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Date: December 17, 2020

To: California Paraprofessional Program Working Group

From: Amos Hartston and Fariba Soroosh

Subject: Update and Recommendations for Regulatory Structure for Paraprofessional 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 requirements for paraprofessional regulation.

The Regulation Subcommittee recommends that the CPPWG approve its recommendations regarding continuing education and financial responsibility. The Subcommittee also seeks the CPPWG's input regarding other proposed regulations under consideration, including an informed consent requirement, written agreement and mandatory disclosure requirements, scope of practice language, possible fee limitations, and other regulations, as discussed below.

## DISCUSSION

At its August 25, 2020, meeting, the CPPWG determined that subcommittees should be created to develop requirements for paraprofessional licensing, regulation, and discipline. These subcommittees were appointed subsequent to that meeting, and each met several times to review and consider information about their assigned topics. At its October 29, 2020, meeting, the Working Group reviewed the status reports from each of these subcommittees and provided feedback on the subcommittees' preliminary recommendations and proposals.

At the October 29 meeting, the Regulation Subcommittee, which comprises the authors of this memo, identified several topics that fall within the purview of our subcommittee and presented a report on the status of our research into these topics. The Regulation Subcommittee also identified

several important issues that the subcommittee was *not* addressing at this time, including determining an appropriate name for licensees; creation of protections similar to attorney-client relationship (privilege and work product); and start-up costs and costs of regulation. These issues need to be taken up separately by the Working Group or assigned to the Regulation Subcommittee. This memo provides an update on the status of our work, along with preliminary recommendations for some of these topics, as summarized in Table 1. Detailed information about the status of each of the topics is provided below the table.

**Table 1. Status of Recommendations**

Topic	Status
Financial responsibility	Proposed recommendations ready for consideration
Continuing legal education	Proposed recommendations ready for consideration
Written agreement and mandatory disclosures	Draft language provided for discussion
Fee limitations	Pending; ready for discussion
Informed consent requirement	Draft language provided for discussion
Advertising limitations	Pending
Ethical Standards	Pending
Proactive/risk-based regulation	Pending

### **MANDATORY CONTINUING LEGAL EDUCATION (MCLE)**

The Regulation Subcommittee recommends adoption of the following continuing education requirements for licensed paraprofessionals:

- 36 hours every 3 years, as follows:
  - 30 hours in the paraprofessional's practice area
  - 4 hours on legal ethics
  - 1 hour on competence issues
  - 1 hour on recognition and elimination of bias in the legal profession and society
- No more than 12.5 hours may be obtained through self-study
- Each practice area subcommittee may require that the above MCLE include specific topics relevant to the paraprofessional's practice area
  - For example, the Family Law Subcommittee recommends trauma-informed legal assistance training be included as part of the 30-hour practice as a requirement
  - Recommendations to be sought from other practice area subcommittees as well
- The paraprofessional licensing board will be authorized to require supplemental MCLE to maintain licenses due to changes in the law or other developments, as well as discretion to impose more specific educational requirements based on practice area or other considerations.

## FINANCIAL RESPONSIBILITY

Our subcommittee continued to discuss financial responsibility requirements for paraprofessionals. After further research, discussion, and consideration, and hearing from several stakeholders and experts, the Regulation Subcommittee believes providing for financial responsibility is critical to ensuring consumer protection and should be part of the CPPWG's proposals. Our discussions centered on three possible ways to provide financial responsibility: (1) a surety bond requirement; (2) malpractice insurance; and/or (3) a Client Security Fund/Restitution Fund.

### Surety Bond

The Regulation Subcommittee recommends adoption of a mandatory \$100,000 bond for licensed paraprofessionals.

A surety bond is a common way to provide for financial responsibility of licensed professionals in California. A surety bond is a three-way contract where the bond company (the surety) financially guarantees the performance of obligations of a second party (the principal or licensee) to a third party (the obligee/entity requiring the bond i.e., the State). Surety bonds are required for many different licensed professionals in California in various amounts. The amount of the bond is the total amount the surety is liable for on the bond, not a per claim amount. Accordingly, large claims or multiple claims can reduce and use up the amount of the bond. The higher the bond amount, the greater the consumer protection afforded. Table 2 provides example selected bond requirements for several professions:

Table 2. Bond Requirements for Selected Licensed Professionals in California

Profession	Amount	Statutory Authority
Immigration Consultant	\$100,000	<a href="#">Business &amp; Professions Code § 22443.1</a>
Legal Document Assistant	\$25,000	<a href="#">Business &amp; Professions Code § 6405</a>
Unlawful Detainer Assistant	\$25,000	<a href="#">Business &amp; Professions Code § 6405</a>
Notary Public	\$15,000	<a href="#">Government Code § 8212</a>

A bond differs from insurance in several ways, including:

- The full premium is paid for the entire term of the bond; coverage does not lapse until the bond expires;
- Bonds are significantly less expensive and burdensome to obtain;
- The bond amount covers all claims related to the period it is in effect (including claims first made after the bond expires);
- Licensees are required to reimburse the bond issuer for any payments made;
- A client may apply directly to the bond issuer for claims; and
- In addition to negligence, bonds may cover fraud and intentional acts.

Premiums for surety bonds above \$25,000 may vary based on underwriting considerations, such as the applicant's credit score, but generally range from 1 to 3 percent of the bond amount. Bonds often are issued for multiple years.

The subcommittee explored whether requiring paraprofessionals to carry a bond would provide meaningful protection for their clients, an appropriate bond amount, and whether a bond requirement potentially would be a hardship for paraprofessionals or an unreasonable barrier to entry into the profession. The Regulation Subcommittee concluded that a surety bond provides an important baseline consumer protection of financial responsibility and recommends that the Working Group adopt a bond requirement for paraprofessionals. With respect to the amount of the bond, because paraprofessionals will be providing legal advice and assistance beyond what immigration consultants and LDAs are permitted to do, and in order to provide meaningful consumer protection, we recommend adoption of a \$100,000 bond requirement similar to immigration consultants.

We acknowledge that the Working Group may want to further consider the anticipated cost of a bond, and whether the proposed bond amount potentially could create an undue burden or a barrier to entry into the profession. The information considered by the subcommittee did not find a meaningful difference in this regard between a \$100,000 bond requirement and a \$75,000 bond requirement, for example, which would provide less consumer protection. We welcome the Working Group's and the public's input with respect to the bond amount.

### **Malpractice Insurance**

The subcommittee continued to explore whether errors and omissions (malpractice) insurance should be encouraged or required for paraprofessionals. While not generally required for California attorneys, malpractice insurance is commonly required by California Rules of Court or local rules when courts appoint attorneys in cases such as family law, probate, and criminal cases. (see, e.g., Rules of Court 5.242(b)(2) (minor's counsel); Rules of Court 7.1101 (c)(3) (counsel appointed by probate court), and via lawyer referral service programs. Malpractice insurance is required for and available to legal paraprofessionals in Washington; an average policy costs a Washington paraprofessional \$900 annually. Following research, discussion, and hearing from presenters, there is agreement that malpractice insurance should, at minimum, be strongly encouraged for California licensed paraprofessionals; mandatory disclosures should clearly and conspicuously disclose whether or not the paraprofessional maintains malpractice insurance; and the State Bar should take steps to encourage insurance companies to make insurance available to licensees.

Malpractice insurance would provide protections beyond that afforded by a bond policy. For example, the minimum coverage level contemplated for a malpractice policy would provide coverage for \$100,000 *per claim* with an aggregate \$300,000 limit. Insurance would also provide protection to paraprofessionals through a duty to defend, and paraprofessionals would not be required to reimburse the insurance company for amounts paid. Malpractice insurance, however, does not cover fraud or other intentional acts.

The Regulation Subcommittee believes that maintaining malpractice insurance, if it is available, is certainly a best practice and invites the full Working Group to consider whether it should be required. Mr. Hartston believes that the full Working Group should seriously consider *requiring* paraprofessionals to maintain malpractice insurance. Ms. Soroosh would like to know the rationale

for requiring this of paraprofessionals but not of attorneys. Because mandatory malpractice insurance is not required for attorneys, may not be immediately available, and the cost is uncertain and may create a barrier to entry, the subcommittee agreed more information may be necessary before recommending mandatory malpractice insurance. This should be discussed and considered by the full Working Group.

#### **Client Security Fund/Possible expansion into Restitution Fund**

The Regulation Subcommittee recommends that licensed paraprofessionals be required to participate in a Client Security Fund (CSF), similar to attorneys.

The subcommittee believes financial responsibility is a critical part of consumer and public protection. Attorneys in California participate in a CSF; currently, annual license fees for attorneys include \$40 toward the CSF. Payouts from the CSF are limited to situations where an attorney engaged in intentional wrongdoing such as theft. In most circumstances, final discipline or a criminal conviction is a required precondition to recovery from the CSF. Thus, claims to the CSF can take many years to be paid.

Our subcommittee has identified limitations to the CSF in terms of consumer protection: (1) the CSF does not provide an effective or consumer friendly opportunity for quick recovery; and (2) the CSF does not reimburse clients who are victims of unintentional acts of negligence. Therefore, we concluded that it is not in and of itself sufficient to ensure financial responsibility.

With respect to the first concern, the subcommittee recommends that final discipline not be a condition precedent to payout from the CSF. Instead, State Bar staff, Board of Trustees, a commission, or committee<sup>1</sup> will review the facts and make a determination as to whether or not reimbursement is warranted.

With respect to the second issue, that the CSF does not cover negligence or malpractice, the subcommittee believes that financial responsibility with respect to these issues is a critical part of consumer and public protection. In the event the proposed regulations do not mandate a \$100,000 bond or malpractice insurance for paraprofessionals, the subcommittee recommends that the CSF for paraprofessionals be expanded to compensate clients for both intentional wrongdoing and negligence/malpractice. Because of the expected expense of administration and the difficulty in funding and maintaining a restitution fund that covers negligence claims, the subcommittee believes that requiring a \$100,000 bond and/or malpractice insurance is a better alternative than expanding the CSF to cover negligence claims.

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<sup>1</sup> Options for decision-making authority include the existing CSF Commission and the paraprofessional board. The subcommittee will develop a recommendation on this issue at a later date.

Table **3** on the following page provides a summary of our recommendations regarding proposed financial responsibility requirements.

Table 3. Proposed Financial Responsibility Requirements

Topic	Description	Issues/Options
<b>Bond</b>	Provides for an important baseline consumer protection of financial responsibility common for licensed professionals	<ul style="list-style-type: none"> <li>• Recommended amount \$100,000, similar to immigration consultants</li> <li>• Covers both intentional and unintentional acts</li> <li>• Significantly less expensive than malpractice insurance</li> <li>• Protection is limited to the amount of the bond (not a per claim amount)</li> <li>• Must balance consumer protection with potential barrier to entry into the profession in determining the bond amount</li> </ul>
<b>Errors and Omissions (Malpractice) Insurance</b>	Provides protection for the licensed professional as well as important increased consumer protections	<ul style="list-style-type: none"> <li>• Insurance is not required for attorneys</li> <li>• Malpractice insurance does not cover intentional acts</li> <li>• Cost and availability not clear</li> <li>• May create burden and barrier to entry into the profession</li> </ul>
<b>Client Security Fund/ Restitution Fund</b>	<p>The existing attorney Client Security Fund reimburses clients for losses due to intentional actions of licensees (normally excluded from insurance)</p> <ul style="list-style-type: none"> <li>○ Theft or equivalent acts</li> <li>○ Funds received and wrongfully retained</li> </ul>	<ul style="list-style-type: none"> <li>• Recommend CSF for paraprofessionals similar to CSF for attorneys</li> <li>• Funded by annual assessment</li> <li>• In the event Working Group does not mandate a \$100,000 bond or malpractice insurance, CSF for paraprofessionals could be expanded to include negligence/malpractice claims as an alternative way to provide for financial responsibility</li> <li>• Administration and funding would be significantly higher if unintentional acts are included</li> </ul>

## REGULATION OF PARAPROFESSIONALS AND RULES OF PROFESSIONAL CONDUCT

The Regulation Subcommittee is considering various proposed regulations for paraprofessionals. We have prepared draft language for the Working Group's consideration, provided in Attachment A, for review and discussion on several topics including:

- An informed consent requirement;
- Written agreement and mandatory disclosures; and
- Scope of practice and prohibited acts.

The prepared language is for discussion purposes only. We have not yet determined whether these regulations should be part of the California Rules of Court or part of the Rules of Professional Conduct. This may depend on the proposed remedy for violations. The draft language identifies our subcommittee's proposed regulation without yet determining where the regulations will live or the proposed final language of the regulations.

The Regulation Subcommittee further recommends that the Working Group develop Rules of Professional Conduct for paraprofessionals based on the attorney Rules of Professional Conduct (RPC). The Regulation Subcommittee anticipates that many of the rules will be directly applicable, while some will require policy discussion and decision for application to paraprofessionals prior to finalization. This review is in process.

Staff from the State Bar's Office of Professional Competence and the Supreme Court have undertaken a review of the RPC and the California Rules of Court (CRC) and will make recommendations to the CPPWG regarding proposed additions and changes to the RPC, CRC, and, where necessary, statutes (the RPC, CRC, and statutes collectively referred to as Rules). This staff will continue to seek input from the CPPWG and its subcommittees as part of its review.

### **Informed Consent**

The Regulation Subcommittee recommends the requirement of informed consent and has drafted language requiring paraprofessionals to obtain informed consent from clients prior to the performance of services for a fee.

### **Written Agreement and Mandatory Disclosures**

The Regulation Subcommittee recommends the requirement of a written agreement with mandatory disclosures, and has drafted proposed language. We believe it is important that it be clear what the paraprofessional can and cannot do, along with other important disclosures. The proposed language is based in large part on Washington's Admission and Practice Rules 28(G).

### **Scope of Practice and Prohibited Acts**

The Regulation Subcommittee recommends providing regulations regarding the scope of practice authorized by the limited practice rule and prohibited acts, and has drafted proposed language. We believe it is important to provide general parameters for licensed paraprofessionals in addition to the work of the specific practice area subcommittees. The proposed language is based in large part on Washington's APR 28(F) and (H); Utah Rule 14-802(c)(1); and Business & Professions Code §§ 22441-22447 (immigration consultants).

### **Fee Limitations**

The Regulation Subcommittee has not yet prepared proposed regulations related to fee limitations. We believe discussion and consideration by the full Working Group would be helpful. In particular:

- Should contingent fees be prohibited:
- Should flat fees be encouraged?



- Given the purpose of the program is to provide a lower-cost alternative to engaging a lawyer, should there be any limitations or restrictions on the amount of fees?
  - For example, bright-line fee limit or schedule, or some other method allowing regulation of fees charged that would protect against excessive fees by paraprofessionals (either hourly or total fees)
- Any other fee limitations that should be considered, for example limits on advance fees

## **NEXT STEPS**

The Regulation Subcommittee will continue to meet and will develop additional recommendations based on the Working Group's feedback.

## Draft INFORMED CONSENT language

(1) Prior to the performance of services for a fee, the [Paraprofessional] shall obtain the client's informed consent. This includes agreement based on receiving clear, understandable information in the client's preferred language about the risks and alternatives to the proposed services by a non-lawyer. The [Paraprofessional] must give the client as much information as the client needs to make an informed decision. Without limitation, the [Paraprofessional] must clearly and adequately explain:

- (a) that they are not a lawyer;
- (b) reasonable disclosure of available choices, including the availability of a lawyer as an alternative, the availability of a free consultation with a lawyer, the possible availability of limited-scope services from a lawyer, and the possibility that free legal services may be available if the client qualifies;
- (c) the risks of agreeing to a [Paraprofessional] in language that the client can understand;
- (d) the potential need to hire a lawyer if needed services go beyond the limited license of the [Paraprofessional];
- (e) the existence of any financial arrangements such as referral fees or fee sharing that the [paraprofessional] has with others; and
- (f) a reasonable estimate of the total costs of services.

(2) The [Paraprofessional] Board may provide additional information and guidance on the requirements of informed consent, including additional required disclosures related to services generally or specific to licensed practice areas, and a standard form that must be used to confirm informed consent in writing separate from the retainer agreement.

(3) If the [Paraprofessional] fails to obtain informed consent, this shall be considered as a basis for discipline and as a basis for a full refund cumulative to any other remedies.

Draft WRITTEN AGREEMENT AND MANDATORY DISCLOSURES language

(1) A [Paraprofessional] must personally perform the authorized services for the client and may not delegate these to a nonlicensed person or device. Nothing in this prohibition shall prevent a person who is not a licensed [Paraprofessional] from performing translation services;

(2) Prior to the performance of services for a fee, the [Paraprofessional] shall enter into a written contract with the client, signed by both the client and the [Paraprofessional], that provides the name, specialty area, and license number of the [Paraprofessional] and includes the following provisions:

- (a) A clear explanation of the services to be performed;
- (b) A clear and conspicuous disclosure that the [Paraprofessional] is not a lawyer, may only provide limited advice, may not represent the client in court, and will provide limited advice and assistance with preparation of court documents and related tasks. This statement shall be on the first page of the contract; in a type size, font, color, appearance, and location sufficiently noticeable for a client to read and comprehend them; in a print that contrasts with the background against which they appear; in larger type than the surrounding text; in a manner that clearly calls attention to the language. An example of an acceptable disclosure will be provided by the [Paraprofessional] Board;
- (c) [We recommend developing a mandatory disclosure attaching a description of what the [Paraprofessional] can and can't do, which must be made clear, as specifically authorized by the scope of practice regulations for the approved practice area in which the [Paraprofessional] is licensed, currently under development.];
- (d) Identification of all fees and costs to be charged to the client for the services to be performed;
- (e) A statement that upon the client's request, the [Paraprofessional] shall provide to the client any documents submitted by the client to the [Paraprofessional] and a copy of the client's file;
- (f) A statement describing the [Paraprofessional]'s duty to protect the confidentiality of information provided by the client and the [Paraprofessional]'s work product associated with the services sought or provided by the [Paraprofessional];

- (g) A statement that the client has the right to terminate the contract and services at any time, with or without cause, and receive a full refund of unearned fees. This statement shall be clearly and conspicuously set forth in the contract;
- (h) A statement confirming that the [Paraprofessional] has malpractice insurance and a surety bond as required by [Financial Responsibility Rule], and detailed and clear information about how to file a complaint about the [Paraprofessional]'s services; and
- (i) Any other disclosures, statements, or conditions required by the [Paraprofessional] Rules of Professional Conduct and the rules and regulations of the [Paraprofessional] Board.

(3) A [Paraprofessional] may not provide services that exceed the scope of practice authorized by this rule, and shall inform the client, in such instance, that the client should seek the services of a lawyer.

(4) A document prepared by a [Paraprofessional] shall include the [Paraprofessional]'s name, signature, and license number beneath the signature of the client. [Paraprofessional]s do not need to sign sworn statements or declarations of the client or a third party, and do not need to sign documents that do not require a signature by the client, such as information sheets.

Draft SCOPE OF PRACTICE AUTHORIZED BY LIMITED PRACTICE RULE language

(1) The [Paraprofessional] shall ascertain whether the issue is within the defined practice area for which the [Paraprofessional] is licensed. If it is not, the [Paraprofessional] shall not render any legal assistance on this issue and shall advise the client to seek the services of a lawyer. If the issue is within the defined practice area, the [Paraprofessional] may render the following limited legal assistance to a self-represented client:

- (a) Obtain relevant facts, help the client collect relevant information and documents, and explain the relevancy of such information to the client;
- (b) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding;
- (c) Assist with selecting and completing appropriate court forms that have been approved by the Judicial Council of California (i.e., Judicial Council forms), by the local court, by statute, by the [Paraprofessional] Board, or by a California lawyer; advise the client of the significance of the selected forms to the client's case;
- (d) Inform the client of and assist with applicable procedures for proper service of process and filing of legal documents;
- (e) Provide the client with California court-approved self-help resources and other self-help materials prepared by a California lawyer or approved by the [Paraprofessional] Board, which contain information about relevant legal requirements, case law basis for the client's claim, venue and jurisdiction requirements, and other information that may help empower the client to understand their rights, how to use court forms, how to represent themselves in court, and potentially how to resolve the dispute outside of court;
- (f) Review documents or exhibits that the client has collected or received and explain them to the client;
- (g) Perform legal research;
- (h) Draft documents to be filed with the court beyond what is permitted in paragraph (c), if the work is reviewed and approved by a California lawyer;
- (i) Advise the client as to other documents that may be necessary to the client's case, and explain how such additional documents or pleadings may affect the client's case;

- (j) Assist the client in obtaining necessary records, such as birth, death, or marriage certificates;
- (k) Communicate and negotiate with the opposing party or the party's representative regarding procedural matters, such as setting court hearings or other ministerial or civil procedure matters;
- (l) Negotiate the client's legal rights or responsibilities, provided that the client has expressly given written consent defining the parameters of the negotiation prior to the onset of the negotiation; and
- (m) Render other types of legal assistance when specifically authorized by the scope of practice regulations for the approved practice area in which the [Paraprofessional] is licensed.

(2) A [Paraprofessional] has an affirmative duty to inform clients when issues arise that are beyond the authorized scope of the [Paraprofessional]'s practice. In such circumstances, the [Paraprofessional] shall inform the client in writing that:

- (a) the issue may exist, describing in general terms the nature of the issue;
- (b) the [Paraprofessional] is not authorized to advise or assist on this issue;
- (c) the failure to obtain a lawyer's advice could be adverse to the client's interests; and
- (d) the client should consult with a lawyer to obtain appropriate advice and documents necessary to protect the client's interests.

Draft PROHIBITED ACTS language

- (1) In the course of dealing with clients or prospective clients, a [Paraprofessional] shall not:
- (a) Make any false or misleading communication about the [Paraprofessional] or the [Paraprofessional]'s services;
  - (b) Make any statement that the [Paraprofessional] can or will obtain special favors from or has special influence with any court or governmental agency, or that would lead a reasonable person to form an unjustified expectation that positive results will be obtained based on comparisons with achievements on behalf of other clients without reference to the specific factual and legal circumstances of each client's case;
  - (c) Retain any fees or costs for services not performed;
  - (d) Refuse to return documents supplied by, prepared by, or paid for by the client, upon the request of the client. These documents must be returned upon request even if there is a fee dispute between the [Paraprofessional] and the client;
  - (e) Represent or advertise, in connection with the provision of services, other legal titles or credentials that could cause a client to believe that the [Paraprofessional] possesses professional legal skills beyond those authorized by the license held by the [Paraprofessional];
  - (f) Represent a client in court proceedings unless specifically authorized by the scope of practice regulations for the approved practice area in which the [Paraprofessional] is licensed;
  - (g) Provide services to a client in connection with a legal matter in another state, unless permitted by the laws of that state to perform such services for the client;
  - (h) Represent or otherwise provide legal or law-related services to a client, except as permitted by law and the rules and regulations authorizing limited scope services by [Paraprofessionals];
  - (i) Conduct or defend a deposition;
  - (j) Initiate or respond to an appeal to an appellate court; and
  - (k) Otherwise violate the [Paraprofessional] Rules of Professional Conduct.