



JTC Quick Response Bulletin

Fostering Innovation in Legal Services:
Testing Legal Regulatory Changes
in a Protected “Sandbox”

Version 1.0
Presented [8 May 2020]

Abstract

The most practical strategy for solving the access to justice gap is to harness the power of the market. However, regulations meant to protect consumers also prevent innovation that is essential for the industry to keep pace with available technologies, unmet demand for services, and consumer expectations. A regulatory “sandbox” is a method that has proven useful in other industries to test innovations, business process improvements, and new technologies based on how they perform. The COVID-19 pandemic has created an opportunity to prioritize legal regulatory reform. With most courts now relying on virtual hearings and telework options that were unthinkable only months ago, there is a new openness to considering broader issues and a willingness to grapple with new technologies and ways of doing business. Some legal innovators think a sandbox may help the legal industry transform to better meet 21st century demands, improving access to justice.

Document History and Version Control

Version	Date Approved	Approved by	Brief Description
1.0	5/8/2020	JTC	Approved for circulation.

Acknowledgments

This document is a product of the Joint Technology Committee (JTC) established by the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC).



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To improve the administration of justice through technology

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Edited by Lise Embley, technical writer, National Center for State Courts

The JTC expresses gratitude to Thomas Clarke, Ph.D. for his significant contributions to this paper.

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Introduction

Legal industry regulations meant to protect consumers are also preventing innovation that is essential for the industry to keep pace with available technologies, unmet demand for services, and consumer expectations. Competition can foster efficiencies that will lower prices and costs as well as increase the variety and availability of services. Updating regulations to reflect 21st century business practices is key.

There are several methods for approaching regulatory reform. Some states are considering rule changes that allow for the creation of alternative business structures (ABS) that, like lawyers, are regulated by the state's existing regulatory structure - usually the state's bar. States might also temporarily pilot some rule changes before making them permanent. These approaches leverage traditional oversight methods which rely on evaluating and regulating the individual or entity providing the service.

An alternative approach that is gaining traction in the world of data-driven decision making is to craft new regulations based on outcomes. A regulatory "sandbox" is a method that has proven useful in other industries to test innovations, business process improvements, and new technologies based on how they perform. Some legal innovators think a sandbox may help the legal industry transform to better meet 21st century demands, improving access to justice.

What is a Sandbox?

Sandboxes are places where children play together creatively while learning interpersonal skills that are (hopefully) later applied more broadly to life. An invitation to "play in the sandbox" is ultimately an invitation to collaborate, build something new, test it out, and get a little sandy in the process. The framework of the sandbox keeps the "mess" of creation mostly contained. Playgrounds aside, there are a variety of sandboxes that have nothing to do with sand. These sand-less boxes date to early computer software labs, where developers established the so-called "sandbox" as a way to test code without negatively impacting a system's users.

Sandboxes have been used successfully for decades to test software; innovators are applying the concept to test more than software. In the financial sector, fintech sandboxes around the world are being used effectively to test financial technology innovations in a controlled way with special, limited exemption from some banking regulations. Insurance and financial services are other sectors utilizing sandboxes to test regulatory changes. A sandbox provides a protected space with significant oversight, where ideas can be vetted and tested. The point is to limit potential negative impacts to either the institution or its customers while allowing for innovations that could have significant benefits.

Several US states have legal regulatory sandbox proposals under consideration. In anticipation of an expected surge of legal needs relating to the COVID-19 pandemic, the Utah Supreme Court stepped up the launch of their regulatory sandbox initiative. The first phase, announced in late April 2020, is designed to “... allow technology and innovation to flourish while addressing risk and generating data to inform the regulatory process.”¹ Expedited consideration is being given to sandbox proposals that focus on offering low-cost or no-cost legal services to address issues stemming from the coronavirus. Less than a month earlier, the State Bar of California voted to delay a sandbox initiative, citing a need to consult with the California Supreme Court and other stakeholders.²

What Problem Could a Legal Services Policy Sandbox Solve?

As the number of SRLs in courts steadily rises, a parallel concern about the access to justice gap has grown. Numerous studies over the last several decades have documented the extent to which those with potential or actual legal problems do not receive any legal services. Barriers to access include cost, complexity, and even discovery (knowing which legal service to consume and where to find it).

Various studies on the access gap consistently confirm that it is large and constant. Many well-meaning programs have been instituted during that time to close the gap. Legal aid, court help centers, legal self-help websites, and bar pro bono services are all examples of largescale attempts to mitigate the gap. Unfortunately, none of these programs individually or the sum of them collectively have significantly reduced the gap. The problem is simply too big and scale of the available resources too small. According to Justice Himonas of the Utah Supreme Court, “For decades, we in the legal profession have tried to volunteer ourselves across the access-to-justice gap. Under that approach, we’ve witnessed the gap grow into a crisis.”³

There is no realistic scenario where funding for these traditional solutions will scale to the problem. Literally billions of dollars of new funding would be necessary each year.⁴ Recent global financial impacts relating to the COVID-19 pandemic may decrease, not

¹ “Utah Implementation Task Force on Regulatory Reform,” Utah Supreme Court. <https://sandbox.utcourts.gov/>

² Moran, Lyle. “Legal Reform Supporters Will Keep Advocating for California Sandbox Proposal.” *ABA Journal*, 31 Mar. 2020, www.abajournal.com/web/article/legal-reform-advocates-criticize-california-bars-delay-of-sandbox-proposal.

³ Knox, Annie. “Coronavirus Jump-Starts Call for Ideas on New, Low-Cost Legal Services.” *Deseret News*, Deseret News Publishing Company, 26 Apr. 2020.

⁴ See Rebecca L. Sandefur, “Re-regulating the Practice of Law.” Presentation. 23 April 2020. <https://www.azcourts.gov/accesstolegalservices/Whats-This-All-About>

increase, available funding while pandemic-related legal issues mushroom. Aside from a post-pandemic surge in legal needs, the size of the problem continues to grow as even middle-class consumers find themselves either priced out of the market or unwilling to pay for the perceived value of legal services currently available.

The most practical strategy for solving the access gap is to harness the power of the market. Competitive markets could foster the kind of productivity improvements that will lower prices and costs as well as increase the variety and availability of services. The power of innovation could come from both for profit and non-profit organizations. The key is to free up the ability to create new business processes and apply technology in innovative ways.

A legal services policy sandbox starts this process by allowing appropriate innovations to be tested. If those new ways of delivering legal services prove to be both cost effective and safe, they can become more broadly available to consumers. The idea is to open up the legal services market, but in a responsible way.

What is a Legal Services Policy Sandbox?

Simply put, a legal services policy sandbox (subsequently referred to as the “sandbox”) permits individual providers with proposed legal service to test consumer benefits and harms under controlled conditions. The regulator sets conditions for the sandbox test according to the perceived level of risk. The regulator requires the provider to collect data to assess the level of consumer benefit and risk of harm.

An important feature of the sandbox is that the current regulatory rules are temporarily and/or selectively relaxed or changed for sandbox participants on an individual basis during the pilot phase. The regulator does not try to guess what rules need to be relaxed or temporarily waived: sandbox applicants communicate what changes are required to allow their innovative service to be delivered. The explicit goal of the sandbox is to increase innovation in the delivery of legal services, lower prices and costs, and thus close the access gap.

Note that such sandbox innovations will likely not just involve the application of technology. Process reengineering experts know that existing processes can often be significantly improved (made more efficient and less costly) by relatively simple design changes such as removing process steps that are unnecessary and add no value. There is probably a lot of potential benefit to be gained by such design improvements, since legal services have not been subjected to market pressures in any serious way and court processes are known to be very complex.

What Precedents are There for a Legal Services Sandbox?

The sandbox may sound like a completely unprecedented and radical strategy for improving the provision of legal services, but state courts and bars have been experimenting with more incremental versions of this approach for a long time. The primary traditional vehicle for fostering innovation is exceptions to existing court or bar rules.

These exceptions may take several forms. The most basic approach is to carve out services that are then declared not to be the “practice of law.” That opens up those services to delivery by non-lawyers. In some cases, anyone can then provide them. In other instances, only a regulated person or entity can do so. States can and sometimes do combine both types of exceptions.

Some exceptions are based on functions. A popular exception is legal services related to real estate transactions. In some cases, these become new roles usually called document preparers. Of course, once that role is created, it is also possible to include other types of documents within their scope. Some states are creating a kind of licensed paralegal role to prepare documents related to family cases and other types of court cases commonly involving SRLs.

All state courts have a process enabling temporary or emergency court rule changes to allow and support pilot testing of new processes and services. Virtually every state made emergency rule changes to allow for virtual hearings as a public safety measure during the Covid-19 pandemic. Another common recent example is rule changes around electronic filing of court cases. Because this process was entirely new and courts knew little about it, a temporary rule change was a sensible approach. Once the court gained enough experience to know what rule provisions worked or didn't, what provisions were needed and which ones could be omitted, then the rule could be made permanent.

Other examples of court rule exceptions for new processes include online dispute resolution (ODR), speedy trials, streamlined case processes, and innovative jury processes. Sometimes technology is involved in these exceptions, especially with ODR, but the process changes are the critical aspect, especially since they often generate ripple effects on other rules and court processes beyond the immediate project or capability. In some cases, courts have performed comprehensive and general rule reviews as a result of a new process being implemented.

How Is a Legal Services Sandbox Different?

The regulatory approach that underlies a sandbox is radically different from the traditional approach in two ways. First, it regulates legal services, regardless of provider type. The usual approach is to regulate legal roles, i.e. lawyers. When a few states added new legal roles like document preparers or licensed paralegals, they regulated the roles in the same way as lawyers, leveraging the existing state bar structures and processes. In contrast, a sandbox allows any qualifying organization to provide a legal service, regardless of the roles involved. The focus is on the legal service and its impact on consumers in terms of benefits and harms.

Traditional role regulation focuses almost entirely on hypothetical harms like conflicts of interest and imposes ethical conduct codes and legal training to avoid them. Rule constraints are imposed on all providers without regard for the actual incidence of harm to consumers. In fact, almost no data exists on the incidence of these feared harms.

In stark contrast, the regulator of a sandbox makes decisions based on empirical data identifying the actual incidence of consumer harm, rather than hypothetical or ethical concerns. As long as the rates of harm are sufficiently low, benchmarked to the current levels of harm, providers are free to operate as they wish. The sandbox then provides a safe way to experiment with rule changes while controlling the degree of risk.

Assessing what constitutes an acceptable level of harm to consumers is difficult. Data on current rates of harm are scarce, so the ability to even specify a probabilistic rate of harm can be troublesome. It is also very important that the rates of harm are “benchmarking” to the appropriate current level of harm. For example, consumers who can afford full representation lawyers experience a rate of harm very different from those who cannot afford any legal services at all.

How Does a Sandbox Operate?

The establishment of any legal services sandbox starts with the regulatory body (usually the state’s Supreme Court or Legislature) with authority to govern the practice of law and establish rules about the provision of legal services. The regulatory body usually delegates all oversight and regulation of legal services to the state bar, but that approach has worked only because the provision of such services was restricted to one or a few roles.

Since no state bar currently has any experience with an empirical approach to regulating consumer harm, it is not at all clear that the bar is the appropriate oversight body for a sandbox. If not, then the regulatory body must establish a new regulatory entity on a pilot basis to administer the sandbox. Operating a sandbox requires staff

with appropriate skill sets such as data analysis, economic analysis, and regulatory affairs. A key function is assessing the current and potential rates of harm to consumers, as well as any beneficial impacts on consumers and the market for legal services. State courts and bars typically lack such roles within their current organizations. That means the court must hire new staff, contract for some services, or partner with a non-profit or educational institution with expertise and research interest in legal regulation.

The sandbox administrator must manage the transition of providers and innovative legal services into and out of the sandbox. Most importantly, the administrator imposes initial conditions for admittance to the sandbox. These conditions mostly concern the collection of assessment data, so the administrator can ascertain if the quality of the legal services is adequate and the rates of harm do not exceed whatever threshold has been established.

If a sandbox participant exceeds the specified level of harm, the administrator will terminate the sandbox pilot and prevent the participant from further delivery of that legal service to anyone. If the participant does not exceed the threshold during the entire pilot period, then the administrator may choose to take one of several actions:

- Allow the organization to continue providing that service to the same scope of consumers or to a broader scope.
- Impose continuing data collection and reporting requirements.
- Broaden the number of providers for similar legal services.
- Recommend permanent rule changes that support the innovation, truly opening up the ability of other providers to compete over the delivery of that type of legal service.

Since only the regulatory body can legally make decisions about regulatory rules or oversight, the administrator can only make recommendations about sandbox decisions. If the regulatory body chooses to continue delegating those decisions to the state bar, it would need to explicitly broaden the scope of that oversight to include a sandbox. It is possible that a state might choose to set up a new, separate regulatory entity to either temporarily run a sandbox or permanently regulate non-bar providers of legal services.

How Well Do Legal Services Sandboxes Work?

The idea of a policy sandbox started with financial services. The United Kingdom started a “fintech” sandbox in 2016, followed soon after by Singapore, Abu Dhabi, Australia, Mauritius, the Netherlands, Canada, Thailand, Denmark, and Switzerland. Arizona started the first state fintech sandbox in 2018, followed by Utah in 2019. Most of the national sandboxes have been moderately successful at generating innovation in

financial services. In particular, the UK issued a report in 2016 finding that their sandbox pilot led to high levels of innovation, greater investment in new technology, and increased competitive pressure on incumbents without significant “misbehavior.”⁵

The same cannot yet be said for American state financial sandboxes. In particular, the Utah sandbox did not entice a single organization to sign up. Although the reasons for that lack of interest are not well understood, it may be that the most meaningful financial regulation in this country occurs at the federal level.

The UK and Australia are considering a sandbox approach to legal services but have not yet done so. Other sectors in the United States considering a sandbox approach to regulation include healthcare, energy, and agriculture.

It is too early to know if a sandbox approach will work for courts and legal services in America. The standard approach for fintech sandboxes has been to impose fairly significant data reporting requirements on the participants. The data costs for innovators was still relatively low, since financial organizations already must collect, analyze, and report a massive amount of data for regulators. In stark contrast, very little data on outcomes, harms, and benefits for legal services is collected and reported by anyone. Requiring sandbox participants to collect all of the required data would likely create uneconomic costs, especially for startups.

The alternative is for regulators to collect some of the necessary data themselves, which may prove difficult to fund. It is also challenging to determine if consumer harms and risks from innovative services are significantly worse than existing services, given the almost total absence of relevant data. Finally, it is also not clear how an on-going regulatory entity might be funded. Right now, bar associations fund themselves from bar fees spread over a relatively large membership base. The same would not be true for a sandbox regulator, which could expect only a few participants in any given year.

What Alternatives Exist to Sandboxes?

A sandbox is not the only way to approach legal regulatory reform. For example, Arizona’s Task Force on the Delivery of Legal Services recently recommended⁶ amending some rules and completely eliminating others that are no longer relevant. These changes, once sanctioned by the Arizona Supreme Court, will permit lawyers and non-lawyers to co-own businesses that engage in the practice of law (also called

⁵ [“Evaluation: Changes in the Legal Services Market 2006/07 - 2014/15 - Main Report.”](#) Legal Services Board, legalservicesboard.org.uk, July 2016.

⁶ [“Task Force on the Delivery of Legal Services - Report and Recommendations.”](#) Supreme Court, State of Arizona. 4 October 2019.

Alternative Business Structure or ABS). Other proposed changes include developing a tier of non-lawyer legal service providers (limited license legal practitioners) to handle routine, high-volume legal work and non-lawyer court coordinators/navigators to provide person-to-person legal information to assist SRLs. The state bar discipline counsel would be authorized to receive, investigate, and prosecute complaints against an ABS in the same way they handle complaints against a specific lawyer. These initiatives leverage existing systems of oversight, reducing the potential cost and complexity of change.

Another option is to leave rule 5.4 in place and create a pilot program that would allow organizations that wish to become an ABS to operate under a different set of rules. If the pilot is successful, rule changes are proposed to incorporate the differences tested during the pilot. If a pilot doesn't work out, the changes cease to be allowed at the end of the pilot timeframe. Pilots are generally well-considered and most often yield anticipated benefits, resulting in incremental improvements. States that conduct pilots report that failures are rare.⁷

What Should State Courts Do About Sandboxes?

State courts have almost nothing to lose if they choose to experiment with regulatory reform in general and sandboxes in particular. The access to justice gap is huge and traditional solutions have not closed the gap. The public holds courts generally in relatively high esteem. Public respect and trust for the bar, which has been the primary provider of legal services, is lower.

A state court need not start out with a legal services sandbox. It can tailor rule changes, allowed innovative services, and associated conditions for operation to align with the amount of support for change that exists within the courts, the bar, and the legislature. Experimentation by states is historically a good thing that provides valuable experience about innovations in governance. If state courts experiment with regulatory reform using overlapping but somewhat different strategies, it may increase the amount of insight gained in the short run.

State courts are already experimenting with regulatory reform in various ways. Several states regulate non-lawyer legal roles like limited license legal technicians and document preparers, and are considering additional pilot programs involving new legal roles. A number of state courts are revising or considering the revision of their bar rules. These changes typically loosen constraints around advertising, marketing, and sometimes fee sharing and ownership. Both chief justices of state supreme courts and

⁷ Email correspondence with state court administrator.

state court administrators are formally looking at regulatory reform. The Conference of Chief Justices passed a formal resolution in support of such pilot programs in February of 2020.⁸ The Conference of State Court Administrators, Western Region, is planning an entire conference on the topic. In short, there is a lot of interest in regulatory reform; state courts willing to experiment should gain knowledge over the next several years that can be shared.

The COVID-19 pandemic has created an opportunity to prioritize legal regulatory reform. With most courts now relying on virtual hearings and telework options that were unthinkable only months ago, there is a new openness to considering broader issues and a willingness to grapple with new technologies and ways of doing business. The essence of a sandbox is a willingness to experiment.

For more information, contact NCSC at technology@ncsc.org.

⁸ [“Resolution 2 - Urging Consideration of Regulatory Innovations Regarding the Delivery of Legal Services.”](https://ccj.ncsc.org/Policy-Resolutions.aspx) Conference of Chief Justices. Adopted 5 February 2020.
<https://ccj.ncsc.org/Policy-Resolutions.aspx>