



# The State Bar of California

## CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

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Date: June 30, 2020

To: California Paraprofessional Program Working Group

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

Subject: Consideration of Income Maintenance Practice Area to be included in a Paraprofessionals Program

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### 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 for the program for review by the full body at its next meeting.

The present team assessed the Income Maintenance practice area. In generating our recommendations, outlined below, we considered the following:

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

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- Information obtained from subject matter experts in the field of unemployment insurance;
- Information from an administrative law judge who hears workers' compensation cases;
- Review of administrative processes for public benefits, unemployment insurance, and workers' compensation; and
- An opinion issued by the State Bar's Office of General Counsel.

### California Justice Gap Study

The California Justice Gap Study included questions about income maintenance-related issues including questions asked about trouble receiving the earned income tax credit; the reduction or termination of state government income, food, disability or housing benefits; and the denial or termination of federal Supplemental Security Income, Social Security Disability income, or Social Security Survivors benefits. Certain problems in the California Justice Gap Study in the broad category of employment were considered by some of the members to be appropriate to include in the income maintenance category for the purpose of consideration by the CPPWG, specifically related to problems with workers' compensation and unemployment insurance claims.

CJGS results were generally categorized as follows:

<b>Top 3 legal needs, all Californians</b>	<b>Top 3 legal needs, Californians at or below 125% of FPL</b>	<b>Top 3 legal needs, Californians above 125% of FPL</b>
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

Income maintenance legal needs aligned with one of these categories: top 3 legal needs with severe impact, Californians at or below 125 percent of FPL. Employment issues were among the most commonly reported types of problems for Californians at or below 125 percent of FPL.

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

- Being denied or terminated from federal Supplemental Security Income;
- Being told to pay back an overpayment for SSI, SSDI or Social Security Survivors benefits;
- Not being approved for or having income, food, disability, housing, or other state government assistance reduced or terminated;
- Being denied payments or medical, mental health, or vocational help for a job-related injury (workers' compensation); and

- Being denied unemployment benefits or unemployment benefits were stopped before they were supposed to.

### **Defining the Scope of Income Maintenance Practice Area**

As noted above, we have defined the broad category of Income Maintenance to include:

- SSI and SSDI: denial of eligibility or being told to pay back overpayments
- Public Benefits, including denial or termination
- Workers' compensation insurance
- Unemployment benefits

### **Subject Matter Expert**

Staff and Judge Yew met with Ms. Ruth Silver-Taube, who teaches the employment law clinic at Santa Clara University, which handles unemployment claims and wage and hour cases. She explained that nonlawyers can assist people with filing unemployment claims, as well as with representation at administrative appeals before the Unemployment Insurance Appeals Board. Free representation is generally available through legal aid programs, although not all those who apply for unemployment insurance qualify for legal aid services

### **Workers' Compensation Judge**

Judge Yew and Mr. Fleischman met with Judge Dora Padilla, who hears cases filed with the Workers' Compensation Appeals Board (WCAB). She explained that injured workers can readily find attorney representation, as statutory provisions provide for attorneys to be compensated based on a percentage of the claimant's settlement. Current procedures allow for paralegals, who work under an attorney's supervision, to communicate directly with the court and even represent clients in court proceedings, if acknowledgment of such representation is provided by the client. The Los Angeles workers' compensation court also allows for paralegals to represent injured workers in depositions. Lien claimants (e.g., hospitals, medical offices, medical equipment providers, etc.) may be represented by either attorneys or nonattorneys, for initial claims, reconsideration, and enforcement of judgments.

Judge Padilla was asked whether she would be in favor of paraprofessionals representing injured workers in administrative proceedings without an attorney's supervision. Judge Padilla expressed her view that she would **not** be comfortable with that change and that she prefers having the ability to be able to call in an attorney on a particular case if she was not comfortable with the paralegal's representation.

### **Review of Administrative Processes**

The administrative processes for public benefits, workers' compensation, and unemployment insurance are very similar: if an initial application or claim is denied, an appeal is filed with the administrative agency that manages the benefit or insurance. A second level of appeal is available through the agency's hearing body, before an administrative law judge. The final remedy is superior court review, via an administrative writ.

Before the superior court review stage all of these administrative processes currently allow for nonattorneys to represent the claimant in the proceedings themselves and, with the exception of representation in Social Security Administration proceedings, no training or certification is required for nonattorneys. However, the statutes and regulations that allow for this representation appear to be silent about the scope of allowable representation outside of the parameters of the hearings themselves.

### **Office of General Counsel Opinion**

The State Bar's Office of General Counsel (OGC) researched the question of what entity has authority to determine whether nonattorneys can represent parties to state administrative hearings, and found that, generally, the Legislature or the administrative agencies themselves (acting under the authority granted them by the Legislature) determine who may appear in administrative hearings. However, the scope of legal services nonattorney representatives can provide incident to the mere representation of parties before administrative tribunals is not clear. Potentially, the judiciary could have some role in regulation with respect to paraprofessionals providing services related to administrative hearings, including by providing clarity in this area. The Court could delineate activities that paraprofessionals could perform incident to appearing before administrative agencies without committing the unauthorized practice of law, where such representation is authorized by statute or regulation.

Staff inquired with the State Bar's Chief Trial Counsel (CTC) as to how nonattorneys who represent parties in admin hearings are viewed from an unauthorized practice of law perspective. The CTC's response mirrored that of the OGC, noting that there are several administrative hearing offices where a person is permitted to have a nonattorney represent them at the hearing, but that the regulations governing those hearings do not typically specify whether the nonattorney can or cannot provide any other services prior to or outside of the hearing. Where there is no clear guidance provided by the rule, where the nonattorney provides other services prior to or outside the hearing, the nonattorney may effectively be engaging in the unauthorized practice of law. If the goal of the CPPWG is to expand the areas of practice where nonattorneys can provide services to members of the public, the CTC recommends that the rules be clearly written to define exactly what services the nonattorney is permitted to provide. If the intent is to allow nonattorneys to provide services outside of the hearing itself, the rule should state that the nonattorney is allowed to provide advice or guidance prior to the hearing, decide what causes of action to raise, and what evidence and witnesses to present.

### **Recommendation**

Our research found that nonlawyers are currently permitted to represent parties in administrative hearings for all categories included in the Income Maintenance practice area, and that it is beyond the purview of the working group to consider changes to this construct.

given the jurisdiction of the Legislature and/or the administrative agencies themselves to so authorize. Our discussion therefore focused on whether we should recommend providing explicit authority to allow nonattorneys to engage in legal activities incident to that hearing representation. While we believe that there is an important public protection rationale for clarifying the scope of authorized services provided by nonattorneys in various administrative proceedings, there was not agreement regarding what that scope should be. The recommendations of each member of our group are provided below:

**A. Representation in Administrative Proceedings:**

**Steven Fleischman:**

Except for unemployment and worker's compensation matters, paraprofessionals are authorized to provide full scope representation in support of advocacy at the administrative agency level where nonattorneys are authorized to represent parties in administrative proceedings by state law. Paraprofessionals would specifically be allowed to provide legal advice in preparation for, or in reaction to, the actual administrative hearing itself. With respect to unemployment and worker's compensation matters, nonattorney advocacy would be limited to that authorized by the respective administrative agencies responsible for these proceedings.

**Ira Spiro:**

Except in workers' compensation, paraprofessionals are authorized to provide full scope representation at the administrative agency level where nonattorneys are authorized to represent parties in administrative proceedings by state law, including representation at the administrative hearing. In workers' compensation, paraprofessionals are limited to working under the direction of an attorney, as paralegals are by statute.

**Judge Yew:**

Paraprofessionals are authorized to provide full scope representation at the administrative agency level where nonattorneys are authorized to represent parties in administrative proceedings by state or federal law. Paraprofessionals would specifically be allowed to provide legal advice in preparation for, or in reaction to, the actual administrative hearing itself.

**Carolyn Shining:**

Paraprofessionals are authorized to assist in Public Benefits proceedings. The scope and details of such representation should be the subject of further debate so that the terminology proposed is clarified. (It is premature to determine how that scope will be defined and shaped in this memo at this time.)

Paraprofessionals should not be involved in unemployment or workers' compensation proceedings (see discussion below).

**B. Representation in Superior Court:**

**Steven Fleischman and Ira Spiro:**

Paraprofessionals are not authorized to provide legal advice, prepare documents or provide representation in superior court related to the appeal of a decision of an administrative review board.

**Carolyn Shining:**

Paraprofessionals are not authorized to provide legal advice, prepare documents or provide representation in superior court.

**Judge Yew:**

Paraprofessionals are authorized to provide legal advice, prepare and file an administrative writ for judicial review, and provide representation in superior court to appeal the decision of an administrative review board.

While the need for clarity around authorized activities beyond those delineated in regulation exists for federal, as well as state, administrative proceedings, federal preemption could complicate any attempt to delineate authorized activities with respect to federal administrative agency proceedings. As such, we do not recommend including federal administrative proceedings that fall under the Income Maintenance practice area in a paraprofessional program.

At least one member is in favor of the working group recommending a strengthening of the Unemployment Insurance Code that would make inadmissible in evidence, in any action or special proceeding, other than a proceeding arising out of the provisions of that Code, all statements by any party, witness, administrative law judges or other person in connection with any claim or proceeding under the Code, and all documents exchanged, created, submitted or received in connection with any claim or proceeding under that Code.

A prime reason is to minimize the adverse effects of such statements on litigation of other claims between the employee and employer, in which the stakes are usually much greater than in the unemployment proceedings, and thus to minimize the adverse effects, in such litigation, of the work of paraprofessionals. Because unemployment proceedings normally take place before the employee and employer have considered potential litigation on other subjects, and because the stakes in such litigation are usually much higher than in unemployment proceedings, the parties normally and understandably do not study the law and the facts as much, or spend as much time and effort to be as unambiguous and accurate, as they would in the higher stakes litigation.

Another member adds that, notably, it is because of this complexity of these issues (as well as other complex legal issues which are specific to these two specialty areas) that the working

group should eschew further discussion of these areas as it would tax the resources of the group at this time.

Another member expressed strong opposition to such an amendment, for the reason parties in such litigation should be allowed to impeach each other and witnesses with statements in unemployment proceedings, and that unemployment claimants should not be able to make statements to obtain unemployment benefits and then make inconsistent statements in subsequently civil litigation. This member believes that it is far outside the jurisdiction of this working group to propose changes to the Discovery Act and Evidence Code regarding the admissibility of relevant evidence in a civil trial. Moreover, the opposing member feels strongly that this working group should be concerned with addressing issues within its charge and should not be used in a manner to overtly favor one group of private litigants (plaintiffs in employment cases) over another group of private litigants (defendants in employment cases), which would be the effect of this type of amendment.

With respect to representation of clients in superior court, at least one member was concerned about the results of the California Attorney Practice Analysis (CAPA) as it relates to allowing paraprofessionals to practice in superior court. The CAPA survey asked attorneys to rate the depth of knowledge required to complete tasks in specific legal areas, as well as the criticality of proficiency in the tasks and legal topics (i.e., the degree of harm that may be inflicted upon clients and/or the general public if an attorney is not proficient). The CAPA study created a composite score to measure both criticality and frequency (i.e., the importance of being proficient and the frequency in performing tasks in an area) for each practice area. The composite score for Civil Procedure is 20.7, the highest among all knowledge areas. Another relevant rating is regarding the depth of knowledge (DOK) required to perform the tasks with competence. On a 5-point scale, the DOK score for Civil Procedure is 3.7, near the high end of the metric.

Based on the CAPA study, at least one member of the Income Maintenance Group felt that the potential for problems created by allowing nonattorneys to practice law was potentially highest in litigation pending in superior courts. This member felt that this was a heightened concern with respect to petitions for writs of administrative mandate, which are highly complex procedurally and which are usually handled by a specialized bar. Therefore, this member concluded that paraprofessionals should not be permitted to represent clients in connection with petitions for writs of administrative mandate in superior courts.

One member believed that it was important to afford litigants the opportunity to have the paraprofessional who represented them follow the matter through to the superior court for review of their administrative decision. That paraprofessional would be most familiar with the facts of the matter and forcing the litigant to represent themselves in superior court may present insurmountable challenges for the litigant. In addition, forcing the litigant to hire an attorney who is not familiar with the case in order to access appellate review in the superior

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court may cause the litigant to incur prohibitive costs or even discourage the litigant from seeking review or defending against a request for review. If the litigant preferred an attorney, the litigant could retain one and dismiss the paraprofessional. If the paraprofessional did not feel competent to appear in superior court, one would expect that any rules of professional conduct for the paraprofessional that would be enacted would require the paraprofessional to make such a disclosure. In addition, in many circumstances, the superior court proceedings would be more efficient with the litigant being represented by a paraprofessional or an attorney instead of appearing without any representation.

An additional recommendation generated by our group is broadly applicable to all practice areas being considered for inclusion in a paraprofessional program: new licensing requirements for the program should not disrupt existing *attorney-supervised* nonattorney advocacy and representation that is already taking place. We anticipate that the full working group will be able to consider the most appropriate approach to actualizing this recommendation during the licensing and certification phase of its work.