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Dear Justice Petrou and Members of the Paraprofessional Working Group:

I write to strongly recommend that these licensed paraprofessionals be permitted to provide in-court representation. As I explain in more detail below, the reasons for this are: (1) consumers want and need advocacy; (2) research shows that advocacy from people who are not lawyers significantly increases the chances of success for litigants; (3) the premise of our adversarial system is that a clash of the strongest arguments is what gets to the truth and therefore fair and accurate outcomes; and (4) political considerations should not be an obstacle.

1. Consumers Want Advocates – and the Lack of Them is a Major Part of the Justice Gap

First, it is important to understand that when we talk about the justice gap, we are mostly talking about two things that consumers want and are not getting: advice and advocacy. Professor Rebecca Sandefur, currently serving as Vice-Chair of the State Bar's Closing the Justice Gap Working Group, is widely regarded as the leading authority in the United States on consumers' legal needs. Indeed, she won a MacArthur "genius" award for this work in 2018. This award and her scholarly reputation is built in significant part on her design and execution of the most comprehensive study of U.S. legal needs undertaken in years. As part of that study, Sandefur asked consumers what they are seeking when they go to formal sources of assistance with civil justice problems. 64% wanted advice, and 45% wanted advocacy.[1]

So we know that nearly half of consumers are seeking advocacy when they are dealing with civil justice problems. And we know from the data showing that three out of four cases in state courts involve at least one unrepresented litigant, that the lack of advocacy is a big part of the justice gap. The paraprofessional working group is already addressing only some of that gap by limiting this program to certain practice areas. If we take advocacy off the table as well, we limit the potential of this program to close the gap even further. It would be one thing if there was good reason to do so. There is not.

[1] Rebecca L. Sandefur, Legal Advice from Nonlawyers, 16 Stanford Journal of Civil Rights and Civil Liberties 283, 293 (2020).

2. Research Suggests that Advocates Will Help Consumers

Limiting this program's ability to address the justice gap in advocacy is unnecessary, unwarranted and unwise. Consumers are right to think that advocacy – even from someone who is not a lawyer – will help them. Though there is one outlier study indicating otherwise, the overwhelming majority of studies present a clear consensus that representation and advocacy – whether from lawyers or nonlawyer advocates – significantly increases a litigant's chance of success as compared to being self-represented. Professor Sandefur did a "meta-analysis" of the leading studies of the effect of representation on civil case outcomes – together encompassing 18,000 adjudicated cases. She concluded that lawyers perform "much better" than self-represented parties but only "somewhat better" than nonlawyer advocates in certain kinds of cases.[2]

Indeed, experience and research from Ontario, England, and the U.S. indicates that representatives who are not lawyers do a very good job in providing advocacy before courts and other tribunals. In Ontario, consumers report high satisfaction with the services received from paraprofessionals, and anecdotal evidence suggests that judges see the benefit as well. In the U.S., lay representatives already represent people in courts and other tribunals, including unemployment benefits appeals, labor grievance arbitration, some state tax courts, Social Security appeals, and immigration courts. And they generally perform as well or better than lawyers in many such cases.[3]

It is worth pointing out that the paraprofessionals that emerge will likely have more training in advocacy than new lawyers. Advocacy is likely to be a required part of the paraprofessional curriculum, while it is not required for lawyers. Though some law students do an oral-argument exercise as part of the first year legal research and writing course, this experience is limited and often done without much training or feedback.

3. Full Advocacy is Key to Accurate Outcomes in Our Adversarial System

A fundamental premise of our adversarial system is that the way we get to truth – the premise of an accurate and fair outcome – is by each side presenting their strongest arguments. As one scholar put it, "The adversary system proceeds from the assumption that the most effective way to determine truth and to do justice is to pit against each other two advocates, two adversaries, each with the responsibility to marshal all of the relevant facts, authorities, and policy considerations on each side of the case, and to present those conflicting views in a clash before an impartial arbiter."[4] We are far from that ideal right now with the number of unrepresented litigants in our courts. By allowing new licensed paraprofessionals who specialize in certain practice areas to provide in-court representation,

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[2] Rebecca L. Sandefur, Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact, 80 American Sociological Review 909, 922-24 (2015).
[3] Sandefur, Legal Advice from Nonlawyers, at 304-05.
[4] Monroe Freedman, Are There Public Interest Limits on Lawyers' Advocacy?, 2 Journal of the Legal Profession. 47, 48 (1977).

we can get significantly closer to that ideal – and therefore to more fair and accurate outcomes in cases.

Some may suggest that allowing paraprofessionals to draft scripts for litigants to read – as initially was the case in Washington – is sufficient to put forth the litigants' strongest arguments. But this claim cannot bear much scrutiny. Any experienced advocate will tell you that presentation – vocal intonation, eye contact and the like – is an important part of oral advocacy. And nervous, inexperienced litigants are rarely well-positioned to do well on this score. Moreover, it is one thing for the paraprofessional to draft an initial statement for the litigant. But when the judge asks questions, the difference between an experienced advocate and a one-time litigant is no doubt stark.

4. Political Considerations Should Not Be An Obstacle

I have previously expressed that to the extent there are stakeholders urging that a line be drawn here for political reasons, I would urge the Working Group to leave such compromises to the State Bar Board of Trustees, Supreme Court, or legislature. The working group's role, as I understand it, is to present a program that reflects the collective expertise of the group and those consulted on what would work best for our legal system and the consumers it serves.

Having said that, it is worth pausing on the specific political consideration being invoked here. One working group member indicated in a prior meeting that including in-court representation risked the California Lawyers' Association (CLA) exercising its full political power to block the program. I do not doubt that the organized bar has such political power. Indeed, lawyers and lobbyists contributed $2.2 million to legislative candidates in California, including members of the Judiciary Committees, for the 2019 and 2020 elections.[5] There are no consumer groups on the other side of this issue making contributions of their own.

But taking on this battle may be a more difficult decision for CLA than it seems. Though some State Bar issues may be debated behind the scenes, this issue will be covered extensively by both the local and national legal press. CLA would be in the position of saying that essential workers like teachers, nurses, and police officers do not deserve representation on fundamental issues affecting their lives like child custody, housing, and debt collection. And they would be asking their legislative allies to adopt and defend that position as well. CLA would also be in the position of opposing judges both on this working group and around the state who have expressed the need for more help in resolving cases with currently self-represented litigants.

[5] https://www.followthemoney.org/at-a-glance?y=2020&s=CA

From Washington's experience, it seems likely that both the providers in this program and their clients are more likely to be women and people of color than lawyers and their clients.[6] Denying opportunities to this group at a time of increased attention to racial justice and social inequality could be problematic as well. Upsolve founder Rohan Pavuluri frames the issue this way: "It's a choice between maintaining a status quo where black people are disproportionately excluded from both providing and receiving assistance and a system where we re-regulate the legal industry to make it more inclusive, increasing the supply of vetted, qualified helpers available."[7]

There are many reasons, then, not to consider the political considerations being invoked as a major factor in designing the program.

Conclusion

In sum, we know that many consumers want advocacy when they look for legal help, and that such advocacy will increase their chances of success in adjudicated cases. It is also a fundamental premise of our adversary system that a clash of the strongest arguments from each side will lead to accurate and just outcomes. We have an opportunity here to move much closer to justice in many cases affecting the lives of people all over California. I urge the working group to put the political considerations aside and take the opportunity by allowing in-court representation.

Sincerely,

Jason Solomon

[6] Comments from Commissioner Jonathon Lack to California Paraprofessional Program Working Group, February 26, 2021.

[7] Law 360, Perspectives: "'Unauthorized Practice of Law' Rules Promote Racial Injustice," June 7, 2020.