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Paraprofessional program: problems and proposals

By Peter M. Walzer

The American Academy of Matrimonial Lawyers adopted a resolution last November opposing the nonlawyer ownership of law firms and opposing the delivery of legal services by nonlawyers until all other reasonable means of providing access to justice have been exhausted and when safeguards have been established to protect the public.

The AAML's membership consists of more than 1,600 of the top family lawyers in the United States. Since the AAML issued this resolution, the movement to establish a new category of professionals established a foothold in California. Although there is opposition from most major bar associations, the State Bar of California is pursuing this initiative with a vengeance. Whether we like it or not, paraprofessionals will have the ability to handle, among other things, family law matters. They will be able to appear in court on behalf of litigants on some issues. Part of this package is that nonlawyers will be able to own up to 49% of law firms.

Let's step back a bit. In some courts, over 85% of the litigants are self-represented. This "access to justice" crisis has been known for some time. People accused of a crime are entitled to an attorney. But litigants in civil matters depend on legal clinics and pro bono representation. Many of these litigants are unrepresented. Because most people cannot afford to hire attorneys, bar associations have

been looking for solutions to this problem with some success. Most courts have robust self-help centers which have been able to assist litigants in preparing forms and getting assistance in filing papers. The judicial branch of the California courts has a website that provides helpful advice for self-represented litigants. Each court has its own websites, which also provide assistance to the public. Many courts offer no-cost mediation services for custody issues. Bar associations provide free mediation for non-custody family law services. The increase of private family law mediation has lowered the cost for many family law litigants. Further, the idea of "unbundling" legal services allows for a family law litigant to hire a lawyer for just one part of their case — such as a support or custody hearing. The use of virtual court appearances will increase access to the courts in doing away with the need for people to travel to a court hearing. It will lower the cost of legal fees because lawyers do not need to travel to court, depositions, and settlement conferences. Better case management systems and calendaring can speed up the court process and lower costs.

The State Bar believed this was not enough and jumped on the bandwagon of a couple of other states experimenting with "legal paraprofessionals" or "limited license legal technicians." The State Bar did not wait to see how these states fared with their experiment — the bar believed it could create an entirely new system of legal professionals from nothing. They

believed that not only could they train these professionals, they could police them. Although the State Bar has not shown they can adequately test and police lawyers, somehow they believe they can handle an entirely new system of representation. The AAML's resolution points out that "the ethical and procedural safeguards to protect the public from legal services delivered by nonlawyers are insufficient."

The State Bar also seems to think that a two-tier system will be equitable with one system for the well-to-do and another system for the poor and middle class. It is hard to believe that the State Bar can regulate paraprofessionals when the bar struggles to fund and maintain the regulatory system for attorneys. It also cannot police the unlicensed practice of law by notaries and others who prey on immigrants and the poor. Anyone who has dealt with the bar knows that this is not possible or even probable. The likely result is there will be much abuse — and the victims will be the poor.

On Sept. 23, 2020, the California Paraprofessional Program Working Group of the State Bar of California issued a "Report and Recommendations." The Board of Trustees of the State Bar appointed this working group in March of 2002. The group was directed to develop a recommendation for creating a paraprofessional licensure/certification program. They were required to balance the dual goals of ensuring public protection and increasing access to legal services. The group was divided into

subcommittees that deal with various issues, such as which areas of law would be within the scope of services of paraprofessionals, the licensing and regulatory structure, and the committee that developed the pilot project. There were 17 subcommittees that held 123 meetings. The areas of law that are included in the report are consumer debt and creditor harassment, enforcement of small claims and limited jurisdiction matters, name and gender changes, employment matters, including wage and hour cases, unemployment insurance proceedings, and certain areas of family law.

Family law matters that are not to be handled by paraprofessionals include nullity matters, petitions to establish a parental relationship,

Peter M. Walzer is the founding partner of Walzer Melcher LLP in Los Angeles. He is a former president of the American Academy of Matrimonial Lawyers.



child custody and visitation involving Hague Convention or the Uniform Child Custody Jurisdiction and Enforcement Act, Qualified Domestic Relations Orders, spousal support in long-term marriages, discovery (oral depositions, experts, motions), premarital and postmarital agreements, Marvin actions (involving individuals who have been cohabiting but never married), and contempt, emergency custody, or visitation requests when a judge has granted temporary orders. Paraprofessionals may represent people in uncontested adoptions, uncontested conservatorships and guardianships, and violence prevention — except where children are involved or where expert testimony is involved.

Paraprofessionals can also represent people in landlord-tenant matters with various exceptions. The Working Group recommended various licensing requirements, including people who graduated from an ABA-accredited law school, or California-accredited law school but who have not passed the bar examination. Also, paralegals and legal documents assistants may represent people. The paraprofes-

sionals are not required to maintain malpractice insurance but are required to maintain a \$100,000 surety bond. They are required to fulfill specific minimal CLE requirements. The board recommended a disciplinary system.

The report includes “dissenting opinions and alternate recommendations.” Stephen D. Hamilton, a fellow of the AAML, joined in the dissent. The dissent detailed several flaws in the report. The report did not include statistics indicating there is a shortage of attorneys in California. There was no research establishing that people who may have needed help actually tried to find help. There was no study on how much this will cost the State Bar. The dissent points out that the Washington Supreme Court canceled a comparable program after spending \$1.4 million. One of the significant defects in the program is that there is no recommendation to limit the fees that paraprofessionals can charge. Without this limit, the public may be paying the same rates lawyers charge for paraprofessionals who have less training or who have not been able to pass our bar exam.

The dissent points out that there

is no basis to believe this program will provide greater access to justice. There is no basis to show that the professionals who provide the service will be able to maintain the quality of service. The program will allow nonlawyers to make court appearances for clients.

The Working Group recommends that the State Bar allow paraprofessionals to own up to 49% of law firms, which would enable them to profit from areas of law in which they are not allowed to practice, such as criminal law, immigration law, personal injury, and employment cases. It is this author’s suspicion that the entire purpose of this program is the push from big business to own law firms and profit from them — an invitation to venture capitalists to own law firms.

So then, what is the solution? AAML urges state courts and state and local bar associations to (a) encourage the delivery of pro-bono legal services to help meet the needs of the public who are not receiving adequate legal representation and lack the means to do so; (b) adopt innovative solutions including, but not limited to, the use of court-approved technol-

ogy to reduce the cost of providing legal services; and (c) oppose the delivery of legal services by non-lawyers without the implementation of clear safeguards.

Safeguards must ensure that (i) nonlawyers delivering legal services have sufficient education and training to provide the services in question; (ii) the conduct of non-lawyers is subject to appropriate oversight and discipline; and (iii) the confidentiality rights of the public are fully and completely protected.

The reality is this program will be implemented despite the opposition. This author’s prediction is that after spending millions of dollars, it will be disbanded — just as it was in Washington State. All that will be left of the program will be the change to the law that allows nonlawyers to own law firms — which was the objective of the businesspersons who spearheaded this ill-conceived idea in the first place. They figured out early on that if they couched their proposal under the phrase “access to justice,” California politicians would buy into this scheme. They thought it would be an easy sell, and they were right. ■