



The State Bar of California

II.A.
08-5-22 Meeting
Open Session

CLOSING THE JUSTICE GAP WORKING GROUP

DATE: August 5, 2022

TO: Closing the Justice Gap Working Group

FROM: Merri Baldwin, Vice Chair
Bridget Gramme, Deputy Chief of Programs

SUBJECT: II.A Discussion and Possible Action on Recommendations for Structure and Governance of Possible Sandbox Regulator

BACKGROUND

This item seeks the working group's approval of a partial draft of the report, memorializing the recommendations the CTJG has already approved with respect to the Structure and Governance of a Possible Sandbox Regulator.

The partial draft provides the relevant excerpt from the working group's charter setting forth all elements of structure and governance that should be covered in the final report and contains placeholders for sections of this chapter that will be discussed at a later meeting.

Please note that this partial draft also includes a recommendation regarding the transparency measures that should apply to the Sandbox Regulator that the working group has not yet considered. A separate resolution on this point is provided below for the working group's discussion and approval.

PROPOSED RESOLUTIONS

Rec. 17: The working group recommends that the Sandbox Regulator be subject to California's government transparency statutes including the Bagley-Keene Open Meeting Act and the California Public Records Act. Additionally, the Sandbox Regulator should establish a conflict-of-interest policy for its board members to ensure the independence of the board's decision making.

Rec. 18: The working group approves the partial draft of the report, attached hereto as **Attachment I**, which memorializes the working group's recommendations as to the Structure and Governance of a Possible Sandbox Regulator pursuant to the charter, paragraph 2, subdivisions a-d. Any substantive changes to this portion of the draft report will be subject to a future vote.

STRUCTURE AND GOVERNANCE OF THE PROPOSED SANDBOX

Excerpt from Charter ¶12:

- a. What agency or entity would house and be responsible for operating the sandbox and regulating its participants (the “Regulator”)*
 - b. Governing board structure, composition, and policies that apply to the board of the Regulator*
 - c. Roles for the Supreme Court and/or the Legislature with respect to establishment and governance of the sandbox and the Regulator*
 - d. Transparency measures such as open meetings and public records*
 - e. Reporting requirements from the Regulator to the Supreme Court, the Legislature, and the public*
 - f. Independent evaluation of the sandbox and the Regulator*
 - g. Generalized funding needs and sources of funding*
 - h. The term of the sandbox and the impact of sandbox termination on participants*
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SANDBOX REGULATOR

The working group considered several options for the regulatory structure of the sandbox, assessing the pros and cons of placing regulatory oversight and authority in any of the following: the State Bar; a non-profit entity; the Judicial Council; or a new entity within the judicial branch of government with its own governing board. After much discussion, informed by a memorandum from the Office of General Counsel as to the legal implications of these options,¹ CTJG recommends that the Sandbox Regulator 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 (“Supreme Court”).²
- Separate from, and independent of, the State Bar of California.
- Subject to active supervision by the Supreme Court and required to act pursuant to clearly articulated state policy set forth in legislation and rules of court.³
- Appropriately staffed to maintain administrative operations, accept and analyze applications, collect data, monitor sandbox participants, receive consumer complaints, and recommend appropriate actions to the governing board.⁴

¹ See July 19, 2021 memo to SAGE subcommittee from Brady Dewar

² Recommendation 2

³ Recommendation 4

⁴ Recommendation 5

The working group ultimately voted to recommend the above structure to operate directly under the auspices of the Supreme Court to communicate clearly to the public and lawyers that, as with the regulation of attorneys, those practicing law in the sandbox are under the supervision of the Supreme Court, with its inherent authority, competence, independence, and impartiality. The working group further recommends that, as appropriate, the new entity contract out for informational technology, human resources, and other services from another state agency to minimize bureaucratic duplication.

GOVERNING BOARD

CTJG recommends that the Sandbox Regulator should have a volunteer governing board with responsibility for all operations of the office, including licensing and discipline recommendations made to the Supreme Court as set forth below.⁵

The proposed Sandbox Regulator governing board would consist of seven public members, with the Senate and Assembly each nominating one public member and the Governor nominating the remaining public members, and six members nominated by the Supreme Court. The Governor's nominees would include at least one economist, one technologist, and one nonlawyer provider of services to communities with significant unmet legal needs. The Supreme Court's nominees would include at least one each of individuals with experience with legal ethics, the provision of legal advice and services to low- or moderate-income Californians, and the regulation of law-related services.⁶

TRANSPARENCY⁷

The working group recommends that the Sandbox Regulator be subject to California's government transparency statutes including the Bagley-Keene Open Meeting Act and the California Public Records Act. The State Bar, and all regulators of professional services within the Department of Consumer Affairs in California, are subject to these statutes in order to preserve public trust and provide a means for members of the public to hold government institutions accountable for their actions. Additionally, the working group recommends that the Sandbox Regulator establish a conflict-of-interest policy for its board members to ensure the independence of the board's decision making.

Particularly in light of the fact that new methods and providers of legal advice and services will be admitted into the sandbox, the working group feels that maintaining these fundamental

⁵ Recommendation 5

⁶ Recommendation 6. The term "legal advice and services" as used in this document means individualized assistance with a legal problem, whether provided by a lawyer or other licensed individual or entity. It is meant to be distinct from the term "legal services," which often refers to legal aid organizations in California.

standards of transparency is critical to ensuring the accountability and legitimacy of the Sandbox Regulator, and any of its ultimate recommendations for permanent changes to statutes or rules that may result.

ROLES OF THE LEGISLATURE AND SUPREME COURT

The working group recommends that the sandbox be established only if authorized by both the Supreme Court and the Legislature.⁷

In addition to establishing the governing board as described above, a Legislative enabling act would enumerate the statutes whose application may be modified or exempted for some participants in the Sandbox. The act would also set forth clear guidelines with standards and safeguards under which the Sandbox Regulator must operate when recommending potential statutory exemptions for Sandbox providers. Specifically, it would specify the prerequisites applicants must meet in order to enter the Sandbox and operate under any statutory exemptions, including public protection mechanisms, such as background checks, proposed consumer disclosures, and any other reporting requirements.

Within these pre-established prerequisites, the Sandbox Regulator, through its governing board, would be empowered to recommend to the Supreme 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. The Sandbox Regulator would not be permitted to grant exemptions to any statutes outside of the framework authorized by the Legislature. Exercising its jurisdiction to regulate the practice of law, the Supreme Court would then decide whether to admit approved Sandbox applicants into the Sandbox and thereafter enforce any necessary discipline against any provider, including revocation of authority to operate in the Sandbox, pursuant to the regulatory framework described further in this report. Although the Supreme Court could exercise this authority by the majority vote of its members, the working group recommends that it retain the flexibility to exercise this authority in the manner it deems most efficient and appropriate.⁸

The Legislature would have continued involvement in and oversight over the Sandbox in a number of ways. These include, but may not be limited to, the following:

- Initially authorizing the sandbox as described above
- Funding the sandbox
- Reauthorizing, extending the term of, or sunseting the Sandbox.
- Appointing members to the Sandbox Regulator's governing board.
- Imposing reporting requirements on the Sandbox Regulator.

⁷ Recommendation 15

⁸ Recommendation 4

**REPORTING REQUIREMENTS FROM THE REGULATOR TO THE SUPREME COURT, THE
LEGISLATURE, AND THE PUBLIC**

[Forthcoming]

INDEPENDENT EVALUATION OF THE SANDBOX AND THE REGULATOR

[Forthcoming]

GENERALIZED FUNDING NEEDS AND SOURCES OF FUNDING

[Forthcoming]

**THE TERM OF THE SANDBOX AND THE IMPACT OF SANDBOX TERMINATION ON
PARTICIPANTS**

[Forthcoming]