



The State Bar of California

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

Date: August 25, 2020

To: California Paraprofessional Program Working Group

From: Steven Fleischman, Carolin Shining, Ira Spiro, and Judge Erica Yew

Subject: Consideration of Employment Law as a Practice Area to Be Included in a Paraprofessional Program

Executive Summary

The California Paraprofessional Program Working Group (CPPWG) is charged with developing recommendations for consideration by the Board of Trustees for the creation of a paraprofessional licensure/certification program to increase access to legal services in California. The CPPWG's charter is informed by the [California Justice Gap Study](#) and the [Task Force on Access Through Innovation of Legal Services](#). In carrying out its charge, the CPPWG must balance the dual goals of ensuring public protection and increasing access to legal services. The CPPWG's recommendations to the Board will include, among other topics, the selection of practice areas for inclusion in the program.

Discussion

At its first meeting on April 21, the CPPWG discussed potential practice areas for program inclusion. One of these areas was Employment Law. At its July 13 meeting, four members of the CPPWG volunteered to serve on the Employment Law subcommittee, tasked with studying this practice area with the goal of generating recommendations regarding inclusion or exclusion of specific subtopics in this practice area for consideration by the full body at its next meeting.

The Employment Law subcommittee, comprised of the authors of this memorandum, considered the following in conducting our assessment of Employment Law as a potential practice area or inclusion in a paraprofessional program:

- Employment-related questions and responses included in the California Justice Gap Study; and

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- Information obtained from subject matter experts.

California Justice Gap Study

The California Justice Gap Study included questions about employment-related issues, including questions about an employer who did not pay wages or other earned benefits, denial of worker's compensation, unsafe working conditions, unfair termination, denial of accommodation for disability or a medical condition, denial of unemployment benefits, inadequate treatment of a workplace grievance, and sexual harassment by a supervisor or coworker, as detailed below.

Employment-related issues were the third most common type of legal problem experienced by Californians at all income levels, with 16 percent of all households reporting at least one employment-related problem. Employment ranked highest for the percentage of problems for which only nonlegal help was received by Californians overall and for those with income above 125 percent of the federal poverty level.

The California Justice Gap Study results for the Employment practice area identified the following specific legal needs for this population:

- Unfair termination
- Unsafe working conditions
- Workplace grievances that were not adequately addressed
- Sexual harassment or unfair treatment or intimidation
- Wage and hour claims
- Unemployment benefits
- Denial of disability accommodations
- Workers' compensation

Subject Matter Experts

We met with the following attorneys who provide assistance with employment-related problems through nonprofit legal aid programs: Ms. DeCarol Davis, from Legal Aid at Work; Ms. Dana Hadl, from Bet Tzedek Legal Services; and Mr. Chris Knauf, from the Disability Rights Legal Center. We also met with the following attorneys in private practice, Mr. Noah Lebowitz and Ms. Abigail Zelenski, who represent employees; and Ms. Laura Reatherford and Mr. Eric Schwettmann, who represent employers. These experts shared information about the work involved in handling employment cases, as well as their opinions about the scope of work that should be permitted for paralegals in this practice area.

The subcommittee also heard from an extensive number of attorneys practicing in this area who spoke during the public comment period during our meetings. Virtually every speaker

during the public comment period opposed inclusion of these areas in any paraprofessional program.

Subtopics for Inclusion and Exclusion

The three members who were present at the first meeting of our subcommittee agreed to eliminate the subtopics of unfair termination, unsafe working conditions, and sexual harassment/unfair treatment, based on the fact that they involve issues that are quite complex, the consequences of error in the initial stages of these types of proceedings can be significant, and the related actions may involve proceedings in federal court. Ira Spiro, who was not present at this meeting, provides his dissenting opinion below.

Two of the subtopics that fall under Employment, wage and hour claims and unemployment benefits, were addressed at least in part by previous action by the working group at its June 30 meeting pursuant to recommendations received regarding the General Civil and Income Maintenance practice areas. The present subcommittee did not revisit those subtopics during the deliberation process that took place between the June and August meetings.

Following is a summary of the subject matter expert feedback received regarding the remaining two subtopics within the Employment Law practice area under consideration:

Workplace Grievances and Disability Accommodations

Ms. DeCarol Davis, of Legal Aid at Work, suggested that with appropriate training, paraprofessionals could provide direct assistance to clients in the pre-litigation stage of their cases, including preparation, guidance, advice and assistance with the employee grievance process to ensure that proper procedures were followed, provided such assistance was under the supervision of an attorney. She noted that there is a significant power differential between employers and employees, and that lay representation has been shown to be very empowering.

Ms. Davis added that it would be beneficial to her organization to have trained paraprofessionals who could provide assistance to their clients. She explained that Legal Aid at Work relies on law students, which requires them to train to each new class of students. While paraprofessionals might require ongoing supervision by attorneys, the continuity of staffing would be beneficial. Ms. Davis agreed with the subcommittee's ultimate conclusion that paraprofessionals should not provide legal services in this area unsupervised by an attorney.

Ms. Hadl, of Bet Tzedek Legal Services, stated that clients, especially undocumented workers, must be advised of the potential consequences of pursuing workplace rights. Both Ms. Hadl and Ms. Davis explained that the nonattorneys assisting clients through their clinics work under the direct supervision of attorneys.

Ms. Reatherford, who represents employers in these matters, explained that her goal in advising her clients was to avoid litigation, and that it was preferable to have the employer and

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employee work directly with one another. She also asserted that employees are able to find attorney representation if necessary.

Mr. Knauf, of Disability Rights Access, asserted that, without adequate training and testing, paraprofessionals might give advice in the pre-litigation stage of an employment dispute that could prove harmful if the case were later to be litigated. He stated that, even with education and training, paraprofessionals should only be permitted to give legal advice while working under the supervision of an attorney.

Mr. Lebowitz, who represents employees in workplace discrimination and disability accommodations cases, agreed that attorney supervision should be required for paraprofessionals. He explained that this is a complex area of law that is subject to significant change over time. He added that most cases are resolved pre-litigation, but that decisions made during the early stage of a case may impact any litigation that follows.

Mr. Schwettmann, who represents employers in these matters, agreed that there were risks to having nonattorneys advising and representing employees in the pre-litigation stage of workplace grievances and requests for accommodations.

Ms. Zelenski, who represents employees in these matters, also asserted that these matters are very complex, with frequent changes to the law. She stated that representation is provided to employees on a contingency fee basis, and that employees are readily able to find representation.

Robust public comment was also taken at the beginning or middle of the first three sessions. The majority of the speakers during public comment were against the inclusion of these subject matter areas in the Paraprofessional program at this time. Also, some did not permit presentations by several invited subject matter experts but it was suggested that they be invited to engage in the "deep dive" process as appropriate.

The majority of the subcommittee (three of the four members) was convinced by the testimony of the subject matter experts, as well as the overwhelming number of public comments opposing this proposal, that these remaining areas also involve complex issues, and that procedural errors during the early stages of case may have dire consequences if litigation is pursued. They were also persuaded that the interactive process, which is initiated when an employee reports a grievance or requests an accommodation, involves direct communication between employee the employer and employee, and that introducing an employee advocate might be detrimental to the process.

At least one member of the subcommittee (Steven Fleischman) was concerned that permitting paraprofessionals to advise clients on these pre-litigation areas would have the potential to turn paraprofessionals into "runners and cappers" by referring their clients to particular

attorneys if the interactive process failed and litigation was required. Mr. Fleischman was also influenced by the strong opposition to this proposal made by public interest law groups.

Recommendations

Following are the subcommittee's recommendations for the Employment Law practice area:

Subtopics	Excluded (unanimous recommendation)	Excluded (with one dissent)
Unfair Termination		X (see below)
Unsafe Working Conditions		X (see below)
Sexual Harassment		X (see below)
Workers' Compensation	X	
Workplace Grievances		X (see below)
Workplace Accommodations		X (see below)

As noted above, our group did not unanimously agree on whether the subtopics of unfair termination, unsafe working conditions, sexual harassment, workplace grievances, and workplace accommodations should be recommended for ongoing consideration for inclusion in a paraprofessional program. Following is the dissenting recommendation from Ira Spiro:

I disagree with the rest of the Working Group not only on Workplace Grievances and Workplace Accommodations. I also disagree that Unfair Termination, Unsafe Working Conditions and Sexual Harassment should be entirely eliminated.

I will explain my disagreement, but first I strongly believe that there should be far more Working Group members who are non-lawyers, the very people whose interests this California Paraprofessional Program is supposed to be serving. I am not impugning any of the lawyers in the Working Group – I am saying that their years and decades as lawyers are bound to influence their outlooks in ways different from non-lawyers. In the full Working Group, out of 13 members there are only 2 non-lawyers, although it appears that 5 or 6 of the lawyers are not substantially engaged in the practice of law. All members of this Employment Subcommittee are lawyers, although one is a Superior Court Judge, and thus her experience varies from most lawyers. The other three are practicing lawyers and have been for decades, although presently I practice very little. Two of the members were selected by private bar associations, i.e. associations of lawyers. Many non-lawyers know a good deal about the law, the business of law and the practice of law. For example, the hundreds or thousands of paralegals, investigators and other legal workers in California, and the non-lawyer staff and retired staff of the California courts and the State Bar.

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With respect to Workplace Grievances and Workplace Accommodations , I am in favor of training and licensing paraprofessionals to advise employees in dealing with employers -- without being supervised by lawyers -- in such things as disagreements about scheduling; duties to employers and insubordination; rights to vacation, leaves, and breaks; workplace health and safety; and obtaining accommodations for disabilities. Possibly there should be separate licensing for each of these areas, depending on sufficient training in each. I am in favor of paraprofessionals advising employees on these and other subjects when there is no lawsuit or imminent threat of one; I recognize the line might be hard to draw, but the Employment Panel's votes thus far would eliminate even the possibility of drawing a line.

I also favor training and licensing paraprofessionals to represent employees in Small Claims Court lawsuits against employers, where the jurisdiction is limited to amount of \$10,000 or less, and possibly in Limited Civil cases, where the jurisdiction is \$25,000. Those cases could include unfair termination, unsafe working conditions and sexual harassment. I believe judges can screen the cases to assure that they are truly within the jurisdictional amounts before allowing paraprofessionals to represent employees in the cases. Similar screening is already authorized for Limited Jurisdiction cases under Code of Civil Procedure 403.040(a).

On the other hand, I believe non-lawyers should not employ more than a small number of paraprofessionals, possibly 5 or 6, possibly fewer, and non-lawyers should not own or control any organization that employs more than that maximum number. The Paraprofessional Program should not be a means for big business to make further inroads into the legal system and the law business. And I believe it should remain the law that law firms cannot be owned or controlled by non-lawyers.

Next Steps

The group will return to the review of unemployment benefits and wage and hour claims, to determine specific authorized tasks.