



The State Bar of California

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

CLOSING THE JUSTICE GAP WORKING GROUP

DATE: August 5, 2022

TO: Closing the Justice Gap Working Group

FROM: Rebecca Sandefur, Vice Chair
Lucy Ricca, CTJG member
Bridget Gramme, Deputy Chief of Programs

SUBJECT: II.B Recommendations for Risk-Based Regulation and Consumer Protection Mechanisms

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 a model for risk-based regulation and consumer protection mechanisms in the Sandbox.

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

PROPOSED RESOLUTION

Rec. 19: The working group approves the partial draft of the report, attached hereto as **Attachments I and II**, which memorialize the working group's recommendations as to Consumer Protection Mechanisms, pursuant to the charter, paragraph 6. Any substantive changes to this portion of the draft report will be subject to a future vote.

CONSUMER PROTECTION MECHANISMS

Excerpt from Charter ¶ 6:

- a. *Principles of oversight of persons and entities authorized to participate in the sandbox, including*
 - i. *Identification and enumeration of specific legal consumer harms to be targeted by the proactive regulatory function and corresponding data reporting requirements*
 - ii. *Compliance and accountability mechanisms, including any required level of involvement of a California licensed attorney in a sandbox participant's business model*
 - iii. *Expectations of conduct for sandbox participants to ensure public protection and privacy*
 - b. *Principles for enforcement relating to sandbox participants, including*
 - i. *Processing and investigation of client complaints*
 - ii. *Suspension or removal from the sandbox*
 - c. *Available Consumer Remedies*
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The working group recommends the following general framework for a risk-based regulatory approach for oversight within the sandbox to guide the Sandbox Regulator in balancing public protection and increasing access.¹

IDENTIFYING AND PREVENTING CONSUMER HARM

Sandbox regulation should assess the risk of the following harms to consumers:

1. The consumer receives inaccurate or inappropriate legal services.
2. The consumer fails to exercise legal rights through bad advice or incomplete information within the scope of the agreed-upon services.
3. The consumer receives an unnecessary legal service or pays an inappropriate amount for legal services.
4. The consumer experiences fraud, theft, loss of privacy, or abuse of trust by the service provider.²[GB1]

For the purpose of admission to the sandbox, the working group recommends that the risk of harm to consumers be measured relative to the experience the consumer would have had absent the legal services provided.

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¹ Recommendation 16

² Recommendation 9

COMPLIANCE AND ACCOUNTABILITY MECHANISMS

Proactive Regulation

Traditional regulation uses primarily reactive tools to supervise licensees: the regulator receives a complaint about potential harm, investigates the complaint, and then after a hearing process imposes some form of discipline on the licensee.

The working group recommends that the Sandbox Regulator instead adopt a proactive regulatory approach, whereby providers are assigned a level of risk depending on their proposed service model and supervised accordingly to maximize consumer protection.³ These methods are designed to prevent harm from occurring in the first instance. An important part of this approach remains that the Sandbox Regulator will receive and investigate consumer complaints and impose discipline or corrective action if needed, but the Sandbox Regulator will not wait for a complaint before investigating.

A key function of any sandbox project is to collect evidence to inform decisions about the regulation of entities that provide legal advice and services.⁴ The working group recommends the following set of recommended minimum requirements for the Sandbox Regulator, combined with illustrative appendices containing more detail as to the proposed methods and tools. These recommendations for proactive regulation are intended to serve as the pillars of a robust regulatory system that ensures public protection by actively monitoring sandbox providers as they test new models for delivering legal advice and services.

1. Risk Assessment

The Sandbox Regulator must establish a uniform approach for assessing and measuring consumer risk to determine eligibility to enter the sandbox. The regulator will screen each applicant and assign a level of risk according to established criteria. The assigned risk level will determine the intensity with which the other regulatory tools below (such as data collection and reporting requirements) will be used, subject to modification based on ongoing risk assessment. The general principle for the risk assessment is that the further the applicant's proposed service model is from traditional, existing legal service models, and the more complex the nature of the service provided becomes, the higher the level of assigned risk.

Appendix I provides detail as to how the risk assessment could operate, and also provides illustrative examples of how the risk assessment would apply to potential applicants.

2. Authorization Orders

The Sandbox Regulator and the Supreme Court should work together to determine the best process for reviewing and approving applicants and may need to adapt the process as the program progresses.

The working group proposes that, after the Sandbox Regulator screens an application and assigns a risk level to the applicant, it compiles a summary report for the Supreme Court. This report would include the proposed model and service; the specific rules and/or statutes from which the applicant seeks exemption; the proposed method of training and supervising non-lawyer employees or other providers

³ Recommendation 16

⁴ Recommendation 11

of legal advice and services; the consumer service area and target consumer market; the reason the applicant cannot otherwise operate under existing rules; and the Sandbox Regulator's risk assessment. The recommended report would also include the Sandbox Regulator's recommendation regarding the proposed scope of permitted practice, the terms of any authorization, and the recommended quality assurance mechanisms, including disclosures the entity must make to consumers, data reporting requirements, and so on.

If the Supreme Court approves the recommendation of the Sandbox Regulator, or a modified version thereof, the working group recommends that the Court issue a detailed authorization order, enumerating the authorized practice for each applicant and setting forth applicant-specific quality assurance requirements. Once issued, these authorization orders would be prominently posted on the Sandbox Regulator's website.

Appendix II provides an illustrative example of an authorization order demonstrating the level of detail the working group recommends be provided for each approved entity.

3. Regular Reporting and Monitoring

An applicant's authorization to enter the sandbox should be conditioned on compliance with mandatory reporting requirements, so that the Sandbox Regulator can assess the data and evaluate whether the sandbox goals are being accomplished and consumers are not being harmed. Each sandbox participant would be required to maintain a robust mechanism for tracking and resolving consumer complaints, and to report complaints received to the regulator on a regular basis. The frequency (e.g., quarterly vs. monthly) may depend on the assigned risk. The data to be reported may also vary by risk, but may include number and content of consumer complaints, number of people served, geographic or demographic information, revenue, and financial and substantive outcomes for clients. Annual reporting may also be required to confirm ownership and controlling financial interests in the entity, as applicable.

The Sandbox Regulator should balance the need for data from participating entities and clients with the regulatory burden placed on both by data requirements.⁵ For example, vendors of digital legal advice and services may be unable to collect, or unwilling to ask for, demographic data that are not relevant to providing the offered service. And consumers may wonder why they are required to provide such information to receive legal advice and services in the sandbox, when it is not required for most other transactions, on-line or on-ground. Also, for-profit and nonprofit providers may have different financial resources to devote to data collection, or different obligations to collect such data for reasons unrelated to sandbox regulation.

The working group recommends the Sandbox Regulator discuss with the sandbox participants on a regular basis the reported data, including trends, spikes in complaints, etc. They may discuss complaints received and efforts made to address those complaints.

The working group further recommends that the Sandbox Regulator develop a standardized method for collecting data so that data may be regularly and accurately analyzed. Aggregate, de-identified data

⁵ Recommendation 12

would be publicly available and included in regular reports from the Sandbox Regulator to the Supreme Court and the Legislature to keep them apprised of sandbox activity.

4. Quality Audits

The working group recommends that the Sandbox Regulator also conduct regular audits to test the quality of the services provided. The regulator may appoint panels to conduct such audits, including expert review of redacted case files to ensure continued consumer protection. The Sandbox Regulator would develop a standardized form for the auditors to use to ensure the needed data is consistently audited and available for analysis. The frequency and detail of the audits may be adjusted based on level of risk.

Appendix III provides a sample standardized audit form.

5. Required Consumer Disclosures

Consumers of legal services should be notified that they are receiving services from a sandbox provider in two ways:

- **Digital Badges:** The working group recommends all approved sandbox providers receive a digital “badge” from the Sandbox Regulator which must be prominently displayed on all advertisements, social media, websites, service platforms, and physical locations to signify authorization to operate. The badge will identify the service provider as authorized by the Sandbox Regulator and will include a link to the Sandbox Regulator’s website, including where the website explains how to file a consumer complaint and where it posts the provider’s authorization order.
- **Disclosure Requirements:** All approved sandbox providers must provide specified disclosures to consumers that describe their service model. In plain language (including in languages other than English), they must advise consumers that the entity is not a law firm, is owned in part by nonlawyers, or uses nonlawyers to provide legal advice and services, as applicable. Additionally, sandbox providers may be required to include a disclosure advising clients that a free attorney through local legal services organizations may be available to those who qualify. The disclosures must advise the consumer about which specific services the entity is authorized to provide. Such disclosures would be posted on the entity website, advertising, and service platform, and incorporated into terms of service or engagement letters.

Appendix IV provides an illustrative example of a digital badge and disclosure language.

6. Additional Security Measures

In addition to the mechanisms described above, the working group recommends the Sandbox Regulator implement additional security measures to ensure consumer protection, including an appropriate mix of the following tools:

- **Robust Consumer Complaint Mechanism:** The Sandbox Regulator should maintain its own robust and timely system for accepting, processing, and investigating consumer complaints,

whether or not the consumers also complained to the sandbox providers. This system could include naming an ombudsperson in the office to assist consumers who may have complaints.

- **Secret Shopper Programs:** The regulator should be authorized to conduct secret shopper studies on sandbox entities as needed to evaluate the quality of the service received. The regulator would establish a clear policy defining the process and setting forth the circumstances in which this program might be used.

Note how these proposed tools for proactive regulation differ from the existing complaint-based model of regulation for individual attorneys. Currently the State Bar does not collect data from all attorneys regarding their practices, does not conduct random quality audits of attorney work product, and has no similar program of badges and consumer disclosures.

Attorney Involvement

[Forthcoming; (August agenda)]⁶

Standards of Conduct

[Forthcoming]⁷

PRINCIPLES FOR ENFORCEMENT

Processing and Investigation of Client Complaints

[Forthcoming]

Suspension or Removal from the Sandbox

[Forthcoming]

AVAILABLE CONSUMER REMEDIES

[Forthcoming (August Agenda)]

⁶ Recommendation 10

⁷ Recommendations 7, 8.

APPENDIX I. RISK ASSESSMENT

The risk assessment by the sandbox regulator considers how different a provider's service will be from the "traditional" model of the provision of legal services. Both the nature of the service and the stakes of the case to the client are a part of this evaluation. Thus, a lawyer-owned firm that provides legal services by lawyers or nonlawyers who are supervised by lawyers would be the lowest risk service model. The risk level would rise as lawyer involvement in the provision of legal services decreased. Conceptually a firm in which a lawyer shared ownership with a non-lawyer but in which the lawyer still held a majority interest in the firm would be a higher risk but still relatively lower than if a non-lawyer had a controlling interest. In classifying the risk inherent in the nature of a proposed service, the sandbox regulator's assessment would include an evaluation of the specificity of the legal advice to be offered. The lowest risk would be basic legal information, which in theory applies to all potential clients (e.g., a client's general inquiry on how to incorporate a family business in California). As the issues become more complex and the specific facts of the client's situation become more relevant to the analysis, the risk level rises. Thus, in-court representation in litigation, in which particular facts of the case dictate very different legal strategies, would be much higher risk than a basic transactional matter. Finally, the stakes of the service could increase the risk level. For example, a firm providing no-contest divorces to couples with minimal assets and liabilities would be lower risk than a practice dealing with contentious child custody disputes.

Consider four hypothetical applicants to the sandbox:

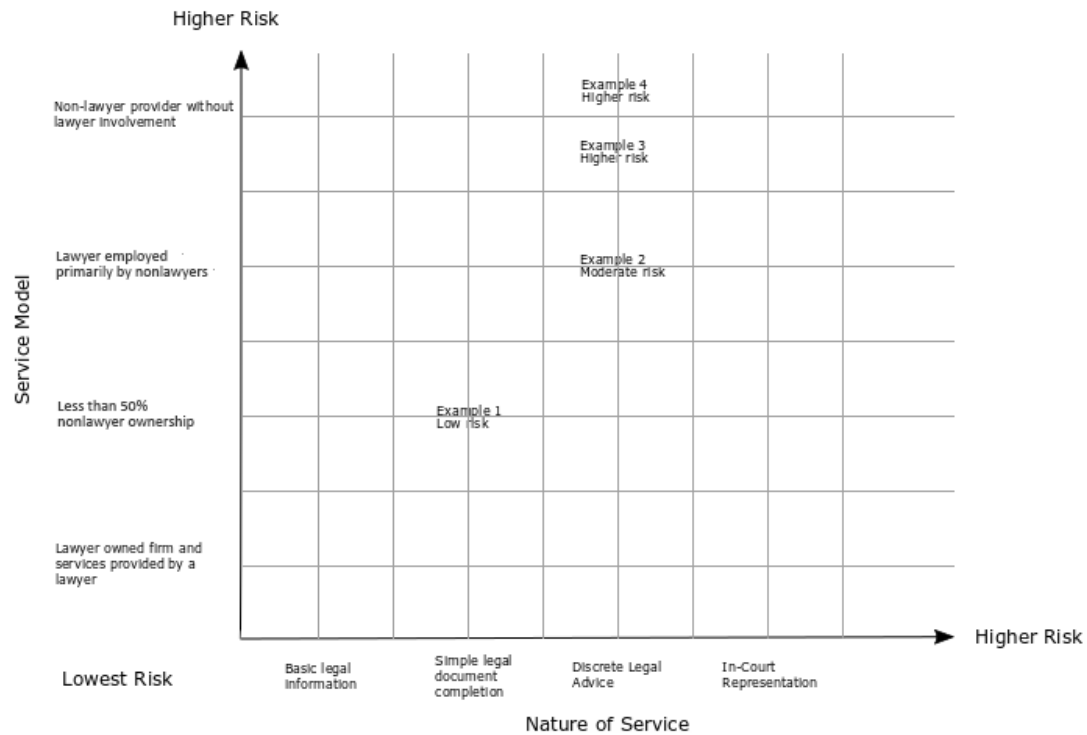
Example 1: A traditional law firm in which the lawyer owns most of the firm but raises outside funds to expand the number of paralegals he or she can employ by giving a minority stake in the firm to outside investors, and the paralegals handle simple tasks such as basic document completion. This applicant would be considered low risk since the lawyer still holds a controlling interest in the firm and must supervise the paralegals, as in a traditional law firm.

Example 2: A non-profit business in which social workers provide basic legal information and limited scope legal advice on dealing with debt collection, but a lawyer provides extensive training to the social workers. This applicant would likely be categorized as a moderate risk for its service model and a moderate risk for the nature of its service.

Example 3: A nonlawyer provides information and advice on immigration laws and prepares immigration documents for filing in court by self-represented parties. This applicant would likely be categorized as high risk due to the significant stakes of these matters (e.g., potential deportation) and the nature of service (i.e., marshalling law and facts to prepare court documents).

Example 4: A company provides self-represented parties advice and assistance in uncontested divorce cases through a technology-driven online form completion service that uses an interface which asks a series of questions similar to income-tax preparation software that is commonly used by consumers. If this software-based model does not involve lawyers directly providing its service, it would be classified

as high risk, but the company could reduce its risk profile by having an in-house lawyer review the advice given to clients.



APPENDIX II. SAMPLE AUTHORIZATION ORDER

IN THE SUPREME COURT OF CALIFORNIA

IN RE: APPLICATION OF LEGAL HELP FOR PATIENTS

ORDER FOR AUTHORIZATION TO PRACTICE LAW

Based upon the California Supreme Court's plenary and constitutionally granted authority to regulate the practice of law in California, and the tenets of Standing Order XX, the California Supreme Court orders that Legal Help for Patients is authorized to practice law within the regulatory sandbox and subject to the restrictions outlined below.

The Court has reviewed the recommendation of the Regulator dated July 29, 2022 for Legal Help for Patients to be authorized to practice law.

Legal Help for Patients is a 501(c)(3) nonprofit organization serving families in the San Francisco Bay Area and Los Angeles area. Legal Help for Patients proposes to offer certain legal services alongside health services provided by local community health centers. The legal services will be provided by nonlawyer Community Health Workers ("CHWs"), an established role within Legal Help for Patients. Specifically, Legal Help for Patients proposes training CHWs to become bilingual medical debt legal advocates ("MDLAs") to provide limited-scope legal assistance related to medical debt and its collateral issues.

CHWs within Legal Help for Patients provide holistic services related to the variety of issues arising within and related to health problems. Their role is to serve as a bridge between patients, health care providers, and social service providers. CHWs in the proposed program will be able to offer limited-scope legal assistance as part of that holistic service, addressing legal issues relating to medical debt immediately and comprehensively. The legal assistance offered by MDLAs includes legal advice on addressing medical debt, assistance in identifying, completing and filing relevant paperwork, and assistance in negotiation with creditors.

The Regulator has assessed the risk of harm to Legal Help for Patients' targeted consumers relative to the risk of harm they currently face and has determined that the risk of harm presented by Legal Help for Patients' services is MODERATE.

In light of the Court's responsibility to the public to effectively regulate the practice of law in California and in keeping with the tenets of Standing Order XX, the Court now orders as follows:

1. Legal Help for Patients is authorized to offer legal services through the following models:

- a. Nonlawyer provider with lawyer involvement
 - i. Nonlawyer providers may only offer the following services:
 - 1. Legal information;
 - 2. Legal process assistance;
 - 3. Form completion assistance;
 - 4. Legal advice related to resolution of medical debt; and
 - 5. Negotiation of medical debt on behalf of the consumer.
 - ii. Lawyers must be involved with the nonlawyers providing the above-mentioned legal services in the following ways:
 - 1. Assessing nonlawyer providers' knowledge and skills before and after they have received training;
 - 2. Developing substantive and procedural curriculum for nonlawyer provider training;
 - 3. Conducting training for nonlawyer providers;
 - 4. Developing checklists for nonlawyer providers to use while delivering services;
 - 5. Conducting regular quality checks of services provided; and
 - 6. Remaining available for assistance to nonlawyers.
- 2. Legal Help for Patients is only authorized to provide legal services relating to medical debt, including assistance with medical insurance issues, bills for medical services, and issues involving Medicaid, Medicare, and financial services available to people experiencing medical debt.
- 3. To the extent that Legal Help for Patients' service model could be found to implicate laws against nonlawyers providing legal advice, the Court waives application of these laws as to Legal Help Patients and its nonlawyer service providers. To the extent the service model could be found to implicate California Rule of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants), the Court waives application of that rule as to lawyers overseeing MDLAs for Legal Help for Patients.
- 4. Legal Help for Patients shall conform to the MODERATE risk reporting requirements as set forth in the attached manual.
- 5. Legal Help for Patients shall prominently display the following disclosure requirements as set forth in the attached manual:

- a. Regulator Badge
- b. Nonlawyer provider disclosure

If Legal Help for Patients wishes to alter these conditions or requirements, it must submit any such change to the Regulator for further assessment. The Regulator will assess the proposed change and may permit the change if it concludes the change does not materially increase the risks to consumers. If the Regulator finds a material increase in risk then it will present the issue to the Court for further consideration.

This authority is granted for an initial period of XX months from the date of service launch as confirmed by the Regulator with the possibility of extension or permanent authorization. This authority and any such extension or permanent authorization is subject to Legal Help for Patients' compliance with the conditions and requirements set forth in the Regulator Manual and this order, and also to a verification by the Regulator that Legal Help for Patients has a record of compliance with all such requirements and that the company's services are not causing harm to consumers.

DATED this 1st day of September, 2022.

A handwritten signature in black ink, appearing to read 'Joan B. Smith', written over a horizontal line.

Joan B. Smith, Chief Justice

APPENDIX III. SAMPLE QUALITY AUDIT STANDARD QUESTIONNAIRE

1) Overall, how would you rate the result(s) of the legal service provided in this engagement?

2) How would you rate the provider's identification of the consumer's legal right(s) and obligations?

3) How would you rate the manner in which the provider addressed the consumer's legal issue(s)?

4) How would you rate the necessity and appropriateness of the purchased legal service?

5) Comments on the quality of information shared by the provider (as related to enabling audit ratings).

6) Comments regarding any poor or very poor service ratings noted above.

APPENDIX IV. CONSUMER DISCLOSURES

A. BADGES

All authorized entities are required to use the digital “badge” provided by the Regulator on all advertisements, social media, websites, service platforms, and at physical locations to signify authorization to operate. The badge must contain information on how to access the limits of the services authorized, how to file a consumer complaint, and a link to find the Regulator’s website. Failure to display the badge will be considered evidence of noncompliance and of consumer harm.

This will facilitate consumer knowledge and confidence and will provide question / complaint information. Regulators in Utah and the UK have developed a similar “badge” for regulated legal service entities. See examples below.



Figure 1. Utah Office of Legal Services Innovation



Figure 2. UK Solicitors Regulation Authority

B. DISCLOSURE REQUIREMENTS

The following disclosures are required depending on the category of service model authorized. These disclosures must be made available at all physical locations, posted on the entity’s website and service platform, affixed to all advertising, and prominently incorporated into any terms of service or engagement letters, so that they are clearly provided to potential clients. Failure to provide these disclosures in a manner they will almost certainly be noticed will be considered noncompliance and considered evidence of consumer harm. Note that the proposed language for the disclosures may need to be amended to account for the rules ultimately adopted pertaining to sandbox participants (e.g., whether the protections of the attorney-client privilege are extended to nonlawyer participants in the sandbox).

- **This is not a law firm. / This law firm is owned by nonlawyers.** Some of the people who own / manage this company are not lawyers. This means that some services / protections, like the attorney-client privilege, may be different from those you could get from a law firm.

- If you have questions, please contact us at _____.
- **The product / service you have selected is not being provided by a lawyer.** This means:
 - Someone involved with you or with your legal issue, including people on the other side of this case, could be using this service as well.
 - We could be required to disclose your communications (such as questions and information submissions), for example in response to a subpoena.
If you have questions, please contact us at _____.
- **Alternative services may be available to you.** Free legal services from a local legal aid organization may be available to you if you qualify for their services. For more information about whether may qualify for free legal services, visit _____.
- **This service is regulated by the [Sandbox Regulator], and is only authorized to deliver specific services.** For more information or to file a complaint go to [website].