

## *For Discussion Purposes*

### **Prior Informed Consent Recommendations**

The possibility of requiring informed consent was initially suggested by ATLAS. Recommendation No. 4, Principle No. 2, entitled “Consumer Understanding and Outreach” recommended for our consideration:

- “Consumer understanding and outreach includes determining an appropriate name for the new providers, **consideration of mandatory disclosures or a possible informed consent requirement**, and the regulator’s responsibility to educate the public regarding the availability and authority of the new class of licensees.”

After consideration, the Regulation Subcommittee concluded that a key goal is to provide consumers with a choice for enhanced access to legal services, and it should be an informed choice. We agreed there should be a pre-engagement informed consent requirement to representation, and reported this recommendation to the full Working Group in the Regulation Subcommittee’s December 17, 2020 report. We also provided draft language for consideration. Our report provided:

- **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.

This was again confirmed and repeated in the subcommittee’s February 26, 2021, and April 19, 2021, reports to the full Working Group. The initial draft language provided that:

- “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.”
- The draft also included examples of required disclosures, but did not include a separate writing requirement.

This recommendation seemed to receive broad support by the full Working Group. There seemed to be consensus, however, that informed consent should be confirmed in writing. As part of the Regulation Subcommittee’s April 19, 2021 report, we updated the recommendation to include a separate writing requirement:

- The Subcommittee recommends that the paraprofessional obtain a client’s acknowledgement of certain disclosures and obtain [informed] written consent to representation in a separate writing from the mandatory written agreement. . .

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We decided informed consent, under Rule 1.4.2, should be clearly separated from the proposed written agreement requirement in proposed Rule 1.5.2. The written agreement requirement has a different history and purpose, and tracks the requirement for attorneys found in Business and Professions Code sections 6147 and 6148. It is focused on the terms of the engagement, not risks of and alternatives to the engagement.

Recent developments:

- (1) Bar staff raised concern over use of the defined term “Informed Consent.” After extensive discussions, it became clear that the objection is limited to use of the defined term and not to the policy decision of requiring paraprofessionals to provide prospective clients with clear, understandable information about the risks and alternatives to the proposed services by a non-lawyer sufficient for the client to make an informed decision.
- (2) We recently started discussing the possibility of requiring disclosures as part of the initial conversation with prospective clients, similar to the required “Notice to Consumers” LDAs are required to provide under Civil Code Section 6410.5. After extensive discussions we concluded that disclosures as part of the initial conversation could not replace an informed consent requirement because, at the time of the initial contact, the paraprofessional would not be able to provide sufficient information to allow consumers to make an informed choice. Also, standardized disclosures are fundamentally different than an informed consent requirement. Nevertheless, initial notice to consumers could provide some additional consumer protection.

We are now considering if there should be three separate rules containing three separate writing requirements: (1) initial notice to consumers; (2) informed consent; and (3) written retention agreement, and if this can be simplified. We remain in agreement that the decision to engage a paraprofessional should be an informed choice, including clear disclosures about the risks and alternatives, that it must be clear what the paraprofessional can and cannot do, and that we should take steps to minimize the burden on paraprofessionals, including by standardizing disclosures where appropriate.

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### **Rule 1.4.2 ~~Informed Written Consent\*~~ Notice to Consumers Prior to Consultation with a Prospective Client**

- (a) Prior to a prospective client's consultation with a licensed paraprofessional for the purpose of retaining the licensed paraprofessional or securing legal service or advice from the licensed paraprofessional in the licensed paraprofessional's professional capacity, the licensed paraprofessional shall disclose, in simple language, provide the written\* disclosures to the prospective client ~~in the prospective client's preferred language and obtain the prospective client's informed written consent\* to proceed~~before proceeding with the consultation:
- (1) ~~A statement t~~That the licensed paraprofessional is not a lawyer;
  - (2) ~~A statement~~That the paraprofessional has a license to provide limited legal services, the area of practice, and that the paraprofessional cannot provide all services that a lawyer performs in this area of practice~~describing limited scope of legal practice under the licensed paraprofessional's licensure;~~
  - ~~(3) A statement that the prospective client may need to hire a lawyer or another licensed paraprofessional if the legal services that the prospective client seeks are beyond the limited scope of legal practice under the licensed paraprofessional's licensure;~~
  - ~~(4) A statement that there may be other alternative choices available for the prospective client to consider, including a free consultation with a lawyer, limited scope services from a lawyer, or potentially free legal services from a local legal aid organization if the prospective client qualifies;~~
  - (5)(3) That the paraprofessional does or if the licensed paraprofessional knows\* or reasonably should know\* that the licensed paraprofessional does not have professional liability insurance, a statement that the licensed paraprofessional does not have professional liability (malpractice) insurance.
- (b) The ~~informed written consent\* to a consultation~~disclosures required under paragraph (a) shall be posted on the paraprofessional's website, social media accounts, and at the paraprofessional's office in such a way that is clearly visible to prospective clients, and communicated to the prospective client within the first three minutes of the first conversation between the paraprofessional and the prospective client~~obtained regardless of whether a licensed paraprofessional-client relationship subsequently ensues. The informed written consent\* under this rule shall be in a separate writing\* from the informed written consent\* to representation required under rule 1.4.3 or the written\* agreement to representation required under rule 1.5.2.~~

#### **Comment**

[Reserved]

### **Rule 1.4.3 Informed Written Consent\* to Representation**

- (a) Prior to a prospective client's engagement of the licensed paraprofessional, the licensed paraprofessional shall obtain the prospective client's informed written consent\* to representation. This includes that the paraprofessional shall clearly communicate. The informed written consent\* shall be provided in the prospective client's preferred language available alternatives and material risks, including any actual and reasonably\* foreseeable adverse consequences, of proceeding with the engagement. The disclosures provided and without limitation, must include the following ~~disclosures~~:
- (1) A statement that the licensed paraprofessional is not a lawyer;
  - (2) ~~Reasonable\* d~~Disclosure of other available choices for obtaining legal services, including the potential availability of a lawyer as an alternative, the availability of a free consultation with a lawyer, the availability of limited-scope services from a lawyer, and the possibility that free legal services may be available to

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- low-income individuals from a legal aid program if the client qualifies, with available contact information;
- ~~(3) The risks of agreeing to obtaining legal services from a licensed paraprofessional's licensure;~~
- (3) The potential need to hire a lawyer or another licensed paraprofessional if needed services go beyond the limited scope of legal practice under the licensed paraprofessional's licensure;
- (4) [Disclosures are needed for each practice area related to the limitations of practice and related risks. For example, no counterclaims for creditor harassment or federal claims in consumer debt cases; no trial representation in eviction cases; no depositions, etc. Also, the Housing Subcommittee recommends specific disclosures about alternatives in "Right to Counsel" jurisdictions, where a free lawyer may be available. I suggest we ask the subcommittees to assist with identifying material limitations, related risks / possible adverse consequences, and suggested required disclosures. We may need to wait until the Working Group finalizes the scope of practice for each practice area. It should be made clear to consumers what the paraprofessional can and cannot do in their case so they can make an informed decision. Hopefully we can standardize some of the disclosures to make it easier for paraprofessionals];
- (5) the existence of any financial arrangements related to the representation that the licensed paraprofessional has with others, such as referral fees or fee sharing;
- (6) a reasonable estimate of the total fees and costs of services provided by the licensed paraprofessional; and
- (7) if the licensed paraprofessional knows\* or reasonably should know\* that the licensed paraprofessional does not have professional liability insurance, the licensed paraprofessional shall inform a prospective client that the licensed paraprofessional does not have professional liability insurance.
- (b) If notice under paragraph (a)(7) has not been provided prior to a client's engagement of the licensed paraprofessional, the licensed paraprofessional shall inform the client in writing\* within thirty days of the date the licensed paraprofessional knows\* or reasonably should know\* that the licensed paraprofessional no longer has professional liability insurance during the representation of the client.
- ~~(c) Notwithstanding paragraphs (a)(7) and (b), the obligation to disclose that a licensed paraprofessional does not have professional liability insurance does not apply to:~~
- ~~(1) a licensed paraprofessional who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client; or~~
- ~~(2) a licensed paraprofessional who has previously advised the client in writing\* under paragraph (a)(7) or (b) that the licensed paraprofessional does not have professional liability insurance.~~
- ~~(d) The informed written consent\* to representation required under paragraph (a) shall be in a separate writing\* from the informed written consent\* to representation required under rule 1.4.3 or the written\* agreement to representation required under rule 1.5.2.~~

### **Rule 1.5.2 Written Agreement to Representation**

Prior to the performance of legal services for a fee, the licensed paraprofessional shall enter into a written\* agreement with the client, provided in the prospective client's preferred language, and signed by both the client and the licensed paraprofessional, that provides the name, specialty area, and license number of the licensed paraprofessional, and includes the following provisions:

- (a) A clear and conspicuous disclosure that the licensed paraprofessional is not a lawyer and may only provide limited legal advice and services with the scope of the licensed paraprofessional's licensure. This statement

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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.

- (b) An explanation of the general nature of the legal services to be provided to the client in the matter;
- (c) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, costs, and charges applicable to the matter;

(d) The mailing address, street address, telephone numbers, facsimile numbers, internet address, and State Bar license number of the paraprofessional;

(d)(e) A statement that, pursuant to rule 1.4, the licensed paraprofessional must keep the client reasonably\* informed about significant developments relating to the representation, including promptly complying with reasonable\* requests for information and copies of significant documents when necessary to keep the client so informed;

(e)(f) A statement describing the licensed paraprofessional's duty to protect the confidentiality of information related to the representation under rule 1.6, including information provided in confidence by the client and the licensed paraprofessional's work product associated with the legal services provided by the licensed paraprofessional;

(f)(g) A statement that, pursuant to rule 1.16(a)(4), 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 pursuant to rule 1.16(e)(2). ~~This statement shall be clearly and conspicuously set forth in the contract;~~

(h) A statement confirming that the licensed paraprofessional is required to carry a \$100,000 surety bond as required by [add rule of court reference], name of the carrier and how to file a claim if necessary;

(g)(i) A statement confirming if the licensed paraprofessional has or does not have professional liability insurance. If the licensed paraprofessional has professional liability insurance, the name of the carrier, the amount of coverage, and how to file a claim if necessary;

(h)(j) A statement describing how to file a complaint with the State Bar of California;

(j)(k) A statement regarding the respective responsibilities of the licensed paraprofessional and the client as to the performance of the agreement; and

(j)(l) Any other disclosures, statements, or conditions required by the ~~{Paraprofessional}~~ Rules of Professional Conduct and the rules and regulations of the ~~{Paraprofessional}~~ Board.

## Comments

[Reserved]