



The State Bar of California

CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

Date: August 31, 2021

To: California Paraprofessional Program Working Group

From: Amos Hartston, Kim Kirchmeyer and Fariba Soroosh

Subject: Regulation Subcommittee Recommendations Regarding Proactive Regulation

EXECUTIVE SUMMARY

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

The Regulation Subcommittee (Subcommittee) of the CPPWG has a broad charge including the development of recommendations in the areas of continuing education, financial responsibility, ethical rules governing paraprofessional conduct, and proactive/risk-based regulation. The CPPWG has previously adopted the Subcommittee's recommendations on most of these topics. This memo presents recommendations for proactive regulation.

BACKGROUND

Table 1 provides a summary of the Regulation Subcommittee's recommendations that have been adopted by the Working Group.

Table 1. Adopted Regulation Recommendations

Regulation	Recommendation	Date Adopted
Financial Responsibility	<ul style="list-style-type: none"> \$100,000 Surety Bond Client Security Fund 	March 18, 2021
Minimum Continuing Legal Education	36 hours every 3 years, as follows: <ul style="list-style-type: none"> 28 hours in the paraprofessional's practice areas 4 hours on legal ethics 1 hour on competence issues 1 hour on recognition and elimination of bias in the legal profession and society 1 hour of trauma-informed practice 1 hour of practice management/running a business 	March 18, 2021
Ethics and Professional Conduct	Paraprofessional Rules of Professional Conduct	July 26 and August 16, 2021

The remaining issue for the Regulation Subcommittee is that of proactive regulation.

DISCUSSION

Proactive, or risk-based, regulation is intended to identify potential risks of harm to consumers and take steps to prevent that harm. In developing recommendations for proactive regulation, the Regulation Subcommittee reviewed information from a number of subject matter experts, as well as information about proactive regulation in other jurisdictions.

At the December 17, 2020, CPPWG meeting, Mr. Zachariah DeMeola from the University of Denver's Institute for the Advancement of the American Legal System led the CPPWG in an exercise that helped the Working Group to identify potential risks of the paraprofessional program. Potential risks identified by the Working Group include the following:

1. Worse legal result for consumers than they would have, if they had used the next best alternative
2. Consumer overpays for legal services
3. Consumer receives incompetent legal services
4. Consumer receives unregulated/unlicensed services (increase in unauthorized practice of law)

At its January 26, 2021, meeting the Regulation Subcommittee heard from Tom Clarke with the National Center for State Courts. During this meeting, the Subcommittee reviewed the risks identified at the December 17, 2020, meeting, and determined that collecting data to evaluate the first of the above identified risks was infeasible. They also determined that, while the fourth risk identified above was significant, proactive regulation of paraprofessionals was not the appropriate means to address the prevention of this risk. Instead, the Regulation Subcommittee

addresses the risk of UPL through concurrent recommendations, provided jointly with the Discipline Subcommittee, regarding increased resources and harsher penalties for the unauthorized practice of law. With respect to the second risk, the Regulation Subcommittee determined it could not address the risk of excessive fees because the Working Group voted in May to not cap or otherwise regulate fees charged by Paraprofessionals.

For proactive regulation, therefore, the Subcommittee focused on the risk of incompetent legal services. At the Regulation Subcommittee's February 11, 2021, meeting, Professor Tara Sklar of the University of Arizona discussed the application of risk-based regulation to paraprofessionals. She explained that risk-based regulation provides a framework to examine allegations of potential misconduct and develop targeted interventions. This approach relies on the collection and analysis of a significant amount of data in order to develop interventions and evaluate their effectiveness. She warned that this could create a significant burden on paraprofessional, particularly if done in parallel with data collection for program evaluation.

Both Mr. Clarke and Professor Sklar emphasized the need to distinguish between proactive regulation and program evaluation. Program evaluation is intended to evaluate whether a program meets its intended objectives, and to identify changes that will lead to program improvement. Proactive regulation is intended to identify areas of potential misconduct and employ interventions to help practitioners avoid them.

At its July 29, 2021, meeting, the Regulation Subcommittee considered the following options for proactive regulation:

- MCLE
- Toolkits
- Self-Assessment
- Ethics Hotline
- Online Resources
- Case File Review
- Client Surveys

It was suggested that data collected in the course of program evaluation would provide information that could be used to develop and modify proactive regulation measures, and that overlap between proactive regulation and program evaluation should be avoided. The Regulation Subcommittee articulated a need to identify program evaluation metrics prior to developing recommendations for proactive regulation.

At its August 19, 2021, meeting, the Regulation Subcommittee reviewed a summary of evaluation metrics that had been considered by the CPPWG, as well as metrics identified by the National Center for State Courts in *An Evaluation Framework for Allied Legal Professional*

*Programs: Assessing Improvements in Access to Justice.*¹ They also reviewed information about self-assessment programs in selected jurisdictions. The August 19 staff memo with this information is provided as Attachment 1.

After considering the input of subject matter experts, reviewing samples of proactive regulation tools, and understanding the potential parameters of the Paraprofessional Program evaluation, the Regulation Subcommittee determined that a full array of supportive tools for paraprofessionals, such as CLE offerings, toolkits, an ethics hotline, and online resources, should be developed as proactive regulation measures to support Paraprofessionals in providing competent legal services.

The Regulation Subcommittee recommends avoiding measures that would be burdensome to paraprofessionals and costly to administer. A mandatory self-assessment was rejected for a number of reasons with these considerations in mind. Specifically, mandatory self-assessments were determined to be burdensome for the practitioner; and, if the information collected through an assessment were to be used for regulatory or disciplinary purposes, the practitioner could not be relied upon to complete it accurately. However, the Subcommittee believes that offered as a voluntary, confidential tool, interactive tool, with MCLE credit for completion, a self-assessment could be a valuable support for paraprofessionals.

The Regulation Subcommittee was advised that the State Bar will be implementing a self-assessment for attorneys. In its initial implementation, the self-assessment will be voluntary; in the future, it may become mandatory under specified circumstances. The Regulation Subcommittee agreed that the implementation of mandatory self-assessments for paraprofessionals should be reconsidered if and when there is a similar requirement for attorneys.

The Subcommittee also recommends requiring paraprofessionals to report certain, limited information related to fees charged and to solicit suggestions for additional Paraprofessional trainings and resources as part of their annual license renewal to assist the State Bar in supporting Paraprofessionals in providing competent legal services, and to gather information about fees.

Ms. Soroosh suggested an additional requirement of a mandatory client satisfaction survey providing clients with the opportunity to give feedback (positive and negative) separate from the complaint process. She suggested that the State Bar could monitor survey responses and, in cases where a significant number of negative responses is received, either initiate an investigation or provide the paraprofessional with information and resources to address potential problems.

¹ National Center for State Courts, *An Evaluation Framework for Allied Legal Professional Programs: Assessing Improvements in Access to Justice* (May 2021). https://www.ncsc.org/_data/assets/pdf_file/0020/64352/APL-Evaluation.pdf

Mr. Hartston and Ms. Kirchmeyer disagreed with this recommendation. Both Mr. Hartston and Ms. Kirchmeyer are supportive of paraprofessionals voluntarily offering their clients the opportunity to provide feedback, but objected to a mandatory requirement of a survey or requiring this information to be submitted to the State Bar for disciplinary purposes. Ms. Kirchmeyer further expressed concern that having a client survey process through the State Bar outside of the traditional avenues for submitting complaints could create confusion among clients, who might not distinguish between submitting a negative survey and filing a complaint.

Case file reviews were rejected as a proactive regulation measure due to such reviews being burdensome to paraprofessionals and costly to the regulator, as well as expected privilege issues.

The Subcommittee's recommended resolutions regarding proactive regulation measures are provided below.

PROPOSED RESOLUTIONS

RESOLVED, that the California Paraprofessional Program Working Group recommends adoption of the following proactive regulation measures:

- Continuing legal education programs and toolkits that support the paraprofessional's practice, which will include a voluntary, interactive self-assessment
- Ethics hotline
- Online resources
- Annual reporting requirements
 - Fees charged to clients
 - Suggestions for additional trainings and resources to further support competent legal services by Paraprofessionals

OR

RESOLVED, that the California Paraprofessional Program Working Group recommends adoption of the following proactive regulation measures:

- Continuing legal education programs and toolkits that support the paraprofessional's practice, which will include a voluntary, interactive self-assessment
- Ethics hotline
- Online resources
- Requirement to provide link to client survey, with responses to be reviewed by State Bar
- Annual reporting requirements
 - Fees charged to clients
 - Adequacy of training requirements and MCLE offerings
 - Additional resource requests