

# MEMORANDUM

**TO:** Members of the Paraprofessional Program Working Group

**FROM:** Steven S. Fleischman

**DATE:** June 25, 2021

**RE:** Proposed rule changes

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I want to thank the regulation subcommittee and staff for their work on revisions to the proposed Paraprofessional Rules of Professional Conduct. I offer these comments to draft of the rules posted for the June 25 meeting, which unfortunately I cannot attend.

I have exchanged several emails with Greg about concerns I've had with some of the proposed rules and many of those issues have already been addressed. However, I remain very concerned about at least two proposed rule changes (listed in order of importance, not numerically):

## Rule 5.4(e)

There is no dispute that this proposed rule would permit paraprofessionals to own up to 49% of law firms and, thus, share up to 49% of fees with lawyers even for cases where paraprofessionals cannot practice, including immigration, employment, personal injury and criminal. Members of this committee have collectively spent hundreds of hours in substantive law subcommittees deciding what areas paraprofessionals can practice in and those that they cannot. I cannot understand why paraprofessionals should be able to share fees for cases where they cannot practice law. And because lawyers have an unlimited license, they can take any type of case they want, subject to self-imposed competency requirements. Thus, there is no way to limit this proposed rule's application to situations where the paraprofessional only shares fees in, say, family law cases, because even a law firm devoted towards family law can decide to take non-family law cases.

When I previously raised this issue at a committee meeting, while there were no votes, my sense was that there was consensus not to allow fee splitting or non-lawyer law firm ownership for areas of the law where paraprofessionals cannot practice. This proposed rule permits that.



Moreover, there are already programs which allow nonlawyers to practice in various areas of the law, such as certified paralegals (supervised by lawyers), legal document assistants, unlawful detainer assistants, and immigration consultants. To my knowledge, none of these other categories of nonlawyers are permitted to share fees with lawyers and/or have any ownership interest in a law firm. (Nor, to my knowledge, can nurse practitioners—the model for the paraprofessional program—have an ownership interest in a medical practice with physicians.) To use immigration consultants as an example, if they cannot share fees with an immigration attorney, or own part of an immigration law firm, I'm at a loss to understand why a paraprofessional should be able to when they are prohibited from practicing immigration law. There is nothing inherent in the nature of the paraprofessional program which, in my view, justifies this radical change in the practice of law.

The paraprofessional program will be aimed at two types of individuals: (1) certified paralegals; and (2) J.D. graduates who have not passed the California bar examination. Both categories of individuals can presently work in law firms but cannot share fees or have an ownership interest in a law firm. By becoming a paraprofessional, these individuals will only have their roles changed slightly in that they will be able to make limited court appearances in a very small number of substantive legal areas. To the extent that they can practice law “unsupervised” by a lawyer, that is very limited in nature because even under this rule they cannot have any supervisory authority over a lawyer in the law firm and cannot own a majority interest; thus, even under this rule they will still, effectively, be supervised by lawyers.

From the number of articles already in the media about the paraprofessional program, it should be apparent that the program is going to be controversial. This provision will be a lightning rod for criticism and will lessen the chances of the program being adopted and implemented.

I urge members of the working group to oppose this proposed rule.

#### Rule 1.5.1(b)

I oppose this proposed rule for similar reasons.

I believe this proposed rule would also allow a paraprofessional to share in fees generated for areas of the law where the paraprofessional is not licensed. For



example, an immigration law firm could contract with a paraprofessional to provide paralegal services in connection with immigration cases supervised by attorneys in the law firm. I believe this provision would allow a division fees in that scenario even though the paraprofessional is not permitted to provide immigration services in their capacity as a paraprofessional. This has the potential to create a huge loophole regarding the manner in which certified paralegals and law clerks are compensated.

Greg and I have debated this provision at length. Greg believes (my paraphrase so apologies if I get something wrong) that my concerns in this respect are unfounded because this rule only applies to the division of a “fee for legal services” and thus paralegal services in my example would not be compensable under this rule because they are not “legal services.” I think that is a technical reading of the proposed rule which would be subject to immense litigation. I think most paralegals and law clerks feel that they are providing legal services, just that they are providing those legal services supervised by an attorney. For example, in the context of attorney fee motions, paralegal fees are recoverable (in the discretion of the trial court) as attorney fees against an opposing party. (See, e.g., *Ellis v. Toshiba America Information System, Inc.* (2013) 218 Cal.App.4th 853, 888–889.) I don’t believe any party could credibly oppose a fee request for paralegal time on the grounds that the paralegal is not providing “legal services” when supervised by an attorney.

If the working group decides to adopt this rule, then it should be made clear that this rule does not apply when a paraprofessional is providing services, of any kind, outside the scope of their paraprofessional license. I suggest the following language:

No fee shall be divided between a licensed paraprofessional and a lawyer under this rule for any services which fall outside the scope of the licensed paraprofessional’s license, including but not limited to any services rendered in their capacity as a paralegal.

Even with this suggested change, I remain opposed to the rule. The requirement that the fee be divided in “proportion to the legal services performed” can be a heavily-litigated issue. The lawyer and/or paraprofessional may or may not keep contemporaneous time records (there is no requirement to do so) making this inquiry more difficult. In addition, legal invoices are generally protected by the attorney-client privilege during litigation and for some unspecified amount of time afterwards. (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 298; see also *Los Angeles County Bd. of Supervisors v. Superior Court*



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(2016) 2 Cal.5th 282, 297–298 [opinion on remand].) While some State Bar complaints may be initiated by the client, thus waiving the privilege, complaints under this rule will more likely be initiated by the attorney or paraprofessional who thinks they have been stiffed out of a fee that they have earned; thus, there will be no waiver of the privileged. And, in my view, whether an attorney or paraprofessional violated this rule and should be disbarred should not turn on a forensic accounting exercise.

Steve