

MEMORANDUM

TO: Members of the Regulation Subcommittee of the California
Paraprofessional Program Working Group

FROM: Steven S. Fleischman

DATE: February 27, 2022

RE: Meeting re public comments

I am looking forward to “seeing” everyone after our long and well-earned hiatus.

In light of staff’s recent memo, I am not sure how much discussion there will be regarding Rule 5.4, but if there is I’d ask everyone to review the three letters attached to this email.

Steve



State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

January 12, 2022

Via Online Public Comment Form

Board of Trustees
State Bar of California
180 Howard St.
San Francisco, CA 94105

To the Board of Trustees of the State Bar of California:

I appreciate the opportunity to provide public comment to the State Bar of California's Board of Trustees regarding the Final Report and Final Recommendations of the California Paraprofessional Program Working Group. I commend the State Bar's interest in taking steps to address the justice gap in California, which is a critical issue for low-income Californians who otherwise may lack access to affordable legal services. However, I share concerns raised by legal-aid organizations and dissenting working group members about the potential for consumer fraud and the need for additional guardrails for this paraprofessional licensure program. I therefore urge the State Bar to consider, at a minimum, the several modifications identified below to help ensure that the proposed pilot program has adequate consumer-protection safeguards and will not negatively affect Californians in need of low-cost legal services. I also strongly recommend that any attempt by the State Bar to address the justice gap should also include increased funding for legal services and an increased focus on pro bono representation by lawyers.

To be clear, consumer-protection guardrails are needed for this paraprofessional licensure program because any pilot program that would relax the standards for legal work in California runs a risk of increased fraud—particularly towards low-income, elderly, and immigrant Californians—and a decrease in the quality of legal services. California currently benefits from a bright-line rule in which, under both California law and State Bar rules, only licensed attorneys may provide legal advice. Attorneys in California are required to meet strict educational, training, and ethical requirements. My office, and our counterparts in the district and city attorney community, have a long history of investigating and prosecuting bad actors—both attorneys and non-attorneys alike—who commit fraud in connection with offering legal services, and we have worked cooperatively with the State Bar in its actions to discipline attorneys and to shut down the operations of people practicing law without a license. These investigations and

prosecutions are facilitated by California's bright-line rule that only licensed attorneys may practice law.

As California's chief law officer, charged both with the enforcement of consumer-protection laws and the prosecution of administrative actions against professionals and paraprofessionals licensed by a host of state agencies, I am concerned that any pilot program that blurs this bright-line rule may introduce a substantial risk of fraud, will create the opportunity for even well-intentioned paraprofessionals to offer legal services beyond their ability and licensure, and will make it harder to protect the most vulnerable Californians. For example, paraprofessionals might use the legitimacy conferred by their State Bar licensure to—either intentionally or unintentionally—mislead consumers about their qualifications and the scope of work they are allowed to perform. Past attempts by the California Legislature to allow non-attorneys to perform ministerial tasks, such as with respect to immigration consultants, provide evidence that regulations allowing non-attorneys to operate in the legal field typically subject vulnerable Californians to increased fraud and incompetence. Creating a system in which a non-attorney can plausibly set up what looks like a law practice also makes prosecution more difficult. To curb the abuses in the immigration consultant field, the Legislature has repeatedly tightened the regulations, but the problem persists. My office has prosecuted numerous immigration consultants for exceeding their limited scope of practice and engaging in the unlicensed practice of law. While we have been able to bring some of these bad actors to justice, their incompetent legal services caused irreversible harm to individuals seeking to adjust their immigration status. The unlicensed practice of law by immigration consultants is so widespread that the Los Angeles County District Attorney created a unit dedicated to prosecuting these cases, and the Los Angeles City Attorney has convened a task force to address the problem. Blurring this bright-line rule also introduces risks that inferior or incomplete legal advice would be provided. While identifying discrete areas of law amenable to paraprofessional work may seem feasible in the abstract, in practice it frequently takes the advice of an attorney in the first instance to identify salient legal issues regarding any particular legal problem. To be sure, a low-income Californian's legal problems are not necessarily less complex than those of more affluent Californians, and reliance on paraprofessionals, who will not be required to practice under the supervision of an attorney, may in some cases have irreversible legal consequences for vulnerable Californians.

In light of these many concerns, I write to focus on several modifications to the proposed paraprofessional licensure program to help mitigate potential harm to communities in need of low-cost legal services.

First, I recommend that the State Bar include reasonable limits on fees that paraprofessionals may charge under this pilot program. It is my understanding that a primary purpose of the paraprofessionals program is to address the justice gap by providing lower-cost legal services. Accordingly, fee caps would be a sensible feature of this program, particularly given that a substantial risk of any such program is that paraprofessionals may charge excessive or predatory fees. We have seen this in our immigration consultant prosecutions, where predatory immigration consultants have at times charged fees that exceed those that would have

been charged by an attorney. Moreover, many vulnerable populations who may use these services may also qualify for free or low-cost legal services and could instead find themselves paying more for legal advice from a paraprofessional than they would pay for the advice of a lawyer. While it is understandable that differences in geography or practice areas may complicate the analysis of reasonable limits on fees, the determination of reasonable fees for paraprofessional services is not beyond the abilities of the State Bar, the Supreme Court, or the Legislature. Failure to impose reasonable limits on fees threatens to undermine a primary purpose of this or any other paraprofessional licensure program.

Second, I recommend that this pilot program require that paraprofessionals work under the supervision of an attorney. This pilot program proposes for the first time permitting non-attorneys to practice law in California. It is unclear why this drastic step is being made in a pilot program without paraprofessionals having the backstop of attorney supervision. An attorney supervisory relationship for a paraprofessional would provide numerous advantages, particularly in situations where a client may raise legal issues outside the permitted scope of work for such a paraprofessional, which could give rise to a host of ethical issues. Many legal-aid organizations have suggested that paraprofessionals should work under the supervision of an attorney in much the same way that a physician assistant would work under the direction of a doctor in the medical field, yet the current proposal takes the opposite approach, allowing paraprofessionals a full range of practice, untethered to any attorney supervision. I urge the State Bar to reconsider this approach.

Relatedly, I recommend that the State Bar remove the aspect of the proposal that permits paraprofessionals to represent clients in court. This default rule authorizing in-court representation by paraprofessionals represents a substantial departure from California's current system, in which only attorneys or individuals supervised by an attorney may represent a client in court. This significant change to California law is not warranted based on the limited experience with paraprofessionals in other states. Further, numerous exceptions to this default rule run the risk of creating confusion for paraprofessionals, clients, and even the court system. These risks are exacerbated by the lack of a requirement for attorney supervision of a paraprofessional's work. Indeed, California's existing rules for practice by Registered Military Spouse Attorneys and Registered Legal Aid Attorneys who are fully licensed by a sister jurisdiction include just such a supervision requirement. Any pilot program should follow these examples.

Third, I recommend that the State Bar remove the aspect of the proposal that would allow paraprofessionals to have an ownership interest in a law firm. Under longstanding California law and State Bar rules, non-attorneys cannot have an ownership interest in a law firm. Under the current proposal, State Bar rules would be amended to allow a paraprofessional to own just under 50% of a law firm, even of law firms that practice in areas outside the subject-matter limitations of the paraprofessionals program, such as criminal, personal injury, employment, or immigration law. The practical result of the current proposal is that a paraprofessional not only could have de facto control over a law firm, but even a law firm that does work for which the paraprofessional is not licensed. This change also would provide a vehicle for non-attorney individuals to

essentially become investors in law firms, which would raise many ethical concerns that the current State Bar rules are designed to address. These rule changes are not related to the licensure of paraprofessionals, nor were these rule changes a part of any previous program in California that allows for non-attorneys to work in the legal field, such as legal document assistants, unlawful detainer assistants, immigration consultants, or certified paralegals. California law-firm ownership rules are in place for important ethical reasons, and there is no apparent reason to include such drastic modifications as part of this pilot program.

Fourth, I recommend that the State Bar provide further details regarding the financial viability of the proposed pilot program, sources of funding, and any potential impact the licensure program may have on the State Bar's other enforcement activities. Any paraprofessional licensure program must be adequately resourced in order to be effective. I applaud the efforts that the State Bar is undertaking, through the ongoing work of the Ad Hoc Commission on the Discipline System, to more effectively perform its existing functions of attorney licensure, the investigation of misconduct, and the imposition of professional discipline, and to obtain additional resources to support those efforts. Any expansion of the State Bar's mission to include the licensure of paraprofessionals must include a similar commitment of resources.

Finally, I recommend that any attempt by the State Bar to address the justice gap through a paraprofessional licensure pilot program should be coupled with increased funding for legal services and increased focus on pro bono representation by lawyers. I appreciate the State Bar's interest in looking for creative solutions to the complicated issue of the justice gap, but such creative solutions should not come at the expense of using existing infrastructure to provide proven low-cost or no-cost services to Californians in need. Moreover, it has been noted that the justice gap in California is not simply a services gap but also a knowledge gap – i.e., a lack of understanding of what constitutes a legal issue or where to go for legal help. I therefore urge the State Bar to focus, not only on bolstering the provision of such existing legal services, but also on further educating the public about when and how to obtain such existing low-cost and no-cost legal services.

I appreciate the opportunity to provide this public comment. I also appreciate the State Bar's interest in receiving comments from other stakeholders, and I encourage the State Bar to give particular weight to comments from legal-aid organizations and other public-interest groups that are close to the populations that this pilot program seeks to benefit. These groups are likely to have insights regarding additional consumer-protection guardrails that may be needed, such as related to disclosures, training, or mechanisms for compensating victims of fraud.

Board of Trustees
January 12, 2022
Page 5

Thank you for your time and attention. The justice gap in California is real, and I appreciate the State Bar's interest in working to make legal services more accessible to low-income Californians.

Sincerely,

A handwritten signature in blue ink that reads "Rob Bonta". The signature is fluid and cursive, with the first name "Rob" and last name "Bonta" clearly distinguishable.

ROB BONTA
California Attorney General



December 7, 2021

Ruben Duran
Chair, Board of Trustees, State Bar of California
180 Howard St.
San Francisco, CA 94105
(by electronic mail)

Re: Legislative Concerns Regarding the Closing the Justice Gap Working Group

Dear Chair Duran:

We are writing to express concern with the California State Bar's Closing the Justice Gap Working Group (CTJG). As Chairs of the Assembly and Senate Judiciary Committees, we have repeatedly urged the State Bar to focus on its core mission of protecting the public by correcting the delays and defects in the attorney discipline system. That focus remains urgent and must be prioritized.

Unfortunately, it appears that the State Bar has chosen to divert its attention from its core mission of protecting the public and addressing the critical issues affecting the discipline system. Instead, the State Bar has used a substantial amount of its resources for the CTJG, as well as the Paraprofessional Program Working Group, apparently utilizing hundreds of hours of staff time and an unknown amount of other State Bar resources. This is very disconcerting given the recent State Auditor's report noting that the State Bar's backlog of discipline cases grew by 87 percent since December 2015 and that recent changes to the system have significantly reduced its efficiency.

The CTJG has been exploring a proposed regulatory sandbox and proposals that would recommend allowing a participant in the sandbox who is not a licensed attorney to be exempt from existing statutory laws regarding the practice of law and rules of professional conduct. Our Committees have prioritized protecting consumers from unscrupulous actors, including those seeking to do business in the legal field. Corporate ownership of law firms and splitting legal fees with non-lawyers has been banned by common law and statute due to grave concerns that it could undermine consumer protection by creating conflicts of interests that are difficult to overcome and fundamentally infringe on the basic and paramount obligations of attorneys to their clients.

Corporations are driven by profits and demands for returns to shareholders, and do not have the same ethical duties and are not subject to the same regulatory oversight as attorneys. The regulatory sandbox could become an open invitation for profit-driven corporations, hedge funds,

December 7, 2021

Page 2 of 2

or others to offer legal services or directly practice law without appropriate legal training, regulatory oversight, protections inherent in the attorney-client relationship, or adequate discipline to the detriment of Californians in need of legal assistance. Any proposal that would materially change current consumer protections for clients receiving legal services and fundamentally alter the sacrosanct principles of the attorney-client relationship would be heavily scrutinized by our Committees.

We reiterate our call for the State Bar to redouble its efforts to focus on the core mission of policing attorney misconduct and supporting proven programs offering access to justice and legal services such as legal aid, court-sponsored self-help, and pro-bono assistance, as well as innovative approaches to increasing the number of attorneys who are licensed in California. These are tangible and existing problems that need your immediate and sustained attention, especially as our courts struggle to get through the COVID-19-induced backlog of cases.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark Stone", with a long horizontal flourish extending to the right.

Assemblymember Mark Stone
CHAIR, Assembly Committee on Judiciary

A handwritten signature in blue ink, appearing to read "Tom Umberg", with a stylized, cursive script.

Senator Tom Umberg
CHAIR, Senate Committee on Judiciary

Cc:

Leah Wilson, Executive Director, State Bar of California
Justice Alison M. Tucher, CTJG Chair
Merri Baldwin, CTJG Co-Chair
Rebecca Sandefur, CTJG Co-Chair

The reality facing moderate and low income Californians is that the majority of them do not obtain legal assistance with legal needs. In large part, this is because people, even those who recognize that the problem they face may have a legal solution, either do not know they can obtain help, or believe-or know- there is no help they can afford. While a variety of mechanisms, including legal aid, pro bono, and self help centers in and outside of courthouses, exist, the unmet need remains. Simply, we do not have justice for all.

It has become clear that there is a continuum of legal needs: some people require full representation to resolve their issues; some need a combination of legal assistance and advice and their own efforts; and some need only information about the process to help them along the way. Recognizing that, a system that provides knowledgeable non-lawyers to help in areas appropriate to the problem and the person trying to solve it, can effectively expand access to justice.

The pending proposal tries to strike this balance: to provide effective, lower cost services, with education and other consumer protection requirements. More importantly, it starts on a limited, defined-term basis so that evaluation in real time can drive changes where aspects of the program prove to be less effective in practice than anticipated. In conjunction with renewed efforts to adequately fund and support legal aid, pro bono, and court based self help, this can provide another tool in the continuum of services needed to address the continuum of need.

There are critical elements in this proposal, including area of practice limitations, specific educational requirements, and ongoing oversight and regulation. As to the latter, the make-up and authority of the Oversight Committee are, in my view, essential items to be enforced. To be effective, the Committee must have knowledgeable membership,

adequate authority and funding, and sufficient enforcement ability to address bad actors, and to prevent repetition of systemic failings if and when they develop. Without measures to ensure that consumers of the services are protected, this system will not provide the access needed.

There are however, aspects of the proposal that are more troubling. Foremost is the issue of ownership in law firms. Past reported abuses involving document preparers and “captive” law firms should be warning signals of issues that need resolution before this goes forward. More than that, it is not clear that the ownership requirement is critical to the success of this proposal.

It also would be meaningful if more emphasis was placed on the need to encourage some form of insurance protection for consumers, including a mandate if policy coverage can be obtained by providers. Insurance has proved to be a valuable consumer protection with respect to services provided by lawyers and should be no less so for services by paraprofessionals.