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Utah Supreme Court Standing Order No. 15

This Standing Order establishes a pilot legal regulatory sandbox and an Office of Legal Services Innovation to assist the Utah Supreme Court with respect to overseeing and regulating the practice of law by nontraditional legal service providers or by traditional providers offering nontraditional legal services.

The Standing Order is effective as of _____, 2020.

Background

The access-to-justice crisis across the globe, the United States, and Utah has reached the breaking point.¹ To put it into perspective, a recent study by the Legal Services Corporation found that 86 percent “of the civil legal problems reported by low-income Americans in [2016–17] received inadequate or no legal help.”² And a recently published study out of California “[m]odeled on the Legal Services” study, concluded that 60 percent of that state’s low-income citizens and 55 percent of its citizens “regardless of income experience at least one civil legal problem in their household each year.” The study also found that 85 percent of these legal problems “received no or inadequate legal help.”³

For years, the Utah Supreme Court has made combating the access-to-justice crisis confronting Utahns of all socioeconomic levels a top priority. To date, the Supreme Court, along with the Judicial

¹ Access to justice means the ability of citizens to meaningfully access solutions to their justice problems, which includes access to legal information, advice, and resources, as well as access to the courts. See Rebecca L. Sandefur, *Access to What?*, 148(1) DAEDALUS 177, 186 (Winter 2019).

² LEGAL SERVICES CORPORATION, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017).

³ STATE BAR OF CALIFORNIA TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVICES, *FINAL REPORT AND RECOMMENDATION* 11–12 (March 2020) (emphasis added).

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Council and the Utah Bar Association, have worked ceaselessly to improve access to justice through many initiatives: the Utah Courts Self-Help Center, the Licensed Paralegal Practitioner Program, form reform, and the Online Dispute Resolution Program, to name but a few. In its boldest step toward bridging the access-to-justice gap, the Supreme Court has undertaken an effort to reevaluate and amend several of the regulations it has relied upon in governing the practice of law. This Standing Order and accompanying rule changes implement that effort. The Supreme Court anticipates that the regulatory reform set out in this Standing Order will shrink the access-to-justice gap by fostering innovation and promoting market forces, all while protecting consumers of legal services from harm.⁴

1. General Provisions

In accordance with its exclusive authority and responsibility under article VIII, section 4 of the Utah Constitution to govern the practice of law, the Utah Supreme Court establishes an *Office of Legal Services Innovation* (Innovation Office). The Innovation Office will operate under the direct auspices of the Supreme Court and its purpose will be to assist the Supreme Court in overseeing and regulating nontraditional legal services providers and the delivery of nontraditional legal services.⁵ To this end, and subject to Supreme Court oversight, the Innovation Office will establish and

⁴ The Supreme Court’s decision to pursue changes regarding its governance of the practice of law is in keeping with (1) the Resolution of the Conference of Chief Justices and (2) the Resolution of the American Bar Association’s House of Delegates “to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public”

⁵ In Utah, the practice of law is defined by Utah Supreme Court Rule of Professional Practice 14-802. This Standing Order incorporates that definition. For an understanding of “nontraditional legal services providers” and “nontraditional legal services,” please refer to Section 3.3 (Regulatory Scope).

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administer a pilot legal regulatory sandbox (Sandbox)⁶ through which individuals and entities may be approved to offer nontraditional legal services to the public by nontraditional providers or traditional providers using novel approaches and means, including options not permitted by the Rules of Professional Conduct and other applicable rules. The Supreme Court establishes the Innovation Office and the Sandbox for a pilot phase of two years from the effective date of this Standing Order.

2. Innovation Office

In carrying out the responsibilities designated to it by the Utah Supreme Court, the Innovation Office, at all times, will be subject to the Supreme Court's direction and control. Furthermore, the Innovation Office will have no authority to regulate any individuals, entities, or activities that are beyond the Supreme Court's constitutional scope and authority to govern the practice of law.⁷ With these overarching restrictions firmly in mind, the Innovation Office will have responsibility with respect to the regulation of legal services provided by nontraditional legal providers, including those services offered within the Sandbox and those that have been approved for the general legal market. The Innovation Office will be responsible for developing, overseeing, and regulating the Sandbox, including admitting and monitoring nontraditional legal providers and services therein. The Innovation Office will meet regularly and at least monthly, on a day and at a time and place of its convenience.

⁶ A regulatory sandbox is a policy tool through which a government or regulatory body permits limited relaxation of applicable rules to facilitate the development and testing of innovative business models, products, or services by sandbox participants.

⁷ By way of illustration, the Supreme Court has authorized real estate agents to advise their customers with respect to, and to complete, state-approved forms directly related to the sale of real estate. *See* Rule of the Utah Supreme Court Rules of Professional Practice 14-802(c)(12)(A). Outside of this grant, and the ability to modify it, the Supreme Court has no authority with respect to regulating real estate agents. That authority rests with the legislative and executive branches.

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2.1 Office Composition

The Utah Supreme Court will appoint the members of the Innovation Office. The Innovation Office will consist of a Chair, Vice-Chair, and seven additional members, all serving on a volunteer basis. In the event of a vacancy, or on its own motion, the Supreme Court will appoint, depending on the vacancy, a new Chair, Vice-Chair, or member.

2.2 Conflicts of Interests

The Utah Supreme Court acknowledges that instances may arise in which Innovation Office members may face conflicts of interest between their business or personal affairs and their member duties. A conflict of interest arises when members—or a member of their immediate family—have a financial interest in a Sandbox applicant or participant or in an entity that has successfully exited the Sandbox. For example, a member’s firm may apply to offer services as part of the Sandbox. Recognizing that transparency and public confidence are paramount concerns, the Supreme Court requires that in cases of conflict, the implicated member(s) disclose the conflict to the Innovation Office in writing and recuse from any involvement regarding that particular Sandbox applicant or participant. The Innovation Office will maintain a record of all conflicts and recusals and make all records related to conflicts and recusals publicly available.

2.3 Office Authority

Subject to the limitations set forth in Standing Order and the ultimate authority and control of the Utah Supreme Court, the Innovation Office will have the authority to oversee the nontraditional provision of legal services (*see* Section 3.3.2 on Regulatory Scope) using an objectives-based and risk-based approach to regulation.

Objectives-based regulation specifically and clearly articulates regulatory objectives to guide development and implementation. Both the Innovation Office and the market participants will be guided in their actions by specific objectives.

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Risk-based regulation uses data-driven assessments of market activities to target regulatory resources to those entities and activities presenting the highest risk to the regulatory objectives and consumer well-being. Using risk-based regulation enables the Innovation Office to better prioritize its resources and manage risks in the Utah legal services market.

The Utah Supreme Court grants the Innovation Office the authority to develop and propose processes and procedures around licensing, monitoring, and enforcement to carry out its mission in light of the Regulatory Objective and Regulatory Principles outlined in Section 3.

The Innovation Office must submit proposed processes, procedures, and fee schedules to the Supreme Court for approval as they are developed and before they take effect.

3. Regulatory Objective, Principles, and Scope

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.

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3.2 Regulatory Principles

The Innovation Office will be guided by the following regulatory principles:

1. Regulation should be based on the evaluation of risk to the consumer.⁸
2. Risk to the consumer should be evaluated relative to the current legal services options available.⁹
3. Regulation should establish probabilistic thresholds for acceptable levels of harm.¹⁰
4. Regulation should be empirically driven.¹¹
5. Regulation should be guided by a market-based approach.¹²

⁸ The phrase “based on the evaluation of risk” means that regulatory intervention should be proportional and responsive to the actual risk of harm posed to the consumer, as supported by the evidence.

⁹ The phrase “relative to the current legal service options available” means that risk should not be evaluated as against an ideal of perfect legal representation by a lawyer. Risk should rather be measured as against the reality of current market options for consumers. In many cases, that means no access to legal representation or legal resources at all.

¹⁰ The phrase “probabilistic thresholds for acceptable levels of harm” (the chance a consumer is harmed) means the probability of a risk occurring and the magnitude of the harm should the risk occur. Based on this assessment, the Innovation Office will determine thresholds of acceptable risks for identified harms. Regulatory resources should be focused on areas in which, on balance, there is a high probability of harm or a significant impact from that harm on the consumer or the market.

¹¹ The phrase “empirically driven” means that the regulatory approach and actions must be supported, whenever possible, by data from the legal services market.

¹² The phrase “market-based approach” means that regulatory tactics should seek to align regulatory incentives with increased revenue or decreased costs for market participants in order to encourage desired behavior or outcomes.

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3.3 Regulatory Scope

As noted, under the auspices of the Utah Supreme Court, the Innovation Office will be responsible for developing, overseeing, and regulating the Sandbox, including the admission and oversight of nontraditional legal providers and services therein. The Supreme Court offers the following examples to help individuals and entities, lawyers and nonlawyers alike, understand the Innovation Office's regulatory scope. These examples are just that and the list is not intended to be exhaustive.

3.3.1 Outside the Regulatory Scope

Individuals and entities that carry out the following activities are outside the Innovation Office's regulatory scope, remain under the Utah Bar's authority, and need not notify the Innovation Office:

(a) Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits:

- (i)** offering traditional legal services as permitted under the Rules of Professional Conduct; or
- (ii)** using new advertising, solicitation, fee-sharing, or fee-splitting approaches as contemplated by the Rules of Professional Conduct.¹³

3.3.2 Within the Innovation Office's Regulatory Scope

Individuals and entities that carry out the following activities are within the scope of the Innovation Office's regulatory authority and are subject to this Standing Order's requirements:¹⁴

¹³ Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits may not, however, engage in fee-splitting or fee-sharing in an effort to avoid the prohibition against outside ownership set forth in rule 5.4A of the Utah Rules of Professional Conduct.

¹⁴ This list is not meant to be exclusive or exhaustive. There may be business arrangements, models, products, or services not contemplated in Section 3.3.2, which are welcome and should come through the Sandbox.

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- (a) Partnerships, corporations, and companies entirely owned and controlled by lawyers; individual lawyers with an active Utah Bar license; and legal services nonprofits partnering with a nonlawyer-owned entity to offer legal services as contemplated by Rule 5.4B;
- (b) Nonlawyer owned entities, or legal entities in which nonlawyers are partial owners (for profit or nonprofit):
 - (i) offering legal practice options whether directly or by partnership, joint venture, subsidiary, franchise, or other corporate structure or business arrangement, not authorized under the Rules of Professional Conduct in effect prior to [Month] [Date], 2020, or under Utah Supreme Court Rule of Professional Practice 14-802; or
 - (ii) practicing law through technology platforms, or lawyer or nonlawyer staff, or through an acquired law firm.

4. The Sandbox

The Sandbox is a policy tool by which the Utah Supreme Court, through the Innovation Office, can permit innovative legal services to be offered to the public in a controlled environment. The Innovation Office will develop, oversee, and regulate the Sandbox according to the guidance outlined in this Standing Order. Individuals and entities wanting to offer the public nontraditional legal business models, services, or products must notify the Innovation Office. Individuals and entities in the Sandbox will be subject to such data reporting requirements and ongoing supervision as the Innovation Office determines, so long as the requirements fall within its regulatory authority.

4.1 Notification

All individuals and entities that fall within the Regulatory Scope (Section 3.3.2) must notify the Innovation Office of their intent to offer legal service. Notification is a first-step, minimal requirement by which legal service providers initiate the process to enter the Sandbox. The Innovation Office will develop a notification form and process for intake, review, assessment, and response to notification.

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4.2 Process Categories

The Utah Supreme Court contemplates two categories of process, tied to the Innovation Office’s determination of potential risk: a notification-only process and an application process.

The following table compares the two processes:

Notification Only Process	Application Process
(1) Notification	(1) Notification
(2) Finding of no risk or minimal risk	(2) Finding of more than minimal risk
(3) Approval or denial of application to participate in the Sandbox (with minimal annual reporting requirements)	(3) Application (4) Approval or denial of application to participate in Sandbox (with specific reporting requirements determined by the Innovation Office)

4.3 Notification-Only Process

Providers or services for which the Innovation Office finds no risk or minimal risk of consumer harm (e.g., providing a de minimis financial or ownership interest in the law firm to a long-time nonlawyer employee) will be permitted to go through the “notification only” process. The Innovation Office will develop minimum reporting requirements for no-risk or minimal-risk legal service providers and a process by which these providers are expeditiously submitted to the Utah Supreme Court. The Innovation Office will submit to the Supreme Court a written finding supporting the no-risk or minimal-risk designation and minimum reporting requirements. The Innovation Office must submit proposed no-risk or minimal-risk candidates to the Supreme Court for approval.

4.4 Application Process

The Innovation Office will require those individuals and entities that have been determined to present more than minimal risk to enter the application process and present more detailed

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information about their business, ownership and investment structure (both existing and proposed), risk self-assessment, proposed mitigations of risk, and proposed consumer complaint process. The objective of the application process is for the Innovation Office to determine that the legal service proposed by the applicant furthers the Regulatory Objective and does not present unacceptable levels of risk of consumer harm. The Innovation Office will develop a process for intake, review, assessment, and response to applications.

The Utah Supreme Court contemplates that the application process will be iterative and will include communications between the Innovation Office and the various applicants, as necessary. The Innovation Office will strive to develop a process that is efficient and responsive.

The Innovation Office will make a determination as to whether an applicant's proposed legal service furthers the Regulatory Objective and does not present an unacceptable risk of consumer harm. The Innovation Office will make recommendations to the Supreme Court regarding whether an applicant should be authorized and the associated requirements for the applicant (e.g., reporting, disclosure, risk mitigation, insurance requirements). In developing these requirements, the Innovation Office will consider the Regulatory Objective and Regulatory Principles.

If the Innovation Office does not find that an applicant's proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed authorization, and will include a brief written explanation supporting the finding. The Innovation Office will develop a process for appeal of a denial of a proposed authorization to the Supreme Court.

4.5 Authorization

As with the licensing of lawyers and Licensed Paralegal Practitioners, the Utah Supreme Court will ultimately be responsible for approving or denying authorization to nontraditional legal service providers.

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An approved application means permission to offer the proposed legal service in the Sandbox as outlined in the approval and under the Innovation Office's authority. Authorized participants and services are deemed authorized to practice law in Utah, albeit on a limited and temporary basis, under Utah Supreme Court Rule of Professional Practice 14-802.

Denial of authorization by the Supreme Court has the effect of returning the applicant to the Innovation Office. The Supreme Court may include a brief written explanation of the reasons for its denial to aid the applicant and Innovation Office in potentially rectifying the issue and resubmitting the proposed authorization.

4.6 Licensing (Exiting the Sandbox)

Sandbox participants that are able to demonstrate their legal services are safe—i.e., that they do not cause levels of consumer harm above threshold levels established by the Innovation Office—will be approved to exit the Sandbox and may be granted the appropriate license to practice law by the Utah Supreme Court pursuant to Utah Supreme Court Rule of Professional Practice 14-802. Such providers and services will remain under the regulatory authority of the Supreme Court, through the Innovation Office and subject to such monitoring and reporting requirements as the terms of the license indicate and subject to the enforcement authority of the Innovation Office.

The Innovation Office will develop the process (subject to Supreme Court approval) by which providers and services exit the Sandbox. It is anticipated that this process will generally follow that outlined for application approval, including an assessment of the provider or service, a finding on the consumer safety of the provider or service, and a recommendation to the Supreme Court as to the scope of the license and associated requirements (e.g., reporting). The Innovation Office is authorized to make the licensing assessment, findings, and recommendations at both the individual or entity level and a more categorical level—i.e., to recommend that a category of legal service providers be licensed to practice law in Utah. The Innovation Office is also authorized to deny Sandbox exit when appropriate.

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If the Innovation Office does not find that a participant's proposed legal service furthers the Regulatory Objective or finds that it presents an unacceptable risk of consumer harm, the Innovation Office will deny the proposed licensure, and will include a brief written explanation supporting the finding. The Innovation Office will develop and propose the process for appeal of a denial of Sandbox exit to the Supreme Court.

4.7 Fees

The Innovation Office will have the authority to propose a fee schedule to the Utah Supreme Court. Unless otherwise required, fees paid will be used to fund the Innovation Office.

4.8 Monitoring

As noted, the Innovation Office will have the authority to develop specific data reporting requirements as part of both Sandbox authorization and general licensing of proposed legal services. The Innovation Office will develop processes and procedures for intake, review, and assessment of incoming data at an individual provider level, across different market sectors, and across the market as a whole. The Innovation Office will have the authority to increase or decrease reporting requirements as indicated by the provider's performance in the market and compliance with the Innovation Office's requirements.

The Innovation Office will have the authority to take proactive actions to effect monitoring of providers and the market as a whole, including but not limited to market surveys, expert audits, anonymous testing, and "secret shopper" tests. The Innovation Office will also develop processes and procedures for intake, review, and assessment of information coming from sources such as media, other government or nongovernmental institutions, whistleblowers, and academia.

All regulated providers, whether in the Sandbox or after exiting, have a proactive duty to report any unforeseen risks or harms of which they become aware.

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4.9 Measuring Risk

The Innovation Office will have the authority to develop the measurements by which it assesses and manages risk. The Innovation Office will identify specific harms presenting the most significant risk to the Regulatory Objective.

The Utah Supreme Court acknowledges that this regulatory approach does not remove all incidence of harm from the market and, in fact, contemplates that sometimes there may be no regulatory enforcement action even though some consumers may experience harm. Nevertheless, aggrieved consumers may seek relief and remedy through traditional channels of civil litigation or, if applicable, the criminal justice system.

4.10 Consumer Complaints

Consumer complaints require two distinct responses from the Innovation Office. First, the Innovation Office will develop a process to address consumer complaints. Second, consumer complaints are a source of data about consumer harm; thus the Innovation Office will develop a process by which individual complaint information is fed into the larger data reporting system to contribute to the assessment of risk.

4.11 Enforcement

The Innovation Office will develop standards for enforcement authority against regulated providers in line with the Regulatory Objective and Regulatory Principles. Enforcement authority will generally be triggered when the evidence of consumer harm exceeds the applicable acceptable consumer harm threshold. The Innovation Office will also develop the range of enforcement mechanisms it deems appropriate for the market, including but not limited to education, increased reporting requirements, fines, and suspension or termination of authorization or license. Last, the Innovation Office will develop a process for appealing enforcement decisions to the Innovation Office, and then to the Utah Supreme Court.

Once the Innovation Office has developed these various processes and procedures, they will be submitted to the Supreme Court for

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review and, if appropriate, approval. Both the Supreme Court and the Innovation Office will strive to make the enforcement process as transparent, targeted, and responsive as possible.

4.12 Standards of Conduct

Lawyers engaging with the nontraditional provision of legal services, whether as owners, employees, contractors, or business partners with Sandbox participants or licensed providers are required to maintain their professional duties and their law license in good standing. The Innovation Office will develop processes and procedures by which to keep abreast of all relevant information on licensing status.

The Innovation Office will have the discretion to develop and propose standards of conduct if necessary to guide regulated providers in applicable professional and ethical duties.

4.13 Confidentiality

Except as otherwise authorized by a duly executed data sharing agreement, the confidential contents of statements, communications, or opinions made by any Sandbox applicant, authorized participant, or licensed provider will be kept confidential. The Innovation Office, however, will have the authority to release nonconfidential, relevant information about approved participants and licensed providers as it deems necessary to advance the Regulatory Objective and to foster transparency and public confidence. Nothing, however, in this paragraph limits the ability of the Innovation Office to provide aggregate and anonymized data sets to outside researchers.

4.14 Reporting Requirements

The Innovation Office will be responsible for regular reporting to the Utah Supreme Court and the public on the status of the Sandbox, the Sandbox participants, licensed providers, and consumers.

The reports to the Supreme Court must be quarterly. Reports to the Supreme Court must include the following:

- The number of applicants

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- General information about applicants (e.g., type of legal entity, ownership makeup, target market, proposed type of service, legal need to be addressed, subject matter served)
- Numbers of (along with general information)
 - Proposed authorizations
 - Denial of proposed authorizations
 - Approved applications
 - Denied applications
 - Applications to exit the Sandbox
 - Licenses granted
- Numbers and demographic data on consumers served by the Sandbox and licensed providers
- Identification of risk trends and responses

The Innovation Office will, subject to existing law, have the authority to determine the nature and frequency of its reports to the public, but must, at a minimum, report the information identified above on an annual basis (keeping anonymity and confidentiality as required).

4.15 Termination of Pilot Phase

The Sandbox is a policy tool, adopted by the Utah Supreme Court to develop a new regulatory approach to nontraditional legal services and to inform the Supreme Court's decision-making on rule changes necessary to support the expanded legal services market. The Supreme Court has set out a two-year period of operation for this pilot phase of the Innovation Office and Sandbox. At the end of the pilot phase, the Supreme Court will determine if and in what form the Innovation Office will continue. Sandbox participants authorized and in good standing at the end of the two-year period and for whom there appears to be little risk of consumer harm will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist. Entities that have successfully exited the Sandbox will be able to continue operations under the authority of the Innovation Office or other appropriate entity should the Innovation Office cease to exist.