The State Bar of California

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Joanna Mendoza and Bridget Gramme
Date: February 12, 2020
Re: B.3. Regulatory Sandbox Recommendation

Executive Summary

To balance the twin goals of public protection and enhanced access to legal services, the Task Force recommends that the Board consider a methodology, such as a regulatory sandbox or other temporary pilot program approach (referred to herein as a sandbox), as a means for evaluating possible changes to existing laws and rules that otherwise inhibit the development of innovative legal services delivery systems, including: (i) consumer facing technology that provides legal advice and services directly to clients who are indigent as well as clients at all income levels; and (ii) other new delivery systems created through the collaboration of lawyers, law firms, technologists, entrepreneurs, paraprofessionals, legal services providers, and other persons or organizations. A primary function of a sandbox would be to gather data on any potential benefits to accessing legal services and any possible consumer harm when existing restrictions on the unauthorized practice of law (UPL), fee sharing with nonlawyers, and partnerships with nonlawyers are temporarily modified or suspended for sandbox participants. A key feature of the sandbox would be to give each applicant an opportunity at the outset to present a proposal for a new delivery system that demonstrates to the sandbox regulator that the proposal would satisfy the applicant's burden of proof that anticipated access to legal services benefits are likely to outweigh the potential risks of harm.

Ultimately, when the sandbox period of experimentation ends, if the regulator determines that the benefits of increased access to legal services afforded by the new delivery model outweigh any identified harm, then the Task Force believes that permanent changes in the law should be explored at that time to allow the applicant's new delivery system to continue and also to expand the opportunity for other providers to have entry to the legal services market by offering services using the same or a substantially similar delivery system.

Discussion

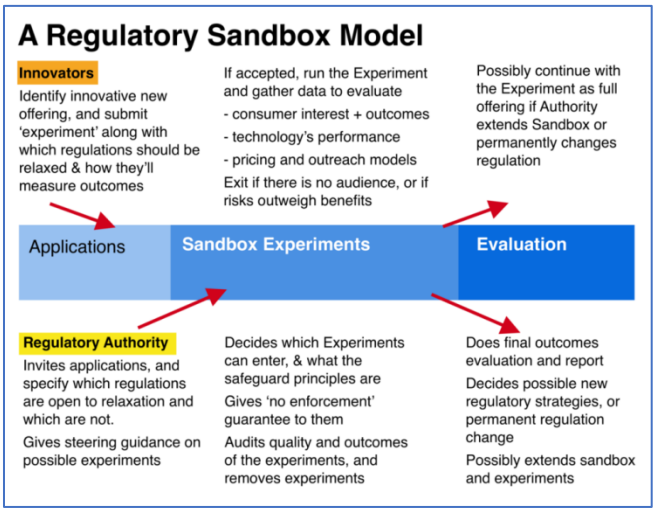
Short Statement of Recommendation

Consider formation and appointment of a new working group to develop a detailed proposal for a regulatory sandbox, pilot program, or other similar time-limited approach that will provide data on any potential benefits to access to legal services and any possible consumer harm if prohibitions on unauthorized practice of law, fee sharing, nonlawyer ownership, and other legal restrictions are relaxed or completely suspended for authorized sandbox or pilot program participants.

What is a Sandbox?

A regulatory sandbox is a framework set up by a regulator that allows participants to test innovative business models or offer products and services in a controlled environment under a regulator's supervision. The sandbox model allows for the gathering of data to assess impact and protect against consumer harm. If the data is promising, changes to rules and statutes will then be considered more generally. Specific objective factors could be developed to guide the regulator's evaluation of risks.[1]

The regulatory sandbox would provide a regulatory platform to encourage innovation to enhance the delivery of, and access to, legal services through the use of technology, online legal service delivery models, and entities not currently allowed under the existing rules of professional conduct and UPL statutes in California. A graphic model of the sandbox derived from the August 2019 Utah report is provided below:



[1] Utah's regulatory sandbox for considering possible regulatory reform in the delivery of legal services includes the following specific examples of factors to consider when assessing the experience of a new delivery system in the sandbox:

- What evidence do we see of consumer harm caused by improper influence by non-lawyer owners over legal decisions? What steps can we take to mitigate these risks in the market?
- What do the data tell us about the risks of consumer harm from software-enabled legal assistance in an area such as will writing? Are the actual risks of harm more likely or more significant than the risks of a consumer acting on their own or through a lawyer? How can the risks be mitigated?
- What do the data indicate about the risk of consumer harm from non-lawyers providing legal advice in the area of eviction defense? Is the risk of , these kinds of harm more significant than the harm we currently see for pro se defendants? What steps should be required to ensure and maintain quality service?
- What are the data on the risks of cyber and data security to consumers of legal services? Where is the impact most likely and greatest, and what regulatory resources should be brought to bear?

(See, Utah's sandbox description on pages 16 – 17 of its report posted at: https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf.)

I. Proposed California Sandbox Composition, Scope and Process

The California State Bar and/or the California Supreme Court, in coordination with the California Legislature,[2] shall use rule-making power to create an oversight body with regulatory authority. The regulatory authority over the sandbox would include the ability to certify and decertify each entity/service and to impose the necessary certification and data collection requirements. The oversight body would have the authority to determine whether a proposed service/entity is currently allowed by existing laws and rules, or if admission into, and approval within, the sandbox is necessary to operate. The oversight body would also have the power of enforcement against entities on evidence of material consumer harm.

A. Oversight Body Composition and Functions

The appointed volunteer oversight body created under this proposal would operate as other professional licensing boards function, with the assistance of full time staff to support their work. The body should be limited in size as appropriate and should include, but not be limited to, the following types of individuals: 1) consumer representative; 2) economist; 3) legal ethics expert; 4) technology expert; 5) legal services organization administrator; 6) trial court judge; 7) court administrator; and 8) an academic with regulatory reform expertise.

1. Antitrust Considerations

When establishing the final composition and function of the oversight body, it is important that state and federal antitrust laws be considered. *See, North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015).[3] Such considerations include the Supreme Court's role in overseeing the sandbox, and whether or not the members of the oversight body might be considered active market participants in the delivery of legal services.[4]

2. Additional Measures to Safeguard Consumer Protection within the Sandbox

Additional consumer protection measures should be considered as the oversight body is established. For example, in the United Kingdom, the Legal Services Act of 2007 established a Legal Services Consumer Panel, an independent arm of the Legal Services Board, comprised of eight non-lawyers appointed by the government.[5] The panel provides evidenced-based advice to the Legal Services Board, in order to help them make decisions that are shaped around the needs of users. Such a model could be very useful to the oversight body in evaluating the utility and harm of the entities applying for and operating in the sandbox.

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[2] California's Unauthorized Practice of Law statute, Business and Professions Code § 6125 et seq., will likely need amendments to reflect entities/services operating within the sandbox.

[3] *See also* the Federal Trade Commission's Staff Guidance on Active Supervision of State Regulatory Board Controlled by Active Market Participants, https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

[4] Some jurisdictions view this concern as a basis for considering an "independent regulator." But this is not regarded as independence from the authority of the state supreme court over the practice of law. *See* August 2019 Report and Recommendation of the Utah Work Group on Regulatory Reform, p. 21 at footnote no. 58.

https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf

[5] https://www.legalservicesconsumerpanel.org.uk/about-us

3. Duty of Regulator to Provide Guidance

To promote access to legal services to those who are under-served by the legal system, the oversight body should collaborate with technologists, people with disabilities, lawyers, low-income individuals and other stakeholders to provide guidance on technology and usability for technology-delivered legal services models.[6] For example, in order to further the regulator's goal of public protection and encourage compliance, a collaborative conference or working group could be called or organized by the regulator to produce best-practice guides to ensure that legal services technology providers understand how to implement the regulations.

In addition to providing guidance to technology delivered legal service providers, the regulator should support an access incubator/accelerator (a formalized network of funders, technologists, strategy, business, and marketing advisors that brings in classes each year to help them refine concept and launch). This could be a program run independently from the regulator-- perhaps in partnership with universities.

B. Scope

Any business model, service or product that cannot be offered under the current rules and statutes for providing legal services will be able to apply to and be considered by the oversight body. For the most part, if a service or entity cannot operate under the current rules and statutes then approval would be needed by the oversight body through the regulatory sandbox process. Actively licensed attorneys or law firms partnering with, contracting with, or employed by entities approved by the oversight body would not need to take any separate action for approval. However, those licensed attorneys who partner with non-approved entities will need to seek approval by the oversight body with respect to that arrangement.

The following provides further detail and examples as to the types of services and entities that are likely to fall both outside and within the regulatory sandbox:

1. Entities and Services Outside of the Regulatory Sandbox

(a) Conventional, 100 percent lawyer-owned, managed, and financed law partnerships, professional law corporations, legal services nonprofits, or individual lawyers with an active California State Bar license:

(i) offering traditional legal services as permitted under the Rules of Professional Conduct and applicable statutes;

(ii) offering non-legal services as permitted under the Rules of Professional Conduct and applicable statutes;

(iii) entering into employment, contract for services, joint venture, or other (fee-sharing) partnership with a nonlawyer-owned entity authorized or licensed to provide legal services by the sandbox oversight body.

[6] As a potential template for the type and structure of materials, the United States Digital Service, or 18F, provides guides on Accessibility, Agile Development, Content, Design Methods, Engineering, and Product Management on its website: 18f.gsa.gov as well as the Digital Services Playbook available at playbook.cio.gov.

(b) Entities and services performed by non-lawyers that do not constitute the practice of law including do-it-yourself consumer facing technology.[7]

2. Entities and Services Requiring Sandbox Approval

(a) Conventional, 100 percent lawyer-owned, managed, and financed law partnerships, professional law corporations, legal services nonprofits, or individual lawyers with an active California State Bar license:

(i) offering legal services whether directly or by joint venture, subsidiary, or other corporate structure, not authorized under the Rules of Professional Conduct or applicable statutes; or

(ii) partnering (fee-sharing) with a nonlawyer-owned entity not authorized or licensed to offer legal services by the sandbox oversight body.

(b) Conventional law partnership or professional law corporation with less than 100 percent lawyer ownership, management, or financing.

(c) Nonlawyer-owned legal services provider (for profit or nonprofit):

(i) offering legal service options whether directly or by joint venture, subsidiary, or other corporate structure, not authorized under the Rules of Professional Conduct or applicable statutes; or

(ii) practicing law through technology platforms or lawyer or nonlawyer staff or through purchase of a law firm.

C. Process and Participant Requirements

If an entity/service cannot provide legal services under the current rules and statutes, or if there is a material question as to whether the entity/service would be allowed, an application must be made to the oversight body for registration. The application process will provide an opportunity at the outset to present a proposal for a new delivery system that demonstrates to the sandbox regulator that the proposal would satisfy the applicant's burden of proof that anticipated access to legal services benefits are likely to outweigh the potential risks of harm. Upon receipt of the application the oversight body shall review the applicants proposal and set requirements upon the applicant as deemed appropriate if the applicant is admitted to the sandbox. This is not intended to be a rigid or technical approach since objective-based regulation is meant to be flexible and responsive to evidence of risk.

The oversight body should consider giving priority and a reduced fee structure to non-profits as well as for-profit entities that propose providing services specifically designed to address areas of most need as identified by the 2019 California Justice Gap Study.

[7] Such entities and services would include websites where consumers can access legal information, forms, statutes, and/or template contracts.

With an effort to ensure that the regulatory burdens are not too onerous, requirements for participation in the sandbox should include, but not be limited to, the following:

- Disclosure to consumers that the entity/service is part of the sandbox and referring consumers to the oversight body where they can learn more and provide feedback or complaints;

- Where applicable, informed consent by consumer acknowledging that service is not provided by a licensed attorney;

- Confidentiality, which shall include a prohibition against regulated entities sharing disaggregated consumer data with any outside third parties other than the oversight body;

- Data collection and reporting to the oversight body to determine if the entity/service is performing and being used by the public, as well as the scope of the impact on providing legal services to the public and whether there are unexpected harms (see below);

- Transparency, including credentials of service providers, and identification of individuals with more than a 10 percent ownership interest in the entity/service;

- Compliance with accessibility and usability standards to be set by the oversight body;

- Corporate entities and LLCs must be either a California entity or a registered foreign entity, requiring an annual statement of information that identifies officers and directors and registered agent for service of process. Partnerships would provide partner information and registered agent to the oversight body;

- Liability and Errors & Omissions insurance at levels to be set by the oversight body;

- Prohibit arbitration clauses or limitations of liability in the terms of service that will preclude consumer access to the oversight body's complaint and remedy system; and

- Training requirements to be determined by the oversight body.

D. Special Considerations for an Applicant's Proposed Technology Driven Delivery System

1. Legal service technology accessibility standards

Technology services must satisfy technical accessibility standards, such as WCAG 2.0 Level AA, to provide assurance of the widest availability of the services being offered. The specific standard(s) required may be changed by the oversight body as standards and technologies change.

2. Augmenting the user experience through accessible language and design

Legal services technology providers (LSTPs) must ensure that their technology meets or exceeds the utility of human-provided legal services. When technology providers deliver a legal service to the public, they should use plain language and accessible design patterns. Any technology should be subject to user experience testing before it is offered to the public. The pool of testers should be broad and include disabled people, low-income individuals, and others disparately impacted by the legal system.

3. Prohibition against use of “dark pattern” marketing

"Dark Patterns" are a broad class of technology language and design choices in marketing that when adopted tend to coerce people into actions against their will or self-interest, add unnecessary products or services, or have other negative effects. Legal service technology providers engaging in authorized practice of law activities within the sandbox must avoid employing dark patterns in their products (perhaps a ban on such behavior should include lawyers as well). To aid technology providers, the oversight body should publish, partner to distribute, or otherwise encourage education on dark patterns.

4. Careful implementation of algorithmic systems

LSTPs would be expected to take reasonable steps to identify and mitigate bias and other harmful effects of their technologies. If such effects cannot be mitigated with existing techniques, the technology should not be provided to the public.

E. Data Requirements and Analysis

At a minimum, the regulatory strategy of the sandbox oversight body is to assess the risk of three possible harms to consumers of the legal services provided by sandbox participants. The burden shall be on an applicant to show that the benefit of its proposal outweighs the potential harm, thereby causing an applicant to consider potential harms and build mechanisms to address those harms its application materials. A risk assessment matrix should be adopted and used by the oversight body to facilitate this analysis.

The harms are:

- Receiving inaccurate or inappropriate legal services.

- Failing to exercise legal rights through ignorance or bad advice.

- Purchasing unnecessary or inappropriate legal services.

The oversight body will need several kinds of data on legal outcomes to assess the likelihood of consumers experiencing these harms. Sandbox participants can therefore raise their chances of approval and registration by providing as much of the required data as possible. A partial but suggestive list of data collection strategies and data sets include:

- Consumer complaints and corresponding resolution or disposition

- User surveys

- Rate of service error fixes

- Types/level/rates of services provided

- Legal and financial outcome data

Although the sandbox oversight body would be interested in the absolute absence of consumer harms by a sandbox participant, the more important criterion is the relative rate or risk of harm compared to the experience a consumer would have received absent the legal services provided. To make that

comparison, information must be known about the consumers of the legal services provided by the sandbox participants. Some possible useful data for this purpose might include:

- Income level

- Education level

- Geographic location

- Race/ethnicity

While the oversight body will negotiate the actual data collection requirements individually with each sandbox participant, it will attempt to establish and maintain data sets as consistent with the guidance above to the greatest extent possible.

No data provided by sandbox participants may be shared with any other organizations for any reason. Data provided by sandbox participants should by anonymized before submission to the sandbox oversight body. Data provided will be kept confidentially and deleted from the oversight body's databases after analysis, unless otherwise required by California law. The oversight body may choose to share provided data to independent evaluators of the sandbox after receiving permission by the data provider; if so, such evaluators will be contractually required to also keep the data confidential and delete it after the analysis is complete.

F. Removal from Sandbox

If an entity fails to comply with the requirements set by the oversight body, including a failure to provide appropriate supporting data with respect to the services provided, it will be subject to removal from the sandbox. If removed, an entity will lose its authority to operate with the protections of the sandbox rendering it subject to all existing rules and statutes regulating the practice of law. However, when possible, the entity should be given an opportunity to cure the issue of concern and become fully compliant.

G. Post Sandbox Activity

A sandbox is not set up as a permanent regulatory structure. It is intended to be a multi-year program (e.g., 2 – 3 years) through which evidence and data can be gathered to determine the appropriateness of changing rules and statutes that would otherwise prohibit the entities and services allowed by the sandbox. At the end of the sandbox period, there should be an opportunity for an entity to seek an extension.[8]

[8] The Wyoming Medical Digital Innovation Sandbox Act (posted at: https://www.wyoleg.gov/Legislation/2019/SF0156) addresses this regulatory issue as follows:

> 40-28-107. Extension of sandbox period.
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> (a) A person granted authorization under W.S. 40-28-103(f) may apply for an extension of the initial sandbox period for not more than twelve (12) additional months. An application for an extension shall be made not later than sixty (60) days before the conclusion of the initial sandbox period specified by the department. The department shall approve or deny the application for extension in writing not later than thirty-five (35) days before the conclusion of the initial sandbox period. An application for extension by a

The Task Force recognizes that any entity willing to participate in a sandbox might reasonably expect the sandbox to be structured and administered in a manner that facilitates a transition to a more permanent model under the oversight body, so long as it is performing as intended and not harming the public. While the mere fact of participation in the sandbox cannot be regarded as a guarantee of any permanent authority to operate it is understood that meaningful post sandbox protections are necessary to encourage interest and applications.

H. Funding

It is critically important to consumer protection that the administrator of the sandbox be appropriately resourced to effectively manage the applications, screen to ensure all requirements are met, monitor the progress and risks of harm, and remove any applicant from the sandbox that is causing consumer harm as identified by the administrator. Ultimately this program would be funded by application and licensing fees each applicant pays to enter and maintain practice within the sandbox. In the United Kingdom, for example, licensing fees of regulated entities (there, "Alternative Business Structures,") are calculated as a percentage of their total annual revenue. The oversight body is encouraged to consider a fee structure that takes into account similar revenue considerations while also incentivizing innovation in particular areas of need.

In order to establish a well-resourced regulatory structure from inception, however, grant funding will likely be needed. In Utah, for example, funds to start up and establish the sandbox have come from the Administrative Office of the Courts (via court staff time), the National Center for State Courts, and the Institute for the Advancement of the American Legal System. The Task Force recommends that the State Bar convene a funders summit to explore the feasibility of philanthropic start-up funding as well as to advocate for a streamlined and coordinated grant application and reporting process.

I. Reciprocity

It is anticipated that California's regulatory sandbox for legal services will allow for reciprocity with other state, federal and foreign jurisdictions to allow a product or service to be made available simultaneously in each jurisdiction.

A number of other jurisdictions, including Arizona, Utah, Wyoming, the United Kingdom and Singapore operate similar regulatory sandboxes. The oversight body in California should coordinate oversight with other jurisdictions to ensure an efficient regulatory approach.

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person shall cite one (1) of the following reasons as the basis for the application and provide all relevant supporting information that:

(i) Statutory or rule amendments are necessary to conduct business in Wyoming on a permanent basis;

(ii) An application for a license or other authorization required to conduct business in Wyoming on a permanent basis has been filed with the appropriate office and approval is currently pending.

II. Rationale for Recommendation

A. Ensuring Access to Justice

ATILS believes that this regulatory sandbox proposal fulfills its charge to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others, and effectively balances our dual goals of consumer protection and increased access to legal services.

B. Current Rules and Statutes Prohibit Innovative Legal Services

It is, of course, difficult to find examples of legal services and entity structures that are currently prohibited by the rules of professional conduct and statutes because of those very prohibitions discouraging entry into the market. We do know that relaxing of non-lawyer ownership and fee sharing provisions in other markets (e.g. U.K. and Australia), has not had any identifiable dilatory impact on consumers, but those changes were not made for the purpose of increasing access to legal services. As a result, any such changes have not been measured. We have learned, however, that since the UK has allowed non-attorney ownership and fee sharing the number of complaints against lawyers has actually decreased.

We will not know the extent of improvement to access to legal services until new entities and services are allowed into the market and proper data is kept and measured. What we do know is that the justice gap continues to grow at an alarming rate with the status quo, and that there simply are not enough lawyers to provide free/low cost legal services to have a meaningful impact of the problem our society faces.

Despite the challenge of identifying examples that could impact access to legal services but remain prevented from during so under the current regulatory scheme, we can nevertheless present some for consideration.

The following are examples of how current barriers to entry and efficiency prevent innovation and expansion of legal services:

- One company that was founded in August 2017, Dupro, was aiming to help people understand complex legal documents for a flat rate. The company was targeting people who did not understand rental agreements, employment contracts and court documents, and if they needed more help it would direct them to a lawyer. Since the company was not owned 100percent by lawyers, there were legal questions from the beginning as to whether the company would be subject to UPL statutory restrictions and fee-sharing prohibitions. The lawyer co-founder was worried about disbarment, and a backlash from other lawyers made it difficult to go beyond the early stages. The founders eventually closed the business down.

- Another company, Disputly, was created by a tech specialist and experienced software engineer (neither of whom was a licensed attorney). They were passionate about helping people navigate small claims court, with an initial focus on helping people get their deposits back from landlords. The platform allows renters to log in, give a name and address, how much money is owed, and upload evidence such as emails and rental agreements. The platform then tells them how to make and generate a demand letter, help engage with mediation and, if those efforts fail, initiate the small claims process. It was California's first automated form filler for SC-100. The company struggled to gain traction because of the concern of UPL violations. It was also

attempted in Oregon, and again the company was advised that they could not launch because the form filler would be offering legal advice. As a result, while the company has very useful and easy to use software that would help many Californians complete the SC-100 form, it is unavailable to the public due to regulatory and statutory restrictions. For more detail on how Disputly works, you can see this article on Disputly.

- One of the members of ATILS described how her law firm works with financial services companies who have routine and repetitive contract work involving consumer mortgages. The firm hired a programmer to assist in creating a software to assist the firm's attorneys with preparing these documents, saving tens of thousands of dollars a year in legal fees. The firm recognized that if they were able to expand the product to meet the needs of their clients in other states, they could then package it for use outside of the firm to sell to other law firms. However, the cost to develop the product and take it to market, in addition to the on-going costs of maintaining it, would have required an investment of outside capital with equity ownership, but the current rules prohibiting fee sharing make such an infusion of capital from an outside entity prohibitive. This example goes directly to the challenges faced by law firms when they attempt to innovate within the confines of the current rules of professional conduct and UPL statutes.

- A project in Arizona allows lay legal advocates at a domestic violence shelter to give limited legal advice beyond just legal information (which is all current UPL statutes would otherwise permit). This unique non-profit project is going live as a result of the Arizona Task Force and the project is part of their report. [see https://law.arizona.edu/i4J]. This type of project is currently not allowed under the Rules of Professional Conduct and UPL statutes, but they are hoping to open up similar projects in California, Utah and other jurisdictions creating a regulatory sandbox.

- One innovator recently spoken to is in the process of developing a marketplace platform for small claims court that works like TurboTax. There are concerns that the statutes controlling LDAs will severely restrict the services that can be offered and limits its usefulness. The availability of a regulatory sandbox would allow such a platform to assist many consumers with respect to small claims court.

- Avvo Advisor was a technology-enabled legal services offering that used an app to connect consumers to a local qualified lawyer for a fixed-fee of $39 for 15 minutes over the phone. Studies at the time showed that Avvo Advisor offered discrete legal advice to consumers a savings of up to 71percent over the average hourly fee for a lawyer. There was both statistical evidence - in the form of significant consumer demand for the service - and anecdotal evidence - in the form of stories from users who found and retained lawyers using Avvo Advisor - to demonstrate the need for and value of this product. Consumer reviews of the service were overwhelmingly positive. Lawyers also liked the service. However, the ethics opinions that condemned Avvo Legal Services, which used the same business model as Avvo Advisor, were many. Nearly every opinion took issue with a slightly or completely different aspect of Avvo Advisor, which made responding to those concerns both difficult and costly from a business perspective and from a technology perspective. The regulatory response suggests that regulation and ethics concerns remain a significant barrier to the development of innovative access services like these.

- Off The Record is an innovative technology-based service that helps connect consumers looking to fight their traffic tickets with local qualified attorneys. Off The Record uses an algorithm that

includes response time, customer service satisfaction, cost, and the ultimate legal outcome in order to select the appropriate lawyer for a given client. The Off The Record model is simple: no ongoing subscription fees, no memberships, no hourly rates - just one fee paid to the attorney to book a traffic matter. If the attorney is not able to get the ticket dismissed or reduced, Off The Record offers the client their money back. Founded in 2015, Off The Record now operates in over 35 states and has seen the cost to fight a ticket in a number of major metros in which it has entered decrease significantly. As just one example, the generally advertised price to fight a speeding ticket in greater Seattle when Off The Record launched was around $400. Today, speeding ticket lawyers advertise $200 or less to fight a ticket. This same thing has occurred in other geographies in which Off The Record has entered. Consumer reviews of Off The Record are overwhelmingly positive. The company now works with over 200 firms in more than 35 states. Some lawyers have inquired about using the Off The Record service to book all of their cases because Off The Record makes everything so easy. Despite this success for both attorneys and consumers, grievances have been filed (by competing attorneys not on the platform) against participating attorneys in three states so far. Off The Record expects many more of these types of grievances before their model is fully blessed and accepted by local regulators and anti-competitive attorneys alike. Those regulators who have investigated Off The Record thoroughly have found nothing that conflicts with the rules of professional conduct, saying that the Off The Record model created no "specific evidence of client/consumer harm, or a business model that on its face appears to pose a substantial likelihood of such harm . . . . " Moreover, in more than one occasion and despite Off The Record's vetting process, unscrupulous attorneys using the Off The Record platform have taken large sums of client money and then disappeared or refused to complete work assigned to them. In such cases Off The Record has stepped in and made the clients whole without the need to involve local regulators. Problems like these could be avoided if Off The Record were able to do things like hold some portion of the legal fee until the completion of the legal service, but this exact type of activity by a third party non-lawyer was one of the major objections raised by regulators to the Avvo Advisor business model.

- Onlinesolutionattorney.be, an online service that allows users to consult with attorneys by email, skype, or phone has been prevented from expanding into many jurisdictions on the basis of current rules of professional conduct, such as not allowing fee sharing with non-California lawyers.

C. Sandbox is an Incremental Approach that Addresses Many Concerns Raised in Public Comment

The concept of a regulatory sandbox was not presented among the recommendations that went out for public comment. However, many concerns raised during the public comment period with respect to allowing non-attorney ownership, fee sharing and alternative business structures (ABS) can be addressed by using the regulatory sandbox approach to ensure that consumer protection is maintained and effectiveness is determined before adopting permanent changes to the rules of professional conduct and UPL statutes.

1. Concerns Raised in Many Public Comments Are Not Borne Out in Practice Where Similar Reforms Have Already Been Implemented

Crispin Passmore, a noted expert on legal regulation within England and Wales, provided public comment to ATILS which included research on the impact of the regulatory changes in those jurisdictions. He pointed out that it was unequivocal that the impact of liberalization of the regulations, while gradual and incremental, presented evidence that the users of legal services were beginning to

see the benefits. Introducing alternative business structures, multi-disciplinary practices, and removing restrictions on firm ownership has resulted in improved access, choice and quality of service and innovations in the provision thereof. More importantly, however, there was no evidence to suggest that the reforms have detrimentally impacted, or resulted in greater risk to, users of legal services.

In his public comment letter to ATILS, Crispin Passmore specified that it is the economic rules that England, Wales, and other regulators around the world have focused upon for reform. In fact, no identifiable regulator, in an effort to modernize the regulatory environment, is seeking to reduce or remove the ethics rules such as duties to the client and court and confidentiality. The aim is to tackle economic rules, whether within the ethics rules or statutes, that serve little or no ethical purpose but undermine an innovative, competitive and consumer focused legal market. This economic analysis is well-presented by the international Organization for Economic Cooperation and Development (OECD) in its recent report and recommendation for reforms for self-regulated professions, including lawyers, intended to better serve consumers of those services by increasing competition and innovation. See https://www.oecd.org/daf/competition/Portugal-OECD-Competition-Assessment-Review-Vol2-Professions-preliminary-version.pdf

Research from the liberalization of legal regulations in England was presented which established that ABS entities 1) were more open to new ideas than non-ABS entities, 2) had higher levels of investment in research and development, 3) generated a higher proportion of turnover from new services than non-ABS entities, 4) are innovating across more aspects of their activities than non-ABS entities, 5) spend on average more than twice as much of their turnover on reputation and branding than do non-ABS entities, and 6) are nearly three times as likely to be using some form of intellectual property protection.

Ultimately, in England and Wales they have made reforms that do not result in regulating less or lowering standards. Rather, they have shifted their energy from writing rules that are intended to "keep out" businesses not run by lawyers toward supervising regulated legal business and lawyers against a clear idea of public expectation and protection. All evidence to date suggests increased legal services available to the consumers without any additional harms. Consumer expectations and needs have been placed above protectionism as the formative basis for ethical standards.

Crispin Passmore's comments to ATILS recognized that each jurisdiction is different, and on this basis he offered proposed steps towards reform in California. Among those recommendations was the suggestion to explore a less prescriptive approach to rule making that would be part of a shift toward a risk-based model that is nimble enough to cope with innovation.

He further encouraged the use of a regulatory sandbox for supporting development of the next stage of proposed reforms. This will allow detailed rules to be written in a manner to ensure that the reforms work as intended and the risks around different practices are identified early. It will also allow an assessment of the appetite for change and will thereby allow consumers and providers both to better understand how regulatory changes will serve all going forward.

Some other public commenters also suggested a level of openness to the regulatory sandbox type approach to determine the value of regulatory changes.

2. Even Some Critics of the Reforms Indicated Openness to the Idea of Using a Regulatory Sandbox Approach

The Association of Discipline Defense Counsel (ADDC), while often critical of immediate reform based upon concerns of lack of professionalism and profit-driven motives of non-attorneys, wrote in its comment to ATILS that California should consider a pilot program for a limited time period in order to test what impact the proposals will have to help bridge the justice gap. In particular the ADDC recognized the potential value of providing one-to-many legal services via technology and online platforms. However, the ADDC believed the program should be limited to non-profit entities. The ATILS task force discussed this issue extensively, and it was generally agreed that requiring non-profit status will severely limit the ability to bring in needed capital and innovation in order to provide the services required. Furthermore, while lawyers similarly argued against the introduction of ABS in England claiming that only lawyers could be trusted to uphold high ethical standards and not be motivated by profit, none of the data gathered since ABS has been adopted has proven out this assertion. In fact, the data presented by Crispin Passmore on England and Wales specifically indicates that these concerns have not been borne out in practice. Instead, alternative business structures have proven to be more innovative, have dealt more effectively with complaints, and do not have regulatory action taken against them any more frequently than traditional lawyer-only practices.

Another example is the Los Angeles County Bar Association which was not in support of immediate changes to the regulations for many of the same reasons identified by ADDC and other lawyer commenters. Nevertheless, LACBA did express support for measuring and testing progress in the delivery of legal services, especially to underserved communities, under the ATILS' proposals in a limited market. LACBA also supported the idea of a pilot program for a limited time which would allow alternative business structures and technology based one-to-many services, including a stepped approach that begins with non-profit entities before allowing for-profit entities to provide legal services in this manner. This proposal by LACBA was based on the assumption that non-profit entities pose less public protection risk than do for-profit entities. However, there is no data that supports this assumption. To the contrary, the data from those foreign jurisdictions that allow for-profit entities to provide legal services suggest that there is no greater risk to public protection.

The conclusion to be drawn from these well-considered comments is that a pilot project like the regulatory sandbox proposal will receive less resistance and opposition than immediate change to the current regulatory structure. A sandbox will allow data and experience drive the changes that are ultimately made. In order for the sandbox proposal to be accepted and better received by the existing legal community, however, data from foreign jurisdictions that contradict the negative assumptions regarding for-profit entity participation will need to be more clearly presented to allay fears. It will ultimately be a transparent and inclusive sandbox that will answer key questions about the benefits and harms of contemplated reforms.