



The State Bar of California

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

Date: February 26, 2021

To: California Paraprofessional Working Group

From: Sharon Bashan, Julianne Fellmeth, Kim Kirchmeyer, and Ira Spiro

Subject: Update and Recommendations for Disciplinary Structure for 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 requirements for paraprofessional discipline.

The Discipline Subcommittee (Subcommittee), comprised of the authors of this memorandum, is charged with the developing a proposed paraprofessional program. To that end, in the present memorandum the Subcommittee submits recommendations for CPPWG review and approval in regard to the paraprofessional disciplinary model and the designation of paraprofessional discipline records as public or private.

DISCUSSION

The Discipline Subcommittee, comprised of the authors of this memorandum, presented the paraprofessional disciplinary model outlined in Table 1 on the following page to the CPPWG at its January 15, 2021, meeting, the CPPWG discussed and provided feedback regarding the model at that time.

Table 1. Disciplinary Model

Model Element	Recommended Approach
Complaint Intake and Investigation	To be handled by the Office of Chief Trial Counsel (OCTC)
Citation and Fine ¹	To be administered by OCTC <ul style="list-style-type: none"> If fine and fee determination is disputed, that dispute will be adjudicated by the Hearing Panel
<ul style="list-style-type: none"> Initial Hearings Disputed Fine and Fee Determinations 	Three-person Hearing Panel
Settlement Conferences	<ul style="list-style-type: none"> To take place only if OCTC and paraprofessional mutually consent To be heard by staff adjudicator
Appeals and Stipulated Discipline	Three-person panel or the Paraprofessional Board
Final Discipline Decision	<ul style="list-style-type: none"> Suspensions and Revocations: final discipline decision to be made by the Supreme Court Appeals from the Appeals level to be heard by the Supreme Court All other discipline finalized at appropriate level within the State Bar's paraprofessional disciplinary structure, level as yet to be determined

The December 15, 2020, memorandum to the CPPWG, discussed at its January 15 meeting, provides further detail regarding this proposal; that memo is provided as Attachment A. The Subcommittee seeks the CPPWG's approval of this proposed disciplinary model with the understanding that a final recommendation regarding which body, a panel or the Paraprofessional Board, will consider appeals and stipulated discipline, will be developed after the composition of the Paraprofessional Board has been determined.

Subsequent to the January 2021 meeting the Subcommittee focused on various alternatives to discipline and the development of a proposed approach to determine which discipline records will be considered public documents. The Subcommittee was aided in this work by Ms. Danielle Lee with the State Bar's OCTC, Mr. Andrew Tuft of the State Bar's Office of Professional Competence, and Judge Yvette Roland, of the State Bar Court.

ALTERNATIVES TO FORMAL DISCIPLINE/NONTRADITIONAL DISCIPLINE

The Subcommittee explored various alternatives to the formal discipline trajectory beyond those outlined in the recommendation reviewed on January 15,² some of which exist in the

¹ The term "Diversion" was also included in this box in the January 15, 2021, memo. The Subcommittee has addressed in detail various diversion options in the following section of this memorandum and made distinct recommendations accordingly. As such that particular issue has been removed from this particular table.

² Specifically, citations and fines, which the CPPWG voted to include in the model at its January 15, 2021, meeting.

attorney discipline context and some that could be imported from Department of Consumer Affairs boards. These include:

- Warning Letters
- Agreements in Lieu of Discipline
- Mandatory Fee Arbitration
- Private Reprovals

In addition, the Subcommittee explored the Alternative Discipline Program (ADP), which is in fact part of the formal attorney discipline system; ADP is a unique disciplinary pathway for attorneys whose misconduct is determined to stem directly from a substance abuse or mental health issue. Each of these alternatives or approaches is described briefly below.

Warning Letters

Warning letters are issued by OCTC in circumstances where no violation has been found but OCTC determines that some action, or lack thereof, should be brought to the respondent attorney's attention, along with corresponding resource material. The Subcommittee believes these letters are useful tools and recommends that they be included in the paraprofessional discipline model.

Agreements in Lieu of Discipline

Agreements in Lieu of Discipline (ALDs) are authorized by Business and Professions Code section 6092.5(i): "In addition to any other duties specified by law, the disciplinary agency shall do all of the following: Make agreements with respondents in lieu of disciplinary proceedings, regarding conditions of practice, further legal education, or other matters."

These agreements are used by OCTC for low-level discipline, for example, failure to perform competently or failure to communicate with a client, that is aberrational in nature. An attorney must stipulate to the underlying facts and admit culpability in order to be eligible for an ALD. Respondent attorneys are subject to normal probation conditions pursuant to ALDs, for example restitution, and/or client trust accounting school. While ALD's are used for low-level discipline, they are not considered disciplinary in nature and are not made public.

The Subcommittee understands that one of the benefits of the ALD tool from OCTC's perspective is that the respondent attorney stipulates to both culpability and the underlying facts; in the event that the attorney does not satisfy the terms of the ALD, OCTC can proceed directly to the filing of a Notice of Disciplinary Charges. From the attorney's perspective the obvious benefits include the fact that the ALD is not considered discipline and is not a public record.

Even in light of these dual benefits however, the Subcommittee does not recommend ALDs for inclusion in the paraprofessional discipline model at this time. The Subcommittee prioritizes transparency for the public and consumers; with this value in mind, the Subcommittee recommends that any conduct that rises to the level of actual discipline should in fact be considered discipline and should be made public accordingly.

Mandatory Fee Arbitration (MFA)

The attorney MFA program is authorized under the Mandatory Fee Arbitration Act (Business and Professions Code sections 6200-6206) and is designed to provide an informal, low-cost process to resolve fee disputes between lawyer and client. About 95 percent of MFA cases are handled through local bar association arbitration programs (currently there are 32 local programs), with the remainder being arbitrated by volunteer arbitrators appointed by State Bar staff. The average annual caseload handled by the State Bar-appointed arbitrators is approximately 60 cases; and on average approximately 1,000 cases are handled by local bar association arbitration programs each year.

In addition to arbitration, the MFA program also handles requests for enforcement of fee arbitration awards. An attorney who fails to adhere to the terms of an MFA award can be placed on involuntary inactive status, therefore losing eligibility to practice. Neither participation in MFA, an award in favor of a client, nor placement on inactive status due to failure to pay, are considered discipline by the State Bar.

While the Subcommittee does have some concerns regarding the fact that MFA participation and awards are not made public, the MFA program does appear to provide effective consumer recourse for addressing fee disputes. An additional benefit is that the existence of an MFA option reduces the burden on the formal discipline system, essentially triaging fee-only disputes to a different resolution track. As such the Subcommittee recommends that the existing attorney MFA program be modified to accommodate a new paraprofessional licensee, and that this MFA program be included in the paraprofessional program accordingly.

Private Reprovals

Private reprovals are issued under circumstances similar to ALDs, though they are considered discipline. The Subcommittee's rationale for not including private reprovals in the paraprofessional discipline model is similar to that articulated with respect to ALDs. Disciplinary conduct should be publicly noticed.

Alternative Discipline Program (ADP)

The Subcommittee also explored the Alternative Discipline Program (ADP). This program was statutorily created as part of the Lawyer Assistance Program (LAP), which is a voluntary program for attorneys facing substance abuse or mental health challenges, funded by a portion of attorney licensing fees. There are between 5 and 10 attorneys admitted into the ADP program annually.

The ADP is designed to address substance abuse or mental health issues that caused attorney misconduct through a services and treatment plan developed by LAP/ADP personnel. A medical professional, whose services are secured by the State Bar, determines the nexus between misconduct and substance abuse/mental health issues as part of the determination of eligibility for ADP. In order to participate in ADP the respondent attorney must stipulate to underlying facts and culpability. Two levels of discipline are determined at the onset of program participation—a lower level of discipline corresponding to successful completion of ADP terms and conditions, and a higher level of discipline for the converse result, with discipline imposed

at the conclusion of the program. Participation in the ADP programs intended to last 36 months but can end early for “good behavior.”

While the Subcommittee was impressed by the structure of the ADP program, is aware of the prevalence of substance abuse and mental health in a variety of professions, and believes that, in the long run, it would be valuable for paraprofessionals to have access to both LAP and ADP, it does not recommend inclusion of ADP in the paraprofessional discipline model at this time. Because of the highly specialized and resource-intensive nature of this caseload it would not make sense for the paraprofessional discipline system to try to replicate the existing process, which involves dedicated State Bar Court judges and a host of State Bar staff and contractors. It would also be extremely difficult to incorporate paraprofessionals into the existing systems in place for attorneys. Given these facts and the projected low number of potential paraprofessional ADP program participants, the Subcommittee does not recommend including the ADP in our model at this time.

A summary of the Subcommittee’s recommendations regarding alternatives to formal discipline/nontraditional discipline is provided in Table 2.

Table 2. Recommendations Regarding Inclusion or Exclusion of Alternatives to Formal Discipline/Non-Traditional Discipline

Alternative or Nontraditional Discipline Approach	Included/ Excluded?	Discipline?
Warning Letter	Included	No
Agreements in Lieu of Discipline	Excluded	
Mandatory Fee Arbitration	Included	No
Orders of Abatement		
Private Reprovals	Excluded	
Alternative Discipline Program	Excluded	

In addition to these alternatives to discipline/nontraditional discipline outcomes fully vetted by the Subcommittee, admonishment, a disciplinary case resolution outcome available to the State Bar Court, which is not actually considered discipline, was also briefly studied. As outlined in the Next Steps section below, the Subcommittee will work to better understand how and when admonishment is used subsequent to the CPPWG’s February meeting.

PUBLIC RECORDS

As reflected in Table 3 below, the Subcommittee has developed a comprehensive set of recommendations regarding public versus private designation of paraprofessional discipline records. In generating these recommendations the Subcommittee was informed by the existing rules in place for attorney records as well as applicable statutes in the Medical Board context; Business and Professions Code sections 803.1 and 2027 address not only the public versus private nature of various record types, but also whether public records will be affirmatively posted on the licensing board’s website, and when/if records will be destroyed. The

Subcommittee specifically applied the following categorization to its record classification efforts:

- Public, Upon Request
- Public, On Website
- Public in Perpetuity
- Public, Finite Term
- Private, in Perpetuity

The verbiage in Table 3 has been abbreviated for ease of review purposes; the full text, which includes a description of parallel designations in the attorney and medical contexts, can be found in Attachment B.

Table 3. Recommendations Regarding Public Records

Intervention or Disciplinary Outcome	Private or Public?	If Public On Website or On Request	Finite or Indefinite Retention?
Warning Letter (not discipline)	Private		TBD
Citation & Fine (not discipline)	Public for 3 years from date of resolution	<ul style="list-style-type: none"> • Website for 3 years unless withdrawn or dismissed • After 3 years transition to Private 	Indefinite
Notice of Disciplinary Charges	Public unless w/drawn or dismissed	On website for duration that discipline itself on website	For duration of period that underlying discipline is public
Public Repeval	Public	<ul style="list-style-type: none"> • Website for 10 years • After 10 years transitions to Public on request 	Indefinitely
Probation	Public	Website	Indefinite
Interim Suspension	Public	Website	Finite: duration of interim suspension
Suspension	Public	Website: Suspensions pursuant to discipline/probation	Indefinite
Disbarment	Public	Website	Indefinite
Criminal Convictions	TBD		

NEXT STEPS

The Subcommittee intends to develop recommendations regarding whether admonishments should be available as case resolution for paraprofessional Hearing and Appellate Panels, and the public versus private designation of records of paraprofessional criminal conviction.

In addition, the Subcommittee will develop recommended discipline standards to be submitted to the CPPWG for review at its June or August meeting.



The State Bar *of California*

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

Date: December 17, 2020

To: California Paraprofessional Program Working Group

From: Sharon Bashan, Julianne Fellmeth, Kim Kirchmeyer, and Ira Spiro

Subject: Update and Recommendations for Disciplinary Structure for 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 requirements for paraprofessional discipline.

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 Discipline Subcommittee, which comprised at that time Kim Kirchmeyer and Ira Spiro, provided the CPPWG with an update on its initial design for a paraprofessional disciplinary structure as follows:

- The State Bar's Office of the Chief Trial Counsel (OCTC) to handle complaint review and investigation;

- First level adjudication to be conducted either by a single staff adjudicator (an attorney employed by the State Bar) or by a three-person panel a public member,¹ and a licensee;
- Appellate level adjudication to be conducted by a distinct staff adjudicator or a three-member hearing panel; and
- An outcome of citation and fine would be established, a remedy unavailable in the attorney discipline system.

Subsequent to that meeting Sharon Bashan and Julianne Fellmeth joined the subcommittee, which has continued to meet and finalize its disciplinary structure recommendations. This memo provides an update on the status of the subcommittee's work, along with preliminary recommendations for a legal paraprofessional disciplinary model.

Table 1. Proposed Disciplinary Model

Model Element	October 29 Proposal	Current Recommendation
Complaint Intake and Investigation	To be handled by OCTC	Same
Diversion Fines and Fees	To be administered by OCTC To be administered by OCTC	Same, with clarification that if an OCTC fine and fee determination is disputed that dispute will be adjudicated by the Hearing Panel
Initial Hearings and Disputed Fine and Fee Determinations	Three-person panel or staff adjudicator	Three-person Hearing Panel
Settlement Conferences	Undecided	To take place only if both OCTC and paraprofessional mutually consent. To be heard by staff adjudicator
Appeals and Stipulated Discipline	Three-person panel or staff adjudicator	Three-person panel or the Paraprofessional Board
Final Discipline Decision	Supreme Court	Suspensions and Revocations: final discipline decision to be made by the Supreme Court. Appeals from the Appeals level to be heard by the Supreme Court. All other discipline finalized at appropriate level within the State Bar's paraprofessional disciplinary structure, level as yet to be determined.

¹ Public members could not be current or former attorney or paraprofessional licensees.

A detailed infographic of the model is provided as Attachment A. Selected issues are addressed below.

THREE-PERSON PANELS VERSUS STAFF ADJUDICATOR

The subcommittee's October 29 update provided options, to be vetted by the Working Group, as to who would preside over the initial hearing and the first appeal, either a single staff adjudicator or a panel comprising a staff adjudicator, a public member, and a paraprofessional licensee. The identified benefits of a panel model included the ability to have broader participation in the disciplinary decision-making process, specifically enabling the participation of a paraprofessional. The Department of Consumer Affairs' disciplinary processes all allow for participation by relevant licensees. Alternatively, a staff adjudicator model would afford efficiency and cost containment benefits.

Subsequent to the October 29 meeting, the subcommittee determined that the benefits of the panel model at the Hearing level, where a majority of cases will be disposed, outweigh the potential downsides. The subcommittee continues to believe that it is important that these panel members be appropriately trained and compensated and will be generating recommendations in that regard for future CPPWG consideration.

With respect to the appellate level, the subcommittee has outlined two options for the CPPWG's consideration—a distinct three-member panel or the Paraprofessional Board.² Leveraging the licensing board, which will presumably be a volunteer in nature, at this stage would be a lower-cost option than utilizing a new three-member Appeals panel, and would still allow for participants with a mix of backgrounds and licensure statuses. Given that a relatively small number of matters are likely to be appealed, the subcommittee is less concerned about the lack of paid professional adjudicators at this level as compared to the initial hearing stage.

UNAUTHORIZED PRACTICE OF LAW

The subcommittee has begun to explore the interplay between licensed paraprofessionals and the existing framework for the investigation and prosecution of the unauthorized practice of law (UPL), in part to determine whether any or statutory changes that might need to be made to address the addition of paraprofessionals a new class of legal licensee. To this end the subcommittee heard from Steve Moawad, Special Assistant to the Chief Trial Counsel, Agustin Hernandez, Supervising Attorney, OCTC, and Ryann Gerber Jorban, Deputy District Attorney with the Consumer Protection Division of the Los Angeles County District Attorney's Office. OCTC has limited statutory remedies available; it can assume jurisdiction over an unlawful practice, pursue civil fines in the superior court, and refer matters to local District Attorneys' Offices (DA Offices). DA Offices can pursue

² As part of its deliberations, the Discipline Subcommittee acknowledged a lack of clarity regarding the structure and composition of the overarching paraprofessional board. The CPPWG's discussion of this topic at its December 17 meeting will be helpful; for the purposes of its deliberations, the subcommittee assumed that there would be a board comprised of a mix of attorney and nonattorney members that would be available to participate in the disciplinary process.

misdemeanor criminal charges³, though a lack of staffing and other resources appears to make this outcome a reality for only the most egregious matters in many jurisdictions. In fact, while the subcommittee now understands that the UPL statutes may not need to be changed to accommodate a new class of licensees, a pervasive lack of resources in OCTC and DA Offices is of concern and may need to be addressed by the CPPWG's recommendations. The addition of a new class of licensees is likely to increase the workload for both systems given the need to determine if the behaviors at issue are in fact authorized under the parameters of the licensed paraprofessional program. The subcommittee will continue to explore these issues and will determine if recommendations in this area are warranted for consideration by the CPPWG.

PUBLIC RECORDS

The subcommittee has also begun deliberations regarding which paraprofessional disciplinary records should be made public. In the attorney discipline system:

- Complaints are not public until charges are filed.
- If a case is settled through stipulation prior to charges being filed, it does not become public until final discipline is imposed.
- All final discipline is public, with the exception of private reproof.
- Private reproof is public only if charges were filed in the case.

The subcommittee has considered, but not reached a decision regarding, whether fines and diversion should be made public. Fines are unavailable in the attorney discipline system. Diversion is most akin to agreements in lieu of discipline⁴. While there is a consumer protection argument that all types of outcomes should be made public, there is a counter-view that paraprofessionals will be less likely to agree to remedies that may ultimately be more protective than an adjudicated hearing if those remedies are made public.

In addition to the types of situations that will be made public, the subcommittee is considering the question of how long disciplinary and other records should be publicly available.

NEXT STEPS

The Discipline Subcommittee will continue to meet, and will develop additional recommendations on topics including:

- Mandatory fee arbitration in the paraprofessional disciplinary system context;
- Compensation and training for panel members;
- Clarification of diversion, fines and fees, and alternatives in lieu of discipline;

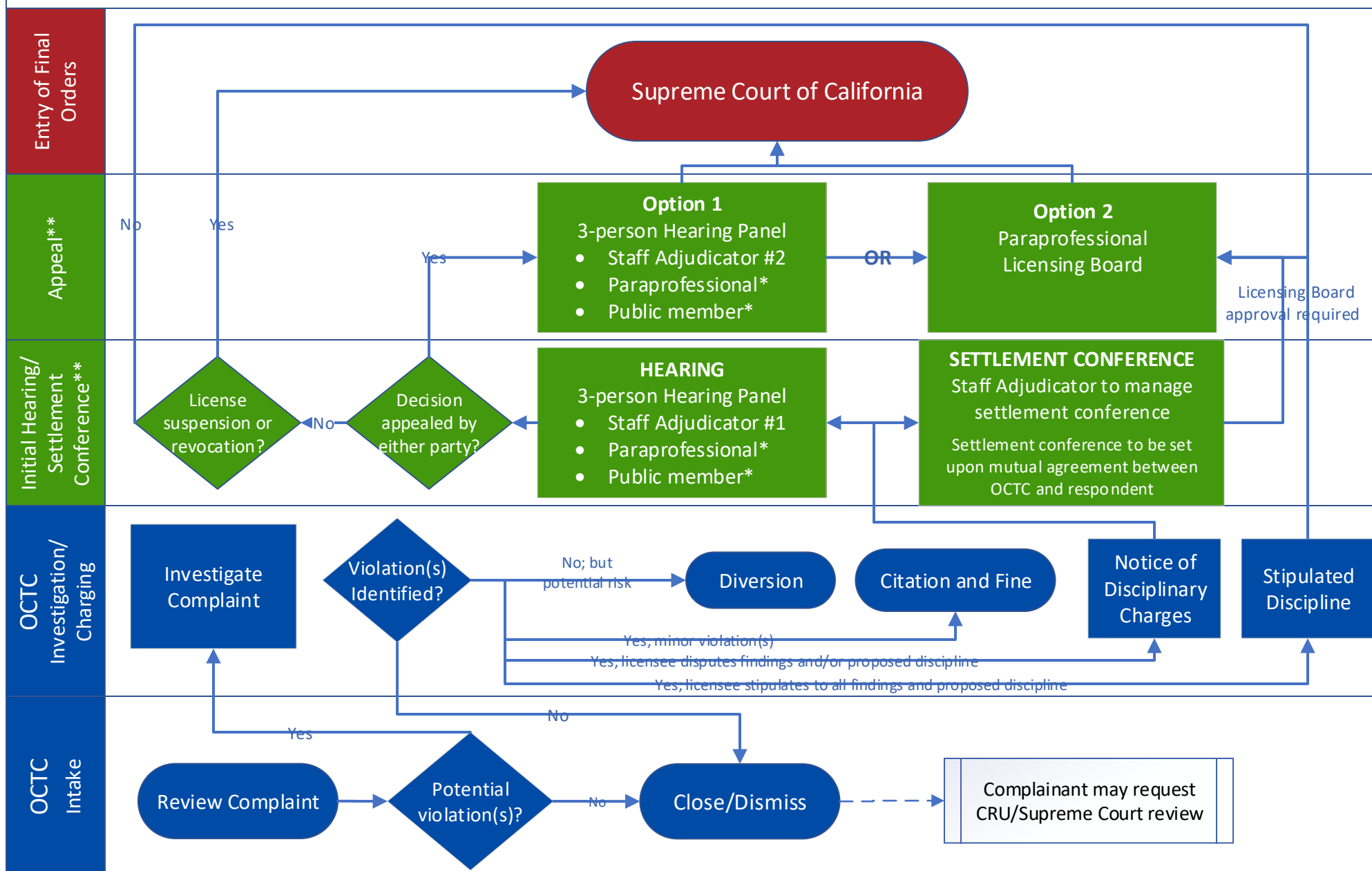
³ Ms. Jorban identified as problematic the fact that DA Offices are limited to misdemeanor charges even when dealing with repeat UPL offenders. She suggested that statutory changes are needed to authorize felony charges in certain circumstances.

⁴ The Discipline Subcommittee has not yet addressed agreements in lieu of discipline, a nondisciplinary outcome available in the attorney discipline system.

- Enhancements/improvements to the existing UPL enforcement structure;
- Public records; and
- Standards of discipline.

Proposed Structure of Paraprofessional Discipline System

ATTACHMENT A



*Panels will be appointed for a limited term, and will hear all cases during their term. Panel members will receive extensive training, and be paid for hearing cases.

**OCTC to prosecute cases at hearing and appeal.

California Professional License Discipline
Public Records Designation

ATTACHMENT B

Intervention or Disciplinary Outcome	Attorneys	Doctors	Paraprofessionals Private or Public?	If Public: On Website or On Request	Finite or Indefinite Retention?
Warning Letter	Private	Usually called an educational letter and it's Private	Private		TBD
Citation & Fine	N/A	Public 30 days after issuance unless an appeal is received and available for three years from the date the citation is resolved by payment of the administrative fine or compliance with the order of abatement.	Public for 3 years from date of resolution	<ul style="list-style-type: none"> Website for 3 years unless withdrawn or dismissed After 3 years transition to Private 	Indefinite
Notice of Disciplinary Charges	Public on website unless withdrawn or dismissed	Public on the website, unless withdrawn or dismissed. If withdrawn, public upon request for one year and if dismissed public upon request indefinitely.	Public unless w/drawn or dismissed	On website for duration that discipline itself on website	For duration of period that underlying discipline is public
Public Reprimand	Public	Public indefinitely, but only listed on the website for 10 years from the effective date	Could be issued before an NDC filed or after (akin to public letter of reprimand)	<ul style="list-style-type: none"> Website for 10 years After 10 years transitions to public on request 	Indefinitely
Probation	Public	Public	Public	Website	Indefinite
Interim Suspension	Unclear	Public indefinitely, but only listed on the website while in place	Public	Website	Finite: duration of interim suspension

Intervention or Disciplinary Outcome	Attorneys	Doctors	Paraprofessionals Private or Public?	If Public: On Website or On Request	Finite or Indefinite Retention?
Suspension	Public	Public <ul style="list-style-type: none"> If the suspension is part of an interim suspension order or similar order, public indefinitely but only posted on the website while in place 	Public	Website: Suspensions pursuant to discipline/probation	Indefinite
Disbarment	Public	Public	Public	Website	Indefinite
Convictions/Consumer Alerts	Unclear	Available indefinitely on the website <ul style="list-style-type: none"> Misdemeanor convictions are only listed on the website if an accusation (NDC) is filed or if a decision related to the misdemeanor conviction is issued 	TBD		