
MEMORANDUM

TO: Texas Supreme Court via rulescomments@txcourts.gov

FROM: Executive Committee, Family Law Council

SUBJECT: Preliminary Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants

DATE: September 20, 2024

I SUMMARY

On August 6, 2024, the Texas Supreme Court issued Preliminary Approval of Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants and invited public comment by November 1, 2024. The Texas Family Law Council Future of Family Law Committee and Executive Committee have analyzed the preliminary rules and provide the following comments.

II COMMENTS

1. Scope of Authority: The rules permit paraprofessionals to perform specific legal tasks, but do not clearly define the boundaries of these tasks, which could lead to unauthorized practice of law.
2. Supervision Requirements: While the rules require lawyer supervision for certain legal tasks, they do not specify the level or extent of oversight needed, which could result in inconsistent application, the unauthorized practice of law, and potential legal malpractice. If the attorney providing “lawyer supervision” carries malpractice insurance, will their insurance be implicated by the actions of the paraprofessional? Has there been discussion with legal malpractice providers to examine this issue?
3. Good Moral Character Assessment: Certain criteria for assessing “good moral character” are vague or broad and may be subject to inconsistent application. This raises concerns about fairness and transparency in licensure.
4. Ethical Obligations: The ethical rules for paraprofessionals are like those for lawyers but may not be enforced with the same rigor, leading to potential conflicts of interest or breaches of confidentiality.

5. Disciplinary Procedures: The disciplinary process for paraprofessionals, while outlined, may not be as robust as that for licensed attorneys, potentially resulting in less accountability. Was there any discussion with the State Bar's Office of Chief Disciplinary Counsel or Board of Disciplinary Appeals to determine whether the rules are specific enough to be enforced?

6. Client Self-Certification: Requiring clients to self-certify their low-income status could lead to fraud or misrepresentation, impacting the integrity of the program. The certification is not required to be filed in the court's record. There appears to be no process for verification of a client's income. The term "Low income" is defined as income "at or below 200% of the federal poverty guidelines," and does not include assets of the client or income or assets of the other spouse. In a family law context, it is common for one spouse to be unemployed (and without any personal earnings) while the other spouse is a high earner with substantial financial resources. In this situation, the unemployed/low-income spouse could obtain competent legal representation by requesting interim attorney's fees from the other spouse.

7. Complex Property Issues: The rules exclude "complex property issues" from the paraprofessionals' scope, but the definition of "complex property issues" is limited to a suit "that involves a third-party sale or title transfer of real estate." The definition would not exclude claims (i.e., reimbursement claims or complex characterization claims) involving the real estate of a party, which may be consequential and could be overlooked if ineffectively handled. Numerous other potential complex property issues are not included in the definition of "complex property issues," including the characterization and division of retirement benefits (including government and military retirement benefits), valuation and characterization of employment benefits and deferred compensation, stock transfers, valuation and characterization of business entities, issues involving trusts including the characterization of corpus of trusts and distributed and undistributed income, claims for breach of fiduciary duty, fraud, and waste of assets, claims giving rise to the reconstitution of the community property estate, tax consequences of the property division, and issues related to financial damages for tort claims. Finally, issues may arise in situations where a case may appear to be simple (i.e., what if a party is without knowledge of the complexity of the case) but later becomes complex, causing issues with continuation of the representation.

8. QDRO Preparation: The prohibition on paraprofessionals preparing Qualified Domestic Relations Orders (QDROs) without lawyer review could create delays or confusion in divorce proceedings. In cases in which a conflict exists between the QDRO and the decree, the decree is the document that controls. As a result, a client might be irreparably harmed by a paraprofessional who lacks an understanding of how to characterize and properly divide retirement benefits. The only restriction on addressing retirement benefits appears to be the preparation of a QDRO. It is important to note that QDROs are only used for dividing retirement benefits that are subject to ERISA. There is

no mention of oversight for preparation of a decree that divides retirement benefits or the documents required to divide retirement benefits that are not governed by ERISA.

9. Legal Advice Limitation: The rules allow paraprofessionals to provide legal advice in certain areas, but the line could be easily blurred between giving legal information and offering legal advice, which is typically reserved for licensed attorneys.

10. Limited Court Representation: Allowing paraprofessionals to represent clients in certain court proceedings without a lawyer could lead to situations in which the paraprofessional is overmatched by a lawyer representing the opposing client, impacting the fairness of the proceeding.

11. Exemptions from Subject-Matter Exams: Exempting certain applicants from subject-matter exams could lead to licensing paraprofessionals who lack sufficient knowledge in specific legal areas.

12. Advertising Restrictions: The rules on advertising are not as comprehensive as those for attorneys, which might lead to misleading or unethical marketing practices by paraprofessionals.

13. Fee Structures: The rules do not restrict the types of fees that paraprofessionals can charge, which might lead to financial sustainability issues or the temptation to engage in unethical fee arrangements. Further, there is no limit on the amount a paraprofessional can charge for their services. If the goal is to create a low-cost service, then there should be a cap on the fees charged for their services. Without a fee cap, then Texas may face the same challenges faced in the State of Washington. A “Limited License Legal Technician” in Washington charges \$100-\$150 an hour, the same rate charged by many attorneys in the area. As a result, the program costs the State of Washington \$1.4 million more than it generated.¹ Finally, the rules fail to provide guidance on how (and how much) the supervising lawyer will be paid and whether this arrangement will be exempt from fee sharing with a non-lawyer as prohibited in Texas Disciplinary Rule of Professional Conduct 5.04.

14. Client Protection and Withdrawal: The rules for withdrawing from representation are not as detailed as those for attorneys, potentially leaving clients vulnerable if a paraprofessional withdraws without proper notice or transition.

¹ Harrison, Gene, “Paraprofessionals Won’t Fix the Access to Justice Problem,” US Law Week, Bloomberg, June 2021

15. Continuing Education Requirements: The required continuing education hours for paraprofessionals might be insufficient to ensure they stay updated on legal changes and maintain competence.
16. Annual Reporting Obligations: The requirement for paraprofessionals to report the number of clients served could create administrative burdens that distract from client service.
17. Regulation and Oversight: The proposed system for regulation and oversight of paraprofessionals is less established than that for attorneys, which might lead to gaps in enforcement and protection for the public. A paraprofessional cannot be expected to evaluate and assess the complexity of a legal case when the paraprofessional is not a trained lawyer. As a consequence, clients may believe their legal needs were met when they were not. It may not become clear that a client's legal needs were not protected for many years down the road. With the passage of time, certain mistakes cannot be remedied.
18. Privileges and Confidentiality: The application of attorney-client privilege to paraprofessionals might be unclear in practice, potentially leading to breaches of confidentiality or misuse of privileged information.
19. Training Quality: The quality and consistency of the training programs for paraprofessionals are not standardized, which could lead to disparities in the level of service provided across the state.
20. Public Perception and Trust: The introduction of paraprofessionals into the legal system could impact public trust in the legal profession, especially if issues arise regarding their competence or ethical conduct.

III

CONCERNS REGARDING THE LANGUAGE AS CURRENTLY DRAFTED

After reviewing the Preliminary Rules Governing Licensed Legal Paraprofessionals and Licensed Court-Access Assistants, the primary concerns with the language as currently drafted are set out below:

1. Ambiguity in "Complex Property Issues" Definition (Section 1.C): The term "complex property issues" is defined as involving a third-party sale or title transfer of real estate, but does not account for the other potential and common complexities that arise in property cases, such as characterization and valuation issues involving retirement plans, employment benefits and deferred compensation, stock transfers, business entities, issues involving trusts, and issues related to claims for breach of fiduciary duty, fraud, and waste, claims giving rise to the reconstitution of the community property estate, issues related to financial damages for tort claims valuation disputes, issues related to division of these

assets, and the tax consequences of the property division. The term "complex property issues" should be more broadly and specifically defined.

2. Vagueness in "Lawyer Supervision" (Section 1.F): The definition of "lawyer supervision" is vague, especially regarding the extent of supervision required and how it applies in different scenarios. This could lead to inconsistencies in practice and potential liability issues. Will there be malpractice implications for the supervising lawyer? If the supervising lawyer is only to look at the four corners of the pleadings without requiring verification of information about the parties' backgrounds, financial circumstances and specific needs, the supervising lawyer cannot comply with their own ethical duties such as Texas Disciplinary Rule of Professional Conduct 3.01 or 3.03.

3. Insufficient Detail on "Substantive Legal Work" (Section 1.M): The term "substantive legal work" is broadly defined, which may lead to misunderstandings about the specific tasks paraprofessionals are allowed to perform. Clarification and specificity are needed to prevent paraprofessionals from overstepping their authorized roles.

4. Lack of Clarity on "Uncontested Divorce" (Section 1.P): The definition of "uncontested divorce" might lead to confusion, particularly regarding what constitutes a "contrary position" in a general denial. The rules should be more precise to prevent unintended disputes about whether a case is truly uncontested. A general denial pleading is sufficient to raise contested issues. Will an opposing party be required to plead with specificity on contested issues if the opposing party is represented by a paraprofessional? And if so, how do they receive notice of this requirement?

5. Broad Definition of "Present Good Moral Character" (Section 5.A): The assessment of "present good moral character" is broad and vague, and could lead to subjective interpretations, potentially resulting in inconsistent licensing decisions.

6. Broad Exemptions from Subject-Matter Examinations (Section 6.D): The exemptions from subject-matter examinations for paraprofessionals could result in individuals being licensed without adequate knowledge in specific areas of law, potentially compromising the quality of legal services. Section 6.D.2 only requires the applicant to have "taken another examination" with no mention of a qualifying result or score on that examination. Section 6.D.3 is unclear as to what other exemptions might be set by the State Bar or how the State Bar would set those standards.

7. Unclear Standards for Ethics Examination Waivers (Section 6.D.3): The criteria for waiving the ethics examination are not well-defined, which could lead to inconsistent application and licensing of paraprofessionals who may not have sufficient ethical training.

8. Eligibility Requirement (Section 7.B): The requirement for clients to self-certify their income as "low income" may lead to challenges, particularly in cases where clients might not understand the implications of self-certification, potentially leading to misuse or fraud. Further, is a client without income required to disclose the assets of the client? Are the income or assets of the client's spouse considered? Does the size of the estate have implications for certification in circumstances of deferred income or non-income producing property? It seems that both income and property of the client and the client's spouse should be included in the eligibility requirement.

9. Lack of Guidance on Client Education (Section 7.B.3): The requirement for providing clients with a brochure explaining the Program and reporting concerns is useful, but the rules do not specify what should be included in this brochure, leaving room for variation and potential gaps in client understanding.

10. Potential for Miscommunication with Unrepresented Parties (Section 7.C.2): The rules allow paraprofessionals to communicate with unrepresented opposing parties without lawyer supervision, which could lead to ethical concerns or miscommunication, particularly if the opposing party does not understand the paraprofessional's role.

11. Overly Broad Permitted Practice in Family Law (Section 7.D.1): The section provides that a legal paraprofessional licensed by the Court in family law may advise a client on completing and filing family law forms that have been approved by an approved entity. Section 1.A.B defines approved entity in an exceedingly broad manner, with entities that may not be aware of the implications of their forms. Will clients have recourse for having been provided an incorrect or incomplete form? Will they be notified of immunity for the provider of the form? 7.D.1.b. allows for preparation of affidavits in support of temporary orders and divorce decrees. While an affidavit may be useful for entry of a decree, there would generally not be any need for affidavits in an uncontested temporary orders hearing. When affidavits are used for a temporary order hearing, they would typically be for a request for extraordinary relief, which is generally not uncontested.

12. Broad Repercussion for QDROs Determined by Decree language (Section 7.D.2): As stated above, in cases in which there is a conflict between the QDRO and the decree, the decree is the document that controls. As a result, a paraprofessional can financially harm a client when the paraprofessional does not understand how to determine the separate and community property components of a retirement account or know how to properly draft the language to divide the retirement account within the decree. Additional protections should be included to restrict the scope of the oversight of a paraprofessional's work on cases involving retirement benefits.

13. "Uncontested" Suits for Protection (Section 7.D.3): This section references "an uncontested suit for protection under Title IV of the Family Code." These suits are rarely uncontested and, even if uncontested, have extreme impact on the applicant and the person agreeing to abide by the terms of protection that far exceed the general knowledge of a

paraprofessional and often require even an experienced family lawyer to consult with a criminal or immigration lawyer.

14. Requiring a Standard Possession Orders and Guideline Support (Section 7.D.3): Requiring those who use the services of a paraprofessional to be limited to a standard possession order or guideline child support may prevent parties from representing to the Court what is truly in the best interest of a child and, thereby, implicate res judicata issues for a court's determination in the future.

15. Appearance, Client Protection, and Withdrawal (Section 8.A): Does a legal paraprofessional have to sign pleadings in accordance with Texas Rule of Civil Procedure 57: Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number. *See* TEX. R. CIV. P. 57.

16. Lack of Specificity in Court-Appearance Notifications (Section 8.A): The requirement for paraprofessionals to file a notice of limited appearance is clear, but the rules do not specify how courts should handle cases in which a paraprofessional's appearance might be insufficient, particularly in complex matters.

17. Insufficient Protections for Clients in Withdrawal Scenarios (Section 8.B): The rules on withdrawal do not provide enough guidance on how paraprofessionals should protect clients when withdrawing from representation. This could leave clients vulnerable if a paraprofessional cannot continue to represent them.

18. Code of Ethics (Section 9.G): Use of the term "to the extent applicable" within this section creates confusion in reference to the requirement to follow the rules set forth within Section VII of the Texas Disciplinary Rules of Professional Conduct. Further concerns include whether a paraprofessional may create a firm of paraprofessionals and adopt a trade name like "The Cheaper Than Dirt Divorce Shop?" How will the consumer distinguish a firm of paraprofessionals from a law firm? If the licensed paraprofessional is following the advertising rules applicable to lawyers, including the review of websites, how will the Court compensate for the already slow review process?

19. Unclear Procedures for Discipline and Appeals (Section 10.F): The process for appealing license suspensions or revocations is not fully detailed but should be to ensure fairness and transparency in these decisions.

20. Inconsistent Use of Terms across Sections: The document uses terms like "uncontested suit" and "uncontested court proceeding" in different contexts without consistent definitions, which could lead to confusion in applying the rules.

21. Insufficient Continuing Education Requirements (Section 11.B.2-3): The continuing education requirements may not be robust enough to ensure that paraprofessionals remain competent in their practice areas, especially as laws and best practices evolve.

22. Vague Language on Privilege (Section 12): The statement that privileged communications between lawyer and client apply to paraprofessionals is broad, and the rules do not clarify how this privilege should be maintained in practice, particularly in cases of mixed representation by lawyers and paraprofessionals.