



The State Bar *of California*

CLOSING THE JUSTICE GAP WORKING GROUP

DATE: September 16, 2021

TO: Closing the Justice Gap Working Group

FROM: Staff

SUBJECT: I.D Staff Report (CTJG Member Comments)

For the Closing the Justice Gap Working Group September 17, 2021 meeting, some members of the working group responded to the request for submission of advance written comments on agenda items as a way to facilitate optimal discussions during the meeting. Written comments were received from: Wendy Musell; Crispin Passmore; and Jim Sandman. Individual compilations are posted for each agenda item for which comments were received. In addition to the comments on individual agenda items, a general or global comment was received from Wendy Musell and it is attached to this memorandum.

September 15, 2021 Wendy Musell:

Globally, I also have concerns related to the standard of care for sandbox participants being at the level of care as if the consumer had no legal representation. This is not a recognized legal standard and appears to be no standard at all. It would be more appropriate to use the legal standard for malpractice that is already enshrined in law.

Judicial Council of California Civil Jury Instructions (2020 Edition), No. 600, sets forth the Standard of Care as follows:

[A/An] [insert type of professional] is negligent if [he/she/nonbinary pronoun] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

[You must determine the level of skill and care that a reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses [, including [name of defendant],] who have testified in this case.]

CACI, No. 600. *See also Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 (“In addressing breach of duty, “the crucial inquiry is whether [the attorney’s] advice was so legally deficient when it was given that he [or she] may be found to have failed to use ‘such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”).

Creating a standard of care that is as if the consumer had no legal assistance at all is in essence, no legal standard of any kind. It is also against the interests of consumers.

Similarly, allowing an ad hoc after the fact determination of which rules apply to sandbox participants after the application of the participant to be determined in the subjective determination of the regulator at the time is not consistent with consumer protection. I am unaware of any other regulatory agency that functions in that manner. There should be transparency regarding the rules that apply to sandbox participants that is published and considered by the legislature. Otherwise, this is an issue regarding consumer protection, governmental transparency, separation of powers and may also raise other issues where certain favored businesses are subject to some subset of regulations, with no meaningful way for the consumer to evaluate those issues. It also raises concerns of proper regulatory oversight.