



Date: April 19, 2021

To: California Paraprofessional Program Working Group

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

Subject: Recommendations for Employment and Income Maintenance Practice Areas,
California 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](#). At its first meeting on April 21, 2020, the CPPWG discussed potential practice areas for program inclusion. These areas included Employment Law and Income Maintenance proceedings. Two distinct subcommittees were initially established to explore each of these topics. The final memos submitted by these two subcommittees to the CPPWG are reflected in Attachment A and B.

Other than the Family Law Subcommittee, practice area focused subcommittees were suspended after the CPPWG's August 2020 meeting as the Working Group decided to pivot to the development of licensing, regulation, and discipline requirements and parameters for the new class of licensees.

In March 2021, a now combined Employment and Income Maintenance Subcommittee resumed review of all outstanding issues under the purview of the joint body. The recommendations of this Subcommittee are now being presented for CPPWG consideration and approval.

DISCUSSION

The Employment and Income Maintenance Subcommittee (Subcommittee) identified the following as topics remaining to be addressed at its first meeting on March 2, 2021:

- Representation in wage and hour claims, Division of Labor Standards Enforcement (DLSE)

- Representation in unemployment insurance benefit hearings, Employment Development Department (EDD)
- Other public benefits administrative hearings

At its first meeting on March 5, 2021, the General Civil and Consumer Debt Subcommittee requested that the present Subcommittee assume responsibility for consideration of the potential paraprofessional practice area of DLSE wage and hour judgment enforcement. The Subcommittee agreed that this topic would be appropriate for its consideration.

WAGE AND HOUR CLAIMS BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT

To facilitate its assessment of DLSE proceedings the Subcommittee heard from a number of subject matter experts including Mr. Lloyd Aubry, Morrison & Foerster, Ms. Danielle Jones, Stanford Community Law Clinic, Ms. Jennifer Lutz, Pettit Kohn Ingrassia Lutz & Dolan, Ms. Ruth Silver-Taube, Santa Clara University School of Law, and Judge Socrates Manoukian, Santa Clara County Superior Court. In addition to these invited speakers, the Subcommittee heard extensive public comment from Employment Law practitioners.

These experts facilitated a solid base of understanding among Subcommittee members about the DLSE process. Mr. Aubry, who previously served as State Labor Commissioner, indicated that the DLSE process is designed to be informal and worker friendly. Non-attorneys are allowed to participate/represent parties in DLSE proceedings as is the case in all state administrative agency proceedings. According to Mr. Aubry, DLSE hearing officers are often non-lawyers. Mr. Aubry indicated that workers having additional support in gathering the documentation needed for DLSE review would be useful. Ms. Jones echoed this sentiment, indicating that while the DLSE process is worker friendly, workers need assistance in pulling together the documents they need to support their claims, and in doing the calculations of amounts owed. Ms. Jones shared her experiences training law students to represent workers in DLSE proceedings, indicating that she has successfully trained students to do the work independently in one academic quarter. Both Mr. Aubry and Ms. Jones felt that trained legal paraprofessionals could responsibly provide legal advice to workers in the DLSE setting.

Ms. Ruth Silver-Taube and Ms. Lutz shared a counter view. Ms. Silver-Taube indicated that there is a robust legal services infrastructure available to represent workers, that the work can be complex, with cultural and linguistic competency issues amplifying that complexity, and that the need to issue spot requires a significant level of knowledge and experience. While, Ms. Silver-Taube, like Ms. Jones, trains students to do wage and hour work, she does not feel that they are capable of doing the work absent attorney supervision. Ms. Lutz, in her role as employer's counsel, indicated that she does not observe a lack of attorneys willing to take employee cases, even for low dollar amounts; according to Ms. Lutz, there are financial incentives for attorneys to take these cases and therefore there is no need to license paraprofessionals to represent workers in wage and hour claims. Both Ms. Silver-Taube and Ms. Lutz also emphasized that the law in wage and hour matters is continually changing. In sum, there was a lack of consensus among the subject matter experts that present to the

Subcommittee regarding both wage and hour proceeding complexity and the availability of the legal services and private bar to fully address all workers' needs.

ENFORCEMENT OF DLSE WAGE AND HOUR JUDGMENTS

The Subcommittee heard about the challenges in enforcing wage and hour judgments from virtually all subject matter experts; one of these presenters made the Subcommittee aware of a 2015 report authored by the National Employment Law Project and the UCLA Labor Center which found that only 17 percent of wage and hour judgments in California are actually collected. While the Subcommittee learned that the DLSE has established a judgment enforcement unit, the gap between the resources available through that avenue and the need was uniformly emphasized.

UNEMPLOYMENT INSURANCE AND PUBLIC BENEFITS

The Subcommittee reviewed past resolutions pertinent to these topics in particular the June 2020 CPPWG resolution regarding the Income Maintenance practice area:

Resolved that the California Paraprofessional Working Group makes the following recommendation regarding ongoing consideration of income maintenance as a practice area for inclusion in a California paraprofessional program: Paraprofessionals are authorized to provide full scope representation at the admin agency level where nonattorneys are authorized to represent parties in administrative agency proceedings by state law. The specific details of allowed activity will be discussed at a later date.

The Subcommittee determined that there was not a need to separately assess unemployment insurance and other public benefits matters in light of previous Working Group action, and with the understanding that certain types of administrative agency proceedings had been explicitly excluded (workers' compensation, for example). Via the present agenda item, the Subcommittee then simply seeks to clarify the specific types of administrative agency proceedings covered by the CPPWG's June 2020 resolution.

WAGE AND HOUR SUPERIOR COURT LITIGATION

Much of the Subcommittee's time was focused on whether there was a need to allow paraprofessionals to represent individuals in wage and hour litigation in superior court. The statistical information available on the purported need in this area is sparse. Of the people who responded to the Justice Gap study, two-thirds of them (67 percent) made no attempt to find an attorney (Justice Gap report at p. 25). Of the remaining 33 percent of respondents, no attempt was made to determine if they tried to find an attorney to represent them (in a wage and hour dispute or otherwise) and was not able to find an attorney to represent them. This was confirmed when the full Working Group heard from the statisticians who prepared the Justice Gap report. Thus, the Justice Gap report does not identify any individual who attempted to locate an attorney and could not, let alone in the area of wage and hour disputes.

Nor was staff able to identify Judicial Council statistics demonstrating that there are a high number of self-represented litigants in this area, as there are, for example, in family law or unlawful detainer cases.

The Subcommittee heard from many speakers and members of the public indicating that the availability of statutory attorney fees incentivizes private attorneys to represent workers with small wage and hour disputes. The anecdotal evidence on whether there are cases too small for attorneys to take was mixed at best. Many speakers indicated that small cases are accepted; some indicated that they are not.

In addition, we heard from several speakers that wage and hour disputes are often combined with other employment-related claims, such as discrimination or wrongful termination, and those subjects have already been excluded from the program and approved by the full Working Group. Thus, allowing paraprofessionals to represent workers in wage and hour disputes might lead to them being hindered in their ability to pursue other claims.

There was also unanimity among the speakers that California wage and hour law is incredibly complex and would be difficult for paraprofessionals to substantively master.

At least one member of the Subcommittee (Steven Fleischman) is also concerned that many wage and hour claims are subject to motions to compel arbitration and that the law on this issue is very complex and constantly changing.

At the end of the day, for a variety of reasons, a majority of the Subcommittee concluded that wage and hour superior court litigation should be excluded from the program.

VOTES AND RECOMMENDED RESOLUTIONS

The Subcommittee voted on five resolutions at its March 22 meeting; each resolution, and corresponding vote count, is provided below, followed by those resolutions recommended by the Subcommittee for CPPWG adoption.

- Paraprofessionals will be authorized to represent claimants in Division of Labor Standards Enforcement (DLSE) proceedings. (Passed, unanimously)
- Paraprofessionals will be authorized to represent claimants in the enforcement of DLSE wage and hour judgments in limited jurisdiction superior court proceedings. (3 Ayes, 1 Abstain)
- Paraprofessionals will be authorized to represent parties in the enforcement of DLSE wage and hour judgments in limited and unlimited jurisdiction superior court proceedings. (3 Nays, 1 Aye)
- Paraprofessionals will be authorized to represent parties in wage and hour proceedings in limited jurisdiction superior court claims. (3 Nays, 1 Aye)

The Subcommittee recommends that the CPPWG adopt the following resolutions:

RESOLVED, that the CPPWG amends the resolution regarding Income Maintenance adopted at its June 30, 2020, meeting to read as follows: the California Paraprofessional Program Working Group recommends that paraprofessionals be authorized to provide full scope representation at the state administrative agency level in the following proceedings:

- Wage and hour proceedings, Division of Labor Standards Enforcement;
- Unemployment insurance proceedings, Employment Development Department; and
- All proceedings relating to public benefits.

FURTHER RESOLVED, that legal paraprofessionals will be authorized to represent claimants in the enforcement of Division of Labor Standards Enforcement wage and hour judgments in limited jurisdiction superior court proceedings.

ALTERNATE RESOLUTION PROPOSED BY IRA SPIRO

RESOLVED, that legal professionals will be authorized to represent claimants in wage and hour claims in limited jurisdiction Superior Court cases but not in PAGA cases, class actions or representative actions, and only after advising the client to attempt to find a lawyer through the California Employment Lawyers Association website and receiving from the client a statement that the client did so but was unable to find a lawyer to represent them for the action.



The State Bar of California

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

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

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;

- 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:

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

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.



The State Bar of California

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

Date: August 25, 2020

To: California Paraprofessional Program Working Group

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

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

Executive Summary

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

Discussion

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

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

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

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- Information obtained from subject matter experts.

California Justice Gap Study

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

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

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

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

Subject Matter Experts

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

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

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

Subtopics for Inclusion and Exclusion

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

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

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

Workplace Grievances and Disability Accommodations

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations

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

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

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

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

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

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

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

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

Next Steps

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