Responsive Law
The Consumer's Voice in the Legal System

Comments on: Regulation of Legal Paraprofessionals

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State Bar of California Working Group on Paraprofessionals

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Responsive Law thanks the Working Group for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. We advocate for policies that expand the range of legal services available to meet people's legal needs and that loosen protectionist restrictions on who may provide assistance on legal matters so that people of all income levels can get the reliable legal help they need.

In analyzing regulation of the legal services industry, we generally follow two overarching principles: (1) Consumer protection measures should be based on consumer needs, not lawyers' perception of those needs; and (2) consumer protection for consumers of non-lawyer services should be similar to the protections for consumers of lawyer services, barring any compelling reason to differ.

The Working Group's work to date has generally followed these principles. There are a few areas, however, where its proposals could better thread the needle between consumer protection and inhibition of service providers.

Consumers of legal services, like those of most other services, are protected by a wide range of laws, regulations, and market forces. We outline these below, along with our recommendations. After discussing disclaimers and fee caps at the last meeting of the Working Group's Subcommittee on Regulation, the Subcommittee asked specifically for our further input on fee caps and disclaimers; therefore, we address those subjects in greater detail.

Generally Applicable Laws And Market Forces Provide Consumers a Baseline of Protection

When discussing regulation, service providers who aren't subject to industry-specific rules are often mischaracterized as being

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"unregulated." In fact, such providers have obligations to their consumers under generally applicable tort law. They have contractual obligations to anyone by whom they are hired. Statutory consumer protections can provide another means of holding service providers accountable to their customers. Finally, the marketplace, while not a perfect regulator, generally rewards service providers who provide good services and punishes those who don't.

The existence of generally applicable laws, regulations, and market forces doesn't proscribe a need for additional regulation of paraprofessionals. However, such regulation should be analyzed by balancing its impact on the availability and affordability of paraprofessionals against the marginal consumer protection it would provide above the existing baseline.

Mandatory Disclaimers Should Protect Consumers, but Shouldn't Be Attorney Marketing Material

In its December 17, 2020 memo, the Working Group's Regulation Subcommittee proposed draft language for mandatory disclosures from paraprofessionals to their clients. Most of this language is beneficial to consumers, and provides them with important information about their relationship with the paraprofessional. (It's worth noting that lawyers are not generally required to make similar disclosures, which would help many of their clients.) However, some of the language goes beyond providing necessary information and drifts into promotional copy for lawyers.

Informed Consent Section 1(b)

The draft Informed Consent language (Memo, p. 10), section 1(b) requires the paraprofessional to mention a lawyer as an alternative to paraprofessional services, the possibility of a free consultation from a lawyer, and the possible availability of limited scope services from a lawyer. We recommend that this section be simplified to read, "(b) reasonable disclosure of the possibility that free legal services may be available if the client qualifies."

If lawyers want to get business through limited scope or free consultations, they're welcome to inform consumers about these things themselves. They shouldn't be allowed to sit back and have

paraprofessionals find clients in these market segments and force them to market on their behalf. (We note that there's no proposal to impose a parallel obligation on lawyers to inform their clients of the possibility that their legal matter may be handled for free through legal aid, or at a lower price through a paraprofessional.)

Informed Consent Section 1(c)

We urge the Working Group to delete this section. It's unclear what would constitute "the risks of agreeing to a [Paraprofessional]," other than "the potential need to hire a lawyer if needed services go beyond the limited license of the [Paraprofessional]" as mentioned in 1(d). If there are other risks, they should be enumerated so that consumers are aware of them. If not, then the disclosures shouldn't have language that will only scare consumers away from a reliable service provider.

Written Agreement and Mandatory Disclosures Section 2(b)

We recommend the deletion of the remainder of the first sentence after the words "not a lawyer." This is similar to the concern above that we not turn disclosure requirements into a marketing tool for lawyers. It is also duplicative of Section 2(c), which mandates disclosure of what the paraprofessional can or cannot do.

Licensing and Scope of Practice Should Not Unnecessarily Restrict the Availability and Scope of Paralegal Services

Consumers can also protected by reasonable licensing schemes that don't place unnecessary constraints on the supply of services, either by having too high a bar for licensure, or by being overly restrictive in the types of services that may be performed by licensees.

Licensing

We recommend that the licensing scheme for paraprofessionals be similar to the Ontario model, which has given consumers access to a robust market of paraprofessionals, rather than the Washington

State model, which created such a high licensing burden that only a few dozen people became licensed providers.

Scope of Practice

The Working Group should be thoughtful about what areas of practice are appropriate for paraprofessionals and likely to lead to an economically viable practice, and make sure that they have the training and experience needed to perform effectively. But then within those areas of practice, paraprofessionals should be allowed to do what is necessary to meet their clients' needs, with the possible exceptions of full-blown trials and appeals. The Regulatory Subcommittee's draft Scope of Practice language (Memo, pp. 13-14) should be altered to conform with these goals, as well as to improve clarity and ensure that it is protecting consumers rather than scaring them into seeking help from a lawyer when that may not be their best option.

Furthermore, if the Scope of Practice document is intended as the template for the mandatory disclosure to prospective clients required under (2)(c) of the draft Mandatory Disclosures, then it is far too long to be useful. Research that shows that if drug companies have to list 20 side effects of medicine, consumers are less likely to process the two or three most important risks. A similar principle would apply here.

Even if it is not intended for consumers, the approach of delineating an exclusive list of 13 tasks that paraprofessionals can perform—with questions inevitably arising about what might fall in the cracks between this list and the "prohibited tasks"—is less desirable than the approach taken by Arizona, which in its equivalent provision indicated that a legal paraprofessional is "authorized to render legal services within the scope of practice...*including*" and then listing five general categories of work that paraprofessionals may perform: preparing and signing documents; providing advice; drafting and filing documents; appearing before a court or tribunal; and negotiating legal rights or responsibilities. (Arizona Code of Judicial Administration, Section 7-210 (F)) Arizona has no general prohibited acts section, though within each area of practice, there are a few limitations. Similarly, it may be better to either incorporate the Prohibited Acts section into other sections or moved to

comments under the general prohibition against false or misleading communications.

We have two other minor suggestions regarding the Scope of Practice draft. First, in the second sentence of Section (1), the Working Group should either eliminate the phrase "shall advise the client to seek the services of a lawyer" or change it to "shall advise the client as appropriate." It may or may not be a good idea to seek to hire a lawyer, depending on the situation. For the same reason, we recommend eliminating Section 2(d). Second, in the third sentence of Section (1), the word "limited" should be deleted; it is duplicative of the list of limitations that follows immediately.

Fee Caps Would Be an Unworkable Solution to a Nonexistent Problem

Most of the types of consumer protection we address here are used in many industries, as they provide some protection to consumers against a plausible harm. Fee caps, on the other hand, are rare in the American regulatory arsenal, as they are an unworkable solution to a nonexistent problem.

The possibility of excessive fees being charged by paraprofessionals is exceedingly remote. On the contrary, lower prices will be one of the greatest market advantages of paraprofessionals. If a consumer feels that the price of a paraprofessional is too high, they will seek other providers, or not use a paraprofessional at all. And if lawyers think that paraprofessionals are charging too much compared to lawyer services, they should advertise their prices to emphasize that they are providing a better deal.

Even if fee caps provided some additional level of consumer protection, the administrative burden in doing so would be unmanageable. Imagine the number of fee caps that would have to be set for multiple types of service across multiple practice areas. Then consider that fee caps might need to vary by geographic area and level of provider expertise. And all of this assumes that there's even a way to make an apples-to-apples comparison between two instances of the same service. The end result would look something like the proliferation of inscrutable insurance codes that medical professionals need to use for procedures.

If the Working Group still decides that it wishes to provide regulatory protection against the charging of excessive fees by paraprofessionals, then it could borrow the language of California Rule of Professional Conduct 1.5, which prohibits lawyers from charging excessive fees. If this language is considered sufficient to prevent avaricious lawyers from taking advantage of their clients, then surely it would suffice for paralegals as well.

Either Malpractice or a Bond Requirement Can Help Guarantee Paraprofessionals' Financial Responsibility to Their Clients

Consumers can be protected from misfeasance or malfeasance by requiring paraprofessionals to carry a bond or malpractice insurance. Malpractice insurers for lawyers have generally pushed lawyers toward implementing risk-based best practices, and insurers for paraprofessionals could be expected to do the same.

Since a market for insurance might not exist immediately upon the creation of a paraprofessional license, the Working Group might consider requiring that paraprofessionals carry either a bond or malpractice insurance.

It's worth noting that California lawyers are not required to carry bonds or malpractice insurance. We urge the Working Group to have such a requirement for paraprofessionals be accompanied by a recommendation that a similar requirement be implemented for lawyers

The Disciplinary System For Paraprofessionals Should Be Representative of Consumers, Not Lawyers

Any disciplinary system for paraprofessionals should have significant representation from consumer voices. Such voices should, whenever possible, be those of actual consumers of legal services. If actual consumers are not feasible, then representatives of consumer organizations would be a suitable alternative. However, such representatives should be from actual consumer organizations, not organizations that represent providers in the legal services marketplace.

Additionally, a disciplinary board should not have a majority of lawyers as members. A lawyer majority on such a board would raise serious antitrust concerns under *North Carolina Dental Examiners v. FTC.* Even without antitrust liability, it would be poor policy to put members of one group of service providers in a position to regulate their economic competitors.

Conclusion

Paraprofessionals can play an important part in filling the legal services gap faced by nearly all Californians. With the modifications we recommend here, the Working Group can increase the extent to which this gap is filled, while maintaining consumer protection. We welcome any further questions the Working Group may have.