



DATE: August 5, 2022

TO: Closing the Justice Gap Working Group

FROM: Merri Baldwin and Lucy Ricca

SUBJECT: II.D. Recommendation for a Standard of Care Applicable to Sandbox Participants

I. INTRODUCTION

During discussions of a possible regulatory framework for the sandbox, questions have been raised around the issue of the standard of care that may apply to sandbox participants. This memorandum addresses the difference between regulatory standards and the standard of care, discusses the common law of negligence and how those standards and principles would apply to the sandbox participants, and offers a possible recommended standard of care, should the common law of negligence be determined to not be sufficient to establish possible liability.

II. BACKGROUND

A. Regulation and Civil Liability for Negligence: Lawyers

An important threshold point is the difference between standards and processes used to regulate professional licensure for lawyers and the standards and processes applied in litigation to determine civil liability for negligence.

i. Regulatory Standard

Regulation of lawyers is carried out by the State Bar of California, pursuant to professional rules of conduct approved by the California Supreme Court, as well as statutory provisions set forth in the Business and Professions Code adopted by the Legislature.¹ Regulation of lawyers encompasses admission to the practice of law as well as continued licensing, discipline and enforcement (which may include a range of measures from warnings up to disbarment.) See, e.g. Bus. & Prof. Code section 6077; California Bar Disciplinary Standard 1.3. The standard that

¹ Regulation of attorneys by the State Bar of California also is governed by Rules of the Supreme Court and rules adopted by the Bar. See, e.g., California Bar Court Rules of Procedure; [others.]

applies to determine whether an attorney should be subject to discipline by the State Bar is whether the attorney has committed a “willful breach” of the applicable rules. (Bus. & Prof. Code, § 6077.) Discipline is imposed on an individual attorney basis: law firms or other entities are not subject to regulatory enforcement through discipline by the State Bar.

ii. Civil Liability Standard

In addition to being subject to regulatory oversight by the Bar, California lawyers also may be civilly liable to clients, former clients, and sometimes others when they breach their duty of care.² Law firms are liable for negligence by individual lawyers employed by or associated with the firm, either as the party contracting with the client for legal services or through the legal doctrine of *respondeat superior*.

The professional negligence standard essentially holds that lawyers’ actions are not to be judged as against a reasonable person but rather as against a reasonably careful lawyer in the same or similar circumstances. As the California Supreme Court put it in *Lucas v. Hamm*: “The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees 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.”³ This principle is set forth in the California jury instructions that apply to negligence claims against attorneys. CACI No. 600 defines the standard of care as “the skill and care that a reasonably careful [attorney] would have used in similar circumstances.” The standard of care is determined by the jury, based on the testimony of expert witnesses. *Id.*

This professional standard of care applies because lawyers, as other professionals, are specially qualified, with distinct and significant educational and other qualifications, and apply specialized knowledge to their transactions with consumers.⁴ The professional negligence standard ensures that lawyers are judged by other lawyers (through the use of expert witnesses) and with reference to other lawyers (as opposed to lay people). In that way, it creates a higher burden for plaintiffs seeking to prove negligence. Unlike in an ordinary

² The elements of professional malpractice are: “(1) the duty of the attorney to use such skill, prudence, and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.” *Wiley v. County of San Diego*, 19 Cal.4th 532, 536 (Cal. 1998)

³ 56 Cal.2d 583, 591 (1961) (citations omitted). The professional malpractice action also incorporates action based on breach of contract. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 181 (Cal. 1971) (“Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney’s failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. Thus legal malpractice generally constitutes both a tort and a breach of contract.”)

⁴ See generally, Insurance Agents or Brokers as Professionals or NonProfessionals for Purposes of Malpractice Statute of Limitations, 121 A.L.R.5th 365 (2004) (discussing court doctrine on determination of professional status in the context of whether insurance agents/brokers are considered professionals for purposes of statute of limitations application).

negligence action, the plaintiff seeking to prove professional negligence must typically produce expert evidence establishing the professional standard of care. The professional status also confers a particular benefit on lawyers by subjecting these claims to a shorter statute of limitations as set forth in Code of Civil Procedure section 340.6.

The rules and statutes that govern regulation of lawyers, including the Rules of Professional Conduct, are designed to facilitate the regulation of lawyers through discipline, not to provide a basis for civil liability.⁵ Although generally the standard of civil liability for professional malpractice is distinct from the system of lawyer regulation, one important intersection occurs on the issue of limitation of liability. California Rule of Professional Conduct 1.8.8 states that California lawyers may not limit liability for professional malpractice in advance through the contract with their client.⁶ Rule 1.8.8 does not, however, prevent the lawyer from limiting the scope of her services through contract or agreement with the client. Indeed, the attorney's duty of care may be limited by the scope of the attorney-client relationship, as set forth in the contract/agreement between lawyer and client. With the client's consent, a lawyer may limit the scope of the relationship in a number of ways and, generally, the attorney's duty to act depends on and is limited by that scope.⁷

B. Regulation and Civil Liability for Negligence: Legal Service Entities

The distinction between regulation and civil liability described above would also hold true for entities admitted to and offering services within the proposed regulatory sandbox. The regulatory framework, through which the government acts to control a particular sector of the economy, would be distinct from the private arena of civil liability, through which individuals can seek redress for wrongs committed by others.

i. Regulatory Standard

The regulatory framework conceptualized for the sandbox is one of entity regulation. Legal service entities, whether for profit or nonprofit, would be the regulated providers. The regulator's function would be similar to that performed by the State Bar of California with

⁵ California Rules of Professional Conduct, rule 1.0, Comment [1]. The Comment also states that "[n]evertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context." See also, Model Rules of Prof'l Conduct, Scope, Cmt. 20 (2009) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. [...] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.").

⁶ See also, Cal. Rules of Court, rules 3.35–3.37.

⁷ It may be the case, however, that even where the scope of representation is expressly limited, the attorney may have a duty to alert the client as to reasonably apparent legal problems outside the scope of the retention. *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.

respect to lawyers and, if approved, paraprofessionals.⁸ The regulator of the sandbox, as authorized and approved by the California Supreme Court and the Legislature as applicable, would set the parameters of that regulatory framework, likely to include any or all of the following: parameters for admission; data reporting requirements; regulatory enforcement, which may be triggered by evidence of consumer harm or noncompliance with authorization order, reporting, and/or disclosure requirements; and when sandbox entities may be suspended or terminated from the sandbox and under what circumstances.

As with lawyers, the regulatory framework of the sandbox, whether implemented through ex ante rules or ex post risk-based assessment, would not itself impose any standards of civil liability.⁹ Regulatory enforcement may, of course, be factual evidence to be examined in the context of a civil liability action. Just as the fact that a lawyer has been disbarred could be considered as evidence of her liability for professional malpractice in a civil action against the lawyer, the fact that a legal service entity was suspended from the sandbox could be evidence in a case for civil liability for negligence against the entity. In either case, the civil action could be brought and professional malpractice found without such factual evidence.

ii. Civil liability

There are three main potential avenues for this group to consider in making a recommendation on the question of civil liability for sandbox entities:

- (1) Recommend that entities be subject to common law negligence standards, allowing courts to develop appropriate standards reflecting the diversity of providers and services likely to emerge within the sandbox. No ex ante standard of care would be imposed by the Legislature.
- (2) Recommend that the Legislature impose a standard of care via statute that would hold sandbox entities to the same standard of care of that of lawyers, regardless of the provider or service model.
- (3) Recommend that the Legislature impose a standard of care via statute that would hold entities to a reasonable standard of care under the circumstances and outline some basic characteristics of the reasonable standard of care. This standard would focus on defining the role of the entity in ensuring proper legal service provision through implementing policies, procedures, and systems to ensure reasonable care is taken.

⁸ The frame of analysis for regulatory action within the sandbox will likely be different than that which exists for lawyer regulation; rather than asking whether a “willful breach” of the rules occurred, the regulator analyzes the reported data to assess whether evidence of consumer harm has surpassed the regulatory threshold thereby triggering regulatory enforcement action. This issue is mentioned here only for an illustrative purpose.

⁹ As noted above, however, violations of professional rules may be evidence of a breach of duty. CRPC 1.0, comment [1].

a. Common Law Negligence

It is a bedrock principle of tort law that there is a baseline duty of reasonable care under the circumstances whenever anyone acts in a way that creates a foreseeable risk of harm.

California Civil Code section 1714 provides the statutory language of common law negligence in California:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.¹⁰

Section 1714 clearly creates the presumption that there is ***always*** a duty of reasonable care under the circumstances for all actors.¹¹ This language aligns with the Third Restatement of Torts: Liability for Economic Harms § 6(1):

An actor who, in the course of his or her business, profession, or employment, or in any other transaction in which the actor has a pecuniary interest, performs a service for the benefit of others is subject to liability for pecuniary loss caused to them by their reliance upon the service, if the actor fails to exercise reasonable care in performing it.

The above language sets a duty of care and liability for negligence applicable across all actors in our society. Those general principles of negligence would apply to sandbox participants, as they do to any other businesses or entities providing services to consumers in California, such that a sandbox entity could be liable for negligence, whether directly or through vicarious liability, for harm caused by inadequate or incorrect services. This common law negligence liability would be separate and apart from (1) whatever regulatory requirements are imposed by the regulatory authority, and (2) whatever body of law has accumulated under the banner of “legal malpractice” in the jurisdiction.¹²

¹⁰ Cal. Civ. Code, § 1714 (2019).

¹¹ See also California Jury Instruction No. 400: Negligence Essential Factual Elements. Courts can find exceptions to this presumptive duty of care: In determining whether policy considerations weigh in favor of such an exception, we have said the most important factors are “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” *Kesner v. Superior Court* (2016) 1 Cal.5th 1132. There is no reason to think any categorical exception would be created here for providers of legal services to consumers in the sandbox.

¹² This principle has already been recognized in California. See, e.g., *Biankanja v. Irving* (1958) 49 Cal.2d 647. In that case, a notary who drafted and improperly executed will was liable in negligence to the will’s beneficiaries, regardless of the fact that he was not a lawyer and had engaged in the unauthorized practice of law.

One possible way of approaching potential liability by sandbox participants would be to rely on the common law negligence standard to provide a means of ensuring tort liability for sandbox participants who act negligently and cause damage to their clients. The advantage to doing that rather than articulating a separate standard to apply to sandbox participants is that it may be difficult to devise a negligence standard specific to the sandbox that provides any better way to evaluate and measure liability than does the general negligence standard. It may be that sandbox participants will offer services in new and different ways to how current legal services are provided. Some of those new ways may look very much like lawyer representation, with an increased level of unique knowledge and expertise and a long-term, trust-based relationship. Other types of services provided may look very different—focused on more discreet, narrow tasks, or assistance designed to enable the consumer to handle their legal problem themselves, for example. Further, any single authorized entity may provide multiple methods or tiers of legal service delivery.

What reasonable care means, and whether heightened duties may need to be applied, in the context of these new providers and in the context of different service models, may best be developed in the tort system on a case by case basis. Courts would turn to the usual factors that go into determining negligence, holding those entities liable which fail to take reasonable care under the circumstances. Under the standard negligence rules, an entity offering a new service must consider the potential liability for its service in advance and take all reasonable steps to protect consumers from foreseeable harm. A software company offering a will creation service must take all reasonable steps to ensure that the software produces valid wills. If the platform fails to ask the consumer a necessary question, such as whether the consumer has children, that service would obviously fall below a standard of reasonable care in the provision of will writing services.¹³ Similarly, an entity offering corporate incorporation services through nonlawyer providers would be expected to ensure that those providers exercise the requisite care to draft, execute, and file the documents such that the incorporation is, in fact, valid. Entities in the sandbox, because they are not immune from liability, need to internalize that standard and take steps to perform their duty of reasonable care. In this way, the tort system would provide a bulwark to the sandbox regulatory oversight system.

¹³ See, generally, *Liability of One Drawing an Invalid Will*, 65 A.L.R. 2d 1363 (collecting cases dealing with the liability of any person, attorney or not, who draws an invalid will). *Biankanja v. Irving*, 49 Cal.2d 647, is illustrative. In that case, a notary (not authorized to practice law) undertook to draft a will for another but failed to direct proper attestation of the will, thereby rendering it invalid. Although the question at issue in *Biankanja* was one of liability to third parties (beneficiaries) not in privity, the Court's liability analysis is informative. As the Supreme Court described the case in *Lucas v. Hamm*: "As in *Biakanja*, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of prevent future harm would be impaired." 5 Cal.2d, at 589.

It is a harder question to assess an entity's duty of care with regard to more complex legal issues and instruments, just as it is with respect to lawyers.¹⁴ It may be that for sandbox entities, most complex services would be provided by lawyer employees of sandbox entities, meaning the professional liability standard would apply to the services as it currently does for law firms. Courts may develop new principles through case law identifying specific standards of care for legal software and nonlawyer-provided legal services. The courts and the tort system are likely best placed to assess possible liability in a changing industry, and ultimately establish a set of legal service industry norms reflecting a balancing of the interests and costs at stake.¹⁵

b. Ex ante standard of care—same as lawyers

If the working group believed that common law negligence standards would not be sufficient, the working group could recommend a model standard of care for legal service entities authorized in the sandbox and beyond. Such a model could have the benefit of communicating to courts that these entities are a new category of providers and should be considered as such when assessing claims of negligence.

One approach is to recommend that sandbox entities be held to the same standard of care as that of lawyers. There are several potential difficulties with this approach. First, as discussed above, while the lawyer standard of care may be appropriate for some entities, many entities within the sandbox likely will be offering legal services that are very different from traditional representation by a lawyer. Entities using lawyers to practice law will already be held to the professional standard via vicarious liability. Beyond that, the sandbox is meant to drive innovation and diversity in service providers; holding all providers to a single standard—and one that reflects a particular history of full legal representation by a human lawyer—could significantly undermine these goals. Further, imposing the professional standard could have the effect of making it more challenging for consumers to gain civil redress because they could face a shortened statute of limitations and the need to present expert evidence. Presenting expert evidence of the professional standard of care as applied to new entities providing services in new ways may prove particularly challenging.

¹⁴ See, e.g., *Aloy v. Mash* (1985) 38 Cal.3d 413, 419 (finding question of fact as to whether lawyer was professionally negligent for failing to assert a community property interest in husband's military benefits); *Davis v. Damrell* (1981) 119 Cal.App.3d 883, 888 (finding attorney's error in judgement on the question of community property interest in military benefits was not professional negligence).

¹⁵ Indeed, regardless of the technical provider category (lawyer vs. nonlawyer), courts may determine that an elevated standard of care applies regardless of the particular provider at issue. See, e.g., Rest. 2 Torts 299 Notes, "A highly skilled individual, as for example, a certified public accountant, may undertake to perform services which normally require little skill, as for example to do ordinary bookkeeping, and in performing those services he may, or may not, undertake to exercise his unusually high skill. On the other hand, a bookkeeper with little or no accounting skill may undertake to do work which would normally call for a certified public accountant, and he may, or may not, undertake in doing it to exercise the skill of such an accountant. It is a matter of the skill which he represents himself to have, or is understood to undertake to have, rather than of the skill which he actually possesses, or which the task requires."

For the above reasons, we do not recommend that the working group include such a recommendation to the Board.

c. Ex ante standard of care—new standard

Another approach is to recommend that the Legislature impose a standard of care ex ante but one that allows for diversity in service models while focusing on the entities status in ensuring reasonable care in service provision regardless of the service model. In this case, the medical field may be informative. The provision of medical services by entities using multiple and diverse methods of service delivery (tech, health professionals, doctors) is much more developed than in the legal field. For example, the medical field has a well-developed body of law around a hospital's duty of care.¹⁶ The relevant jury instruction, CACI No. 514, distills the case law and defines a hospital's duty to its patients as follows: "A hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of its patients." CACI No. 514. Entities' (hospital systems') direct liability in negligence often rests on a failure to vet and/or train provider employees/systems.¹⁷ The application of this theory of liability to AI provided medical services is still new but does provide a potential model for AI provided legal services.¹⁸

A potential model standard of care for legal service entities could be as follows:

A legal service entity authorized to provide legal services to the public through the regulatory sandbox, including services traditionally performed only by lawyers, is negligent if it, or its agents, does not take reasonable care toward its users. A legal service entity must implement policies, procedures, and systems reasonably necessary to protect its users from foreseeable harm. Any cause of action alleging the negligence of a lawyer in providing legal services shall be governed by the standard of care and the statute of limitations for a claim of legal malpractice.

Examples of potential application of this liability standard to possible sandbox scenarios include:

- Entity with lawyer employees could be liable through direct and vicarious liability for any professional malpractice committed by the lawyer employees acting within the scope of their employment.

¹⁶ See, e.g., *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291.

¹⁷ See, *Elam v. College Park Hosp.* (1982) 132 Cal.App.3d 332, 340 (hospital negligently failed to ensure its staff physicians were competent).

¹⁸ See, generally, Maliha G, Gerke S, Cohen IG, Parikh RB. Artificial Intelligence and Liability in Medicine: Balancing Safety and Innovation. *Milbank Q.* 2021;99(3):629-647, available at <https://doi.org/10.1111/1468-0009.12504>.

- Entity offering software-based services advising consumers on completion of CA family law forms could be negligent for failure to properly vet, train, and test the platform to ensure that it asked the right questions to adequately identify the relevant factual information (e.g., do you have children).¹⁹
- Entity with a nonlawyer provider tier of service could be directly liable in negligence for failure to vet and train nonlawyer provider who gives bad legal advice or fails to identify a material factual or legal issue. The entity could also be liable through vicarious liability.

It is difficult to say what meaning and impact such a standard would have and whether the standard imposes inappropriate constraints or is itself fundamentally limited in such a way as to make it ultimately less effective or useful to courts than the common law negligence principles set forth above. The tort system is an ex post system, one through which standards are developed over time through cases with reference to actual experience. The baseline negligence standard is broad and flexible enough to encompass a wide range of products, services, and behavior. It also allows the courts the flexibility to draw the appropriate policy lines (i.e. what harms may or may not be foreseeable) based on actual facts rather than assumptions and hypotheticals.

E. Limitation of Liability

Regardless of whether the working group recommends a model standard of care or defers to the ordinary negligence standard of care and the expertise of the courts, it is recommended that the working group consider whether to recommend a rule preventing legal service entities from contracting to limit their future liability for negligence beyond limitations related to scope of services provided. For example, an entity authorized to help consumers complete guardianship petitions should not be able to contract to waive liability for negligence in completing those forms. It should, however, be able to limit the scope of its service and the related liability to the completion of those forms. Such a rule will be most impactful if accompanied by robust, plain language disclosure obligations around scope of service and related liability for negligence.

III. ISSUES NOT ADDRESSED BY THIS MEMORANDUM

A. Fiduciary Duty

In addition to owing clients a duty to comply with the applicable standard of care, attorneys owe their clients fiduciary duties. Clients may sue their former attorneys for breach of fiduciary duty as a separate cause of action from that for negligence or legal malpractice. In a breach of

¹⁹ It should be noted that the question of whether software providers may be liable to users under a theory of product liability is highly unsettled. See, e.g., Nora Freeman Engstrom, 3-D Printing and Product Liability: Identifying the Obstacles, 162 U. of Penn. L. R. Online, No. 35 (2013).

fiduciary duty claim, similar standards apply to determine whether a breach has occurred. We will address in a separate memo the question of whether and to what extent sandbox participants may owe clients fiduciary duties, and whether the Working Group should recommend adoption of a standard addressing this issue.

B. Insurance

The question of whether entities in the sandbox should be required to hold insurance covering their legal practice activities, whether performed by lawyers or not, is not addressed by this memorandum.

IV. PROPOSED RECOMMENDATIONS

Recommendation 21:

Option 1:

The working group recommends that common law negligence principles should apply to entities participating in the sandbox. Any cause of action alleging the negligence of a lawyer in providing legal services shall be governed by the standard of care and the statute of limitations for a claim of legal malpractice.

Option 2:

The working group recommends adoption of a standard of care applicable to entities participating in the sandbox that the entity is negligent if it, or its agents, does not use reasonable care toward its users. A legal service entity must implement policies, procedures, and systems reasonably necessary to protect its users from foreseeable harm. Any cause of action alleging the negligence of a lawyer in providing legal services shall be governed by the standard of care and the statute of limitations for a claim of legal malpractice.

Option 3: (disfavored)

The working group recommends that any cause of action alleging negligence in the provision of legal advice and services by an entity participating in the sandbox shall be governed by the standard of care and the statute of limitations for a claim of legal malpractice.

Recommendation 22: The working group recommends that entities participating in the sandbox not be permitted to limit their liability by contract with their clients.