Responsive Law
Consumers for a Responsive Legal System

Stanford Law School | Stanford Center on the Legal Profession

May 14, 2021

Dear Justice Petrou and Members of the Paraprofessional Working Group:

We write with a few thoughts on fee caps, and appreciate the opportunity to have input. Responsive Law is a national, nonprofit organization representing the interests of consumers of legal services, and Stanford Center on the Legal Profession focuses on the relationship between legal services regulation and access to justice. We share the goal of ensuring that these services are affordable and can reach as many Californians as possible, but do not think this is the right mechanism to achieve that goal. Indeed, fee caps may well make it harder to reach this goal, which may be why no other paraprofessional program has done this.

Our specific thoughts are mainly along four lines: (1) Fee caps would impose a difficult administrative burden on a new program, with limited staff resources, just getting off the ground; (2) The market will take care of this issue without caps; (3) Fee caps may discourage applicants; and (4) It would not make sense or be equitable to impose caps on paraprofessionals -- but not lawyers -- for the exact same services.

Fee Caps Would Be Very Difficult To Administer. The administrative burden of establishing fee caps and monitoring fees would be unmanageable. Fee caps 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—a paraprofessional in the Central Valley who has just begun her practice would likely have lower fees than one in the Bay Area with twenty years of experience.

The various fee schedules referenced in the May 17 staff memo demonstrate the impracticality of establishing fee caps. Those fee caps cover a small subset of lawyers' services and billing structures. Almost all of them are for litigation, not transactional work, and thus are based on an hourly rate. But paraprofessionals are unlikely to bill hourly for transactional work. Therefore, a regulator would have to decide the appropriate cap for a flat fee for every variation of services that a paralegal might provide.

For example, fee caps for a name change petition could vary based on whether the applicant is a minor or adult, whether the paraprofessional will file the petition with the court, whether the paraprofessional will notify government agencies of the name change, and whether the paraprofessional will notify private entities of the name change. Similar determinations would be necessary for dozens of other paraprofessional services. Layering these on top of the dimensions of geography and experience could yield thousands of separate fee caps that a regulator would need to establish.[1]

The Market Will Take Care of This. Because this is a new program, it would be difficult for the working group to do the market research in advance to establish reasonable fees on which to base fee caps. Fortunately, the market itself will keep prices affordable in the absence of fee caps.

The possibility of excessive fees being charged by paraprofessionals is exceedingly remote. On the contrary, affordable prices will be a key market advantage of paraprofessionals. If a consumer feels that the price of a particular paraprofessional is too high, they will seek other providers. And if lawyers think that

[1] California has nine economic zones. Conservatively, a regulator could establish four broad tiers of experience levels for paraprofessionals. There are at least 100 different tasks paraprofessionals could be licensed to perform (again, a conservative estimate). In the name change example above, there would be 2^4, or 16 different permutations of services. So, a low-end estimate for the number of different services requiring fee caps would be 9x4x100x16=57,600.

paraprofessionals are charging too much for what they provide, they should advertise their own services to emphasize that consumers are getting a better deal.

Fee Caps Risk Discouraging Applicants. Of all the possible risks in the design and execution of this program, perhaps the greatest is that the limits set on what paraprofessionals can do discourages applicants. As a new and attached white paper from the Stanford Center on the Legal Profession explains, one of the reasons why Washington decided to stop licensing legal technicians was because the barriers to entry were so high (3000 hours) that there were not enough licensees soon enough to make the program revenue-neutral to the State Bar.

In order to achieve greater access to justice for people of modest means, we want and need hundreds of paraprofessionals in all parts of the state to get their licenses and be able to make a living. To the extent we signal it may be difficult to make a living – by limiting matters, tasks, and fees -- we may not get enough paraprofessionals to improve access to justice in a meaningful way.

And of course, this relates to the market point above. The two of us are far from free-market ideologues. But in this context, the best way to make sure prices remain affordable is to encourage an adequate supply of paraprofessionals. A shortage of supply will, of course, drive prices up.

This context is very different than those referenced in the staff memo such as court-appointed lawyers or modest means programs. In those contexts, lawyers can decide how many court-appointed or modest-means cases to take on to supplement private practice at their usual fees. Here, these fee caps will define the entire universe of what paraprofessionals can do. So if they need to make more money, they will need to increase their volume of cases, which could have negative consequences.

The Bar Should Not Impose Caps on Paraprofessionals -- But Not Lawyers -- for the Exact Same Services. Putting antitrust issues aside, it is difficult to justify imposing a cap on certain State Bar licensees, but not others, for the exact same services. As you know, the Bar is an agency often criticized for being too cozy with lawyers, which is why the legislature separated the regulator from the trade association and added public members to the Board a few years ago. Here, you could have two licensees on either side of a divorce, doing the same work, with the state telling one that it must charge less. It would not help the optics or justification that the "capped" group of licensees is more likely to be women and people of color than the "uncapped" lawyers, and may even be better prepared in their specialized area of practice than the lawyer.

Thank you for your consideration of our views and for all your work on this important program.

Sincerely,

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