

January 10, 2022

Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: California Paraprofessional Program Working Group Report and
Recommendations

Dear Board of Trustees:

We submit these comments on behalf of the California Lawyers Association (CLA) in response to the California Paraprofessional Program Working Group (CPPWG) Report and Recommendations and appreciate the opportunity to comment.

CLA acknowledges that California suffers from a serious justice gap and shares the State Bar's goal of increasing access to justice. While we commend the tremendous effort that went into preparing the CPPWG recommendations, we have significant concerns about those recommendations and the potentially detrimental impact on those who are most in need. We believe there are other alternatives that would better serve the people of this state and their need to access justice.

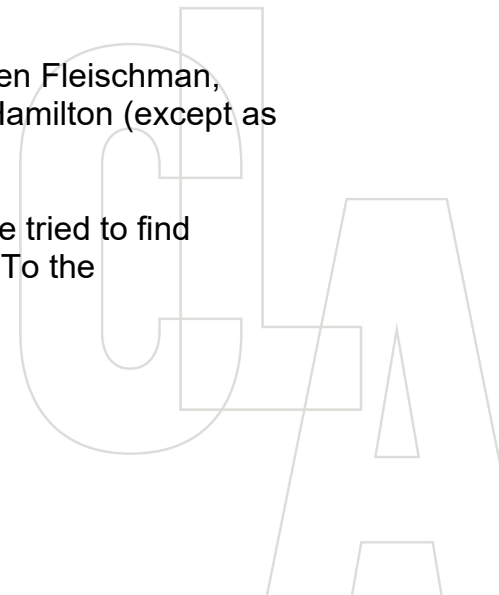
1. Justification for the CPPWG recommendations

We question at the outset whether there is adequate justification for creating an entirely new class of licensed professionals who would be authorized to provide legal services.

A. The "knowledge gap"

We note the following from the dissenting opinion of Steven Fleischman, joined by Carolin Shining (except as to Section 5), Stephen D. Hamilton (except as to Section 5) and Sharon Basham.

There is no statistical data on how many Californians have tried to find an attorney and could not or were unable to afford one....To the



contrary, the available data shows that two-thirds of Californians with perceived legal needs took no steps to try to find help, whether from a lawyer, legal aid group, the internet, or otherwise. The State Bar's Justice Gap Report correctly refers to this as a Knowledge Gap, not a Justice Gap.

(Report and Recommendations, at p. 84.)

According to the State Bar's 2019 California Justice Gap Study Executive Report (Justice Gap Report) some of the most common reasons given for not seeking legal help among Californians suggest a lack of knowledge about the civil legal system and the help that is available. Among the top reasons for not seeking legal help, 31 percent of the survey respondents said they were unsure if it was a legal issue and 15 percent said they did not know how or where to look for legal help. (Justice Gap Report, at p. 10.)

The California Justice Gap Survey revealed that there are two components to the justice gap: a knowledge gap and a service gap. For many problems, Californians simply do not know that the problem they experience has a legal component or remedy, and/or do not know where to look for legal help—this is the knowledge gap. The service gap occurs when Californians who seek legal help for their problems do not receive adequate help to resolve those problems.

(Justice Gap Report, at p. 7.) The knowledge gap can only be addressed through public education. There is no indication that adopting the proposed paraprofessional program will have any impact on this knowledge gap.

B. Cost as a perceived barrier

The CPPWG recommendations appear to be based, at least in part, on the premise that creating licensed paraprofessionals will result in the provision of legal services at a cost that is lower than the cost of legal services available from lawyers, thereby assisting in closing the justice gap. But the data supporting this underlying premise is lacking.

The Justice Gap Report does not identify how many people actually contacted a lawyer and decided they could not afford to hire that lawyer. According to that report, only 16 percent of the survey respondents identified worry about cost as a

reason for not seeking legal help. (Justice Gap Report, at p. 10.)¹ Numerous other studies have likewise concluded that cost is not among the major barriers to access to justice, and those studies have been consistent over the course of many years.²

For those who have identified worry about cost as a barrier to seeking legal services, we do not have data demonstrating the amount the potential client would have been willing to pay, and question whether creating licensed paraprofessionals would truly make a difference. We note that the CPPWG recommends (with some dissenting views) against imposing caps on the fees that paraprofessionals could charge, except in the case of contingency fees. Although we are not advocating in favor of fee caps, we question whether paraprofessional billing rates would ultimately eliminate cost concerns for those who would identify cost as a barrier to the affordability of lawyer billing rates. This is not just a theoretical question.

When the CPPWG was looking into Estates and Trusts as one of the “wobbler” practice areas, our Trusts and Estates Section examined the billing rates of Legal Document Assistants (LDAs), currently authorized to provide certain services. The Trusts and Estates Section found that fees charged by LDAs, although perhaps slightly lower in some cases, were comparable to fees charged by some lawyers. The proposed new paraprofessional program would include licensing and regulatory requirements that are not currently required and would presumably increase the cost of services provided by nonlawyers, with little or no benefit to those who already cannot afford to pay for these services.

C. Consumer choice

We appreciate the argument that something is better than nothing and that litigants who are currently self-represented should at least be offered the choice of

¹ Although the report does not break this figure out by type of case, it appears to include individuals with legal problems related to personal injury, employment, and consumer protection issues where contingency counsel is often available at no out-of-pocket cost.

² In 2014, Prof. Rebecca Sandefur published “Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study” available at: <https://ssrn.com/abstract=2478040> or <http://dx.doi.org/10.2139/ssrn.2478040> finding that “[c]oncerns about cost played a role in 17% of cases in which people did not or were not planning to turn to third parties, including lawyers, for assistance in handling civil justice situations.” (p. 13.). In 2017, the Legal Service Corporation (LSC), in association with the University of Chicago, arrived at an almost identical statistical conclusion in their study entitled “The Justice Gap: Measuring the Unmet Civil Needs of Low-Income Americans” available at: <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> finding that 14% of the individuals in the study identified worry about the cost as a reason for not seeking legal help. (p. 34.).

hiring a paraprofessional to provide legal services. We question whether something is necessarily better than nothing and believe the precise nature of other options (the something) is a significant factor. As we noted in our September 23, 2019 letter sent in response to the State Bar's request for public comment on the options for regulatory reform being considered by the Task Force on Access Through Innovation of Legal Services (ATILS), and the recommendation that nonlawyers be authorized to provide specified legal advice and services as an exemption to unauthorized practice of law (UPL) with appropriate regulation:

Many of our members have seen problems created for consumers in various areas, including immigration (immigration consultants and notaries), bankruptcy (petition preparers), loan modifications (foreclosure and loan modification consultants), general civil and family law matters (paralegals and legal document assistants), and probate (trust mills and document preparation services). This often results in devastating injuries to consumers, sometimes caused by scam artists, but often the result of poor legal advice provided by individuals who were simply not qualified to provide that advice. Sometimes the problems that have been created cannot be fixed. When they can, significant resources may be required to remedy the harm caused by the nonlawyer who provided the initial legal advice. In many instances this results in additional costs to clients who are obligated to pay a second time, ultimately resulting in services that are far more costly. Often it is those who can least afford to pay for the services of a lawyer who are the most susceptible to the potential harm caused by nonlawyers giving legal advice.

The CPPWG recommendations include new licensing and regulatory requirements that presumably would alleviate some of the issues relating to qualify of services and consumer harm, but we remain concerned. As stated in a November 16, 2020 letter sent relatively early in the CPPWG process from several legal services organizations to the CPPWG's Family Law Subcommittee (but fundamentally applicable, in our view, to all of the recommended practice areas):

It is true that when people have legal disputes and receive no assistance for them, they are denied access to justice. This makes the lack of assistance in such cases a rough proxy for lack of access to justice. But it is not true that all that justice requires is assistance of any sort. Poor assistance can leave a person just as bereft of justice as no assistance. In our view, the rush to paraprofessionals rests on a

confusion between a proxy for justice and justice itself.... The creation of for-profit paraprofessionals who draft documents for default and uncontested matters in family court may be filling a gap, but not a justice gap. In order to address a justice gap, the goal needs to combine the provision of legal assistance to self-represented litigants with achievement of justice. We should not confuse the rough proxy of any legal service with the real thing of justice. Doing so may change the answer to the question of “did you get legal help?” but it will not change the reality of justice and access concerns for the vast majority of California’s self-represented population.

We share these concerns and question whether the proposed paraprofessional program will in fact benefit underserved communities.

Although CLA believes the recommended disclosure requirements may alleviate some of the issues, we remain concerned that there will be confusion in many cases about the difference between the nature of the services a paraprofessional can provide and the services a lawyer can provide. The proposed program would also create a new, for-profit market participant in certain areas of law. Historically and currently low- income, underserved, and marginalized communities have difficulties in both knowing their rights and gaining access to competent, affordable legal services. Throughout California, public and non-profit agencies exist to provide their services to remediate this issue.³

As discussed above, the knowledge gap has a significant impact on access to justice. Under the CPPWG’s recommendations not only would an individual be responsible for identifying which narrowly focused nonlawyer provider is qualified to address their issues, but the individual would also need to understand that the legal advice they are receiving does not necessarily address all of their collateral legal needs and how that could negatively impact them. The options that the CPPWG recommends will often require a relatively sophisticated comprehension of the law by members of the public who would be the consumers of this new legal services market. Moreover, in many cases, the paraprofessionals would compete with other options that are in place, creating the mistaken belief that there is a need to pay for services that are already offered for free.

³ We discuss in greater detail below alternatives to the paraprofessional program, including full funding for legal aid.

2. Specific aspects of the CPPWG recommendations

Beyond our overarching questions and concerns, we have several concerns about particular aspects of the CPPWG recommendations in the event this does move forward.

A. In-court representation

The CPPWG Report and Recommendations notes that the “question of whether paraprofessionals should be able to assist their clients in court was one of the most difficult issues addressed by the CPPWG.” (Report and Recommendations, at p. 41.) After extensive discussion and debate, the CPPWG voted to adopt a default position that paraprofessionals may provide full in-court representation, with a complete prohibition on representation in jury trials, and an ability to modify the default position in regard to a particular practice area based on a recommendation from that practice area subcommittee.

Full in-court representation would be a dramatic step, not supported by the limited experience with paraprofessionals in other states. For example, under Washington’s LLLT program, which initially required three times the number of educational hours proposed by the CPPWG, paraprofessionals could accompany clients to court, sit next to them at counsel table, and assist in responding to questions from the court. However, they were not allowed to be in-court advocates. We are concerned about the potential detriment to consumers if members of this newly licensed profession are entrusted with full in-court advocacy from the outset. A potential paraprofessional could complete all pre-requisite education and the paraprofessional program in two years. Members of the public may believe the services provided by a paraprofessional, are equivalent to those provided by a lawyer, despite the fact that paraprofessionals would not be subject to the same education and licensing requirements as lawyers and would be limited in the scope of services they could provide.

Short of a complete prohibition on in-court appearances, we recommend that the other options in the CPPWG Report and Recommendations be considered, namely responsive representation or in-court support.

B. Paraprofessional ownership interest in law firms

Under the CPPWG’s recommended Rules of Professional Conduct for Licensed Paraprofessionals, rule 5.4, a licensed paraprofessional would be

authorized to practice in a law firm with a lawyer, provided licensed paraprofessionals do not possess a majority ownership interest or exercise controlling managerial authority in the firm. We do not view this as an essential element of any paraprofessional program and believe it should not be included.

This proposed rule would permit paraprofessionals to own 49 percent of a law firms and share profits with lawyers even in practice areas where paraprofessionals are not authorized to provide services. We do not believe an adequate justification has been provided for this change, including the argument some have advanced that this would encourage new business models. There are already programs that allow nonlawyers to provide services in various areas of the law, such as certified paralegals, legal document assistants, unlawful detainer assistants, and immigration consultants. These individuals can presently work in law firms but cannot share fees with lawyers or have an ownership interest in a law firm. Moreover, as many have noted in the course of the CPPWG's discussions, 49% ownership – or even a substantially smaller percentage than that – can amount to de facto control of an entity under various scenarios insofar as it is very unlikely that the other 51% will be controlled by a single person or interest group or otherwise vote uniformly so as to defeat the 49% ownership interest.

CLA's September 23, 2019 letter sent in response to the ATILS recommendations expressed concern about the potential amendments to Rule of Professional Conduct, rule 5.4, relating to nonlawyer fee-sharing or otherwise sharing in the profits or ownership of law firms. We continue to have those concerns with respect to licensed paraprofessionals.

3. Practice areas, scope of services, and overall structure

We address two of the specific practice areas below, but first have preliminary observations about the overall structure of the paraprofessional program. The laws of California are profoundly interconnected. A mishandled expungement or reclassification can result in a lost job or more serious charges in a future case, and can affect parental rights. A domestic violence restraining order filed in a family law proceeding may have implications that extend into criminal or immigration proceedings. For example, a restraining order filed in a family law proceeding is discoverable in a criminal proceeding and can have serious consequences such as prior inconsistent statements, impeachment, and charging decisions by prosecutors, all of which can adversely affect both the defendant's and victim's rights.

Attorneys must be proficient not only in the field in which they practice but should also possess a general understanding of the network of laws and regulations that may adversely affect their client's interests. The educational and licensing requirements proposed by the CPPWG for paraprofessionals fall short of what is required for lawyers. While some have argued that the specialized focus of paraprofessional training and licensing has advantages over what is required from lawyers – who may be “generalists” – that focus can also be detrimental insofar as the paraprofessional may not be equipped or believe it is necessary to look at broader implications, and clients may believe the narrow focus will necessarily be sufficient to protect their interests. The CPPWG recommendations create a disconnect between the sophistication of members of the public in need of legal help and the nonlawyer legal service provider, putting the burden of understanding exactly what legal services are needed upon those without an adequate understanding of the law. This burdens the very individuals the program is designed to help, while providing a new market for nonlawyers to provide services to those who will likely lack an understanding of the complexity of the law, their legal needs, and the limitations of the paraprofessionals.

In addition to these overarching concerns, we have the following comments about the CPPWG recommendations in two of the recommended practice areas.

- **Collateral Criminal**

As an initial matter, we take issue with the CPPWG's designation of the term “collateral criminal” as a rationale for the paraprofessional recommendations. The CPPWG endeavors to create a new “collateral criminal” area of law for services such as expungement, reclassification, and representation in infraction cases “as a right to counsel is not provided in these matters.” (Report and Recommendations, at p. 29.) However, while there may not be a Sixth Amendment right to counsel for these particular legal issues, ineffective assistance of counsel is still very much a risk if a person hires a paraprofessional who does that person a disservice during an expungement, reclassification, or infraction proceeding.

We also note that California has a growing number of low-cost or free expungement and reclassification services in place that are already competently providing these very services. The creation of a program that allows individuals to charge for what is currently a free service offered by the offices of public defenders or by various legal aid programs will create confusion, likely reduce funding and support for these agencies, and harm the communities most in need.

It is difficult to adequately summarize the expansive number of legal clinics, non-profit legal services, and other public services that have committed to providing expungements and felony reclassification services in this letter.⁴ Although the names of various services differ, the service is the same: expungements of criminal convictions, sealing of records where appropriate, and reclassification of felony offenses, handled by seasoned attorneys and staff who already work in the criminal law arena. More importantly, they have the same cost to county residents seeking out these services - they are free.

- **Family, Children, and Custody**

Family law is complex and the stakes are high. Family law has a direct impact on the lives of families and children. Family law encompasses areas that include child custody, child support, spousal support, property division, and retirement benefits. It often includes crossover issues in tax, bankruptcy, probate, business valuations, and other issues. Mistakes can have significant, long-term, and often irreparable consequences, potentially spilling into other interconnected areas of the law. Effectively litigating family law cases frequently requires forensic accounting experts, joinder of multiple parties, and extensive, costly discovery. Family law is one of the areas of law that provides for a certified specialty in California, and many family law attorneys specialize in sub-areas of family law due to its complexity.

Against this background, we note that the CPPWG recommends that the authorized tasks for paraprofessionals in the practice area designated Family, Children, and Custody include *all* matters, except those that are specifically *excluded*. This is far too broad. In our view, a better approach would be to identify the specific tasks that *are authorized*, limiting those to relatively simple, generally less controversial tasks. Consideration could then be given to expanding the list, pending collection of data with a true pilot program (as discussed in greater detail below), if deemed successful.

⁴ Home to a quarter of California's population, Los Angeles County alone has numerous legal aid services dedicated to expungements, from the Legal Aid Foundation of Los Angeles to the Law Project of Los Angeles, and the Public Defender's Office which offers county-wide expungement and reclassification services for any resident. San Diego County's "Clean Slate" program hosts community clinics as well as daily services for those seeking to expunge their records. The San Francisco Public Defender's Office also has a similar "Clean Slate" program. The Orange County Public Defender's Office calls their free expungement service the "New Leaf Program." At the Riverside Public Defender's Office, it is called the "Fresh Start Program."

Some suggested tasks for potential inclusion would be:

- Preparing, filing and serving the Petition, Summons, and Response
- Processing judgment packets, including applying for and filing default judgment papers
- Summary dissolution proceedings
- Simple, uncontested settlement agreements using only Judicial Council forms (but no drafting of marital settlement agreements)
- Joinder of pension plans using Judicial Council forms
- Status-only dissolution papers
- Preparing Declarations of Disclosure
- Propounding Judicial Council form discovery and responding to Judicial Council form discovery
- Preparing an Attorney Fee request on a Judicial Council form (so that an attorney can be retained)

Beyond what may be considered traditional family law matters, the Family, Children, and Custody recommendation also includes “uncontested conservatorships and guardianships” with the exception of guardianships established in dependency court for parties entitled to court-appointed counsel. This recommendation, as stated, does not distinguish between a limited, or general, conservatorship of the person and a limited, or general, conservatorship of the estate. If anything moves forward in this area, we believe the proposal should be clarified so any work on conservatorships is explicitly restricted to uncontested *limited conservatorships of the person*.⁵

⁵ These conservatorships are established for individuals over the age of 18 who are developmentally disabled. Most commonly, they are sought by a parent or parents of the developmentally disabled individual in order to make decisions for the developmentally disabled individual, now an adult. In these cases, once the petition for the limited conservatorship is filed appointment of counsel for the proposed conservatee is mandatory. Once a limited conservatorship of the person is established, there generally is no need to return to court except in certain circumstances, such as the need to replace a conservator. In contrast, a general probate conservatorship of either the person or the estate does not require appointment of counsel for the proposed conservatee. General probate conservatorships are also more complex and have ongoing procedural requirements that are not included with limited conservatorships. In both limited and general probate conservatorships of the estate, there are ongoing services related to proceedings involving the conservatee’s estate that are not necessary for proceedings involving conservatorships of the person only.

4. Implementation

The CPPWG considered various options for initial program rollout, including full implementation, a pilot program with a sunset date, and a phased implementation approach. The CPPWG ultimately recommended a phased implementation approach with program rollout initially limited by practice and geographic areas.

If a paraprofessional program does move forward, we recommend that any such program be implemented as a controlled pilot for narrowly defined circumstances with a sunset date, subject to potential extension pending evaluation of meaningful data collected during the pilot period.

For a potential model, we suggest as a starting point that consideration be given to Minnesota's adoption of a Legal Paraprofessional Pilot Project, a statewide, two-year pilot project that allows approved legal paraprofessionals to represent and advise clients in select housing and family matters with oversight by a licensed Minnesota attorney, effective March 1, 2021 through March 2023.⁶ The Pilot Project is intended to increase access to civil legal representation in case types where one or both parties typically appear without legal representation. The Minnesota Judicial Branch will evaluate the results and experiences of participants in the pilot project to determine if implementing the new legal paraprofessional services will resolve long-term representation disparities in civil case types.

We have not compiled a comprehensive list of the data collection we believe would be required in order to meaningfully evaluate any pilot program, and realize collecting some of this data may be difficult, but we believe evaluation of the following points is key:

- the demographic and economic profile of those being served to determine, for example, whether the program is serving the needs of low-income, moderate income, or other individuals
- a comparison of the services provided by paraprofessionals to the same services that would have been available from lawyers on a low or no-cost basis
- paraprofessional billing rates, as compared to lawyer billing rates for similar services

⁶ <https://www.mncourts.gov/Help-Topics/Legal-Paraprofessional-Pilot-Project.aspx>

- actual impact on access to legal services
- nature and types of cases for which a paraprofessional is hired
- case outcomes, including an examination of long-term impact where appropriate, as opposed to immediate impact only which may not disclose future problems resulting from the legal services provided

5. Alternative and more effective ways of addressing the justice gap

California has a myriad of legal aid and non-profit organizations staffed by fully licensed attorneys and often aided by paralegals and other trained legal assistants who provide competent and effective legal services. These organizations offer legal representation and advice, often at little or no cost, in the areas where ATILS and, by extension, the CPPWG identified a need for greater access to legal services, but these organizations are limited because they are not fully funded or cannot support the full area of need.

CLA believes the people of California would be better served by fully funding preexisting, effective programs, including legal aid, other non-profit organizations, and:

- **Self-help centers**
These centers have become a powerful resource for individuals without access to lawyers. Over the past decade, self-help has become more robust. Centers have expanded the scope of their services, created more accessible and informative self-help guides, and redefined their role as legal information providers to be more substantive and creative. In fact, some of the services the paraprofessionals would be authorized to provide are already provided by self-help centers no cost.
- **Family law facilitators**
Most courts have family law facilitators. However, in many counties self-represented litigants need to wait for hours to see a family law facilitator. They usually cannot make appointments, and it is first come first served. Having to take significant time off work to see a family law facilitator is often not something a self-represented litigant can afford to do. If there were more family law facilitators available to assist self-represented litigants this would provide a significant benefit to the litigants and the court.

- **Court navigators**

Court navigators serve as an important bridge for unrepresented litigants, serving those litigants and assisting judges and other court staff in improving access to justice and achieving better case outcomes.

- **Other non-legal solutions**

Not all legal problems require legal solutions. One way to address the need and to reduce litigation in general is the creation of more robust court-based services, some of which already exist to help people work out family law and other issues without involving lawyers, litigation or court intervention. Examples include trained court-supplied co-parenting assistance, intervention of skilled counselors to assist with co-parenting related issues and disputes, the offering of safe free or sliding scale supervised visitation centers to help with visitation and to facilitate exchanges, and court-staffed alternative dispute resolution for family law and other cases.

Finally, in our experience, there is also a significant knowledge gap in that many people do not even know about the free or low-cost assistance that already exists or how to utilize the existing services. We believe consideration should be given to providing more information to the public so people are able to identify and utilize the legal aid and other resources that already exist.

CLA is fully committed to exploring these and other alternative solutions.

We appreciate your consideration of our comments.

Sincerely,



Oyango A. Snell
CEO and Executive Director



Jeremy M. Evans
President