



# The State Bar of California

180 Howard Street, San Francisco, CA 94105

**COMMITTEE**  
**RESPONSIBILITY AND CONDUCT**

D.1. PP Proposed RPCs  
01-07-22 Meeting  
Open Session

415-538-2162

January 7, 2022

Justice Petrou, Chair  
California Paraprofessional Working Group  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

RE: Proposed Licensed Paraprofessional Rules of Professional Conduct

Dear Justice Petrou and Members of the Paraprofessional Working Group:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed Licensed Paraprofessional Rules of Professional Conduct.

COPRAC has reviewed each of the proposed rules and provides feedback on certain proposed rules below. We offer comment on the rules for which we have substantive input. We note that the proposed rules were provided for public comment without draft or proposed Comments associated with the rules. Our feedback at this time is constrained by not having the Comments to inform our complete understanding of the proposed rules.

We also understand there may be statutory changes contemplated in connection with these proposed rules. If the goal is to regulate licensed paraprofessionals in a manner similar to how attorneys are regulated in California, we believe the existence of any statutory obligations imposed upon a licensed paraprofessional would affect how the proposed Licensed Paraprofessional Rules of Professional Conduct would operate.

We would very much welcome the opportunity to provide additional feedback once there are Comments associated with the proposed rules or any statutory changes made. In the interim, we hope the comments below are helpful.

## **PROPOSED RULE 1.0 – PURPOSE AND FUNCTION OF THE RULES OF PROFESSIONAL CONDUCT FOR LICENSED PARAPROFESSIONALS**

We recommend that the protection of the legal profession be deleted from the phrase, “to protect the public, the courts, and the legal profession” in paragraph (a). Inclusion of this language may detract from and overshadow the other stated purposes, namely, to protect the public, the courts, and the integrity of the legal system, and to promote the administration of justice and confidence in the legal profession.

Delete extra space before “opinions of California courts.”

Delete “to” in the following: “to enlarge or ~~to~~ restrict.”

Delete extra space before “licensed paraprofessionals to others.”

### **PROPOSED RULE 1.0.1 – TERMINOLOGY**

As indicated below, we believe a reference to the California Rules of Court and/or State Bar Act provisions defining licensing process and scope of permissible practice should be added to paragraph (b).

(b) “Licensed Paraprofessional” means a person\* licensed to engage in the limited practice of law pursuant to [ADD reference to CRC rule(s) and/or State Bar Act provisions defining licensing process and scope of permissible practice].

The term “licensed paraprofessional” is repeated in the third line paragraph (c) line 3 and should be deleted.

### **PROPOSED RULE 1.1 – COMPETENCE**

This rule permits a licensed paraprofessional without sufficient learning and skill within the scope of the licensure to associate with, consult with or refer the matter to another licensed paraprofessional believed to be competent, but does not require the licensed paraprofessional being consulted to be licensed to provide the required services. We recommend that paragraphs (c)(i) and (ii) be amended to require that the legal services fall within the scope of the licensure of any licensed paraprofessional being consulted:

“If a licensed paraprofessional does not have sufficient learning and skill when the legal services within the scope of the licensure are undertaken, the licensed paraprofessional nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another licensed paraprofessional, *the scope of whose licensure includes the legal services to be undertaken*, or a lawyer whom the licensed paraprofessional reasonably believes\* to be competent . . . (iii) referring the matter to another licensed paraprofessional, *the scope of whose licensure includes the legal services*

*to be undertaken, or lawyer whom the licensed paraprofessional reasonably believes\* to be competent.”*

## **PROPOSED RULE 1.2 – SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY**

The conduct permitted by paragraph (b) may require legal advice outside the licensed paraprofessional’s licensure. For the sake of clarity, the rule should make clear that (b) is subject to rule 1.1.

## **PROPOSED RULE 1.4.2 – NOTICE TO CONSUMERS PRIOR TO CONSULTATION WITH A PROSPECTIVE CLIENT**

This rule may be ambiguous where the licensed paraprofessional contemplates providing services through a law firm with which they are affiliated. If the licensed paraprofessional is to provide legal services through a law firm, confusion may arise as to whether the client may believe or reasonably expect that it is engaging the law firm, and any lawyers therein, or only the licensed paraprofessional, or a combination of both. If the paraprofessional intends to provide legal services through a law firm, but it is not contemplated that any lawyer in the firm will work on the client’s matter, then a disclosure to that effect would be valuable to avoid confusion. We recommend the addition of paragraph (a)(7): *“(7) whether any lawyer in any law firm with which the licensed paraprofessional is affiliated will provide legal services to the client pursuant to a separately negotiated agreement.”*

We can appreciate the seeming intent to ensure that the potential client understands the nature, scope, risks and effect of any disclosures provided by the licensed paraprofessional. However, the phrase “prospective client’s preferred language” is ambiguous. If a potential client speaks multiple languages, for instance, what does “preferred” mean in that context? Does the licensed paraprofessional have an obligation to retain a translator at their own cost to convert the proffered written consent into the “preferred” language of a client, even if that client reads and understands the language used by the licensed paraprofessional? It is further unclear why a licensed paraprofessional would have this obligation, but lawyers do not with respect to other rules that require disclosures and/or informed written consent.

Paragraph (a)(3) does not contemplate that in addition to a lawyer, another licensed paraprofessional may be licensed to provide needed services outside the scope of the licensed paraprofessional’s license. We recommend inserting in paragraph (a)(2) “the prospective client may need to hire a lawyer *or other licensed paraprofessional* if the legal services that the prospective client seeks are beyond the limited scope of the licensed paraprofessional’s license; . . . .”

Other than the potential for a free consultation with a lawyer or limited-scope services from a lawyer, paragraph (a)(4) does not contemplate that retaining a lawyer under a traditional or pro

bono fee arrangement is an alternative choice available to the client. We recommend revising the proposed language as follows: “(4) there may be other alternative choices available for the prospective client to consider, including but not limited to, *retaining a lawyer*, a free consultation with a lawyer, limited scope services from a lawyer, free services from a Self Help Center or Family Law Facilitator’s Office, or potentially free legal services from a local legal aid organization if the prospective client qualifies; . . . .”

Paragraph (a), line 4, insert a comma after the word practicable. The requirement of oral plus written disclosure may create confusion, difficulties in consistent implementation, and seems unnecessary. Oral disclosures may not accomplish the purpose of disclosure; written disclosures are possibly more effective. There is concern that oral disclosures may be rote, and/or difficult to understand. Clarity is a primary concern for adequate disclosure in light of the purpose of access to justice. Consideration should be given to limiting or focusing required oral disclosures (e.g., informing the prospective client that the licensed paraprofessional is not a lawyer, disclosure of the area of licensure).

### **PROPOSED RULE 1.4.3 - INFORMED WRITTEN CONSENT\* TO REPRESENTATION**

This rule may be ambiguous where the licensed paraprofessional contemplates providing services through a law firm with which they are affiliated, or where legal services are to be provided by one or more lawyers of the firm as well as by the licensed paraprofessional. See Comments to rule 1.5. If the licensed paraprofessional is to provide legal services through a law firm, confusion may arise as to whether the client may believe or reasonably expect that it is engaging the law firm, and potentially any lawyers therein, or only the licensed paraprofessional, or a combination of both. If the paraprofessional intends to provide legal services through a law firm, but it is not contemplated that any lawyer will work on the client’s matter, then a disclosure to that effect would be valuable to avoid confusion and should likely be required by rule 1.4.2. For example: “(7) *whether any lawyer in any law firm with which the licensed paraprofessional is affiliated will provide legal services to the client pursuant to a separately negotiated agreement.*”

We can appreciate the seeming intent to ensure that the potential client understands the nature, scope, risks and effect of any written consent elicited by the licensed paraprofessional. However, the phrase “prospective client’s preferred language” is ambiguous. If a potential client speaks multiple languages, for instance, what does “preferred” mean in that context? Does the licensed paraprofessional have an obligation to retain a translator at their own cost to convert the proffered written consent into the “preferred” language of a client, even if that client reads and understands the language used by the licensed paraprofessional? It is further unclear why a licensed paraprofessional would have this obligation, but lawyers do not with respect to other rules that require informed written consent.

The inclusion of subparagraphs (1)–(5) highlight the need for disclosure of the particular facts referenced therein. However, this has the potential to deemphasize the need for disclosure of

the material risks of the prospective representation set forth in the first paragraph of the rule, other than as described in (3). The risk of the need to hire a lawyer if needed services go beyond the limited scope of the paraprofessional's license is not necessarily the only potential risk. Also, the term "actual and reasonably foreseeable adverse consequences" may be ambiguous as it may be interpreted to mean that only risks that are both actual and reasonably foreseeable need be disclosed. We recommend striking "including any actual and reasonably\* foreseeable adverse consequences" from paragraph (a), and separately adding to the list of itemized, required disclosures enumerated under paragraph (a) a new paragraph stating: "(6) *A description of all actual adverse consequences and reasonably\* foreseeable adverse consequences of proceeding with a non-lawyer in this matter.*"

Paragraph (a)(3) does not contemplate that in addition to a lawyer, another licensed paraprofessional may be licensed to provide needed services outside the scope of the licensed paraprofessional's license. We recommend inserting in paragraph (a)(2) "the prospective lawyer may need to hire a lawyer *or other licensed paraprofessional* if the legal services that the prospective client seeks are beyond the limited scope of the licensed paraprofessional's license; . . . ."

As with paragraph (a)(4) of rule 1.4.2, other than the potential for a free consultation with a lawyer or limited-scope services from a lawyer, paragraph (a)(2) does not contemplate that retaining a lawyer other than under a limited scope arrangement is an alternative choice available to the client. We recommend revising the proposed language as follows: "(2) Disclosure of other available choices for obtaining legal services, including, *but not limited to, retaining a lawyer*, a free consultation with a lawyer, limited scope services from a lawyer, free services from a Self Help Center or Family Law Facilitator's Office, and that free legal services may be available to low-income individuals from a legal aid organization if the client qualifies; . . . ." The language in paragraph (a)(2) varies slightly from that in paragraph (a)(4) of rule 1.4.2, and in any event the language of these paragraphs should be consistent.

It is unclear why in paragraph (b) there is a purported need for a separate writing from the written agreement to representation, where informed written consent can be addressed in the written agreement to representation. We have concern about confusion, dilution, and inconsistency with access to justice/efficiency purposes. Consideration should be given as to how best to balance any signing/comprehension concerns vs. dilution/confusion concerns in this context. Also, how does correlate with case law (e.g., client's duty to understand what they are signing) and the licensee's duty to counsel the client as to what they are signing so as to achieve the purpose of the program?

Finally, paragraph (a)(5) is vague as to the phrase "financial arrangements . . . with others." A more clear and specific description of what is meant would help avoid confusion.

## PROPOSED RULE 1.5 – FEES FOR LEGAL SERVICES

Paragraph (c) provides that a licensed paraprofessional shall not make an agreement for, charge or collect a contingent fee except in an enforcement of judgment matter. It is unclear how this prohibition would apply where the paraprofessional is employed by a law firm and paraprofessional services are provided as part of the law firm's contingency fee arrangement with the client. For example, the law firm may be retained to pursue employment claims that encompass both wage and hour claims that can be handled by the paraprofessional, and wrongful termination/discrimination that can only be handled by the law firm. It is possible that the paraprofessional services may benefit both aspects of the case. Thus, there is a risk that the client would be paying the law firm twice for the same work: the hourly invoices from the paraprofessional and fees from the contingency. Perhaps an exception to this prohibition makes sense for law firm engagements that encompass both paraprofessional and legal services in a single matter to (1) avoid confusion and possible overreaching and (2) prevent unnecessary restrictions on the freedom of the law firm and client to agree on reasonable terms.

In addition, although contingency typically refers to a percentage of recovery, it can also refer to an hourly contingency fee under which the client does not pay unless and until there is a recovery. It is unclear whether this prohibition would apply to hourly contingency arrangements.

### PROPOSED RULE 1.5.1 FEE DIVISIONS AMONG LICENSED PARAPROFESSIONALS

Paragraph (a)(3)(iii) states that disclosure must be made to the client of "the identity of the licensed paraprofessional or law firms that are parties to the division." Paragraph (b) states that a "licensed paraprofessional and a lawyer who are not in the same law firm shall not divide a fee for legal services." However, under paragraph (a)(3)(iii), a paraprofessional in one law firm may share a fee with another paraprofessional at another law firm, which includes lawyers. We suggest that the reference to "law firms" in (a)(3)(iii) be clarified to state ". . . the identity of the licensed paraprofessional *and the paraprofessional firm or law firm to which he or she is affiliated, if applicable*, that are parties to the division."

In addition, paragraph (b) seems to contradict rule 5.4(a): "(a) A licensed paraprofessional or law firm\* shall not share legal fees directly or indirectly with an individual who is not a lawyer or a licensed paraprofessional or with an organization that is not authorized to practice law . . ." This implies that a licensed paraprofessional *may* share legal fees with an individual who is a lawyer.

### PROPOSED RULE 1.5.2 WRITTEN AGREEMENT TO REPRESENTATION

Paragraph (c) would require the written agreement to provide a reasonable estimate of the total fees, expenses, and costs of services and the basis of compensation. These requirements arguably exceed the scope of professional conduct rules. In comparison, for instance, a lawyer is not ethically required to provide a case budget or estimate within an engagement agreement. The basis and exigency for a different obligation for paraprofessionals is unclear.

Similarly, it is not clear why the representation agreement must state that the licensed paraprofessional must keep the client reasonably informed about significant developments relating to the representation. A lawyer has a similar duty, but a lawyer is not required to recite that duty in an engagement agreement. Again, the basis and exigency for a different obligation for paraprofessionals (specifically, to recite such a duty in an engagement agreement) is unclear.

Similar concerns apply to the remainder of rule 1.5.2, particularly whether this proposed rule goes beyond regulating professional conduct and instead unnecessarily invades the province of the contractual relationship between paraprofessional and client by dictating contract terms.

We can appreciate the seeming intent to ensure that the potential client understands the terms of the written agreement. However, the phrase “prospective client’s preferred language” is ambiguous. If a potential client speaks multiple languages, for instance, what does “preferred” mean in that context? Does the licensed paraprofessional have an obligation to retain a translator at his or her own cost to convert his or her standard agreement into the “preferred” language of a client, even if that client reads and understands the language more routinely used in the licensed paraprofessional’s standard agreement? It is further unclear why a licensed paraprofessional would have this obligation, but lawyers do not.

We recommend clarifying what is meant by “internet address.” That is, whether that refers to the licensed paraprofessional’s email address, website, or both.

Finally, it is unclear how proposed rule 1.5.2 would operate where a paraprofessional and lawyer in the same law firm would be providing services to the client. In that event, would the paraprofessional and lawyer each need a separate representation agreement, or could they present the client with one representation agreement so long as the portion relating to paraprofessional services complies with rule 1.5.2? If one agreement in this circumstance was allowed, query whether that would make compliance with rule 1.5.2 more difficult for paraprofessionals given that they may not completely control the drafting of the representation agreement. On the other hand, requiring separate agreements with two professionals within the same law firm seems duplicative and onerous. These seeming tensions do not appear to be addressed by the proposed rule.

Finally, the reference to “rules and regulations” in paragraph (k) may be vague and open to misinterpretation.

## **PROPOSED RULE 1.6 CONFIDENTIAL INFORMATION OF A CLIENT**

There is a concern regarding the inconsistency in references to the Business and Professions Code and the State Bar Act in some instances, versus the omission of the references in other instances, such as in rule 1.6. Assuming licensed paraprofessionals are not subject to Business and Professions Code 6068, we feel it would greatly increase clarity to use “within the meaning

of Business and Professions Code section 6068, subdivision (e)(1)” where appropriate. This would implicate the long history of laws, decisions, and opinions that have interpreted the meaning and scope of the Business and Professions Code since there will be no existing body of law or formal opinions interpreting these proposed rules upon their implementation.

For example, this rule adopts some language of Business and Professions Code section 6068(e). Section (e)(1) provides that a lawyer has a duty “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Since there is no existing statutory duty for licensed paraprofessionals, rule 1.6 paragraph (a) does not contain the same language. However, is the term “confidential information” in paragraph (a) intended to have the same meaning as “secrets” in 6068(e)(1), and the same meaning as “confidential information” in (e)(2)? If so, it would be useful to state so, particularly since “confidential information” is not a defined term. We suggest inserting the phrase “within the meaning of Business and Professions Code section 6068(e)” after the term “confidential information.” This would also give more clarity to other rules that reference rule 1.6.

Typo in first sentence: space between paraprofessional and shall.

Insert “the” before “representation” in line one of paragraph (d).

### **PROPOSED RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS**

Paragraph (d)(3) provides that representation is not permitted under this rule unless it does not involve the assertion of a claim by one client against another client represented by the licensed paraprofessional in the same litigation or other proceeding before a tribunal. This should be expanded to include the licensed paraprofessional’s law firm: “(d) Representation is permitted under this rule only if the licensed paraprofessional complies with paragraphs (a), (b), and (c), and: . . . (3) the representation does not involve the assertion of a claim by one client against another client represented by the licensed *paraprofessional or a lawyer or another licensed paraprofessional in the licensed paraprofessional’s firm* in the same litigation or other proceeding before a tribunal.”

### **PROPOSED RULE 1.8.2 USE OF CURRENT CLIENT’S INFORMATION**

Authorizing use of a client’s information protected by rule 1.6 to the disadvantage of the client “except as permitted by these rules or applicable law” seems open to misunderstanding and inconsistent interpretation. The phrase “applicable law” substitutes for the phrase “the State Bar Act” which is used in the lawyer Rules of Professional Conduct. The phrase “applicable law” is vague compared with the specific reference in the lawyer rules to the State Bar Act. Rule 1.6(a) prohibits the disclosure of confidential information relating to the representation of a client unless the client gives informed consent, or the disclosure is permitted by paragraph (b). Rules 1.6 and 1.8.2 therefore seem to be in conflict as to whether there are additional laws or circumstances that may permit the disclosure of confidential information relating to the



representation of a client. Are there specific “laws” or legal circumstances other than those described in rule 1.6 that can be more particularly described or further guidance and clarification offered to paraprofessionals trying to determine whether use of the client’s protected information to the disadvantage of the client is permissible absent the client’s informed consent? If not, we recommend striking “or applicable law” from this rule.

### **PROPOSED RULE 1.8.3 – GIFTS FROM CLIENT**

There should be a space between “not” and “solicit.” Strike “or” after paragraph (a).

### **RULE 1.8.5 PAYMENT OF PERSONAL OR BUSINESS EXPENSES INCURRED BY OR FOR A CLIENT**

To the extent revisions are not made to the contingency prohibition contained in rule 1.5 (see above), we suggest clarifying language to paragraphs (b)(1), (3) and (4): “pursuant to rule 1.5(c) . . .”

### **PROPOSED RULE 1.8.6 COMPENSATION FROM ONE OTHER THAN CLIENT**

Paragraph (b) states that compensation from one other than the client may be accepted if “information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) . . .” However, references to section 6068(e)(1) are stricken in rule 1.6 relating to the duty of confidentiality. Other rules also strike the reference. (See, e.g., rules 1.7 and 1.9.) To maintain consistency, it should be stricken here too.

(Although with respect to those rules that include prohibitions against the paraprofessional’s law firm, the stricken reference to section 6068(e) may be inconsistent with the California Rules of Professional Conduct. See comment to rule 1.9, below.)

### **PROPOSED RULE 1.8.8 LIMITING LIABILITY TO CLIENT**

In paragraphs (b)(1) and (2) the term “independent lawyer” may be ambiguous in this context, where a paraprofessional may be employed by a law firm. We suggest clarifying language, such as “represented by a lawyer *independent from the paraprofessional and the paraprofessional’s law firm*” and “advised in writing by the licensed paraprofessional to seek the advice of a lawyer *independent from the paraprofessional and the paraprofessional’s law firm.*”

### **PROPOSED RULE 1.8.9 PURCHASING PROPERTY AT A FORECLOSURE OR A SALE SUBJECT TO JUDICIAL REVIEW**

Paragraph (a) prohibits a paraprofessional from purchasing property at a probate, foreclosure, receiver’s, trustee’s or judicial sale in an action or proceeding in which such licensed paraprofessional or any lawyer *or licensed paraprofessional* affiliated by reason of personal, business, or professional relationship with that licensed paraprofessional or with that licensed

paraprofessional's law firm is acting as *a lawyer* for a party or as executor, receiver, trustee, administrator, guardian or conservator. A licensed paraprofessional cannot act as a "lawyer." We suggest revising to: ". . . or with that licensed paraprofessional's law firm *is representing a party in the action or proceeding* or acting as executor, receiver, trustee, administrator or conservator."

### **PROPOSED RULE 1.8.11 IMPUTATION OF PROHIBITIONS UNDER RULES 1.8.1 TO 1.8.9**

Rule 1.8.11 provides: "While licensed paraprofessionals are associated in a law firm,\* with other paraprofessionals or lawyers, a prohibition in rules 1.8.1 through 1.8.9 or in the lawyer RPC, rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them."

This may be somewhat confusing when applied to rules that are different for licensed paraprofessionals and lawyers. For example, the lawyer rule 1.8.3 provides that a lawyer may not: "(2) prepare on behalf of a client an instrument giving the lawyer or a person\* related to the lawyer any substantial\* gift, unless (i) the lawyer or other recipient of the gift is related to the client, or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code section 21384."

This prohibition is not contained in the licensed paraprofessional rules because licensed paraprofessionals are not permitted to perform estate planning services. However, this rule makes the prohibition applicable to licensed paraprofessionals, nonetheless, which may create confusion. Licensed paraprofessionals may believe that they are entitled to prepare a gifting instrument if the conditions contained in the prohibition are met. Clarification should be provided in comments to this rule.

### **PROPOSED RULE 1.9 DUTIES TO FORMER CLIENTS**

Paragraphs (c)(1) and (2) state that a paraprofessional who has formerly represented a client in a matter *or whose present or former firm has formerly represented a client in a matter* shall not thereafter . . . " use or reveal information protected by rule 1.6 acquired by virtue of the representation of the former client. References to information protected by section 6068(e)(1) is stricken. Generally, the protections afforded under rule 1.6 and section 6068(e)(1) are coextensive. However, it is unclear why the paraprofessional would not be expressly prohibited from using and revealing confidential information protected under section 6068(e)(1).

### **PROPOSED RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

It is unclear whether lawyers and licensed paraprofessionals can be disciplined for violating the other's rules via imputation.

## **PROPOSED RULE 1.15 SAFEKEEPING FUNDS AND PROPERTY OF CLIENTS AND OTHER PERSONS\***

Paragraph (d) states “. . . in accordance with paragraph (d)(3)” which should instead read “. . . in accordance with paragraph (c)(3).”

Paragraph (d) states “by licensed professionals and law firms . . . .” To be parallel with similar clauses in paragraphs (b), (c)(3)–(c)(5), (c)(7) it would be preferable for that clause in Paragraph (d) to instead read “by licensed paraprofessionals *and licensed paraprofessional’s* law firms . . . .”

## **PROPOSED RULE 1.16 DECLINING OR TERMINATING REPRESENTATION**

Paragraph (a)(2): the phrase “other law” substitutes for the phrase “the State Bar Act” which is used in the lawyer Rules of Professional Conduct. The phrase “other law” is vague compared with the specific reference in the lawyer Rules to the State Bar Act. Mandating withdrawal by non-lawyer paraprofessionals based on a violation of “other law” seems open to misunderstanding and inconsistent interpretation. Are there specific “laws” or legal circumstances that can be more particularly described or further guidance and clarification offered to paraprofessionals trying to determine whether withdrawal is mandatory? Should “defined practice area” as used in (a)(5) be a defined term?

It is unclear why, under (a)(5), a licensed paraprofessional must “advise the client in writing *to seek the services of a lawyer or licensed paraprofessional authorized to provide legal services on the subject of the representation.*” Why should it not suffice for the paraprofessional to advise the client in writing that the licensed paraprofessional cannot provide legal services on the subject of the representation because it is beyond the scope of the defined practice area(s) for which the licensed paraprofessional is licensed?

## **PROPOSED RULE 1.17 SALE OF A LICENSED PARAPROFESSIONAL’S PRACTICE**

Paragraph (c): it is not clear if this paragraph should read, or is intended to read, “substitute a lawyer *or licensed paraprofessional* . . . .” instead of “substitute a lawyer . . . .”

## **PROPOSED RULE 1.18 DUTIES TO PROSPECTIVE CLIENT**

We recommend modifying paragraph (c) to read: “If a licensed paraprofessional is prohibited from representation under this paragraph or a lawyer *in the same firm as that licensed paraprofessional* is prohibited from representation under Lawyer RFP rule 1.18(c), no licensed paraprofessional in *such* a firm\* with which that licensed professional is associated may knowingly\* undertake or continue representation in such a matter . . . .”

The added language clarifies that the scenario addresses when a licensed paraprofessional or lawyer are in the same firm, which seems to be the intent of paragraph (c) in context.

## **PROPOSED RULE 2.4 LICENSED PARAPROFESSIONAL AS THIRD-PARTY NEUTRAL**

We appreciate that proposed Comments have not yet issued for the proposed rules. We want to note, however, that we believe proposed rule 2.4 will benefit from a Comment similar to what exists in the corresponding California Rule of Professional Conduct.

On the other hand, including what might ordinarily be included in a comment here may make the standards applicable to paraprofessionals offering third party neutral services more explicit and clear.

## **PROPOSED RULE 3.3 CANDOR TOWARD THE TRIBUNAL\***

(a)(2) should read “by the opposing party” instead of “by opposing party.”

With respect to (a)(3), assuming a licensed paraprofessional could call a witness to testify under certain circumstances (e.g., an administrative hearing or non-jury proceeding), then we recommend adding back the language that was deleted from the lawyer rule.

## **PROPOSED RULE 3.5 CONTACT WITH JUDGES, OFFICIALS, AND EMPLOYEES**

The proposed rule adds reference to licensed paraprofessionals in (b)(4), but not in (b)(2) and (b)(3). A suggested revision for parallelism and accuracy is to add reference to licensed paraprofessionals in (b)(2) and (b)(3) as follows:

(b)(2): “with the consent of all other counsel *or licensed paraprofessionals* and any unrepresented parties in the matter;”

(b)(3): “in the presence of all other counsel *or licensed paraprofessionals* and any unrepresented parties in the matter;”

## **PROPOSED RULE 3.6 TRIAL PUBLICITY**

Paragraph (a) reads in part “...shall not make an extrajudicial statement that *the lawyer* knows\* . . . .” That portion of Paragraph (a) should instead read: “. . . shall not make an extrajudicial statement that *the licensed paraprofessional* knows\* . . . .”

The two references to “licensed paraprofessional” in paragraph (d) is confusing and it is unclear if one of the references was intended to be deleted. It presently reads “(d) No *licensed professional* associated in a law firm\* *with a licensed paraprofessional* subject to paragraph (a) . . . .”

The phrasing and structure of the second clause in Paragraph (d) (which reads “or a lawyer subject to California Rule of Professional Conduct 3.6(a) . . . .”) suggests that the proposed rule is

regulating the lawyer's conduct. We recommend this phrase be revised or deleted and/or the intention of the phrase clarified so that it cannot be construed as regulating lawyers.

### **PROPOSED RULE 3.7 LICENSED PARAPROFESSIONAL AS WITNESS**

Recommend inserting an adapted version of rule 3.7, Comment [1] that would read: "This rule applies to a trial before a judge, administrative law judge or arbitrator. This rule does not apply to other adversarial proceedings. This rule also does not apply in non-adversarial proceedings, as where a licensed paraprofessional testifies on behalf of a client in a hearing before a legislative body."

### **PROPOSED RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

Consider inserting an adapted version of rule 3.9, Comment, such as:

"This rule only applies when a licensed paraprofessional represents a client in connection with an official hearing or meeting of a governmental agency or legislative body to which the licensed paraprofessional or the licensed paraprofessional's client is presenting evidence or argument."

### **PROPOSED RULE 5.1 RESPONSIBILITIES OF MANAGERIAL AND SUPERVISORY LICENSED PARAPROFESSIONALS**

It is not clear whether or how a licensed paraprofessional with managerial authority in the law firm might supervise a lawyer. Does the proposed paraprofessional scheme permit a licensed paraprofessional to supervise a lawyer under any circumstance? If so, those circumstances should be explained. If not, that should be clarified.

### **PROPOSED RULE 5.3.1 EMPLOYMENT OF DISBARRED, SUSPENDED, RESIGNED, OR INVOLUNTARILY INACTIVE LAWYERS OR LICENSED**

Section (a)(3) should read: "Involuntary inactive licensee" means a *licensee* who is ineligible to practice law . . . ."

Query whether the referenced Business and Professions Code sections 6007 and 6203(d)(1) and California Rule of Court 9.31(d) are applicable to licensees who are not lawyers.

### **PROPOSED RULE 5.4 FINANCIAL AND SIMILAR ARRANGEMENTS BETWEEN LICENSED PARAPROFESSIONALS, LAWYERS, AND NONLICENSEES**

Rule 5.4 contemplates a significant change in a lawyer's or law firm's relationship to nonlawyers in that it allows fee-sharing between lawyers and licensed paraprofessionals and permits a licensed paraprofessional to have an ownership interest in a law firm and serve as a director or officer thereof.

To enable implementation, a parallel change to rule 5.4 in the State Bar Rules of Professional Conduct will be required. We understand that the Closing the Justice Gap Working Group is currently reviewing a recommendation to put rule 5.4 in a regulatory sandbox designed to study whether changes in the rule that allow fee-sharing and ownership by nonlawyers help to promote innovation and access.

### **PROPOSED RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

Rule 5.5 addresses the unauthorized practice of law and representations to the public. To clarify the requirements of this responsibility, we recommend the following additional language to Section (b):

(b) hold out or otherwise represent to the public that the licensed paraprofessional is permitted to practice law beyond the permissible scope of their license (*see rule 1.4.2 on required notice to prospective clients and rule 1.4.3 on informed written consent prior to representation*);

### **PROPOSED RULE 6.5 LIMITED LEGAL SERVICES PROGRAMS**

Add space between “paraprofessional” and “who” in the first sentence.

### **PROPOSED RULE 7.1 COMMUNICATIONS CONCERNING A LICENSED PARAPROFESSIONAL’S SERVICES**

Make the last word plural—“paraprofessional” should be “paraprofessionals.”

### **PROPOSED RULE 7.3 SOLICITATION OF CLIENTS**

In subsection (d)(1): Expand prohibition on running and capping to include doing so on behalf of lawyers. A proposed revision could be: A licensed paraprofessional shall not act as a runner or capper for a lawyer or another licensed paraprofessional, nor solicit another person to act as a runner or capper for the licensed paraprofessional, another licensed paraprofessional or a lawyer.

### **PROPOSED RULE 8.1 FALSE STATEMENT REGARDING APPLICATION FOR ADMISSION TO PRACTICE LAW**

Change two instances of “licensure in” to “licensure by.”

### **PROPOSED RULE 8.1.1 COMPLIANCE WITH CONDITIONS OF DISCIPLINE**

Delete “pursuant to” at the end of the sentence.

## **PROPOSED RULE 8.2 JUDICIAL OFFICIALS**

Add spaces between “paraprofessional” and “shall,” and “paraprofessional” and “knows.”

## **PROPOSED RULE 8.4 MISCONDUCT**

Subsections (g) and (h) do not appear in the lawyer rules, though we understand they may appear in other governing statutes like the Business and Professions Code. Without knowing more about the statutory scheme that may accompany the proposed rules, it is difficult to comment on these kinds of additions other than to note that they feel somewhat out of place given the lack of parallelism with the lawyer rules.

### **PROPOSED RULE 8.4.1 PROHIBITED DISCRIMINATION, HARASSMENT AND RETALIATION**

Subsections (a) and (b): add space between “paraprofessional” and “shall”;

It may be helpful to discuss limitations on when the rules apply. For instance, would a licensed paraprofessional be accountable in certain circumstances for the conduct of attorneys? Please consider whether it would be appropriate to revise or clarify to limit a violation of the rule, such as where the paraprofessional is operating independently or with other paraprofessionals or not under the supervision of an attorney.

## **PROPOSED RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW**

Delete errant period after the first sentence and correct spacing.

Sincerely,

Justin Fields  
Chair, Committee on Professional Responsibility and Conduct

cc: Members, Committee on Professional Responsibility and Conduct