Session

**DATE:** November 22, 2021

**TO:** Closing the Justice Gap Working Group

**FROM:** Brady Dewar, Assistant General Counsel

**SUBJECT:** II.C. Separation of Powers Issues Regarding Sandbox Oversight

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## I. EXECUTIVE SUMMARY

This memo explores issues surrounding separation of powers and the extent to which the sandbox regulator, or ultimate decisionmaker, would have the authority to exempt sandbox participants from the reach of certain statutory prohibitions if given the authority to do so by the Legislature.

The proposed sandbox contemplates activity that involves the Supreme Court's primary authority over the practice of law, and, potentially, the Legislature's jurisdiction over conduct that is not the practice of law.

At its September 17, 2021 meeting, the Working Group voted in favor of a series of recommendations with respect to the governing structure of a sandbox regulator. Of relevance to this discussion, the Working Group recommended that the regulator: 1) be established by the Legislature as a public corporation or other appropriate entity within the judicial branch of government, serving as an arm of the California Supreme Court; 2) be subject to active supervision by the Supreme Court and must act pursuant to clearly articulated state policy; and 3) make recommendations to the Supreme Court concerning the licensing and discipline of sandbox participants. The adopted recommendation also notes that, as with attorneys, the Court should reserve to itself the authority over licensure of sandbox participants to the extent they are engaged in the practice of law, while recognizing the shared responsibility of the two branches for approval of any governing principles the sandbox regulator employs.

To the extent that the sandbox regulator's role in recommending that a sandbox participant be exempt from the certain rules or statutory requirements might be considered a delegation of decision-making authority, a review of the legal landscape leads to the conclusion that such a delegation will be valid if accompanied by clear instructions from the Legislature and/or Court that resolve fundamental policy issues and provide standards and safeguards to be applied by the sandbox regulator in any decision-making.

The Working Group should keep these concepts in mind when developing recommendations regarding the scope of a potential sandbox, the specific standards for admission to the sandbox, potential exemptions from specified rules or statutes, and any accompanying safeguards to meet the dual goals of improving access to justice and protecting the public. Those detailed recommendations can then be considered by the public, the State Bar Board of Trustees, and, ultimately, the Supreme Court and Legislature, which together will consider whether and how to authorize a sandbox.

## **II. THE SUPREME COURT HAS PRIMARY AUTHORITY OVER THE PRACTICE OF LAW; THE LEGISLATURE MAY REGULATE THE PRACTICE OF LAW SO LONG AS IT DOES NOT MATERIALLY IMPAIR THE JUDICIARY’S EXERCISE OF AUTHORITY, AND THE LEGISLATURE HOLDS THE POWER TO REGULATE CONDUCT THAT IS NOT THE PRACTICE OF LAW**

The Supreme Court has the inherent power to regulate the practice of law. In *In re Attorney Discipline System*—a case in which the Court ordered California licensed attorneys to pay fees to support the State Bar’s attorney discipline system when the Legislature and Governor were unable to reach an agreement on 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 . . . .

*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592 (internal quotations and citations omitted). The judiciary’s primary authority includes the “exclusive right to determine who is qualified to practice law.” *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 727.

The Legislature also may regulate the practice of law, but only to the extent such regulation does not conflict with the judiciary’s exercise of its primary 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* (1994) 7 Cal.4th 525, 543 (emphasis added) (internal citations and quotations omitted). “[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.” *Merco*, 21 Cal.3d at 728-29 (emphasis added). Notably, the State Bar Act itself recognized the judiciary’s primary authority over the practice of law. See, Cal. Bus. & Prof. Code, § 6087 (reciting that State Bar Act shall not be construed as limiting or altering the Supreme Court’s power to disbar or discipline State Bar licensees and recognizing Supreme Court’s authority to issue rules regarding matters reserved to Supreme Court); see also *In re Attorney Discipline System*, 19 Cal.4th at 600 (Cal. Bus. & Prof. Code, § 6087’s “express legislative recognition of reserved judicial power over admission and discipline is critical to the constitutionality of the State Bar Act.”)

The Court’s primary authority over the practice of law is well illustrated by two cases in which the Court invalidated legislative enactments that expanded the class of persons permitted to practice law because the laws materially impaired the Court’s authority to determine who may practice law:

In [*Merco*,] we held that former Code of Civil Procedure section 90, giving non-attorney representatives of corporations the right to appear in municipal court, unconstitutionally infringed on the judiciary’s exclusive right to grant admission to the practice of law. In *In re Lavine* (1935) 2 Cal.2d 324, 329, this court held unconstitutional a statute that automatically reinstated to the bar attorneys who were convicted felons, once they received a full gubernatorial pardon. The statute encroached upon “the inherent power of this court to admit attorneys to the practice of the law and [was] tantamount to the vacating of a judicial order by legislative mandate.” (*Ibid.*) These cases ... entail statutes that impinge on the court’s traditional power to control admission, discipline and disbarment of attorneys.

*Santa Clara County Counsel Attys. Ass’n*, 7 Cal.4th at 543 (citations and quotations omitted). The Court has also invalidated an attempt by the Legislature to discipline certain attorneys as violative of the Court’s primary authority over such matters. See *Hustedt v. Workers’ Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 337–38 (striking down a Labor Code provision authorizing the Workers Compensation Appeals Board to remove or suspend licensed attorneys from practicing before it).

Such disputes are few and far between (the most recent of these examples is 40 years old), which is likely indicative of the Legislature’s and Court’s shared understanding of their roles with respect to regulation of the practice of law.

The judiciary’s primary power to regulate the practice of law is also illustrated by the numerous exemptions the Court has created to the provision of the State Bar Act stating that “[n]o person shall practice law in California unless the person is an active licensee of the State Bar.” Cal. Bus.

& Prof. Code, § 6125.<sup>1</sup> These exemptions are set forth in Division 4 of Title 9 of the California Rules of Court. Entitled “Appearances and Practice by Individuals Who Are Not Licensees of the State Bar of California,” this division contains ten rules permitting—under specified circumstances and subject to safeguards such as agreements to be bound by the Rules of Professional Conduct and the disciplinary authority of the State Bar—the practice of law in California by individuals who are not active licensees of the State Bar. See, e.g., Cal. Rules of Court, 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); 9.47 (registered in-house counsel). These are all *Court-created* expansions of the class of persons permitted to practice law in California.

In general, of course, the judiciary may not make exemptions to statutes such as Business and Professions Code section 6125. This is only permissible here due to the Court’s primary authority over the practice of law. The Legislature, in turn, recognizes these court-created exemptions in Business and Professions Code section 6126, which defines the crime of unauthorized practice of law. See, Cal. Bus. & Prof. Code, § 6126(a) (“Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active licensee of the State Bar, **or otherwise authorized pursuant to statute or court rule to practice law in this state** at the time of doing so, is guilty of a misdemeanor . . . .”) (emphasis added).

To the extent that a duly authorized sandbox permits non-attorneys—whether individuals, entities or software—to engage in limited practice of law activities subject to specified requirements and safeguards, that would be no different in concept from the exemptions the Court has already created to the general requirement that only attorneys licensed by the State Bar may practice law in California.

While the judiciary has primary authority over the practice of law, the legislative power of the state is vested in the Legislature. Cal. Const. Art. IV, § 1; *Cal. Redev. Ass’n v. Matosantos* (2011) 53 Cal.4th 231, 254 (“[T]he entire law-making authority of the state, except the people’s right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution.”) (internal references omitted). This includes the authority to regulate the practice of law where not inconsistent with the Court’s exercise of its primary authority, as well as the authority to regulate conduct that does not include the practice of law, including conduct that is related to the legal system, but that does not constitute the practice of law. For example, the Legislature regulates non-lawyer legal document assistants, Cal. Bus. & Prof.

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<sup>1</sup> The term “practice law” is defined by caselaw:

Although the [State Bar] Act did not define the term “practice law,” case law explained it as “the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.” (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535 (*Merchants*)). *Merchants* included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.

*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128.

Code, §§ 6400, *et seq.*, while explicitly recognizing that such legislation does not authorize the practice of law by non-lawyers. Cal. Bus. & Prof. Code, § 6401.5.

### **III. EVEN THOUGH THE REGULATORY SANDBOX’S FOCUS IS LARGELY ON PRACTICE OF LAW ACTIVITIES, THE STATE BAR HAS COMMITTED THAT A SANDBOX WOULD NOT PROCEED WITHOUT AUTHORIZATION BY THE LEGISLATURE; SUCH AUTHORIZATION WOULD BE REQUIRED IF THE SANDBOX REGULATES CONDUCT THAT IS NOT THE PRACTICE OF LAW**

The regulatory sandbox under consideration by the Working Group is primarily concerned with practice of law activities, and, specifically, potential waivers or exemptions to particular rules and statutes regulating the practice of law to be granted under specific circumstances and with specific safeguards.

Indeed, the Working Group’s charter defines the sandbox as a way to “foster experimentation with innovative legal services delivery systems in a manner that protects the public and allows for the collection of data to assess the impact on access to legal services of **possible changes in the laws and rules regulating the practice of law in California.**” Charter at ¶ 1 (emphasis added). Among the rules cited for consideration by the Working Group are those defining the practice of law and attorney conduct rules, such as Rule of Professional Conduct 5.4, which is Court-created.

However, while the sandbox—as conceived so far—is largely focused on potential exemptions to restrictions regarding the practice of law, it may include exemptions to statutes that do not concern the practice of law, such as the law pertaining to lawyer referral services. Charter at ¶ 3; Cal. Bus. & Prof. Code, §§ 6155–56. Were the sandbox to be permitted to grant any exemptions to those statutory requirements, it could only do so with authorization by the Legislature, of course. The Legislature, presumably, would only allow exemptions to be made for applicants who met specified requirements and only where specific safeguards to protect the public were in place.

Despite the sandbox’s focus on the practice of law, the State Bar’s intention and previously stated commitment is that a sandbox would only proceed if authorized by the Legislature—even if the sandbox’s scope is ultimately limited to practice of law activities. The sandbox would represent a potentially significant change to the provision of legal services in California, and the process for considering it, including this Working Group, anticipates input from various stakeholders and implementation only if authorized by the Court and the Legislature.

### **IV. THE DELEGATION DOCTRINE AND DECISION-MAKING BY THE SANDBOX REGULATOR**

At its September 17, 2021 meeting, as stated in detail above, the Working Group voted to approve a recommendation that the sandbox be regulated by a sister agency to the State Bar. This sandbox regulator, as envisioned by ongoing Working Group discussions, would be empowered to recommend to the Court that applicants be admitted to the sandbox with exemptions from specified rules or statutes as appropriate to the particular model the applicant

seeks to implement. This necessarily raises the question of whether the Legislature may, by reference in a statute, delegate authority to another to exempt certain entities from the reach of certain statutes.

Under the delegation doctrine, the statutes and Rules of Court authorizing the sandbox must provide sufficient instruction to the regulator such that fundamental questions are resolved by the Legislature (or the Court exercising its authority to regulate the practice of law). Legislative power may be delegated, 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* (1971) 20 Cal.App.3d 1, 11 (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* (1983) 35 Cal.3d 184, 190. Thus, some delegation of decision-making authority is permitted. For instance, in *Monsanto Co. v. Office of Environmental Health Hazard Assessment* (2018) 22 Cal.App.5th 534, the Court upheld a law that permitted a private non-governmental organization, the International Agency for Research on Cancer, to identify chemicals that would be treated as known carcinogens subject to the discharge and public warning provisions of California’s Proposition 65. The Court held that this delegation of power to a private party was permissible because: (1) the fundamental policy issues—the decisions to prevent discharge of and issue warnings about cancer-causing chemicals—were not delegated (*Id.* at 550–53); and (2) the Legislature provided adequate directions for implementation for the policies and “adequate protections against abuse of the delegated authority,” including the opportunity for challengers to prove that a chemical poses no significant risk. (*Id.* at 556–559.)

Thus, the sandbox regulator would not be permitted to grant “ad hoc” exemptions to any statutes unfettered by direction from the Legislature. Rather, the sandbox regulator would only be able to exempt an applicant from complying with a statute if the Legislature had expressly authorized the sandbox regulator to grant exemptions from that statute, had decided “truly fundamental issues” about when such exemptions were appropriate, and had put in place safeguards against abuse of the delegated legislative authority. For example, the Legislature could decide that an exemption would be appropriate if the exempted entity was subject to background checks, proactive regulatory measures, and reporting requirements, and if the decisions of the sandbox regulator were reviewed by the Supreme Court. While individual decisions could involve some exercise of discretion, such discretion would be exercised within the confines of guidelines set out in advance by statute.

Similar delegation of power principles may apply to the Court in delegating its authority to regulate the practice of law.<sup>2</sup> In any event, the Court would retain its authority here, as the sandbox is anticipated to make *recommendations* to the Court, which would retain the final authority to admit participants to the sandbox.

## V. ANTICIPATED LEGISLATIVE INVOLVEMENT IN SANDBOX ENTITY

As set forth above, the State Bar has committed to pursue statutory authorization for the sandbox. Moreover, to the extent the sandbox would allow exemptions to statutes that do not concern the practice of law, separation of powers principles would require authorization by the Legislature.

In addition to the foregoing, the Legislature could have continued involvement in and oversight over the sandbox in a number of ways. These include, but would not be limited to, the following:

- Identification of specific statutes that could be subject to exemption by the sandbox and standards and safeguards under which exemptions could be granted.
- Appointment of members to the sandbox regulator's governing board.
- Imposition of reporting requirements on the sandbox regulator.
- Oversight hearings.
- Funding reauthorization, extension, or sunset of the sandbox.
- Adoption or rejection of reforms/modifications piloted in the sandbox in any reauthorization or extension.

In conclusion, the Working Group should be mindful of these separation of powers issues as it continues its work developing recommendations for the regulatory structure and operations of the sandbox. Specifically, recommendations should include clear guidelines that would be set forth in statute and court rule setting forth detailed instructions, standards, and safeguards under which the sandbox regulator will operate when recommending potential statutory exemptions and rule waivers for sandbox providers.

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<sup>2</sup> California cases regarding delegation of regulatory authority generally concern the question of whether legislative authority may be delegated. Here, of course, the Court and the Legislature would authorize creation of the regulatory sandbox. Because such rule-setting activity by the Court with respect to the practice of law is akin to the legislative power, we apply here by analogy the constitutional principles limiting delegation of the Legislature's power to regulate.