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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), 46-51, 54-58, 60, 75 and 76, ARIZ. R. SUP. CT., and ADOPT NEW RULE 33.1, ARIZ. R. SUP. CT.	Supreme Court No. R-20 - ___

I. Introduction

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Petitioner petitions the Court to abrogate and amend Rule 31; amend Rules 32, 41, 42 (ERs 1.0, 1.5-1.8, 1.10, 1.17, 5.1, 5.3, 5.4, and 5.7), 46-51, 54-58, 60, 75 and 76, Ariz. R. Sup. Ct.; and adopt new Rule 33.1, Ariz. R. Sup. Ct.

[1] Mr. Byers files this petition in his capacity of a member of the Task Force and as chairman of the workgroup established to develop proposed rule changes to accomplish entity regulation.

This petition proposes substantial rule changes to implement recommendations resulting from the Task Force on the Delivery of Legal Services extensive review, fact-finding and analysis of the changing consumer legal market and the well-documented access-to-justice gap.[2] This petition includes rule changes developed through a subsequent workgroup on entity regulation established at the recommendation of the Task Force.[3]

The bulk of this petition focuses on the Task Force's recommendation that the Court eliminate Ethical Rule (ER) 5.4 of the Arizona Rules of Professional Conduct, Rule 42, Ariz. R. Sup. Ct., which in general bars lawyers from sharing legal fees with nonlawyers or forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. The petition requests that the Court adopt a framework for regulating what would be called an "alternative business structure" (ABS) — an entity that provides legal services to third parties and in which a nonlawyer has an economic interest or decision-making authority.

Arizona's ER 5.4, which is the same as the American Bar Association's Model Rule 5.4, reflects the nearly-century-old general prohibition on nonlawyers owning any interest in a law firm. Eliminating the rule would mean, for example, that a professional nonlawyer administrator in a law firm could have an ownership interest

[2] The Task Force's October 4, 2019, report and recommendations and other Task Force information is available at https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force.
[3] *See* Task Force report at 14.

or that a Fortune 500 company could be a passive investor. It also could mean that a law firm could attract nonlawyer talent, such as technologists, marketers, and business systems analysts, by providing equity in the firm.

The Task Force concluded that eliminating the rule would encourage innovation in the delivery of legal services. Innovation, in turn, may help bridge the access-to-justice gap as lawyers, technology companies and others would be less constrained by an artificial restriction.[4]

To protect core values of professional independence, confidentiality of client information, and conflict-free representation, this petition proposes that an ABS be required to identify a compliance attorney who would be responsible for establishing policies and procedures within the entity to assure that nonlawyer owners and managers comply with the Arizona ethical rules that govern these core concepts. In addition, the ABS will be required to be licensed, and only active lawyers who are part of the ABS will be able to provide legal services. Licensure as an ABS does not entitle the ABS itself to practice law; rather, licensure creates the ability of nonlawyers and lawyers to jointly own a legal practice.

This petition also proposes expanding the universe of legal professionals in Arizona by adopting a new category of nonlawyer legal-service provider: the limited license legal practitioner ("LLLP"). An LLLP could appear in court and

[4] *See* Task Force report at 10.

administrative hearings in limited practice areas. LLLPs would become affiliate members of the State Bar of Arizona for regulation and discipline purposes. For context, an LLLP in some ways would be similar to a nurse practitioner, an innovation implemented decades ago that is now an integral part of the delivery of medical services. The purpose of creating this new tier of licensed legal service provider is to fill a gap that exists between medium- and low-income individuals needing legal services and the cost of securing those services from the traditional legal market. LLLPs will be required to meet education, examination, and licensure requirements that are greater than what LDPs must meet and LLLPs will therefore be able to provide legal assistance to a portion of the population that LDPs cannot.

The creation of LLLPs is not the first instance Arizona has allowed nonlawyers to provide legal assistance. Decades ago Arizona voters authorized real estate agents to engage in limited scope practice of law by conveying real estate without requiring an attorney to draft the contract, a requirement that still exist in many states. In Arizona, it is now routine to conduct what is often the largest economic transaction in which a person will be involved without an attorney but instead with a nonlawyer real estate agent. This example demonstrates that nonlawyers can successfully deliver legal services in limited areas if trained and regulated properly.

Moreover, Arizona is not the first U.S. jurisdiction to consider licensing nonlawyers to provide limited legal services and appear in court. Washington adopted what it calls "Limited License Legal Technicians" in 2012 and Utah established its program for "Licensed Paralegal Practitioners" in 2018.[5] In fact, Arizona's Legal Document Preparer program, (LDPs), which took effect in 2003, was one of the first programs to allow nonlawyers to provide limited legal services. Today, 600 LDPs are certified in Arizona.

This petition also proposes a restyling and reorganization of Rule 31.

II. Background

Arizona Supreme Court Administrative Order 2018-111, issued November 21, 2018, charged the Task Force on Delivery of Legal Services with "review[ing] the regulation of the delivery of legal services in Arizona." The order specifically noted that "consumers often rely on sources other than lawyers for legal information or other assistance and that lawyers increasingly are providing services other than through traditional legal partnerships or professional corporations."

To that end, the order directed the Task Force to:

> a. Restyle, update, and reorganize Rule 31(d) of the Arizona Rules of Supreme Court to simplify and clarify its provisions.

[5] The Bar Examiner, "Limited Practice Legal Professionals: A Look at Three Models," available at https://thebarexaminer.org/article/winter-2018-2019/limited-practice-legal-professionals-a-look-at-three-models/ (winter 2018-19).

b. Review the Legal Document Preparers program and related Arizona Code of Judicial Administration requirements and, if warranted, recommend revisions to the existing rules and code sections that would improve access to and quality of legal services and information provided by legal document preparers.

c. Examine and recommend whether other nonlawyers, with specified qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, administrative hearings not otherwise allowed by Rule 31(d), and family court matters.

d. Review Supreme Court Rule 42, ER 1.2 related to scope of representation and determine if changes to this and other rules would encourage broader use of limited scope representation by individuals needing legal services.

e. Recommend whether Supreme Court rules should be modified to allow for co-ownership by lawyers and nonlawyers in entities providing legal services; and,

f. In the Chair's discretion, consider and recommend other rule or code changes or pilot projects on the foregoing topics concerning the delivery of legal services.

The Task Force responded to its charge by recommending amendments to the Ethical Rules in Rule 42 and other Supreme Court rules; amendments to the Arizona Code of Judicial Administration (ACJA); and other administrative changes.[6]

The Task Force presented its recommendations to the Arizona Judicial Council ("AJC") on October 24, 2019. The AJC accepted all recommendations of the Task Force.

[6] *See* Task Force report at 3-5.

This petition addresses the Task Force's recommendations responding to the Court's assignments to review and clarify Rule 31(d); examine whether nonlawyers should be licensed to provide legal services; and consider nonlawyer ownership of legal-service entities.[7]

After adoption of the Task Force's report and recommendations a workgroup was formed to explore the technicalities of regulating alternative business structures. The workgroup was convened to propose rule changes under which alternative business structures would be regulated. The workgroup also proposed a regulatory framework, code of conduct, and disciplinary sanctions for ABSs that will be encompassed in a new section of the Arizona Code of Judicial Administration.[8]

The workgroup also gave input on amendments to rules that would accomplish the regulation of the LLLP. While most LLLP regulation will be in the ACJA, this petition includes recommendations for incorporating necessary references to LLLPs in jurisdictional and procedural rules. The Administrative Office of Courts has begun the process of convening other workgroups to identify the practice areas, scope of practice, educational requirements, licensing and

[7] In addition to the rule changes proposed in this petition, the Task Force also recommended amending ERs 7.1 through 7.5 (information about legal services) and amending Rule 38(d), which deals with law practice by clinical law professors and law students. Those rule changes are the subjects of petitions R-20-0030 and R-20-0007, respectively.

[8] The ACJA code section proposal will be filed shortly after the filing of this rule petition and a link to the code section proposal will be provided in the Rules Forum. ACJA code section proposals are open for public comment.

examination requirements and ethical code for LLLPs. Therefore, the proposed amendment to rules in this petition would not be triggered until after development, posting, and adopting of those regulatory requirements.[9]

A clean version of the proposed amendments for Rule 42, ERs 1.0 through 5.7, is attached at Appendix 1A and a markup version of the proposed amendments is attached at Appendix 1B.

A clean version of the proposed amendments to Rules 31 through 76 is attached at Appendix 2A, and a markup version of the proposed amendments is attached at Appendix 2B.

III. Nonlawyer-ownership-related Ethical Rule proposals

A. Eliminate ER 5.4

The cornerstone of the Task Force's recommendations regarding "co-ownership by lawyers and nonlawyers in entities providing legal services" was eliminating ER 5.4, which in general prohibits lawyers from sharing legal fees with nonlawyers, prohibits nonlawyers from having any financial interest in law firms, and prohibits a lawyer from forming a partnership with a nonlawyer if any of the partnership's activities consist of the practice of law.

[9] An ACJA code section proposal containing the regulatory requirements for the LLLP program will be filed and open for public comment in the Spring of 2020.

This petition proposes that ER 5.4 be eliminated because no modern compelling reason for maintaining the rule exists. ABA Model Rule 5.4 and its predecessor rules as far back as the 1928 Canons of Professional Ethics "originated in legislation aimed at forbidding lawyers from being employed by corporations to provide services to members of the public."[10] This prohibition was not rooted in protecting the public but in economic protectionism. There was "no evidence that the corporations then supplying lawyers to clients were harming the public, and the transparent motivation behind the legislation was to protect lawyers' business."[11]

Today, Model Rule 5.4 is "directed mainly against entrepreneurial relationships with nonlawyers."[12] As a result, it has been identified as a barrier to innovation in the delivery of legal services and contributing to the justice gap.[13]

It purportedly "protect[s] a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers"[14] but other rules provide that protection. ER 1.7 prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to a third person – a nonlawyer investor, for example. And ER 1.8(f)

[10] Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 Akron L. Rev. 599, 618 (2013).
[11] *Id.*
[12] ABA Formal Ethics Opinion 01-423 (2001).
[13] Task Force report at 10.
[14] ABA Op. 01-423.

directs that third-party payers (such as insurance companies) cannot interfere with a lawyer's independent professional judgment or the client-lawyer relationship.

The general concept of nonlawyers owning law firms is not new. Insurance companies often employ staff lawyers – sometimes called "captive counsel" – who function as law firms to represent insureds, not as in-house counsel who provide legal services to the insurance company.[15] In that situation, a nonlawyer – the insurance company – employs lawyers who provide legal services to third parties (the insureds).

Arizona would not be the first U.S. jurisdiction to explicitly allow nonlawyer ownership by rule. For three decades, Washington D.C. has allowed an "individual nonlawyer who performs professional services [that] assist the organization in providing legal services to clients" to have a financial interest or managerial authority in a law firm under limited circumstances. That jurisdiction explains that it "liberaliz[ed]" Rule 5.4

> *to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee*. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the

[15] ABA Formal Ethics Opinion 03-430 (2003).

> professionals may be given financial interests or managerial responsibility…

D.C. Rule 5.4 comment [7] (emphasis added). Further, Utah recently adopted a two-year pilot "sandbox" program that would allow the formation of alternative business structures and regulate those businesses through an independent regulatory body overseen by the Utah Supreme Court.[16]

Eliminating – not just liberalizing – ER 5.4 means nonlawyers could partner with lawyers in an entity that solely provides legal services or in an entity that provides legal services among non-legal services. A nonlawyer could make a passive investment in a legal-services entity. A lawyer even could pay nonlawyer personnel a percentage of fees earned by the law firm on a particular case.

B. Other Ethical Rule changes necessitated by eliminating ER 5.4

After deciding to recommend eliminating ER 5.4, the Task Force determined that other ERs needed amendments, with the goal of protecting core values of professional independence, confidentiality of client information, and conflict-free representation. The following is a summary of the proposed amendments to other ERs contained in this petition.

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[16] The Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, 15, 21 (2019) available at https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf; "Utah Supreme Court Adopts Groundbreaking Changes to Legal Service Regulation," available at https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/.

1. Terminology

Proposed amendments to ER 1.0 (terminology) incorporate concepts from existing comments to the rule that the Task Force determined were important enough to be part of the rule's text. Amendments also define previously undefined phrases in rules that are necessary to address the new concept of nonlawyers having ownership interests in firms and the potential that nonlawyers in those firms may provide nonlegal services to firm clients.

"Firm" or "law firm": A streamlined definition encompasses "any affiliation," rather than listing types of entities, and is expanded to include "any entity that provides legal services for which it employs lawyers."

"Screened": The definition has been expanded to apply to a nonlawyer with the firm as well as lawyers within the firm. Because the existing definition refers to "reasonably adequate" screening procedures, what constitutes those procedures has been imported from ER 1.0 comments [8], [9] and [10].

"Business transaction": A definition has been created from ER 1.8 comments [1] and [3].

"Personal interests": A definition was created from comments to ER 1.7 and ER 1.8.

"Authorized to practice law in this jurisdiction": This new definition pegs a firm's conduct to Rule 31.

"Nonlawyer": New definition to clarify that a "nonlawyer" could either be a person not licensed as a lawyer in any jurisdiction or a lawyer licensed in another jurisdiction who is not authorized to practice in this jurisdiction.

"Nonlawyer assistant": New definition created from ER 5.3 comment [3].

One definition is proposed to be eliminated: "Partner." The specific term "partner" is no longer relevant if ER 5.4, which contains the prohibition on being partners with a nonlawyer, is eliminated and proposed changes to ERs 5.1 and 5.3 are adopted.

2. Professional independence

ERs 5.1 and ER 5.3 detail the obligations of lawyer owners and managers in a firm.

i. ER 5.1 (Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors)

Amendments to this rule were made in part because a lawyer may hold an ownership interest in a firm in a variety of ways. The rule is no longer limited to a "partner" and instead a broader reference to "ownership interests" was added to the title because of the change in the definition of "firm" in ER 1.0(c) and the elimination of ER 5.4.

As with several other ERs, rule comments that addressed important concepts were integrated into the text of the rule itself. The definition of "internal policies and procedures" was moved from the comment to subsection (a)(1). Subsection (b) now

states that whether a lawyer has supervisory duties over lawyers may vary depending on the circumstances. And, subsection (c) now provides guidance on what constitutes reasonable remedial action. Existing comments to the rule were deleted because of the changes and additions to the rule itself.

ii. ER 5.3 (Responsibilities Regarding Nonlawyers)

A change to the title was made to identify the rule's scope, which now encompasses both nonlawyers in the firm and nonlawyer assistants, who can be inside or outside the firm.

The proposed amendments to ER 5.3(a) instruct that all lawyers in a firm must ensure that the firm has in effect measures that provide reasonable assurance that the conduct of all nonlawyers, including any nonlawyers who have economic interests in the firm, comports with a lawyer's professional obligations.

ER 5.3(a) also now contains two important criteria of "reasonable measures."

First, proposed amendments to ER 5.3(a)(1) require that policies and procedures be designed to prevent nonlawyers 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." This language provides additional protection against nonlawyer owner influence over a lawyer's legal practice.

Second, ER 5.3(a)(2) specifies that policies and procedures must be designed to ensure that nonlawyers avoid conflicts of interest, maintain the confidentiality of all firm client information, and otherwise comport themselves in accordance with a lawyer's ethical obligations. This is another protection against nonlawyer interference.

The amendments to ER 5.3(b) also move important information from the comments to the rule itself resulting in the deletion of those comments. New subsection (b)(1) states what constitutes a direct supervisor's "reasonable efforts." New subsections (b)(2) and (3) require that lawyers be cognizant that nonlawyers may not have legal training and are not subject to professional discipline, and therefore must give directions appropriate under the circumstances. New subsection (b)(4) deals with the allocation of responsibility between the lawyer and the client when the client directs that the lawyer use a particular nonlawyer service provider.

Finally, and perhaps most importantly, new subsection (d) requires that *all* lawyers practicing in firms that include nonlawyer owners or managers must ensure that one firm lawyer has been designated to be responsible for establishing policies and procedures to assure that all nonlawyers comply with the lawyers' ethical obligations.

Further, the forthcoming proposed section of the ACJA requires that ABSs identify on an annual registration statement which lawyer in the ABS is responsible

under ER 5.3(d), similar to how a lawyer required to have a trust account may identify another lawyer in the firm as being responsible for maintaining the trust account. This provides a level of entity accountability to assure that a specific attorney must establish appropriate nonlawyer ethics procedures.

3. Confidentiality of client information: ER 1.6

The Task Force recognized that by eliminating ER 5.4 and allowing lawyers and nonlawyers to partner together to form businesses that might provide both legal and nonlegal services, there would be a heightened need to protect client confidentiality.

ER 1.6(e) currently requires that a lawyer make reasonable efforts to prevent inadvertent or unauthorized disclosure of confidential information about a client. A proposed amendment to subsection (e) adds this obligation even if the services the firm provides to the client are purely nonlegal. The amendment thus clarifies that regardless whether a client is receiving legal services from a lawyer or receiving nonlegal services from a nonlawyer in the same firm, the traditional protections to the client's information apply to all aspects of the business.

4. Conflict-free representation: ER 1.7, ER 1.8, ER 1.10

i. ER 1.7 (Conflict of Interest: Current Clients)

There are no proposed amendments to ER 1.7. However, the concept of personal-interest conflicts addressed in ER 1.7 comment [10] was imported into a

new definition of personal-interest conflict in ER 1.0(o). Existing comment [10] therefore was eliminated.

ii. ER 1.8 (Conflict of Interest: Current Clients: Specific Rules)

The possibility that a firm may provide legal and non-legal services raises the specter of lawyers referring their legal clients to the firm's nonlawyers for services. This is not a new ethical issue, considering that law firms already may provide law-related services and some lawyers have businesses in addition to their law practices. If, however, ER 5.4 is eliminated, and an entity can employ a lawyer to provide legal services to third parties, the referral issue becomes more significant.

The proposed amendment to ER 1.8 adds subsection (m), which states that when lawyers refer clients for nonlegal services provided either by the lawyer or nonlawyers in the firm or refer clients to a separate entity in which the lawyer has a financial interest, they must comply with ERs 1.7 and 1.8(a). This proposed amendment is based on content from ER 1.8 comment [3].

ER 1.8 comments [1], [2], and [3] were deleted. Relevant parts of comments [1] and [3] have been made part of a new definition of "business transaction" in ER 1.0(n). Comment [2] merely restates ER 1.8(a) and is therefore redundant and thus deleted.

iii. ER 1.10 (Imputation of Conflicts of Interest: General Rule)

With the elimination of ER 5.4, nonlawyers would be able to play significant roles in firms, including having ownership interests. Therefore, ER 1.10 should explicitly address imputation of their conflicts to others.

Amendments include deleting comments 1 through 4. Comment 1, which discusses a "firm," is no longer needed in light of the expanded definition of "firm" in ER 1.0(c). Comments 2 and 3 summarize the concepts of imputation, with one important exception that addresses conflicts if a lawyer owns all or part of an opposing party. That exception was expanded to include nonlawyers and was added to the rule's text as subsection (f), which provides that a conflict is imputed to the entire firm if a lawyer or nonlawyer owns all or part of an opposing party.

Comment 4 contains important concepts the task force determined should be part of the rule itself. New subsection (g) therefore allows disqualified nonlawyers to be screened from matters without imputing the conflict to the firm, unless the nonlawyer is an owner, shareholder, partner, officer or director of the firm. Similarly, new subsection (h) allows lawyers to be screened if they are disqualified because of events or conduct that occurred before they became licensed lawyers, unless the lawyer is an owner, shareholder, partner, officer, or director of the firm.

C. Other Ethical Rules impacted and therefore amended

1. ER 1.5 (Fees)

The proposed amendments to ER 1.5 are based on ensuring that the rule's language reflects the change to the definition of "firm" in ER 1.0(c) as well as the elimination of ER 5.4's prohibition of lawyer and nonlawyer co-ownership of businesses providing legal services. The proposed rule also incorporates language from current comments to clearly provide that the rule applies to firms dividing a single billing to a client and firms jointly working on a matter. The rule further requires that division of responsibility must be reasonable.

2. ER 1.17 (Sale of Law Practice or Firm)

Removing the ER 5.4 restrictions on law-firm ownership conceptually impacts ER 1.17, which governs selling a law practice. ER 1.17(a) and (b)'s restrictions on lawyers selling their law practices do not remained viable in light of elimination of ER 5.4.

ER 1.17(a) currently requires that a lawyer who sells all or part of a private law practice stop practicing law – either entirely or in the practice area that has been sold – in the geographic area where the practice has been conducted. This is in part rooted in ER 5.4, which contained explicit exceptions to the ban on sharing fees with a nonlawyer for paying money to a lawyer's estate. ER 5.4(a)(1), (2).

The comments to ER 1.17 contain exceptions that undercut the value of what is effectively an artificial non-compete clause imposed on the selling lawyer. For example, comment [2] explains that a lawyer who sells their law practice but then returns to private practice "as a result of an unanticipated change in circumstances" does not necessarily violate subsection (a).

ER 1.17(b) currently requires that an "entire practice" or an "entire practice area" be sold to one or more lawyers or law firms. The stated reason is to protect "those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters." ER 1.17 comment [6]. The comments, however, contain exceptions that swallow the rule. They recognize that not all of the seller's clients will choose to be represented by the buyer (ER 1.17 comment [2]), and that a purchaser may not be able to take on a particular matter because of a conflict of interest (ER 1.17 comment [6]).

Again, as with other ERs discussed above, amendments encompass moving important information from remaining comments into the rule's text. The amendments require that clients be advised of the purchaser's identity (new subsection (a)(1)) and new subsection (c) requires that the purchaser honor existing fee and scope-of-work arrangements between the seller and client. New subsection (d) requires the seller to give notice to clients before allowing a purchaser to access detailed client information. New subsection (e) requires the seller to ensure that a

purchaser is qualified and new subsection (f) advises that if courts must approve substitution, the matter cannot be included in the sale until obtaining that approval. Finally, new subsection (g) makes the rule inapplicable to transfers of legal representation unrelated to a sale of the firm.

As a result of these changes, all comments were eliminated.

3. ER 5.7 (Responsibilities Regarding Law Related Services)

In evaluating whether to recommend eliminating ER 5.4, the Task Force also considered the viability of ER 5.7. Under that rule, 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.

Considering the recommendation to eliminate ER 5.4, and thus allow lawyers to partner with nonlawyers, ER 5.7 is unnecessary, restrictive of innovation and therefore is eliminated.

IV. Rule 31

As the Court directed, the Task Force reviewed Rule 31(d), which over years has expanded to include 31 exceptions to the general rule that only active lawyers may practice law, thus becoming cumbersome and difficult to navigate.

The Task Force opted to take a holistic view of Rule 31 and proposed restyling and reorganizing the entire rule, not just subsection (d), into four separate rules. This

makes the rule easier to navigate and understand and is consistent with other rule-restyling efforts.

Consistent with the Court's restyling conventions, the new proposed rules use the active voice and eliminate ambiguous words (especially "shall") and archaic terms (*e.g.*, "herein," "thereto"). The rules are also restated in a positive—rather than prohibitory—manner (*e.g.*, "a person may" rather than "a person may not,"; "a person or entity may" rather than "nothing in this rule prohibits").

The workgroup that developed recommended amendments for regulating ABSs and LLLPs did so in the context of the proposed restyled Rule 31. Therefore, the rules included in Appendix 2A and Appendix 2B show the restyled rules – not current Rule 31 —with the ABS additions shown through underlining. Original Rule 31 appears in the Task Force's report at pages 150 through 155.

A. Rule 31 (Supreme Court Jurisdiction)[17]

The changes in proposed Rule 31, which incorporates much of current Rule 31(a), are stylistic, with one major exception.

Although current Rule 31(a) already referred to the Court having jurisdiction over "any person or *entity* engaged in the authorized or unauthorized 'practice of law' in Arizona…" (emphasis added), a sentence has been added to make explicit

[17] Restyling as described led to amendments to Rule 41 (but not substantive changes) to incorporate content deleted from restyled Rule 31.

that the Court has jurisdiction "over any ABS who is licensed pursuant to Rule 31.1(b) and ACJA 7-209." This amendment was necessary because the term "entity' has particular meaning in the existing rules regulating the practice of law and it is ABSs that amendments in the petition are designed to regulate, not traditional law firms.

The restyled Rule 31 does not include all of the content of current Rule 31(a). In particular, three definitions have been omitted:

- "Legal assistant/paralegal" (defined by current Rule 31(a)(2)(C)) was removed as that term is not used in either current or restyled Rule 31.
- "Mediator" (defined by current Rule 31(a)(2)(D)) was not included in the restyled rule. An exception for mediators appears in restyled Rule 31.3(e)(5).
- "Unprofessional conduct" (defined by current Rule 31(a)(2)(E)) was not included because the term is not otherwise used in Rule 31.

This petition recognizes that the definition of "unprofessional conduct" is a cornerstone of lawyer discipline. Therefore, it is proposed that definition be relocated to Rule 41, which lists the duties and obligations of members. Rule 41 also has been amended to specifically incorporate the Oath of Admission to the Bar and the Lawyer's Creed of Professionalism of the State Bar of Arizona, neither of which were previously officially part of a rule.

B. Rule 31.1 (Authorized Practice of Law)

Proposed Rule 31.1 incorporates current Rule 31(b) as Rule 31.1(a).

A new proposed Rule 31.1(b) defines an Alternative Business Structure. Although the criteria for an ABS will be in ACJA 7-209, adding this definition is important to clarify that an ABS must employ an active State Bar member in good standing; must be licensed pursuant to ACJA 7-209; and that legal services only may be provided by authorized persons and in compliance with Court rules.

C. Rule 31.2 (Unauthorized Practice of Law)

Current Rule 31(a)(2)(B) describes the "unauthorized practice of law." Restyled Rule 31.2(a) carries over but broadens the definition of who may engage in the practice of law by acknowledging that lawyers such as registered in-house counsel and out-of-state lawyers admitted pro hac vice may practice law in Arizona.

Restyled Rule 31.2(b) adds "alternative business structure" to the list of descriptions that are reasonably likely to induce others to believe that the person or entity is able to practice law or provide legal services in this state.

D. Rule 31.3 (Exceptions to Rule 31.2)

The most extensive restyling occurs to current Rule 31(d), which the proposed rule denominates as Rule 31.3. Rule 31(d) currently has 31 subsections with little reason to their order.

To make the rule more useful, subsection (d) was reorganized into 10 subsections in proposed Rule 31.3: (1) a "Generally" section; (2) Governmental Activities and Court Forms; (3) Corporations, Limited Liability Companies, Associations, and Other Entities; (4) Administrative Hearings and Agency Proceedings; (5) Tax-Related Activities and Proceedings; (6) Legal Document Preparers; (7) Mediators; (8) Legal Assistants and Out-of-State Attorneys; (9) Fiduciaries; and (10) Other.

The following merit specific mention:

- Proposed restyled Rule 31.3(c)(1) provides a definition of "legal entity."
- Subsection (3) collapses the three current provisions regarding the representation of companies and associations in municipal or justice courts.
- Subsection (4) retains the provision authorizing a person to represent entities in superior court in general stream adjudications.
- Subsection (5) collapses seven current rules regarding the representation of various types of legal entities in administrative hearings or administrative proceedings.
- Subsection (6) sets forth in a single location a general exception saying that a hearing officer or presiding officer can order an entity to be represented by counsel.

The Task Force also considered rule petition R-18-0004, which the Supreme Court had continued pending the Task Force's recommendation. That petition sought an amendment to the rule that would permit owners of closely held corporations and like entities, or their designees, to represent the entities in litigation. While the Task Force empathized with the plight of "mom and pop" entities that cannot afford counsel and yet are deprived of the ability to represent the entities in court, the Task Force did not recommend this proposal. However, the proposed restyling of Rule 31(d) herein addresses the organizational issues raised by rule petition R-18-0004.

Finally, to the extent practicable, the proposed restyling endeavors to conform the rules to one another to avoid expressing identical requirements in different ways. With one possible exception, this petition does not recommend substantive changes to existing Rule 31 language. The Task Force clarified language in proposed Rule 31.3(d), which addresses "Tax-Related Activities and Proceedings." Even assuming this clarification effects a substantive change, the Task Force believed the change was within its charge to simplify and clarify the rule.[18]

V. ABS/Entity Regulation proposals

Arizona's current professional-responsibility rules apply only to individual lawyers. Regulating ABSs, however, requires adopting rules that apply to entities.

[18] Task Force report at 38.

Entity regulation is not a unique concept. Australia, England and Wales, and parts of Canada already use some form of entity regulation that supplements individual lawyer responsibility for ethical behavior.[19] It is notable that after ten years of experience in the UK, the traditional legal field thrives with no decrease in billings by traditional legal practices even with the implementation of the ABS structure.

In the United States, New Jersey and New York require law firms – not just individual lawyers – to comply with professional rules. *See*, *e.g.*, New Jersey Rule of Professional Conduct 5.1(a) ("Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct."). Entity regulation is not foreign to Arizona. The state already regulates Licensed Document Preparer businesses (ACJA 7-208 et seq) as well as defensive driving schools (ACJA 7-205 et seq.) and licensed fiduciary business entities (ACJA 7-202 et seq.)

[19] *See, e.g.*, Jayne Reardon, "Would Entity Regulation Improve Consumer Protection?" available at https://www.2civility.org/can-entity-regulation-protect-consumers/

The Task Force recommended that the Court adopt a system of entity regulation for ABSs; the post-task-force work fleshed out that recommendation with a framework.

Under that framework, ABSs would be licensed by this Court after being vetted by a new court committee, and then folded into the existing lawyer discipline system, with investigation and prosecution by the State Bar; assessment by the Attorney Discipline Probable Cause Committee of reports of investigation by the State Bar; and adjudication by the Presiding Disciplinary Judge.

All definitions, criteria and process for licensing, code of conduct, requirements for the compliance lawyer, disciplinary sanctions, and other specifics will be regulations in ACJA 7-209, rather than as Supreme Court rules.

Significant substantive proposed rule changes proposed by this petition include the following.

A. Rule 31

As described in section IV above, the Task Force proposes adding provisions to restyled Rules 31, 31.1, 31.2 and 31.3 to effectuate ABS regulation.

B. Rule 32 (Organization of the State Bar of Arizona)

Substantive proposed amendments include adding to Rule 32(a)(2)(D) that the State Bar is obligated to assist the Court with regulating ABSs; defining "discipline" in Rule 32(b)(3) to include sanctions and limitations on ABSs; defining

"respondent" in Rule 32(b)(7) to include ABSs; and adding to Rule 32(h) a reference that ABSs will be licensed by the new Committee on Alternative Business Structures.

Rule 32(l) now includes a sentence allowing the State Bar and the Administrative Office of the Courts to recoup "extraordinary costs" beyond the Court-adopted schedule of fees. The concern is that investigating the application of or a complaint against an ABS could entail extraordinary investigation, prosecution and adjudication costs, depending on the size and organizational structure of the ABS.

C. New Rule 33.1 (Committee; Entity Regulation)

This new rule creates the Committee on Alternative Business Structures, which will review applications and licensure of ABSs and make recommendations to the Court.

Proposed Rule 33.1(b)(1) requires that the Committee take into consideration these regulatory objectives:

(A) protecting and promoting the public interest;

(B) promoting access to legal services

(C) advancing the administration of justice and the rule of law;

(D) encouraging an independent, strong, diverse, and effective legal profession; and

(E) promoting and maintaining adherence to professional principles.

Proposed Rule 33.1(b)(2) requires that the Committee examine whether an ABS applicant has "adequate governance structures and policies in place to ensure" that:

(A) lawyers providing legal services to consumers act with independence consistent with the lawyers' professional responsibilities;

(B) the alternative business structure maintains proper standards of work;

(C) the lawyer makes decisions in the best interest of clients;

(D) confidentiality consistent with Arizona Rule of Supreme Court 42 is maintained; and

(E) any other business policies or procedures do not interfere with a lawyers' duties and responsibilities to clients.

D. Rule 46 (Jurisdiction in Discipline and Disability Matters; Definitions)

A new paragraph provides that an ABS applicant's false statements or misrepresentations may be independent grounds for discipline and an aggravating factor in any discipline proceeding, and that fraudulent misstatements or material misrepresentations may result in an ABS's license being revoked.

E. Rule 47 (General Procedural Matters)

Service of discipline complaints on ABS respondents may be made on a designated agent for service.

F. Rule 48 (Rules of Construction)

Proposed Rule 48(d)(2) provides that allegations in a complaint against an ABS shall be established by a preponderance of the evidence, compared to the clear-and-convincing standard required for lawyers. The rule includes the same rebuttable presumptions for failing to maintain trust account records as lawyers are subjected to in Rule 48(d)(1).

G. Rule 49 (Bar Counsel)

Proposed Rule 49(c)(2)(C) would be amended to require that all sanctions against ABSs be published in *Arizona Attorney* magazine, and revocation, suspension, reprimand, and licensing after a period of revocation be posted on the State Bar's website for an indefinite period.

H. Rule 50 (Attorney Discipline Probable Cause Committee)

The ADPCC's jurisdiction is expanded to include an ABS's violations of ACJA 7-209.

I. Rule 51 (Presiding Disciplinary Judge)

The presiding disciplinary judge's jurisdiction is expanded to include imposing discipline on ABSs.

J. Rule 54 (Grounds for Discipline)

The rule is expanded to include ABSs and violations of ACJA 7-209.

K. Rule 56 (Diversion)

Amendments to this rule make ABSs eligible for diversion.

L. Rule 58 (Formal Proceedings)

Under the proposed amendment to Rule 58(k), sanctions imposed against an ABS shall be determined in accordance ACJA 7-209 and to the extent applicable, with the American Bar Association *Standards for Imposing Lawyer Sanctions*.

M. Rule 60 (Sanctions)

Misconduct by an ABS would be grounds for sanctions specified by ACJA 7-209, which will include license revocation, suspension, reprimand, probation, restitution, disgorgement of profits, and civil fines.

N. Rule 75 (Unauthorized Practice of Law, Jurisdiction)

Amendments extend jurisdiction to pursue allegations of UPL against an ABS.

O. Rule 76 (Unauthorized Practice of Law, Grounds for Sanctions, Sanctions and Implementation)

An amendment adds authority for the Superior Court to impose a civil penalty of up to $25,000 against respondents upon whom another sanction is imposed.

VI. Limited License Legal Practitioner (LLLP)

The Task Force proposed that the Court adopt a new category of nonlawyer legal-service provider, the LLLP, who would be licensed and able to provide limited

legal services to clients, including appearing in court and administrative hearings in limited practice areas, such as family law.

The Task Force concluded that licensing nonlawyers to provide limited legal services will not undermine the employment of lawyers for several reasons. First, the legal needs targeted for LLLPs involve routine, relatively straight-forward, high-volume but low-paying work that lawyers rarely perform, if ever. Second, lawyers could team with LLLPs to provide complementary services, thereby increasing business opportunities for lawyers. Moreover, to date no jurisdiction that allows certified nonlawyers to provide limited legal services has reported any diminution in lawyer employment. While some lawyers may prove instinctive skeptics on this issue, the Task Force was not able to find empirical evidence that lawyers are at risk of economic harm from certified LLLPs who provide limited legal services to clients with unmet legal needs.

LLLPs would provide services distinctly different from Legal Document Preparers. LDPs may not give legal advice nor may appear in court for customers who hire them to prepare documents. The Task Force recommended that LLLPs, on the other hand, be able to provide legal advice and to make appearances in court on behalf of clients.[20]

[20] The exact parameters of an LLLP's authority, such as particular legal tasks suitable for LLLPs to perform and whether LLLPs could provide "pre-litigation education about legal rights and responsibilities," would need to be developed by a steering committee. Task Force report at 41.

Therefore, this petition proposes rule amendments that would effect regulation and licensing of LLLPs. As with ABSs, the definitions, criteria and process for licensing, code of conduct, and other specifics regarding LLLPs will be regulations in an ACJA section (ACJA 7-210), rather than Supreme Court rules. Also, like ABSs, LLLPs would be folded into the existing lawyer discipline system, with investigation and prosecution by the State Bar; assessment by the ADPCC of reports of investigation by the State Bar; and adjudication by the Presiding Disciplinary Judge.

Unlike ABSs, however, LLLPs would become affiliate members of the State Bar with limited benefits of membership, such as access to the ethics hotline.

Significant substantive proposed rule changes include:

A. Rule 32 (Organization of the State Bar of Arizona)

Rule 32(c)(1) currently provides that the State Bar has five classes of membership: active, inactive, retired, suspended, and judicial. Proposed Rule 32(c)(3) creates a sixth category of membership for LLLPs. They would be "affiliate members" for the purposes of regulation and discipline only. They would pay annual fees, including an amount designated for the Client Protection Fund. They would receive a certificate of licensure, not a bar card.

Rule 32(c)(13) would be amended to require that LLLPs, like active lawyers in private practice, disclose whether they have professional liability insurance.

B. Rule 46 (Jurisdiction in Discipline and Disability Matters; Definitions)

A new paragraph provides that an LLLP applicant's false statements or misrepresentations may be independent grounds for discipline and an aggravating factor in any discipline proceeding, and that fraudulent misstatements or material misrepresentations may result in an LLLP's license being revoked.

The definitions of "discipline," "misconduct," and "respondent" were amended to include LLLPs.

C. Rule 49. (Bar Counsel)

Amendment to Rule 49(c)(1) ensures chief bar counsel has prosecutorial oversight over LLLPs and amendment to Rule 49(c)(2)(C) specifies that as with ABSs, all sanctions against an LLLP would be reported publicly.

D. Rules 50 (Attorney Discipline Probable Cause Committee) and 51 (Presiding Disciplinary Judge)

Amendments to both rules expand jurisdiction to include discipline-related activities involving LLLPs.

E. Rule 54 (Grounds for Discipline)

This rule is expanded to include LLLPs and violations of ACJA 7-210, which will be the ACJA section governing LLLPs.

F. Rule 56 (Diversion)

Amendments to this rule make LLLPs eligible for diversion.

G. Rule 60 (Sanctions)

Misconduct by an LLLP would be grounds for sanctions specified by ACJA 7-210, which will closely resemble the sanctions for misconduct by lawyers including revocation of license, suspension, reprimand, probation, and civil fines.

VII. Conclusion

Petitioner respectfully requests that the Court consider this petition and proposed rule changes at its scheduled August rules conference. Petitioner additionally requests that the petition be circulated for public comment, and that a staggered comment period as follows be ordered: (a) initial comments due on March 30, 2020; (b) response to initial comments on April 27, 2020; (c) second round comments due on May 26, 2020; and (d) reply and final amended petition due on June 22, 2020. Petitioner respectfully requests that the Court adopt the proposed rules as they currently appear, or as modified considering comments received, with an effective date of January 1, 2021.

DATED this 31st day of January, 2020.

___/s/_____

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