



Date: June 30, 2020

To: California Paraprofessional Program Working Group

From: Julia Brynerson and Amos Hartston

Subject: Consideration of Veterans Advocacy as a Practice Area to Be Included in a Paraprofessionals 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, 2020, the CPPWG discussed potential practice areas for program inclusion. While there was agreement with regard to including certain practice areas for additional consideration and excluding others, several practice areas were deemed “wobblers,” meaning that additional information was required before a decision could be made regarding their status. Members of the CPPWG volunteered to study each of the wobbler areas with the goal of generating recommendations regarding ongoing consideration of the practice area for review by the full body at its next meeting.

The present two-person team assessed the Veterans Advocacy practice area. In generating our recommendations, outlined below, we considered the following:

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

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- Information regarding programs, resources, and recourses available to veterans on both the U.S. Department of Veterans Affairs' (VA) and the U.S. Department of Defense's (DoD) websites;
- The State Bar's report on [Veterans Legal Services in California](#);
- Survey data from the VA's [Project CHALENG](#);
- Information obtained from subject matter experts in the field; and
- An opinion issued by the State Bar's Office of General Counsel.

California Justice Gap Study

The California Justice Gap Study (CJGS) included questions about issues with discharge status, denial of Veterans Administration benefits, denial of access to service-related medical care, and problems in getting an old job back after discharge.

CJGS results were generally categorized as follows:

Top 3 legal needs, all Californians	Top 3 legal needs, Californians at or below 125% of FPL	Top 3 legal needs, Californians above 125% of FPL
Top 3 areas for which legal help sought and received, all Californians	Top 3 legal needs for which legal help sought and received, Californians at or below 125% of FPL	Top 3 legal needs for which legal help sought and received, Californians above 125% of FPL
Top 3 legal needs with severe impact, all Californians	Top 3 legal needs with severe impact, Californians at or below 125% of FPL	Top 3 legal needs with severe impact, Californians above 125% of FPL

Veteran legal needs aligned with two of these categories: top 3 legal needs with severe impact, Californians at or below 125 percent of FPL, and top 3 legal needs with severe impact, Californians above 125 percent of FPL.

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

- **Denial of VA benefits:** Being denied Veterans Administration (VA) disability, housing, educational, job training, or other service-related benefits.
- **Employment:** Having problems with getting an old job back after discharge or returning from deployment, and other employment-related problems.
- **Service discharge upgrades:** Experiencing problems with discharge status or the stated reason for separation from the military, including the impact of discharge status on access to VA medical care.

Additional Research

We were initially inclined to recommend inclusion of veterans advocacy as a practice area in a paraprofessional program, given the significant identified need and the desire to assist this particular impacted population. However, additional information regarding the current systems for addressing Veterans Administration (VA) service-related benefits and discharge status matters was needed before a final decision could be made. State Bar staff assisted in gathering this information through a combination of staff research and discussions with Mr. Robert Muth, Director of the University of San Diego Veterans Legal Clinic, and Ms. Olivia Cole, Deputy Director of Legal Services at Swords for Plowshares, in San Francisco.

With respect to VA service-related benefits advocacy, both attorneys and nonattorneys already may be accredited to assist veterans under existing VA rules and procedures. There is a well-articulated, easily navigable process for attorneys and nonattorneys to become accredited and act on behalf of veterans in the preparation and presentation of claims for VA benefits and appealing a denial of benefits. Each county has a Veterans Services Organization (VSO) through which accredited, nonattorney claims agents are available to assist veterans in applying for VA benefits and/or appealing a denial of benefits. Initial applications are usually filed with the VA by veterans on their own or with the assistance of a VSO claims agent. If benefits are denied, an accredited attorney, nonattorney, or VSO can assist with filing an appeal with the Board of Veterans Appeals, an administrative process. In addition to county VSOs, private nonprofit VSOs, some legal service organizations, and pro bono attorneys provide assistance with both the filing of the initial claims application and, if needed, with appeals. In addition, under current law, fees may not be charged in connection with the initial filing of a claim for VA benefits. There is a statutory prohibition on charging fees for assistance with filing initial claims.

With respect to discharge status advocacy, both attorneys and nonattorneys already may assist veterans under existing rules and procedures. Each branch of the armed forces has its own process, rules, and regulations. Initial requests are filed with a Discharge Review Board, and appeals are filed with a Board for Correction of Military Records. Veterans can elect to either self-represent or seek the assistance of an attorney or nonattorney advocate in both of these proceedings. The DoD has not established an accreditation process for representation.

Thus, nonattorney advocates are already allowed to provide VA service-related benefits advocacy and discharge status advocacy, with the only differentiation being that, prior to being allowed to represent veterans before the VA, attorney and nonattorney advocates must go through and successfully complete the VA's accreditation process.

A more detailed overview of the results of staff research is provided as Attachment A.

As part of the overall research, we also explored veterans' employment-related issues raised by the CJGS and found that assistance and/or advocacy for employment-related issues is not provided by the VSOs. Instead, veterans are referred to seek the assistance of an employment law attorney or legal aid center that handles employment law matters. Based on this research, it

was concluded early on that it would be better for the working group to explore and address veterans' employment-related issues under the Employment practice area, at a later date.

Additionally, we also explored veterans' housing-related issues raised by the CJGS and concluded early on that it would be better for the working group to explore and address veterans' housing-related issues under the Housing practice area, at a later date.

Office of General Counsel Opinion

The State Bar's Office of General Counsel (OGC) researched the question of California's jurisdiction to authorize nonattorneys to provide representation in federal proceedings and found that California does not have the authority to authorize nonattorneys to provide legal services in such proceedings, whether administrative or in court. Rather, federal agencies and federal courts set their own rules, which typically allow attorneys licensed in any state to appear before them. Additionally, various federal agencies already allow nonattorneys to represent parties under limited circumstances prescribed by federal law or regulation. The state has no authority to modify these federal provisions. A copy of the opinion is provided as Attachment B.

Recommendations

Although Veterans' legal needs are significant and were identified in the California Justice Gap Survey as being one of the top 3 legal needs with severe impact on Californians both above and below 125 percent of FPL, we do not recommend inclusion of this practice area in a California paraprofessional program at this time. First, with respect to both VA service-related benefits and discharge status matters, nonattorneys are already allowed to advocate on behalf of veterans. Further, the prohibition on charging fees associated with filing of an initial application for VA benefits renders the market for nonvolunteer paraprofessionals nonviable. Finally, as outlined in the OGC opinion, the State Bar does not have the authority to regulate who may or may not advocate in federal proceedings.

Given the significance of the need, however, we do recommend that the working group include in its report that the State Bar convene Veterans Services Organizations, legal aid organizations, and pro bono attorneys that are currently providing legal services to veterans to discuss ways in which the State Bar can increase awareness of: (1) available services; (2) increase the number of attorneys providing pro bono legal services to veterans; (3) provide additional resources and trainings; and (4) to potentially recruit nonattorney volunteers interested in veterans advocacy as authorized by the VA and the DoD.

Veterans Advocacy Summary Chart

Attachment A

	Administrative Agency – Initial Filings	Administrative Agency - Appeals	Is nonattorney advocacy allowed?	Nonattorney advocacy provided by?	Are nonattorneys required to go through a certification/accreditation process?	Are there any associated fees to be paid by veterans	Would it be helpful to have certified paraprofessionals?
Benefits Advocacy	Department of Veterans’ Affairs (VA)	Board of Veteran Appeals	Yes	Accredited representatives/claims agents, either working for private nonprofit veteran service organizations (VSOs) or state/county VSOs	Yes <ul style="list-style-type: none">Initial accreditation process for nonattorneys includes an extensive background investigation and an examination; ongoing education courses must be completed within the first yearAccredited nonattorneys are required to complete CLE requirements every 3 years	<ul style="list-style-type: none">No - Collection of fees for initial filing is not allowedYes - Fees can only be collected if/when a notice of denial is issued and the case is appealed to the Board of Veteran Appeals	No <ul style="list-style-type: none">Nonattorneys are already allowed to advocate on behalf of veteransThe State Bar does not have the authority to regulate who may or may not advocate in federal proceedings
Discharge Status Advocacy	Department of Defense (DoD) - Discharge Review Board (DRB) <ul style="list-style-type: none">Each branch of the armed forces has its own DRB	Boards for Correction of Military Records (BCMR) <ul style="list-style-type: none">Each branch of the armed forces has its own BCMR	Yes	Not explicitly stated	No	Yes <p>Fee is usually agreed upon up front and the entire amount is due to the service provider, regardless of the outcome of the case</p>	No <ul style="list-style-type: none">Nonattorneys are already allowed to advocate on behalf of veteransThe State Bar does not have the authority to regulate who may or may not advocate in federal proceedings



The State Bar *of California*

OFFICE OF GENERAL COUNSEL

Date: May 12, 2020

To: Leah T. Wilson, State Bar Consultant

From: Brady Dewar, Assistant General Counsel, Office of General Counsel

Subject: State Authority to Regulate Provision of Legal Services by Nonattorneys in Federal Proceedings

I. Question Presented

To what extent does California have the authority to authorize nonattorneys to provide legal services in federal proceedings such as proceedings regarding Social Security benefits, bankruptcy, veterans' benefits, and military discharge status?

II. Short Answer

California does not have any authority to authorize nonattorneys to provide legal services in federal proceedings. Federal agencies and federal courts set their own rules regarding who may practice before them. Various federal agencies already allow nonattorneys to represent claimants before them under circumstances prescribed by federal law and/or regulation. The state has no authority to modify these federal provisions.

III. Analysis

1. California Does Not Have Any Authority to Authorize Nonattorneys to Provide Legal Services in Federal Proceedings; Federal Agencies and Courts Control Who May Practice Before Them

States such as California cannot authorize nonattorneys to provide legal services in federal proceedings, whether before federal administrative agencies or in the federal courts. Rather,

federal courts and federal agencies have the right to control who practices before them. In *Benninghoff v. Superior Court*, 136 Cal. App. 4th 61 (2006), the Court of Appeal relied on these principles in ruling that the state superior court could not take jurisdiction over the federal administrative practice of a California attorney who resigned from the State Bar with charges pending:

[S]tate law cannot restrict the right of federal courts and agencies to control who practices before them. In *Sperry v. State of Florida* (1963) 373 U.S. 379, the United States Supreme Court vacated a state court injunction prohibiting a layperson from representing parties in the U.S. Patent Office. The court conceded that patent prosecution constitutes the practice of law, and that Florida law validly prohibited laypeople from practicing law in the state. But federal regulations allowing nonlawyers to prosecute patents preempted state laws barring the unlicensed practice of law. The court concluded that a state “may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority.”

Benninghoff, 136 Cal. App. 4th at 74 (emphasis added) (internal citations omitted); *see also* *People v. Salcido*, 42 Cal. App. 5th 529, 543 (2019) (“We accept that a state cannot penalize a nonlawyer who represents a client before a federal agency for the unauthorized practice of law, when the representation is authorized by federal law.”)

2. Various Federal Agencies Already Permit Nonattorneys to Represent Claimants

While states have no authority to control who may practice in federal proceedings, federal agencies and courts typically allow members of state bars to practice before them. *See, e.g.*, 42 U.S.C. § 406(a)(1) (“An attorney in good standing who is admitted to practice before the highest court of the State... of his residence ... shall be entitled to represent claimants before the Commissioner of Social Security.”); *See, e.g.*, L.R. 83-2.1.2 (United States District Court for the Central District of California) (local rule regarding appearance of attorneys before the federal district court).

And, as discussed in the examples below, various federal agencies already permit nonattorneys to practice before them under specified circumstances. Federal courts, on the other hand, generally permit only attorneys licensed by a state bar to practice before them, with limited

exceptions (such as for certain law students practicing under the supervision of an attorney; *see, e.g.*, L.R. 83-4 (United States District Court for the Central District of California) (local rule regarding appearance of law students meeting certain criteria and under the supervision of an attorney)). As set forth above, California does not have the authority to modify these federal provisions regarding who may practice before federal agencies and courts.

a. Social Security

Claims under titles II, XVI, or XVIII of the Social Security Act (concerning retirement and disability benefits, supplemental security income, and Medicare coverage) are pursued first through federal administrative hearings.¹ Federal statute permits the Social Security Administration (which hears claims relating to retirement and disability benefits and supplemental security income) to regulate the provision of services by nonattorneys in such administrative proceedings:

The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State... of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security.

42 U.S.C. § 406(a)(1).

¹ If the agency denies a claim, that claim may be appealed to federal court. The rules for who may provide representation in court are set by local rule, and generally limit representation to attorneys, subject to limited exceptions, such as for certain law students under attorney supervision. *See, e.g.*, L.R. 83-2.1.2 (United States District Court for the Central District of California) (local rule regarding appearance of attorneys before the federal district court; L.R. 83-4 (United States District Court for the Central District of California) (local rule regarding appearance of law students meeting certain criteria and under the supervision of an attorney)).

Federal regulations, in turn, permit representation by attorneys and nonattorneys who meet certain qualifications, including moral character requirements. See, e.g., 20 C.F.R. §§ 404.1705, 416.1505 (setting qualifications for who may serve as representatives). Federal rules also include rules of conduct for representatives and provisions regarding when fees may be charged and at what rate. See 20 C.F.R. §§ 404.1740, 416.1540.; see generally SSA's Fee Authorization Processes (Social Security Administration 2020), <https://www.ssa.gov/representation/overview.htm> (overview of rules and procedures regarding fees). Federal law also sets additional qualifications that nonattorney representatives must meet in order to qualify to receive their fees directly from the Social Security Administration. See 42 U.S.C.406 §(e).

Nonattorney representatives who qualify under the rules may communicate with the Social Security Administration on behalf of claimants, may appear with them at hearings and interviews, and may perform other tasks similar to those a lawyer would perform. See generally “Your Right to Representation,” Social Security Administration Publication No. 05-10075 (June 2017), available at <https://www.ssa.gov/pubs/EN-05-10075.pdf>.

Of note, neither federal law nor federal regulation appear to prohibit a nonattorney who does not meet the Social Security Administration’s requirements for qualification as a nonattorney representative from merely providing advice to a Social Security claimant without actually representing the claimant before the agency. Thus, California may be able to authorize such advice-giving by a nonattorney without conflicting with federal law or regulation, so long as California does not purport to authorize or restrict practice before the Social Security Administration. However, the utility of such a limited exception to the prohibition unauthorized practice of law is not clear given that the Social Security Administration already permits qualified nonattorneys to actually represent claimants.

b. Bankruptcy

The requirements for appearing in bankruptcy court are set by local court rule. Appearances are generally limited to attorneys or certain law students under an attorney’s supervision. See, e.g., L.B.R. 2091-1 (United States Bankruptcy Court for the Central District of California) (local rule limiting appearance in bankruptcy court to attorneys admitted to the district court and certified law students who meet certain qualifications and are supervised by an attorney).

Federal law does permit nonattorneys called “bankruptcy petition preparers” to type documents for filing in bankruptcy proceedings, but these bankruptcy petition preparers are

specifically prohibited from providing any legal advice. *See* 11 U.S.C. § 110. The fees that such bankruptcy petition preparers may charge are limited by the court. In the Central District of California, such fees are typically limited to \$200. *See* Bankruptcy Petition Preparer Guidelines (United States Trustee, Central District of California 2004), *available at* https://www.justice.gov/sites/default/files/ust-regions/legacy/2014/03/10/bpp_guidelines.pdf.

There does not appear to be any federal prohibition on nonattorneys (other than bankruptcy petition preparers) providing *advice* regarding bankruptcy without appearing in court or preparing documents. Thus, California may be able to authorize such advice-giving by a nonattorney without conflicting with federal law or regulation, as long as such nonattorney is not also a bankruptcy petition preparer. However, California cannot authorize nonattorneys to prepare bankruptcy petitions or other filings or to appear in bankruptcy proceedings.

c. Veterans' Benefits

Veterans may be entitled to a number of benefits, including pensions, education benefits, healthcare benefits, and disability benefits. Claims for benefits are processed by the Department of Veteran Affairs, which also has an administrative hearing process for challenges to benefits determinations. Pursuant to federal regulation, both attorneys and qualified nonattorneys may represent veterans in pursuing claims, provided they meet certain requirements including meeting certain continuing education requirements and are then certified by the Department of Veterans Affairs; nonattorneys who are certified to represent claimants before the Department are referred to as “claims agents.”

Federal regulations expressly prohibit individuals who have not been certified by the Department as attorneys or claims agents from even assisting with the preparation of claims for benefits. *See* 38 C.F.R. § 14.629(b)(1) (“No individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA for such purpose.”) Thus, in practice, California could not even authorize nonattorneys to provide mere advice to potential claimants for veterans’ benefits, as individuals who did so without obtaining accreditation from the Department of Veterans Affairs would likely be in violation of federal regulations.

d. Military Discharge Status

Challenges by service members to their discharge status (which may affect eligibility for veterans’ benefits) are heard by discharge review boards and boards for correction of military

records, which are authorized by federal statute. *See* 10 U.S.C. §§ 1552 (establishing boards for correction of military records in each service branch), 1553 (establishing military discharge review boards in each service branch). Each service branch has its own boards and promulgates its own regulations for practice before the boards. Army regulations, to cite one example, appear to permit representation of service members before the Army Discharge Review Board (ADRB) by attorneys and a broad array of nonattorneys, by defining “counsel or representative” as:

An individual or agency designated by the applicant who agrees to represent the applicant in a case before the ADRB. It includes, but is not limited to: a lawyer admitted to the bar of a Federal court or of the highest court of a state; an accredited representative designated by an organization recognized by the Secretary of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives of a private organization or local government agency.

See Army Regulation 15-180 (Sept. 25, 2019), *available at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN7383_AR15-180_Web_FINAL.pdf. This broad definition of who may represent service members before branch discharge review boards appears to be mandated for all service branches by Department of Defense instruction. *See* Instruction No. 1332.28 ¶ E2.1.3 (Dept. of Defense April 4, 2004), *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133228p.pdf>.

IV. Conclusion

As set forth above, California does not have any authority to authorize nonattorneys to provide legal services in federal proceedings. Federal agencies and federal courts set their own rules regarding who may practice before them, which typically allow attorneys licensed by state bars to practice. Additionally, various federal agencies already allow nonattorneys to practice before them under limited circumstances prescribed by federal law and/or regulation. The state has no authority to modify these federal provisions.