

WASHINGTON STATE
B A R A S S O C I A T I O N

Board of Governors Meeting
Post Meeting Materials

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Washington State Convention Center, Seattle WA
Zoom, Webcast and Teleconference

Practice of Law Board

Presentation to Washington State Bar Association, May 2021

Slide One

Thank you, President Sciuchetti. Governors, members and staff of the Washington State Bar Association, and members of the public, I am here today in my role as the current chair of the Washington Court's Practice of Law Board, which is one of the Supreme Court boards administered by the Washington State Bar Association. I thank you for giving the Practice of Law Board time on your agenda.

Although I am presenting this information, before I begin I would like to acknowledge that this presentation represents the combined work of a group of volunteers from the Practice of Law Board and the Access to Justice Board's Technology Committee. These volunteers have spent many hours reading the literature on this subject as well as reaching out to and meeting with people such as John Lund, Board Chair of the Utah Office of Legal Services Innovation, Crispin Passmore, a consultant who has been a key proponent for legal reform in the United Kingdom, and we have worked with the staff of the bar including staff in the Offices of General Counsel, Discipline, and Admission to Practice, and our liaison to the WSBA Board of Governors, Governor Anjilvel. We attended CLEs on the subject including an excellent program at Gonzaga University where our own Supreme Court Justice Stephens, as well as Utah Supreme Court Justice Hermonas, and Dean Andrew Perlman, Dean of Suffolk Law School and Professor of Law who has written extensively on legal reform were part of an informative panel on legal reform and access to justice.

Slide Two

Under Washington Court General Rule 25, the Practice of Law Board has three responsibilities. The first is to educate the public about competent legal assistance, and to fulfill this the Practice of Law Board is working on a Legal Checkup program. The role most people know the Practice of Law Board for is the third responsibility, reviewing and when appropriate, referring unlawful practice of law complaints to the appropriate enforcement agency.

I am here today regarding our second responsibility—to recommend to the Supreme Court new avenues for legal services.

Slide Three

The Practice of Law Board has spent considerable time over the last several years working to understand the nature of the market for legal services in Washington State. This includes services provided by individual legal practitioners who have been authorized by the Supreme Court to practice law in Washington—our attorneys, licensed practice officers, and limited license legal technicians. As represented in the illustration, these people provide legal services through large law firms, medium-sized law firms, solo or small law firms, triple LT firms that form the base of the illustration, and legal aid agencies which are shown at the top of the illustration. Not shown in the chart are legal practitioners who provide services through the Courts, government agencies, and as corporate counsel.

But the Practice of Law Board has focused on a growing number of internet- or online-based legal service providers.

Slide Four

At the time of this study in 2020, the Practice of Law Board identified over 50 online legal service providers. Some services target legal practitioners, and some target consumers. As shown by the overlap in the diagram, others target both segments of the market for legal services. Today there are even more such services.

Slide Five

These online legal service providers offer legal services across a wide spectrum of legal matters. They will help with divorces, contractual clauses that force arbitration, traffic infractions, and getting a visa. Some services offer referrals to legal practitioners, others are pure do-it-yourself legal services where the consumer does the work through an online application and appears in court pro-se. In many cases, a commissioner or judge will be unaware the documents the pro-se individual is presenting came from an online legal service.

These online legal services can show glowing reports from the press illustrating how consumers are using these services to address their legal needs. This is a multi-billion-dollar market today with more venture capital flowing to these firms, and the firms are merging to gain additional market power.

Slide Six

In examining these online legal services, the Practice of Law Board has observed these services may be addressing the access to justice gap—that is they are getting people with a legal issue connected with a legal service which can help them with their issue, they appear to offer focused and timely advice, in a manner that consumers—particularly young and busy consumers—want and can afford.

However, they raise several questions. Who monitors quality? Which regulations should apply to these services? And if a regulation does not apply to a service, why should it apply to legal practitioner offering similar legal services in person? Should these services be licensed, or admitted to practice law?

Slide Seven

The Practice of Law Board is not alone in asking these questions. This chart shows a variety of ideas for both closing the access to justice gap and introducing new and authorized legal services. Some states are looking to license new types of legal practitioners. Others are looking at changing regulations, such as changing rules about referrals, fee-splitting, and of-course the long examined and debated changes to advertising rules.

Like British Columbia, California, Florida, and Utah, the Practice of Law Board is looking into creating a legal regulatory sandbox, particularly to test online legal services and alternative business structures by empirical observation, measurement, and data collection to determine what regulation is required.

A legal regulatory sandbox (LRS) allows a non-traditional legal service, for example, an Internet-based legal service, to offer legal services, including the practice law, while data about the effect of the service on the access to justice gap and consumer harm are evaluated in a low-risk, data-gathering environment.

Slide Eight

This infographic from Bloomberg Law shows a similar picture of the movement towards addressing the new market for legal services by ownership reform. Arizona and Utah are taking the most aggressive steps to address market conditions to close the access to justice gap.

Slide Nine

The Practice of Law Board strongly feels there is considerable risk of doing nothing about online legal services. They will not go away. The market for legal services is too large. Investment in such services is growing. And perhaps most important, the network effect means there is great danger of “spontaneous deregulation,” where the consumer’s acceptance and use of the services makes it virtually impossible to remove them from the market or impose regulation. The network effect can be seen in the past for its role in defining the market for PC operating systems, web browsers, ride sharing, and short-term rentals of real property. Today, many online legal service providers are entering the Washington legal services market by following an “Assurance of Discontinuance” between the Washington State Attorney General and LegalZoom, as if this court approved decision provides a safe harbor—do the same things as required by LegalZoom—and you’re good to offer legal services in Washington.

Slide Ten

At the Practice of Law Board meeting with the Supreme Court in February, the Practice of Law Board promised the Supreme Court that the Practice of Law Board would bring a proposal to address online legal services to the Court. The Practice of Law Board will be proposing that Washington Courts create a legal regulatory sandbox to allow the Supreme Court, the Practice of Law Board and others, such as the Access to Justice Board and the Washington State Bar Association, to evaluate the provision of online legal services to ensure they are closing the access to justice gap and not harming consumers.

Slide Eleven

The legal regulatory sandbox the Practice of Law Board will be proposing tries to allow legal practitioners, and entrepreneurs to provide innovative and non-traditional legal services while the Practice of Law Board and again, the other interested parties build the regulatory relationships, and collect data so data-driven decisions about whether such services are addressing access to justice and are not creating consumer harm can be made.

Slide Twelve

It is not a goal of the legal regulatory sandbox to allow entities providing online legal services to skirt regulation, perform the unlicensed practice of law, or create additional bureaucracy. While all the details have not been finalized, the Practice of Law Board is looking to fund the legal regulatory sandbox using fees from legal regulatory sandbox participants or from grants, and not from the current legal practitioners.

Slide Thirteen

Much of the Practice of Law Boards focus in preparing the legal regulatory sandbox proposal for the Supreme Court has been on problems such as how does one measure whether a legal service closes the access to justice gap while minimizing potential harm to consumers. This is a model the Practice of Law Board is working on for analyzing the risk and the benefits of an applicant applying for and operating in the legal regulatory sandbox.

The horizontal or x axis is risk of harm to the consumer. The vertical or y axis is how much the service addresses the access to justice gap. Finally, the z axis, which admittedly creates a 3-D model, considers when the harm to consumers is most likely to arise—now—or in the distant future.

For example, those services that reduce the access to justice gap, with little risk of harm—those falling in the green box—would likely be admitted to the legal regulatory sandbox for further study. Those services that do not positively affect the access to justice gap, have high risk of harm, and such harm might not be detectable for years—those falling in the red box—are not candidates for either the sandbox or frankly, to provide legal services.

Slide Fourteen

The remainder of our work on the proposal focuses on the processes for getting into, operating in, and exiting the legal regulatory sandbox. The Practice of Law Board has to address the application process for operating in the legal regulatory sandbox, management of the legal regulatory sandbox, interaction with the Supreme Court, and finally, how to fund the legal regulatory sandbox .

Slide Fifteen

So, what are the next steps? The Practice of Law Board will be presenting our first draft proposal to an en Banc meeting of the Supreme Court in July—just barely meeting the Practice of Law Board’s objective from our February meeting with the Court. However, I say draft, because this will be an iterative process. There is still a lot the Practice of Law Board, and others like Utah ahead of us, have to learn. There are unknown unknowns—things the Practice of Law Board does not know it does not know. As these unknowns come to light, the Practice of Law Board will address them and incrementally improve the legal regulatory sandbox.

The Practice of Law Board will continue to work with all interested parties, such as the Board of Governors to move this forward. The Practice of Law Board welcomes your input and your support.

Thank you, and now if there is time, I would be happy to answer your questions.

Practice of Law Board

Washington State Bar Association Board of Governor's Meeting May 2021

Practice of Law Board

General Rule 25

1. Educate the public about competent legal assistance
2. Consider and recommend new avenues for legal services to the Supreme Court
3. Review and may refer complaints for unlicensed practice of law (UPL) to enforcement agencies

Practice of Law Board

New avenues for legal services

- Overview of the legal service provider market in Washington State as of 2020
- Includes legal services provided by:
 - Authorized legal practitioners including attorneys, licensed practice officers (LPOs), limited license legal technicians (LLLTs) through firms and legal aid agencies
 - Online legal service providers offering Internet-based services for legal service providers and consumers



Practice of Law Board

New avenues for legal services — online legal service providers

- Over 50 online legal service providers are offering legal services in Washington
 - 20 + provide services primarily to legal practitioners (Westlaw, CLIO)
 - 14 + provide services to legal practitioners and consumers (Avvo, LegalZoom)
 - 17 + provide services primarily to consumers (FairShake, Hello Divorce)



Representative Online Legal Services (Consumer)

Representative Online Legal Services (Legal Practitioners)

Breakdown of other providers is available from the POLB

Practice of Law Board

New avenues for legal services — online legal service providers

- Online legal service providers are offering legal services across a wide spectrum of legal matters including family law, contracts, traffic infractions, immigration...
- Several different business models exist, from referral to a legal practitioner to full do-it-yourself (DIY) for consumers
- Getting positive reviews and support from media—consumers are finding through such publicity and search
- Venture capital is making substantial investments and consolidation amongst the providers is starting to happen

The New York Times <https://ny0.nyt.ms/2V304js>

'Scared to Death' by Arbitration: Companies Drowning in Their Own System

Lawyers and a Silicon Valley start-up have found ways to flood the system with claims, so companies are looking to thwart a process they created.



By Michael Corkery and Jessica Silver-Greenberg

April 6, 2020

Teel Lidow couldn't quite believe the numbers. Over the past few years, the nation's largest telecom companies, like Comcast and AT&T, have had a combined 330 million customers. Yet annually an average of just 30 people took the companies to arbitration, the forum where millions of Americans are forced to hash out legal disputes with corporations.

Mr. Lidow, a Silicon Valley entrepreneur with a law degree, figured there had to be more people upset with their cable companies. He was right. Within a few months, Mr. Lidow found more than 1,000 people interested in filing arbitration claims against the industry.

About the same time last year, Travis Lenkner and his law partners at the firm Keller Lenkner had a similar realization. Arbitration clauses bar employees at many companies from joining together to mount class-action lawsuits. But what would happen, the lawyers wondered, if those workers started filing tens of thousands of arbitration claims all at once? Many companies, it turns out, can't handle the caseload.

Hit with about 2,250 claims in one day last summer, for example, the delivery company DoorDash was "scared to death" by the onslaught, according to internal documents unsealed in February in federal court in California.

Driven partly by a legal reformist spirit and entrepreneurial zeal, Mr. Lidow and Mr. Lenkner are leaders in testing a new weapon in arbitration: sheer volume. And as companies face a flood of claims, they are employing new strategies to thwart the very process that they have upheld as the optimal way to resolve disputes. Companies, in a few instances, have refused to pay the fees required to start the arbitration process, hoping that would short-circuit the cases.

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Online legal service unanswered questions

Online legal services may be:

- Addressing the access to justice gap
- Offering focused, timely advice
- Offering services in manner consumers want
- Offering services consumers can afford

But:

- Who monitors service quality?
- Is advice accurate and complete?
- Should RPCs apply?
- Should they be admitted to practice?

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New avenues for legal services — other jurisdictions

| Jurisdiction | Regulatory Sandbox | New Types of Practitioners | Online Legal Services | Alternative Business Structure | Court Navigators or Facilitators | Fee Sharing Non-Lawyer and Lawyer | Non-Lawyer Economic Interest in Law Firms | Remove Lawyer Referral Rules | Professional Independence | Reform Advertising Rules | Recognition of Indigenous People Law |
|------------------|--------------------|----------------------------|-----------------------|--------------------------------|----------------------------------|-----------------------------------|---|------------------------------|---------------------------|--------------------------|--------------------------------------|
| Arizona | | Yes | | Yes | | Yes | Yes | | | | |
| California | Yes | | | Yes | | Yes | | Yes | | | |
| Florida | Yes | | Yes | Yes | | | | Yes | Yes | Yes | |
| New York | | Yes | | | Yes | | | | | | |
| Utah | Yes | | | Yes | | Yes | | Yes | | | |
| British Columbia | Yes | Yes | | Yes | | | Yes | | | | Yes |

This slide is subject to change

Practice of Law Board

New avenues for legal services — The risk of doing nothing

Online legal services are not going away:

1. Investment in such services is growing
2. Using “network effect” to make themselves irresistible to consumers—
”Spontaneous Deregulation”
3. Many are using the LegalZoom and Washington Attorney General’s “Assurance of Discontinuance” as a “safe harbor” by following the guideline established for LegalZoom

1 EXPEDITE
2 No hearing set
3 Hearing is set
4 Date: _____
5 Time: _____
6 Judge/Calendar: _____

7 STATE OF WASHINGTON
8 THURSTON COUNTY SUPERIOR COURT

9 In Re the Matter of: NO.
10 LegalZoom.com, Inc., a Delaware
11 corporation,
12 Respondent. ASSURANCE OF
DISCONTINUANCE

13 The State of Washington, by and through its attorneys, Robert M. McKenna, Attorney
14 General, and Douglas D. Walsh, Senior Assistant Attorney General, files this Assurance of
15 Discontinuance pursuant to RCW 19.86.100.

16 I. INQUIRY

17 1.1. The Attorney General initiated an investigation into the business practices of the
18 Respondent, LegalZoom.com, Inc.

19 1.2. Respondent is engaged in the business of offering certain legal forms over the
20 Internet to consumers throughout the United States of America, including the State of
21 Washington.

22 1.3. Respondent has offered and the Attorney General has accepted an Assurance of
23 Discontinuance. This Assurance of Discontinuance shall not be considered an admission by
24 Respondent that it has engaged in any of the below-described acts or an admission by
25 Respondent of a violation of Chapter 19.86 RCW for any purpose.
26

ASSURANCE OF DISCONTINUANCE-
LEGALZOOM.COM, INC. - 1
72557-0001/LEGAL19068040.1

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

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Goal for new avenues for legal services

1. Get draft proposal of how-to address online legal services to the court in first half of 2021

A proposal for a legal regulatory sandbox (LRS) to serve as a safe harbor to allow for the provision of innovative and non-traditional legal services in Washington State, under a court order which defines the metes and bounds of the service, under the application of appropriate regulations, and with requirements to provide data about the services that will be used to assess whether the service is reducing the access to justice gap, and not harming consumers.

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Goals for the Legal Regulatory Sandbox

1. Support innovative legal services

Allow legal practitioners and other entrepreneurs to provide innovative (non-traditional) legal services in Washington state, particularly those legal services which can reduce the access to justice gap

2. Foster necessary regulatory relationships

Ensure a regulatory relationship is created between online legal service providers and the courts and other regulators, to ensure the public is not harmed by the innovative legal services

3. Enable in-depth data collection

Ensure data about the innovative legal services is collected so that data-driven decisions can be made to reduce the access to justice gap and ensure consumer protection

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Non-goals for the Legal Regulatory Sandbox

1. Allow entities to skirt regulation

Rather, it is the intent to the LRS to determine the correct set of regulations for traditional and innovative legal services to ensure the balance between closing the access to justice gap while protecting consumers of legal services, which may involve changes to current regulations and the drafting of new regulations as required

2. Allow the unlicensed practice of law

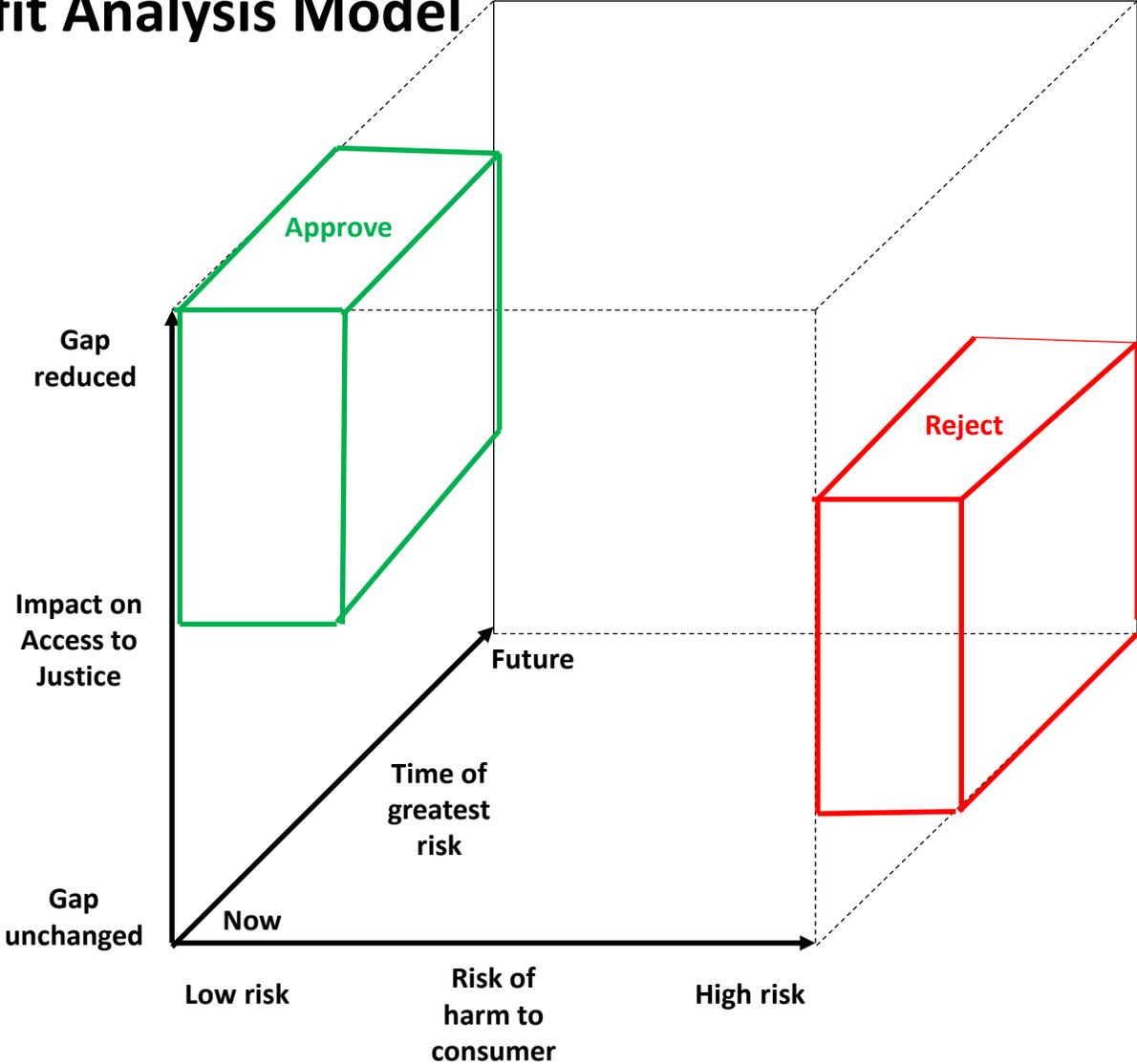
Rather, it is the intent to provide pathways for innovative legal services to be authorized in some manner to practice law in Washington state

3. Create additional bureaucracy

Rather, it is the intent to find the best way to utilize existing resources and expertise within and outside of Washington State—and looking at utilizing a “charge back” method to ensure traditional legal practitioners are not paying for regulation or admission of the innovative legal services—but each provider covers their own costs of regulation and admission

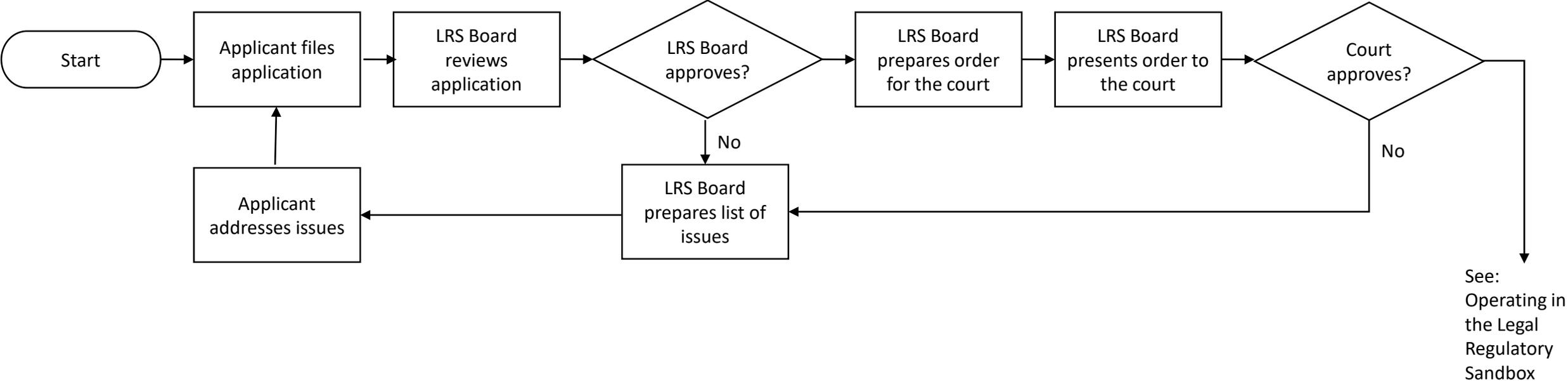
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Legal Regulatory Sandbox Risk Benefit Analysis Model



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Legal Regulatory Sandbox—Admission to the Sandbox



Practice of Law Board

Next steps

1. Present first-draft of proposal to en Banc meeting of Supreme Court on July 1st
2. Continue building relationship with affected parties as well as other jurisdictions which are considering or implementing a LRS
3. Continue working through an iterative process to improve the proposal into a working LRS