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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULES 31, 32, 41, 42 (ERs 1.0-5.7, 8.3), 43, 46-51, 54-58, 60, 63, 66-67, 75-76, ARIZ. R. SUP. CT., and ADOPT NEW RULE 33.1, ARIZ. R. SUP. CT.	Supreme Court No. R-20-0034 Reply and Final Amended Petition

This Reply and Final Amended Petition explains additional proposed amendments made to Arizona Supreme Court Rules, including the proposed Arizona Code of Judicial Administration sections, that complete the proposals set forth in Petitioner's petition.

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, Petitioner petitioned the Court to allow nonlawyers to have ownership interests in law firms and to create a new category of legal-service provider, as well as make other rule

[1] Mr. Byers files this reply and final amended petition in his capacity of a member of the Supreme Court's Task Force on the Delivery of Legal Services and as chairman of the workgroup established to develop proposed rule changes to accomplish entity regulation.

changes. The Court's Task Force on the Delivery of Legal Services ("Task Force") recommended these significant initiatives as ways to increase the public's access to legal services.

In response to concerns and issues raised by stakeholders, such as the State Bar of Arizona, and the comments by lawyers on the rules forum, as well as continuing work by the Entity Regulation Work Group, Petitioner now submits a reply and final amended petition.

This reply builds on the explanations in the original petition and the first response, and responds to some stakeholders' and commenters' issues and objections. It also includes several substantive changes to the first amended petition, as explained below.[2]

I. Alternative business structure (ABS) proposal

A. General opposition

Many comments that oppose eliminating Ethical Rule (ER) 5.4 of the Rules of Professional Conduct, Rule 42, Ariz. R. Sup. Ct., focus on the risk that nonlawyer owners, presumably intent only on making money, would interfere with a lawyer's relationship with a client and turn the legal profession into a money-at-all-costs business.

Opponents raise constructive and valid concerns, including how client information would be protected from nonlawyer owners; the potential for nonlawyer owners to engage in misconduct and harm consumers; and the resulting conflicts of interest if, for example, an insurance company owns a law firm that represents a client adverse to that insurance company. Lawyer commenters understandably worry about damaging the practice of law, not necessarily in the sense of protecting their

[2] Only significant changes, issues and objections are itemized and discussed below. The appendices reflect all changes.

livelihoods but because of the possibility that a nonlawyer's profit motive will elbow out professionalism.

That all theoretically could happen – if this petition proposed eliminating ER 5.4 in a vacuum. Without safeguards, a disreputable nonlawyer could hire a lawyer as an employee, hang out a shingle, and demand that the lawyer be concerned only with making money, without regard for clients' best interests.

But this petition does not propose eliminating ER 5.4 without safeguards. Instead, the proposal to eliminate ER 5.4 and allow nonlawyer ownership comes packaged with a proposed robust regulatory framework to guard against the possible evils.

If these proposals are adopted, the regulations would require that an ABS – an entity that provides legal services to third parties and in which a nonlawyer has an economic interest or decision-making authority – be approved and licensed, staffed with a compliance attorney, and act only in accordance with a detailed code of conduct.[3] While it is impossible to promise that nothing bad would ever happen, the proposed regulatory structure proactively anticipates problems, such as the need for mandatory internal compliance monitoring.

B. Specific issues and objections raised by commenters and stakeholders

1. Objection: Nonlawyer ownership does not equate to access to justice.

Nonlawyer ownership clearly facilitates access to justice.

Effective access to legal services is an integral part of access to justice. "Access" means far more than simply providing free or low-cost representation to consumers who need legal services. For example, in his five-year strategic plan

[3] The ABS regulations would be codified as ACJA § 7-209. The full set of proposed regulations are at ACJA Pending Proposals Web Forum.

"Advancing Justice Together," then-Arizona Chief Justice Scott Bales, who appointed the Task Force, described the goal of "effective access to justice" as being furthered "not only by examining legal representation for moderate and low-income persons, but also by helping self-represented litigants and others navigate the judicial process and by using technology to make courts more accessible to all."

One now-traditional avenue for accessing legal services is advertising. Access to legal services has increased over the past 40 plus years as lawyers have been able to advertise their services and availability. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977) (rule banning lawyer advertising "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable," in part because of "inability to locate a suitable lawyer"); *In re Zang*, 154 Ariz. 134, 145 (1987) ("Advertising that informs consumers about their rights and about the availability and cost of legal services is a valuable method of increasing access to legal representation and of furthering the rule of law").

Access to legal services also necessarily encompasses nontraditional avenues, such as adopting existing or inventing new technology; integrating legal services with other professions (multidisciplinary practice, or MDP); and allowing free market competition.[4] Allowing nonlawyer ownership is critical to increasing access to justice using all of these avenues.

[4] *See, e.g.*, George C. Harris and Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm,* 70 Fordham L. Rev. 775, 805 (2001) ("Efficient use of technology could help consumers with legal needs connect more easily with legal service providers, who would tap into the currently underserved middle-class market for legal services"); *id*. at 801-02 ("The ability of MDPs to provide so-called 'one-stop shopping' may lead not only to lower-cost provision of legal services but better service for consumers generally because of the broader expertise of the service providers and the close cooperation of a professional, interdisciplinary team"); Neil M. Gorsuch, *Access to Affordable Justice*, 100 Judicature 46, 49 (2016) ("All else equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of

First, adopting or creating new technology requires capital. Because ER 5.4 prohibits nonlawyer ownership, "any investment in technology services or integration of technology with existing legal services must come from within the profession, from law firm partners, or from their shareholder counterparts. The potential for costly technological investment, especially by lawyers that focus on middle-class clients (mostly small law firms and solo practitioners), is, therefore, limited."[5]

Second, creating MDPs requires the ability to partner with nonlawyer professionals. Because ER 5.4 currently prohibits this, a law firm that wishes to collaborate closely with a nonlawyer professional – perhaps to provide "one-stop shopping" for clients – would seem to have only two options: require that the nonlawyer professional be "relegated to the status of an employee"[6] of the law firm, or continue to work as two separate businesses.

Eliminating ER 5.4, and thus allowing nonlawyer partners, may lead not only to lower-cost provision of legal services but better service for consumers generally because of the broader expertise of the service providers and the close cooperation of a professional, interdisciplinary team. The MDP prohibition is a "virtual guarantee that the quality of expertise generally available to clients will be lower than optimum." Given the likely cost-savings and convenience, middle-income individuals are likely to choose an integrated provider of professional

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capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local 'superstores.'").

[5] Harris and Foran, *supra* n. 2, at 805 (footnotes omitted).

[6] District of Columbia Rule 5.4 allows nonlawyers to be partners in a law firm under limited circumstances. Comment [7] to D.C. Rule 5.4 explains that "the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee."

services rather than a stand-alone professional enterprise.[7]Third, the lack of free-market competition helps restrict the supply of legal services, which in turn "helps to keep the market for legal services noncompetitive and the price of legal services artificially high."[8] ER 5.4 thus effectively "grant[s] to lawyers the exclusive right to earn a profit from investment in the legal services industry."[9]

Finally, the consensus of the participants in the seven online town halls held by the Arizona Town Hall recognized that clients could benefit from allowing nonlawyers to invest or own law firms[10]:

- "[T]he delivery of legal services involves both business skills and professional responsibilities. Although allowing non-lawyers to invest in or own law firms raises conflicts of interest and other concerns, ABS could help lawyers by freeing up their time to practice law and making their practices more profitable, which could benefit clients by making legal services less expensive and/or more available."

- "[W]ith appropriate safeguards and regulations to avoid conflicts of interest and inappropriate influence by nonlawyers and to preserve lawyer independence, ABS could bring complementary services together in a collaborative way that could benefit clients."

2. Objection: A nonlawyer ABS owner will be able to wreak havoc on clients and then walk away unscathed.

If the Task Force and the petition *only* proposed eliminating ER 5.4, a nonlawyer owner theoretically could establish a law firm, cause problems and then close it down and walk away, perhaps to establish another operation that continued

[7] Harris and Foran, *supra* n. 2, at 802 (footnotes omitted).
[8] Harris and Foran, *supra* n. 2, at 800.
[9] *Id*.
[10] Comment of the Arizona Town Hall, submitted by Judge Patricia K. Norris (ret.), board chair, and Tara Jackson, president.

harming clients. The proposal to eliminate ER 5.4, however, must be read in conjunction with the proposed regulatory framework, ACJA § 7-209, which includes a myriad of requirements for licensing and, for misconduct, sanctions as serious as $1 million civil fines.

The proposed regulatory framework is in fact so rigorous that some proponents of allowing nonlawyer ownership might consider it too much, but the Task Force and the Entity Regulation Work Group believed the rigorous application process, the code of conduct (including requiring that the licensee have an internal compliance attorney), and the stiff sanctions are necessary to ensure lawyer independence, client confidentiality, and, perhaps most important, protect consumers.

Assuming an ABS is licensed (which would be a major undertaking based on the application and vetting requirements), the code of conduct requires, among other provisions, that the licensee:

- Not allow the ABS to represent legal clients if doing so results in a conflict of interest;
- Not take any action or engage in activity that interferes with the professional independence of lawyers or others authorized to provide legal services;
- Not do anything that misleads or attempts to mislead a client, a court, or others, either by the entity's own acts or omissions or those of its members or employees; and
- Hold property of legal-services clients separate from the ABS's property, in compliance with ER 1.15.

Failing to comply with the code of conduct or any of the regulatory requirements is not only a ground for disciplinary action against the ABS as an entity but also against its nonlawyer members, "who each have the same responsibility for ensuring ethical legal services for clients." ABS Code of Conduct, ACJA § 7-209(K). ACJA § 7-209(K)(2) emphasizes this by making any manager, economic-

interest holder, or decision-maker in a licensed ABS *individually* responsible for the ABS complying with the code of conduct.

In addition, the ABS's required compliance lawyer also will be *individually* responsible for ensuring that the ABS and all managers, owners and decision-makers comply with the code of conduct. ACJA § 7-209(K)(3). The compliance lawyer also could be summarily suspended if the compliance lawyer does not take reasonable steps to discharge their duties, including failing to report "any facts or matters reasonably believed to amount to a substantial breach of the regulatory requirements of this code or the ethical and professional obligations of lawyers." ACJA § 7-209(G)(3)(c).

The ABS regulatory system would be able to audit ABS license holders to make sure they are complying with the rules and refer those out of compliance to the State Bar for investigation and possible prosecution. ACJA § 7-209(D)(3)(b)(3).

If an ABS or its members are found to have engaged in misconduct, possible sanctions include revocation or suspension of the ABS's license; reprimand; admonition; probation; restitution; disgorgement of profits; *and civil fines up to $1 million*. ACJA § 7-209(H)(2).

The rigorous regulatory framework is necessary to ensure that nonlawyers – either individuals or entities – are regulated and liable for misconduct and resulting harm if they choose to own all or part of a law firm. As a result, as envisioned by the Task Force and the petition, a nonlawyer ABS owner will not be able to engage in misconduct and inflict harm and then walk away without suffering repercussions.

3. Issue: A lawyer or a nonlawyer in an ABS firm could have an ownership interest in the opposing firm or the opposing party.

Eliminating the ban on nonlawyer ownership of law firms could open the door to a wide range of ownership scenarios, from one as simple as a law firm granting

its long-time nonlawyer administrator a partnership to one as complex as a conglomerate buying and operating a law firm.

Few conflicts may arise if the long-time nonlawyer administrator becomes an owner. Those that do, more than likely than not, would be similar to conflicts that already arise, such as a lawyer having conflicting nonlawyer business interests or being related to someone who works for the adverse party or opposing law firm.

But the conglomerate buying and operating a law firm could indeed be problematic. For example, if the conglomerate also owns an insurance company, and the law firm the conglomerate owns represents a client adverse to the insurance company, then the same huge entity owns the ABS *and* the opposing party. The ABS would have an ownership interest in the opposing party.

The Task Force and the petition proposed addressing this issue – an ABS owning an interest in the opposing party – with a new subsection (f) to ER 1.10, which deals with imputing conflicts. As proposed, the new subsection would disqualify a law firm if a lawyer or nonlawyer in the firm owned all or part of any opposing party.

In the example above, the involvement of the conglomerate also could have implications for a private lawyer that represents the conglomerate-owned insurance company. If that lawyer happened to own 10 shares of stock in the conglomerate, then that lawyer would have an ownership interest not in the opposing party but in the opposing law firm.

After the petition was filed, the Entity Regulation Work Group analyzed these issues and has concluded that proposed ER 1.10(f) drew a clear line that was too simplistic and impractical. In particular, the Work Group decided that the scale of ownership – in either the opposing party or the opposing law firm – or existence of management authority should be relevant to determining whether a lawyer or nonlawyer, and possibly the rest of the firm, has a conflict.

The Work Group concluded that instead of the proposed ER 1.10(f), the conflicts that arise when a lawyer or a nonlawyer owns an interest in either the opposing party or the opposing law firm or has dual management authority should be part of ER 1.7, which deals with current-client conflicts.

First, to address a lawyer or a nonlawyer in one firm having an ownership interest or management authority in the *opposing firm*, the Work Group proposed adding to ER 1.7 a new subsection (c):

> A lawyer may not represent a party in asserting a claim against another party represented by a firm if the same person or entity holds, directly or indirectly, an ownership interest of 10 percent or more, or has managerial authority comparable to that of a partner, in the lawyer's firm and the other firm.

As a result of this new subsection, it would be a nonwaivable conflict for a law firm if any of its lawyers or nonlawyers have a 10-percent or more ownership interest or if they have dual management authority in firms on both sides of a matter. A proposed new comment explains that the conflict of a lawyer or a nonlawyer who has less ownership or does not have dual management authority would be determined based on the general conflict provisions of ER 1.7(a) and (b).

Second, if a lawyer or other owner of a firm has a financial interest in an *opposing party*, the interest will be considered a personal interest that would not be imputed to other lawyers in the firm unless the personal interest would materially limit the other lawyers' independent professional judgment. Even if the personal-interest conflict would not be imputed, the lawyer would need to disclose the interest to the firm's client and obtain the client's informed consent, confirmed in writing, to proceed with the representation.

This Reply and Final Amended Petition adopts the Entity Regulation Work Group's substitute proposal to add language to ER 1.7. It therefore eliminates the

proposed ER 1.10(f) provision and substitutes the proposed ER 1.7 language (See Appendix 1).

4. Issue: Protecting the confidentiality of client information if nonlawyers own the law firm.

The Task Force and the original petition proposed extending a lawyer's duty of confidentiality to all clients of an ABS, regardless whether those clients receive legal or nonlegal services. Under that proposal, if, for example, an accountant who owned an interest in a law firm provided nonlegal services to accounting clients of the firm, those clients would be entitled to the same confidentiality as the firm's legal clients. In other words, information pertaining to the representation of all clients of an ABS would be treated the same — as confidential. A lawyer in an ABS thus would need to make reasonable efforts to prevent inadvertent or unauthorized disclosure of confidential information about all firm clients, even if the services the firm provides to the client are purely nonlegal.

The Task Force and the original petition proposed amending ER 1.6(e) to state:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client, even if the firm provides the client with only nonlegal services.

Comments [1], [5] and [22] also would be amended accordingly.

In recommending this change, the Task Force recognized it would be "imperative to protect clients and the confidentially of representations" and explained that the proposed amendment "preserves that protection and clarifies that regardless whether a client is receiving legal services from a lawyer or receiving nonlegal services from a nonlawyer, the traditional protections of the client's information apply to all aspects of the business."

Upon further consideration, the Entity Regulation Work Group concluded that it would be unnecessary to require that lawyers in an ABS firm make reasonable efforts to prevent the inadvertent or unauthorized disclosure of information relating to a nonlegal client who receives nonlegal services from a nonlawyer. Lawyers in an ABS should not be obligated to make reasonable efforts that the nonlawyers in the firm protect the confidentiality of information relating to the nonlegal services they provide to their clients. Only client information obtained in the attorney-client context would fall within ER 1.6.

With the amendment to ER 1.6, the policy question arose as to whether ER 5.3, which governs lawyers' responsibilities over nonlawyers in the firm, should apply only to nonlawyers in an ABS who either are engaged in ABS activities that are part of an attorney-client relationship (such as paralegals and lawyer assistants) or to those who have access to attorney-client confidential information. Some nonlawyers in an ABS may have no involvement in the delivery of legal services at all and may be members of other professions that have their own ethical responsibilities to ABS customers. For example, an ABS may include CPAs who may have clients of their own – clients that receive only CPA services and no legal services. Those professionals do not need to adhere to the lawyer's ethical obligations, unless they have access to lawyer client confidential information.

The Entity Regulation Work Group recommended avoiding overly restrictive provisions by limiting ER 5.3 to its traditional application: protecting lawyer clients, not extending to customers of an ABS who have no attorney-client relationship with any lawyer within an ABS. Extending the ethical duty of confidentiality to include protecting information about these ABS customers appeared to be overly inclusive and unnecessary.

To achieve this, the Work Group recommended eliminating the Task Force's proposed amendment to ER 1.6(e) and, instead, proposed a slightly revised amendment to ER 5.3:

~~With respect to a nonlawyer employed or retained by or associated with a lawyer:~~

~~(a)~~ ~~a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;~~.

(a ~~b)~~ ~~a lawyer having direct supervisory authority over the nonlawyer~~ A lawyer in a firm shall make reasonable efforts to ensure that the ~~person's~~ ~~conduct~~ firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and who have access to attorney-client information is compatible with the professional obligations of the lawyer.~~; and~~ Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and

(2) to ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of an attorney comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and

maintaining the confidentiality of all lawyer client information protected by ER 1.6.

(b) A lawyer having supervisory authority over a nonlawyer within or outside a firm shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(1) Reasonable efforts include providing to nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment or retention, particularly regarding the obligation not to disclose information relating to the representation of the client.

(2) Measures employed in supervising nonlawyers should take into account that they may not have legal training and are not subject to professional discipline.

(3) When retaining or directing a nonlawyer outside the firm to assist in the lawyer's delivery of legal services, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

(The remainder of ER 5.3 would be as the Task Force and the petition proposed.)

This Reply and Final Amended Petition adopts the Entity Regulation Work Group's substitute proposal for ER 5.3, sections (a) and (b) (see Appendix 1). The final amended petition strikes the language that extended the ethical rule to client information if the client received only nonlegal services from a nonlawyer in the ABS.

5. Objection: The compliance lawyer should be an "authorized person" to have sufficient control and clout within the ABS.

As proposed, an ABS would have to have a compliance lawyer who would be required to "take all reasonable steps" to ensure, among other things, that the lawyers in the ABS act ethically and that the ABS's "authorized persons" comply with their obligations. The compliance lawyer will be required to be a manager or an employee of the ABS but need not be an "authorized person," who the regulations define as someone who owns a 10-percent or more economic interest in the ABS or who has the "legal right to exercise decision-making authority" on the ABS's behalf. ACJA § 7-209(A).

The State Bar has suggested that the compliance lawyer must be an "authorized person" to have sufficient control and authority within the ABS.

The Entity Regulation Work Group concluded it would be unnecessary for the compliance lawyer to be an "authorized person" to effectively discharge their duties. The compliance lawyer need not have an ownership interest in the ABS nor have decision-making authority to establish policies and procedures within the entity to assure that nonlawyer owners and managers comply with the ABS code of conduct.

In fact, the compliance lawyer might be more objective about whether the ABS has complied with the regulatory framework if they are not part of the ownership structure.

6. Objection: Elimination of ER 5.7

The State Bar questions the proposal that ER 5.7 be eliminated. Under ER 5.7, and depending on the circumstances, a lawyer may be obligated to provide the recipient of "law-related services" the full panoply of protections enjoyed by the lawyer-client relationship:

> [L]awyers and law firms are allowed to offer law-related services through ownership or operation of separate consulting entities—so-called "ancillary businesses." The rule neither touts nor criticizes such enterprises but instead uses a "safe harbor" approach through which lawyers may provide law-related services—without requiring the business to comply with all legal ethics rules—by clearly distinguishing for customers how the ancillary business differs from the provision of legal advice and making clear what protections customers will and will not have that clients of attorneys enjoy.

ABA/BNA Lawyers Manual on Professional Conduct § 91:401 (construing American Bar Association Model Rule 5.7, which does not differ in substance from Arizona's ER 5.7).

The Task Force concluded that, in light of its recommendation to eliminate ER 5.4 and thus allow lawyers to partner with nonlawyers, ER 5.7 seemed unnecessary and restrictive of innovation.

Retaining it, in fact, would complicate the concept and effect of allowing nonlawyer ownership.

For example, if ER 5.4 is eliminated, then a lawyer and an accountant could be partners. In their partnership, the lawyer could provide legal services to law clients, and the accountant could provide accounting services to accounting clients. But "accounting" is considered a law-related service (ER 5.7, comment [9]), and the accounting services would be provided "in circumstances that are not distinct from the lawyer's provision of legal services." As a result, the lawyer would be obligated to accord that accounting client the protections of all of the Ethical Rules that apply to the client-lawyer relationship – even though the lawyer does not provide any legal services to the accounting client.

This directly conflicts with, for example, this final amended petition's proposal, described above, that lawyers in an ABS should not be obligated to make

reasonable efforts that the nonlawyers in the firm protect the confidentiality of information relating to the nonlegal services they provide to their clients.

ER 5.7 simply will not work when lawyers are able to partner with other professionals who may provide nonlegal services to nonlegal clients. The rule is intended to avoid confusion regarding the protections a client can expect when that client receives law-related services, but it would only promote confusion under the proposed paradigm.

7. Issue: Additional amendments to proposed rules

- Rule 43, Ariz. R. Sup. Ct., which governs trust accounts, has been amended to reflect the proposed change in the definition of "firm" in ER 1.0(c) so that it would apply to ABSs holding legal services client funds.
- ACJA § 7-209 now reflects that persons denied admission to practice of law, disbarred from practice, or currently suspended from practice cannot be an authorized person in an ABS.[11]

II. Proposed new category of legal-service provider

A. Establishing a new paraprofessional category is viable and justified, despite Washington's decision to end its program.

The Washington Supreme Court voted earlier this month to end its Limited License Legal Technician (LLLT) program, which it called an "innovative attempt to increase access to legal services" that it created in 2012.[12] The Washington court said it had determined that the LLLT program was "not an effective way" to increase access to legal services because of the "overall costs of sustaining the program and the small number of interested individuals."

[11] These persons also would not be eligible to be compliance lawyers because compliance lawyers must be active lawyers.

[12] June 5, 2020, letter from Chief Justice Debra L. Stephens to Washington State Bar Association and Limited Licensed Legal Technician Board leaders.

Washington's action, however, should not deter Arizona's efforts to create a paraprofessional category of legal-service provider.

The Task Force deliberately did not pattern its paraprofessional proposal on Washington's LLLT program, in part because of that program's high experiential learning requirement. Although Washington required only an associate's degree in a paralegal program as base education, it also required 15 additional credits at an ABA-accredited law school plus 3,000 hours working under the supervision of a licensed lawyer.

The Task Force's proposal also differed from Washington's program in that Washington did not allow its LLLTs to represent clients in court.

If the Court adopts this new legal-service provider category, it would join Ontario, Canada, and Utah in licensing nonlawyers to provide limited legal services.

B. Specific issues and objections raised by commenters and stakeholders

1. Issue: Name of new legal-service provider

Some sources have suggested that "limited license legal practitioner" is a cumbersome name for the proposed new tier of legal-service providers. Several participants in Arizona Town Hall events, particularly members of legal aid agencies, nonprofits serving the under-represented, and law librarians, commented that the name or even the acronym "LLLP" would be difficult for many self-represented litigants to remember.

Therefore, three additional names should be considered: "legal practitioner," "independent licensed paralegal" and "licensed paralegal."

When the Task Force debated potential names for the new tier of legal-service provider, the simpler title "legal practitioner" garnered significant support. The name

was not adopted, however, because some Task Force members noted that – technically speaking – lawyers are "legal practitioners."

"Legal practitioner" is nonetheless a viable candidate, and not only because it is a simpler name. This petition proposes creating a second tier of legal practitioner – one that is distinct from lawyers by name and scope of practice. More importantly, by virtue of the nurse practitioner model, the public may quickly understand that the legal practitioner is one who works in the legal field but is not a full-fledged lawyer.

Members of the Entity Regulation Work Group, which was tasked with developing the regulatory framework for the ABS proposal, endorsed the name "legal practitioner" for the same reasons. That work group, which included former Task Force members and lawyers from other states and countries, concurred that the name "legal practitioner" would resonate with the public better, because "legal practitioner" is part of the already existing name being used. The more abbreviated and focused name is a logical improvement of the new tier and avoids issues with any label that involve the term "paralegal."

The names "licensed paralegal" and "independent licensed paralegal" also have some attraction. Although these names are shorter than limited license legal practitioner, the term "paralegal" might be problematic. It is widely understood to mean a person working under a lawyer's supervision. Current Rule 31(a)(2)(C), Ariz. R. Sup. Ct., even defines "legal assistant/paralegal" in part as a person "who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule."

In addition, "licensed paralegal" could be confused with "certified paralegal." Several national paralegal organizations certify paralegals by way of examination. That certification is a basis for the pay rate a paralegal can garner in the workplace as well as a basis to support the hourly rate a law firm bills clients or seeks when

petitioning a court for attorneys' fees. Arizona's Phoenix College runs a preparatory course for one of those certification exams; many of its graduates obtain that certification and refer to themselves or list themselves as "certified paralegal," a term that could be conflated with "licensed paralegal." It was suggested that the name "independent licensed paralegal" may avoid the issue of confusion with the term "certified paralegal" because the use of 'independent' may signal to a consumer the person is not working under the supervision of a lawyer.

A number of participants in Arizona Town Hall events noted that the name of the new legal-service provider should not be similar to any other common terminology a lay person would use or be aware of as being used by persons who work in the legal field. The name "licensed paralegal" might lead a lay person to believe the licensed paralegal is being supervised by a lawyer and, therefore, the litigant is receiving the assistance, tangentially, of a lawyer. Because of that, the Task Force opted not to use the word "paralegal" in the name for the new tier.

Recognizing that the term "limited license legal practitioner" is cumbersome and may not easily be remembered or understood by the public, there is support for a new name. Input from the public and various groups that have had a chance to share their thoughts on the topic have suggested that "legal practitioner" be the term chosen. It is shorter, and it does not use the word "paralegal," which avoids potential confusion, misrepresentation to the public, and conflict with the long-established meaning of that term.

2. Issue: Qualifications of new legal-service provider

Several commenters questioned the sufficiency of the licensing requirements for the new legal-service provider. One in particular suggested that a hypothetical new legal-service provider could have only "an online bachelor's degree in music composition and 'additional studies in paralegal studies or certificate programs, plus additional training and experiential learning.'"

Under the proposed regulations, an applicant could meet education requirements in different ways: a four-year degree from an accredited university or college in any subject, plus additional specific paralegal training; a four-year degree in law from an accredited college or university with specific coursework; or a master of legal studies or juris doctor degree from American Bar Association-accredited law schools.

If an applicant has earned an online bachelor's degree in music composition from an accredited college or university, it is indeed possible that that could suffice as the baseline education requirement for the new legal-services practitioner, who also would be required to obtain additional legal-related studies. That same degree also could suffice as the baseline undergraduate requirement for a law student who ultimately becomes a lawyer.

For the first three years of the new legal-services practitioner program, the new Board of Nonlawyer Legal Service Providers (the former Legal Document Preparer Board) could waive the educational requirements for applicants who have completed seven years of full-time substantive law related experience within the 10 years preceding the application.

The new tier of legal-service provider will have education, training, and ethical requirements that exceed those of the many persons who are allowed under the existing numerous Rule 31 exceptions to practice law and nonlawyer real estate professionals allowed to practice real estate law.

3. Issue: Additional amendments to proposed rules

Several rules and code sections have been amended to apply to the new category of legal-services provider:

- Rule 41, Ariz. R. Sup. Ct., now requires that limited license legal practitioners abide by the Creed of Professionalism as amended and applies the concept of "unprofessional conduct" to them.
- Rule 43, Ariz. R. Sup. Ct., which states trust account requirements, now applies to limited license legal practitioners, who as proposed will need to comply with ER 1.15 (safekeeping of property).
- Rule 63, Ariz. R. Sup. Ct., was amended to ensure limited license legal practitioners could be transferred to disability inactive status. This provides additional necessary protections to the public.
- Rules 66-67, Ariz. R. Sup. Ct., were amended to include the new legal-services provider in conservator rules so that the State Bar may initiate conservatorship proceedings against them if necessary.
- ACJA § 7-210 now reflects, consistent with proposed Rule 31.3(e)(4), that suspended and disbarred lawyers can be licensed as the new nonlawyer legal service provider only with Supreme Court approval, which is the same process used for legal document preparers.
- ACJA § 7-210 has been clarified to provide that lawyers who may also be licensed as the new nonlawyer legal provider must report if they have been suspended or disbarred to the new Board of Nonlawyer Legal Service Providers (the former Legal Document Preparer Board) and to the State Bar.
- New ACJA § 7-210(K) was added (moving existing (K) Fee Schedule to (L)) to create the nonlawyer legal services provider/client privilege.

III. Other proposals

A. Issue: The petition proposes to eliminate part of ER 1.5(e)'s current criteria for dividing a fee.

ER 1.5(e)(1) provides that two lawyers in different firms have two alternatives for dividing one legal fee. The two may assume joint responsibility for the representation, or they may divide a fee in proportion to the services they perform. The State Bar questions the proposal to eliminate the joint-responsibility option.

One of the Task Force's work groups spent considerable time discussing impediments to limited-scope representation. In the course of addressing that topic, the work group was advised that a lawyer who has a small or narrow role in a case may be reluctant to divide a fee if the lawyer must assume joint responsibility for the entire representation. The joint-responsibility option was therefore thought to be an impediment to lawyers putting together teams to handle matters.

The proposed amendment deletes the alternative grounds and instead requires, among other things, the lawyers to disclose to the client, in writing, the basis for division of the fees and obtain the client's consent.

B. Issue: Elimination of many instructional comments

After deciding to recommend eliminating ER 5.4, the Task Force determined that other Ethical Rules needed amendments, with the goal of protecting core values of professional independence, confidentiality of client information, and conflict-free representation. In the course of making those changes, the Task Force also approved moving some content from the comments into the rules themselves and eliminating comments where possible.

The State Bar has objected to comments being deleted, in part due to the existence of limited caselaw on the Ethical Rules, and believes that some content, moved to the rule, does not reflect the meaning of the comment or is inadequate to replace existing comments.

The Entity Regulation Work Group discussed the State Bar's objections and, other than the substantive changes to the ERs 1.6, 1.7 and 1.10 proposals as discussed above, decided against recommending any further changes.

C. Proposed restyling of Rule 31

Two comments, one filed by the Scottsdale City Prosecutor's Office and one filed by the Arizona Corporation Commission, directly addressed the proposed restyling of Rule 31, Ariz. R. Sup. Ct.

The Scottsdale City Prosecutor objected to amendments to Rule 31.3(c)(3) because they would "vastly expand" the existing rule, Rule 31(d)(3). In support of its objection, the Scottsdale City Prosecutor cited Arizona case law for the proposition that a corporation may appear in court only through counsel. However, its citation to *Ramada Inns v. Lane and Bird Advert., Inc*.[13], is not controlling because that case preceded amendments to Supreme Court Rule 31(d), which expressly permits a corporation to appear in a justice or police court by an authorized, nonlawyer- representative. The citation to the more recent cases of *State v. Eazy Bail Bonds*[14] and *Boydston v. Strole Dev. Co*.[15] are also not controlling because those cases involved a corporation's appearance in the superior court, whereas the subject of proposed Rule 31.3(c)(3) concerns a corporation's appearance in limited jurisdiction courts. The citation to *Rowland v. California Men's Colony*[16] is similarly misplaced because that case involved the interpretation of a federal statute by a federal court, a subject that is well outside the scope of R-20-0034.

More to the point, the Scottsdale City Prosecutor's comment says, "In fact, Rule 31(d)(3), which the proposed Rule 31.3(C)(3) would significantly expand, only applies to Justice Courts and police courts, not municipal courts, and even then, in very limited circumstances." Indeed, the current rule refers to "justice courts and

[13] 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967).
[14] 224 Ariz. 227, 229, 229 P.3d 239, 241 (Ct. App. 2010).
[15] 193 Ariz. 47, 50, ¶ 12, 969 P.2d 653, 656 (1998).
[16] 506 U.S. 194, 201-02 (1993).

police courts," rather than to municipal courts. But "police court" is an antiquated term in Arizona. A police court in the current vernacular is a municipal court. The Supreme Court's website[17] recognizes that usage, saying that "Limited jurisdiction courts are justice and municipal (or city) courts." The levels of courts in Arizona no longer include a police court. The webpage includes a mention to the establishment of police courts more than a century ago, but it also includes a parenthetical reference to the modern term: "1913: The Arizona Legislature established police (municipal) courts for each of the state's incorporated cities and towns." Although there still might be a few antiquated references to an Arizona "police court," virtually all city and town courts, including the one in Scottsdale, reference themselves as municipal courts. A rule amendment changing "police courts" to "municipal courts" is a modernization of terminology rather than a substantive change. See further A.R.S. Title 22, as well as A.R.S. § 28-2552, which describes the jurisdiction of municipal and justice courts but makes no references to police courts.

The second comment, filed by the Arizona Corporation Commission ("Commission"), raised six issues, five involving substantive language changes. Four of those suggestions were incorporated into the Final Amended Petition, each addressed below in (a) through (d).

(a) The Commission noted that in Rule 31.3(c)(1), the definition of "legal entity" should be revised to include federal, state, county, municipal, and tribal governmental entities. It is not uncommon for a federal government entity or a tribal entity to desire representation by an individual licensed as an attorney in another jurisdiction. Additionally, small municipal entities may prefer to rely on lay employees for representation rather than outside counsel for budgetary reasons. This

[17] https://www.azcourts.gov/AZ-Courts.

proposal seems reasonable, and a change to Rule 31.3(c)(1) to include "or a governmental or tribal entity" was made.

(b) The Commission requested that "the Arizona Corporation Commission" be removed from proposed Rule 31.3(d)(5), as the Commission is not involved in tax-related proceedings, and its inclusion there invites confusion. This was a matter that the Task Force discussed at length – debating whether to exclude the Commission because there was no evidence they were involved in tax-related proceedings. However, in an effort to avoid making substantive changes, the Task Force left the reference to the Commission in Rule 31.3(d)(5) as it was in the original Rule 31 language. Having now heard directly from the Commission that they are not involved in tax-related proceedings, the amendment was made.

(c) The Commission suggested that the "full-time" requirement in Rule 31.3(c)(5)(A) should be deleted, noting a number of smaller utilities primarily use part-time employees in their operations. The Commission suggested that an individual's status as "full-time" with a legal entity does not necessarily correlate with an enhanced ability to represent the legal entity effectively in a hearing or other administrative proceeding. Staff reviewed the suggestion noting that the Task Force had discussions about concerns around an entity hiring someone on a part-time basis to do nothing else than represent the entity. However, it was noted that subpart (C) should take care of that issue as it requires that "such representation is not the person's primary duty to the entity but is secondary or incidental to other duties relating to the entity's management or operation." As such, the phrase "full-time" was deleted from Rule 31.3(c)(5)(A).

(d) The Commission requested that a revision be made in Rule 31.3(c) to allow for the preparation and filing of technical or financial documents by qualified nonlawyers. A change was made to this final amended petition to add a new subsection (c)(6) and renumber existing (c)(6) as (c)(7).

The new (c)(6) reflects the normal practice of utilities and other legal entities regulated by the Commission that are required to prepare and file or submit with the Commission technical or financial documents, such as tariffs, rate schedules, or engineering reports, often through hired consultants rather than attorneys of the employees of the regulated entity. Regulated entities also may be required to submit such technical or financial documents to a Commission Division directly. The Commission noted that in the case of utilities, this is true largely because public utility operation and regulation is a complex and niche field, and it can be difficult for utility personnel to develop the level of regulatory expertise that experienced consultants have acquired. For smaller utilities, of which there are hundreds in Arizona, the training necessary to develop such expertise generally is cost prohibitive, as is hiring an attorney. For out-of-state competitive telecommunications utilities, which commonly operate throughout the United States, it is often most efficient to have one consulting company oversee regulatory compliance for all operations. Also, and importantly, the education, training, and experience of most attorneys does not impart the knowledge and expertise necessary to prepare such technical or financial documents.

The Commission noted that the preparation of the document by a nonlawyer consultant appears to constitute the unauthorized practice of law ("UPL") under the current Rule 31(b)(3) and (5). Likewise, under the current Rule 31(b)(2), the act of filing such a document in a Commission docket or submitting such a document to a Commission division can be viewed as representing the utility in an administrative proceeding and thus UPL. The Commission believed that it would be beneficial to the regulated entities and the public interest to facilitate regulated entities' use of experienced nonlawyers, including consultants, for the preparation and filing of technical or financial documents. The Commission further believed that the cost

savings to affected utilities (from not being required to hire attorneys) would flow through to the customers of those affected utilities in rates.

Administrative Office of the Court staff tasked with assisting the Task Force with restyling Rule 31 reviewed the Commission's proposed language and reasoning. It was noted that current Rule 31(d)(28) had special provisions for appearances before the Commission, and removing them, as the proposed restyling had done, without providing adequate substitute provisions could do a disservice to the Commission, to those who appear before it, and to customers of these entities. Therefore, the proposed language from the Commission for the new (c)(6) was reviewed, revised to fit with current restyling guidelines, and shared with the Commission. Assistant Chief Administrative Law Judge Sarah Harpring noted that the Commission's goal was to ensure that a nonlawyer expert's preparation, submission, or filing of the document and the amendment provided in this final amendment petition was acceptable if it was understood that was the meaning of the change.

Finally, an amendment was made to Rule 31.1. In reviewing Rule 31 as restyled and the comments offered by the public, staff noted that a provision was added to Rule 31.1 after the initial restyling effort to accommodate the regulation of alternative business structures. The proposed rule therefore reflected the following section titles:

a) Requirement

b) Alternative Business Structures (ABS)

c) Lack of Good Standing

Because "good standing" is a term that is found in section (a), and a lack of good standing as described in section (c) directly relates to the term's use in section (a), these sections were reordered to reflect this relationship as follows:

a) Requirement

b) Lack of Good Standing

c) Alternative Business Structures (ABS)

III. Conclusion

The Task Force and subsequent work groups — formed to develop the regulatory framework for these proposed fundamental changes to the *business* of law as well as the *practice* of law in this state — have given considerable time and consideration to developing rules and regulations that will continue to protect the public.

Resistance and anxiety by lawyers should not deter the Court from adopting and implementing the Task Force's recommendations. the substantive comments and input received to this petition, as well as all concerns raised by commenters, have been carefully considered in drafting additional amendments during the pendency of this petition to further advance the dual goal of increasing access to legal services and protecting the public.

DATED this 22nd day of June, 2020.

___/s/_____
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