

OFFICE OF LEGAL SERVICES INNOVATION

AN OFFICE OF THE UTAH SUPREME COURT

February 23, 2021

Utah State Bar Regulatory Reform Committee
c/o Erik Christiansen
Parsons Behle & Latimer
201 South Main St.
Salt Lake City, UT 84111

Re: Letter of Inquiry to the Office of Legal Services Innovation

Dear Committee:

Thank you very much for your recent letter expressing interest in the operations of the Court's Office of Legal Services Innovation. We are most appreciative of the Utah State Bar's support of the Utah Supreme Court's historic initiative to explore regulatory reform to increase access to justice. As the Court's delegates implementing that effort, we certainly welcome the opportunity to address the Committee's questions.

As you noted, the Court has stressed the importance of transparency from the outset of this project and we have strived to provide that. Indeed, as more fully addressed below, the answers to your questions are found for the most part in materials that we have made publicly available in the due course of the Office's operations. As a further measure of transparency, we intend to post both your letter and our response on the Office's website, so that they are available to the public at large.

Your letter requested information about six items. We address each of those below.

Criteria for Approval - The criteria for consideration of an application to the sandbox are spelled out in detail in the Court's Standing Order No. 15 and in the Innovation Office Manual, a copy of which is attached. The Manual has been approved by the Court and is revised occasionally. The Committee, just like any member of the public, can go to our website, sandbox.utcourts.gov, for the most recent version of the Manual.

Part III of the Manual sets forth the Innovation Office's process for reviewing applications. The four Qualifiers are listed. The Office's process for Risk Assessment is described. The Manual expressly lists the three potential risks to consumers which are being assessed by the Office and by the Court. The Manual also describes the Service Model Risk Categories which are being used to determine where a particular sandbox proposal falls along the risk spectrum. The next several pages of the Manual then articulate the potential risks of each Service Model and the

related data and disclosure requirements in place for that Service Model. In addition to identifying the Service Models in each proposal, the application and review process also identifies the specific Service Categories in which the applicant is seeking to provide service. These are the criteria being applied by the Office and by the Court. To your specific question, the same criteria are applied to each applicant.

As for why each specific applicant was approved, we wish to first stress that our Office does not approve applicants. The Utah Supreme Court does that. Our responsibility is to assess the applications and make recommendations to the Court. For applications approved by the Court both the Office's recommendation and the Court's resulting Order are publicly available on our website. Here is an example of that documentation from the application of [Sudbury Consulting's Expungement Project in partnership with Code for America](#) (also attached). The recommendation discusses whether each of the Qualifiers is met, what Service Models are used, and other details of the proposals. The assessment process focuses on the extent of potential harm to consumers and how to address those risks by working through the criteria discussed above. A copy of the current blank [application form](#) is also attached.

The Applicant's Potential Effect on Meeting Unmet Legal Needs - Whether a particular applicant's proposal will directly meet particular unmet legal needs and, if so to what extent, will be best answered through the data developed by the sandbox project. As the Committee no doubt understands, the Court is testing a hypothesis with the sandbox. The hypothesis is that allowing non-traditional legal models will lead to improvements in both the accessibility and affordability of legal services. The data generated by sandbox participants should allow both our Office and third-party evaluators to determine whether the hypothesis is valid.

However, under the Court's formulation of the Sandbox and what can be tested in it, that issue was approached in a different and more impactful way. This is best understood by considering the Court's sole objective of this regulatory activity, as found in Section 3.1 of Standing Order No. 15. There the Supreme Court stated:

3.1 Regulatory Objective

The overarching goal of this reform is to improve access to justice. With this goal firmly in mind, the Innovation Office will be guided by a single regulatory objective: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services. The Utah Supreme Court's view is that adherence to this objective will improve access to justice by improving the ability of Utahns to meaningfully access solutions to their justice problems, including access to legal information, advice, and other resources, as well as access to the courts.

This has been incorporated into one of the Qualifiers mentioned earlier. To meet the Regulatory Qualifier, an applicant's proposal must appear to increase the market of affordable legal services for consumers. A proposal could meet this qualifier by offering legal services to a segment of the market not currently served by lawyers. A proposal could also meet this

qualifier because it targets legal needs that are either underserved by lawyers or only served by lawyers at prices that are not affordable to people of ordinary means. A proposal could also meet this qualifier if it combines legal services with other professional services in a way that makes the overall set of services affordable or more accessible to consumers. Importantly, in stating the Regulatory Objective as it has, the Court has articulated a broad view of access to justice, stressing the need for all Utahns to be able to get meaningful access to help with their legal problems. This is not constrained to some specific income level nor is it constrained to traditional legal services as they have been developed and provided by lawyers. The premise is to build up the market more broadly, both on the supply side and on the demand side.

The Workings of a Sandbox Participant's Project - The third item in your list of inquiries is about how the project of each approved applicant will work. You can review those details for each approved applicant in their authorization packets, as well as monthly reports on applications all applications posted on the Office's website: <https://sandbox.utcourts.gov/approved>. The Office's inquiry into these proposals is entirely focused on the potential for harm to consumers: What does the entity offer to consumers and could it harm consumers if not done properly?

To illustrate, consider an actual applicant using software, such as FOCL. As described in our recommendation:

FOCL Law proposes offering a software platform to guide consumers through the process of completing financial disclosures related to divorce proceedings (Utah Rule of Civil Procedure 26.1). The software walks consumers through the Utah disclosure form and provides basic information and nonlegal advice assistance to enable completion. The software can be used by lawyers or by pro se litigants. The software was developed and is managed by a Utah licensed lawyer employed by the company.

While this describes what the software does for consumers, it does not describe how the software works. That is because the way the software works is not material. So long as it provides results that are not detrimental to the consumer, the specific algorithms in the software are not for the Office to investigate. Instead, as described in the Manual, such models are subjected to audits of their services to assess the actual competence of the service provided. If attorney review of FOCL Law's software in action showed it was generating erroneous financial disclosures, then the Office would have a basis for requiring FOCL to either fix its program or stop providing services.

Expected Data from Participants - The data required from participants vary depending on the level of assessed risk and are spelled out in the manual. By way of example, here are the data requirements for either a nonlawyer provider with lawyer involvement or a software provider with lawyer involvement, both of which are classified as moderate risk:

Consumer Service	Criteria of Assessment	Provider	Measure	Reporting
General	General	All services under the fee sharing model	Number of people served	Monthly
			Geographic info (requested)	Monthly
			Revenue / receipt info	Monthly
			All consumer complaints	Monthly
Specific consumer service	Consumer achieves an inaccurate or inappropriate legal result. Consumer fails to exercise legal rights through ignorance or bad advice. Consumer purchases an unnecessary or inappropriate legal service.	All services under the fee sharing model	Nonfinancial (legal) outcomes data (% customers that did / did not get the outcome they sought)	Monthly
			Financial outcome data (benefit obtained / loss prevented) broken down by outcome (verdict, settlement, etc.)	Monthly
			(Potential) Expert review of redacted case file	As determined

Thus, in addition to the general information called for in the first four lines of this table, a provider in the moderate risk category must also provide case specific information for each service category in which they are authorized. This includes both financial and non-financial outcome data. The reporting frequency for moderate risk participants is monthly. For less risky models, the reporting is quarterly. Of course, all data are anonymized so that client confidentiality can be maintained.

Assessed Risks of a Particular Proposal - As outlined above, the Office’s process is to understand the service models presented in each proposal. The Office then uses the identified service models to guide each proposal’s risk assessment process. The three primary risks to the consumer are listed in the manual. However, the manual further discusses the risks of particular models. Indeed, Part B of the manual is a several page long description of the various risks which may be posed by certain aspects of certain models. We encourage you to fully review it; however, here is an excerpt pertaining to non-lawyer ownership:

Nonlawyer investment / ownership presents the potential risk that nonlawyer owners / investors, unfamiliar with and unlimited by the legal Rules of Professional Conduct, could undermine the legal services model to the consumer’s detriment. It potentially increases the likelihood of implementing business practices that increase the consumer harm risk across all three risk areas. The potential negative impacts of nonlawyer investment / ownership are significantly lower if the nonlawyers have less than majority ownership.

Anticipated Impact on Lawyers Working in the Area of the Applicant - As the foregoing discussion clarifies, the Court has directed the Office to use a risk-based approach focused on concern for the consumers of legal services, not on concern for the current providers of legal services. The impact on lawyers working in the area is not within the Office's remit. So far, however, most of the sandbox proposals are lawyer-led and most include lawyers as some part of the business model.

The Office is charged with exploring whether innovation will lead to a wider, more affordable and more accessible range of legal services for the people of Utah. Whether that will increase or reduce the demand for the services of lawyers is unknown. In the early going we have seen new delivery systems for those services as opposed to a wholesale replacement of the lawyers. By analogy, the advent of Netflix came as Blockbuster faded; however, has the total amount of entertainment content and the number of actors, writers and producers employed in that industry increased or decreased? Similarly, even though the business models and economic structure for legal services might change, the essential need for smart, well-trained people to give legal advice to others will not go away.

The Court's experiment in regulatory reform is as much a response to what is already happening in legal markets as an instigation of change. We would hope that the Bar, whether through your Committee or otherwise, would consider anew how to assist lawyers both adapt to and benefit from the changes being brought about by the broader impacts of changes in technology, information and consumer expectations in our ever-more complex legal system.

We hope these responses to your six areas of inquiry are helpful to you, at least in pointing you towards the materials that address the questions you posed. You suggest there might be some desire not to share information with the Bar; that is not at all the case. The Office has been given very clear direction to be as transparent as possible to all concerned, and that includes the Bar. Other than protection of confidential business information from applicants and of deliberative information, our intent is to operate openly in all respects. Our meetings, our minutes, our reports to the Court and all other such activities are open to the fullest extent possible.

As to the question you raise about the Client Security Fund, this is not something the Office has considered in detail. Lawyers participating in sandbox approved entities are generally not relieved of their obligation to comply with the Rules of Professional Conduct and remain subject to disciplinary activity like any other member of the Utah Bar. Similarly, if those lawyers were to act in some way that warranted a payment from the Client Security Fund, we would expect that resource to remain available to their clients irrespective of the context in which the lawyer harmed his or her client. However, if the harm were caused by some provider other than a lawyer, perhaps an accountant in a multidisciplinary practice or a non-lawyer provider, then that would seem to be outside the scope of the Client Security Fund. This strikes us as something to test against the language of the rules establishing the Client Security Fund.

In closing, we would like to thank you for your interest and for your leadership of the Bar on this important matter. After you have studied the Office's manual and the other materials we

have referenced, if you believe it would be helpful, we would be pleased to have a Zoom call with your committee.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John R. Lund". The signature is stylized and fluid, with a prominent loop at the end.

John R. Lund

CC: Heather Farnsworth, Utah State Bar President
Hon. Constandinos Himonas, Utah Supreme Courts
Lucy Ricca, Executive Director, Utah Supreme Court's Office of Legal Services Innovation