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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)	
)	
)	Supreme Court No. R-20-0034
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)	Response and Amended Petition
33.1, ARIZ. R. SUP. CT.)	
_____)	

This combined Reply and Amended Petition first 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 original petition, and then responds to the most common themes expressed in the comments posted through the first comment period.

SUMMARY OF ADDITIONAL PROPOSED RULE AMENDMENTS

A. Amendments to Proposed Rule 33.1.

¹ Mr. Byers filed the reply and 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.

After reviewing amendments proposed in the original petition and proposed Arizona Code of Judicial Administration (ACJA) § 7-209, additional amendments are proposed to Rule 33.1 to clarify the role of the Committee on Alternative Business Structures and the Supreme Court on initial licensing and renewal of licenses for alternative business structures (ABSs).

The amendments to proposed Rule 33.1 clarify that the Committee on Alternative Business Structures will examine applications for ABS licenses and make a recommendation to the Supreme Court whether a license should be granted or denied. The process and procedures mirror those set forth for applications to the practice of law. Just as the Committee on Character and Fitness recommends to the Court whether or not an applicant should be admitted to the practice of law, the Committee on Alternative Business Structures will recommend to the Court whether an ABS should be granted a license. These amendments are also reflected in amendments to proposed ACJA § 7-209(D)(5) and (E), which defines the roles and responsibilities of the Committee on Alternative Business Structures and the application and decision-making process and policies for examination of applications for licensure.

B. Amendments to Rule 46, Ariz. R. Sup. Ct.

Additional amendments were made to Rule 46(h) to ensure that lawyers, Limited License Legal Practitioners (LLLPs), and ABSs are all explicitly included.

C. Amendment to Rule 48(d)(2), Ariz. R. Sup. Ct.

The original petition provided that the burden of proof applicable to ABSs was preponderance of the evidence, as opposed to clear and convincing evidence – the standard applicable to lawyers. The proposed rule is amended to make the burden of proof for ABSs and lawyers the same – clear and convincing evidence. This change is the result of discussion by the Entity Regulation Workgroup on the difficulties that would arise if an ABS (as entity) and any of its nonlawyer members as well as a lawyer in the ABS were simultaneously prosecuted by the State Bar before the Presiding Disciplinary Judge and there were two different burdens of proof. In addition, concerns were raised that some parties to the matter may be found to have violated ethical obligations while others are not because of the difference in burdens of proof. After discussion it was determined that the burden of proof should be the same for ABSs as for lawyers in general. The amendment therefore makes that change.

D. Amendment to ER 8.3.

An amendment to ER 8.3 was added to the amendments proposed in the original petition, R-20-0034. Specifically, a new ER 8.3(c) was added. The amendment is the result a suggestion that the various tiers of legal service providers should bear similar ethical obligations to report known misconduct. ACJA § 7-210(J) requires LLLPs to report misconduct similar to lawyers' obligations in ER

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8.3. Therefore, the amendment to ER 8.3 clarifies that “A lawyer who knows that a Limited Licensed Legal Practitioner or certified Alternative Business Structure entity has committed a violation of the applicable codes of conduct that raises a substantial question as to the person or entity’s compliance with the codes shall inform the appropriate authority.” Further a new comment to ER 8.3 clarifies that the duty to report misconduct of a LLLP does not apply to a lawyer who is retained to represent the LLLP. Similarly, the duty to report misconduct by an ABS does not apply to a lawyer retained to represent the ABS but does apply to lawyers who work in or have ownership interests in an ABS.

Additional amendments to these rules are in Appendices 1 and 2 to this reply and amendment petition.

E. Additional amendments to proposed ACJA § 7-209.

Since R-20-0034 was filed, the Entity Regulation Workgroup finalized the full scope of regulation for ABSs in proposed ACJA § 7-209, located on the [ACJA Pending Proposals Web Forum](#).

First, as noted above, amendments were made to ACJA § 7-209(D)(5) and (E) to align with the amendments to Rule 33.1. Those edits transfer proposed content from ACJA § 7-209(I) to ACJA § 7-209(D)(5)(d). This consolidates all content related to the roles and responsibilities of the Committee on Alternative Business Structures into a single section of ACJA § 7-209.

Second, the procedures and requirements for reinstatement of an ABS license after revocation or suspension was moved from ACJA § 7-209(E)(8) to ACJA § 7-209(I). Initial licensure and renewal of a license involves similar requirements and processes. Reinstatement, just like for lawyers seeking reinstatement to the practice of law, is a different process from initial licensure and renewal. Therefore, having the procedures and requirements of reinstatement in a single dedicated section that followed the section on discipline was more logical and makes navigation of the regulation easier.

In addition, changes have been made to the process of reinstatement. As originally proposed reinstatement investigations and approval would be carried out by the Certification and Licensing Division of the Administrative Office of Courts and the Committee on Alternative Business Structures. After further consideration and review, it was determined that the reinstatement process should proceed like that for lawyers. The proposed rule changes and ACJA § 7-209 place the duty of investigating complaints against an ABS and both its lawyer and nonlawyer members on the State Bar with formal actions proceeding before the Office of the Presiding Disciplinary Judge in the same manner as lawyer discipline. Because it handles lawyer reinstatement proceedings, the State Bar will be best positioned to handle ABS reinstatement proceedings. Therefore, amendments to ACJA § 7-209(I)

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(formerly ACJA § 7-209(E)(8)) align the reinstatement process with that of reinstatement for lawyers.

A third amendment adds an explicit statement to ACJA § 7-209(E)(2)(d)(2) that the Committee on Alternative Business Structures must recommend denying licensure if any member of an ABS was disbarred from or denied admission to the practice of law in any jurisdiction, domestic or foreign. The Legal Services Task Force unanimously recommended that disbarred lawyers should be prohibited from owning all or a part of an ABS because of the possibility that they could circumvent the law. In addition, many lawyers' comments to R-20-0034 expressed concern that the proposed rule language was not explicit enough to exclude disbarred lawyers. Therefore, this amendment explicitly prohibits disbarred lawyers as economic interest holders of an ABS.

Finally, several grammatical and formatting changes were made throughout the section.

F. Additional Amendments to Proposed ACJA § 7-210.

As with ACJA § 7-209 above, R-20-0034 does not itself contain the full regulatory framework for LLLPs, located in ACJA § 7-210. Section 7-210, the basis for the education, examination, and licensing requirements for LLLPs, contains the Code of Conduct for LLLPs. Therefore, changes to proposed ACJA § 7-210, located on the [ACJA Pending Proposals Web Forum](#), are important to summarize here.

The amendments to ACJA § 7-210 are centered in subpart (J), Code of Conduct. In the original proposal, the ethical obligations of LLLPs were not fully defined. Subpart (J)(1) now states that Supreme Court Rule 42 applies to LLLPs and provides guidance on how to read those rules in applying them to LLLPs. Except for ER 5.5(c) – (h), all ethical rules in Rule 42 are applicable to LLLPs.

Based on a suggestion to develop a pathway for current working paralegals to become LLLPs, an additional path to licensure was added to ACJA § 7-210. Section 7-210(E)(3)(c) was added creating an educational waiver for applicants who have seven years of experience as a paralegal and who can demonstrate a specific amount of substantive legal experience in each area they seek licensure. The waiver is for the education requirements of only § 7-210(E)(3)(b)(7). Applicants meeting the experience requirements would be allowed to take the examination and be required to follow the remaining licensing processes.

In addition, there was a slight reorganization to ACJA § 7-210(J)(5). Subpart (d) was divided into two separate subparts, expanding the list from four items to five. However, no substantive changes were made.

Finally, a number of grammatical and formatting changes were made throughout the section.

**REPLY TO COMMENTS RECEIVED THROUGH FIRST
COMMENT PERIOD**

In response to the current health emergency, courts in Arizona and across the country have had to quickly respond to a forced change in the way courts do business. An infusion of technology to allow cases to be handled remotely, allow staff to work remotely, and to significantly reduce the numbers of people coming to courthouses has been rapidly deployed. Hearings and a few bench trials have been conducted remotely. Marriage licenses are issued without applicants physically coming to the Clerk's office. The Arizona Supreme Court held oral arguments virtually and in one Arizona county a grand jury is meeting via Zoom.

These innovative ways to conduct court business would not have been possible without an infusion of new technology and emergency changes to existing court rules. These Courts are finding that the traditional way of doing business may not be the only way to do business. The Task Force recommendations, while not foreseeing the pandemic, fulfill its charge to ignite similar innovation into the traditional services and to expand access to justice, not just for low income and indigent persons, but for working- and middle-class persons. The effects of the pandemic will severely increase the need for legal services. These proposals will be increasingly relevant and necessary to ensure the public's legal needs are met. Moreover, the financial impact of the pandemic on some law firms may be severe. The ability to partner with other professionals to create innovative ways to deliver

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legal services in addition to the ability to attract capital may well help firms survive and thrive in what will likely become a new normal.

Petition R-20-0034 drew a significant number of comments by lawyers during the initial comment period. Comments are important to the rule-change process, and these comments were reviewed and used to refine both the ABS and LLLP regulatory programs proposed by R-20-0034 and proposed ACJA §§ 7-209 and 7-210 which round out the regulatory framework for both programs. Two overarching themes were identified in the lawyers' comments filed in response to this petition:

- If nonlawyers are allowed to own all or part of law firms, their profit motive will drive lawyers into acting unethically, thus interfering with a lawyer's independent advice to a client and otherwise eroding the legal profession's core values.
- Nonlawyer limited license legal practitioners will be uncredentialed and untrained and not only will endanger the public but will relegate family law lawyers and litigants to second-class status.

While these concerns of lawyers are understandable, they are unwarranted. The comments also reveal a more basic, existential anxiety: that the petition's proposals will devalue the legal profession, in general, and lawyers' law licenses, in particular.

This anxiety is understandable. Not only does the petition propose major changes to the *business* of law it proposes changes to the *practice* of law in this state. However, adopting the changes would allow Arizona to expand access to justice

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while protecting the public, the very charge the Task Force was given. The proposed elimination of ER 5.4 coupled with entity regulation provides opportunities for an infusion of capital and innovation into law practices while also providing a robust regulatory structure designed to protect the public from the very types of situations so many lawyers raised in comments to the petition. Moreover, the LLLP program proposed creates an educated, licensed paraprofessional tier of legal service provider – one subject to the same ethical requirements as lawyers – to bridge the gulf between the need for legal information and services and access to those services. That gulf has clearly widened during the current pandemic. More importantly, both proposals put into action paragraph [12] of the preamble to the Arizona Rules of Professional Conduct, which exhorts the legal profession to “assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”

While it is true that, as many of the comments note, under these proposals a nonlawyer investor could own a law firm and a trained and licensed nonlawyer paraprofessional could represent clients in family court, it doesn't automatically follow that evil will result.

First, lawyers already face third-party pressures, such as non-clients who pay a client's fee and want to interfere with the client representation to reduce costs. The Rules of Professional Conduct have and will continue to contemplate these kinds of

pressures and prohibit lawyers from succumbing to them. *See, e.g.*, Ethical Rule (“ER”) 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless ... there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship”).

Being motivated to make a profit is not at odds with private law practice. As one expert has put it, “It should not be assumed that nonlawyer businesspeople would always act only to pursue profits, regardless of ethics and morality, any more than lawyers will. An ABS that does not provide quality legal services in a responsible manner will soon face the revocation of its license under the regulatory framework. And it should not be assumed that the ethical backbone of lawyers is so weak as to turn to jelly due to working alongside nonlawyers.”²

Regarding the new paraprofessional tier of legal provider, LLPs will not be the first nonlawyers in this state authorized to practice law. Rule 31(b), Ariz. R. Sup. Ct., already contains 31 exceptions to the general rule that only lawyers may practice law. Lawyers have not had a monopoly on law practice in this state for decades. In 1963 following an Arizona Supreme Court decision finding that drafting of real estate contracts was the practice of law, real estate agents put forth a ballot initiative allowing them to practice real estate law. The State Bar opposed the measure citing

² Jayne Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 St. Mary's J. Legal Mal. & Ethics 304, 349 (2017) (footnotes omitted).

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“real estate agents would not provide independent advice and that they would not have sufficient education and training to perform their duties properly.” Arizona citizens disagreed and overwhelmingly passed the measure. Similarly, the Certified Legal Document Preparer Program has been in existence in Arizona for over fifteen years and has not eliminated or reduced the demand for lawyers, contrary to anxiety about and opposition to the program by many lawyers at the time it was adopted.

Most importantly, LLLPs will have education, training, and ethical requirements that exceed those of the many persons who are allowed under the numerous Rule 31 exception to practice law and nonlawyer real estate professionals allowed to practice real estate law.

Citizens are coming to court in growing number without representation. The LLLP was conceived to fill a gap that the existing, traditional legal profession has not been able to fill – the gap that exists between medium- and low-income individuals needing legal services and the cost of securing those services from the traditional legal market. Lawyers complaints about legal document preparers were raised in comments as a reason not to adopt another category of non-lawyer practitioner. However, a LLLP will be fundamentally different from legal document preparers. Unlike document preparers, who are not authorized to give legal advice, LLLPs will be trained, tested and licensed in particular areas to provide legal representation and appear in court.

Commenters have speculated that LLLPs will not be able to provide sufficient quality services to the public and as a result will cause harm. One only needs to look at the experience of Ontario, Canada and Washington State to see that that is simply not the case. In both jurisdictions’ paraprofessionals provide legal services. Neither has reported discipline problems or harm to the public that exceeds that of lawyers in those jurisdictions. Similarly, Arizona has not seen disproportionate numbers of problems with real estate agents practicing law than is reported for lawyers. The regulatory framework proposed in both the Rules of Supreme Court and proposed ACJA § 7-210 regarding LLLPs establish education, training, licensing, and code of conduct measures to ensure protection of the public.

In making the recommendations described above, the Supreme Court’s Task Force on the Delivery of Legal Services and subsequent Entity Regulation Work Group also proposed other rule changes to ensure that ABSs – firms in which nonlawyers own all or part – comply with lawyers’ obligations and that lawyers working within an ABS work for the best interests of their clients. After all, the goal is not to reduce ethical protections of the public; the goal is to “tackle *economic* rules that serve little or no ethical purpose but undermine an innovative, competitive and consumer focused legal market.”³

³ Crispin Passmore formerly head of the Solicitors Regulation Authority (the regulatory body for solicitors in England and Wales), report dated September 20, 2019, prepared for the State Bar of California’s Task Force on Access Through Innovation of Legal Services, at ¶ 16.

A. Proposal to Eliminate ER 5.4 and adopt ABS regulations

In opposing the proposal to eliminate ER 5.4 and adopt ABS regulations, many comments argue that lawyers suddenly will face conflicts between serving the best interests of their clients and nonlawyer owners of an ABS, because of a pernicious profit motive.

1. Lawyers already face conflicts between serving the best interests of their clients, and making money, which lawyers appear to manage now.

One commenter seemed to sum up many of the lawyers' reactions to the proposal to eliminate ER 5.4 and regulate ABSs by saying, "As an attorney, my duty is to my client and I shouldn't have to worry about balancing the interests of a for-profit owner with the interests of my clients."

But in serving clients' best interests, lawyers in private practice already balance a myriad of conflicting interests, from the influence and financial interests of third parties to their own personal or law firm's interests. "[T]he transcendent importance of conflict rules for practicing lawyers can hardly be doubted," as conflicts in law practice now "are universally acknowledged as a topic of vital importance and considerable complexity"⁴

⁴ Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change ...*, 70 Tenn. L. Rev. 27, 28 (2002).

Allowing nonlawyers to own all or part of a law firm, therefore, does not suddenly interject the need for “balancing” conflicting interests into lawyers’ lives. In addition, lawyers already and routinely face the challenges so many commentators claim will be their undoing. And they appear to do so without harm to the public and within their ethical obligations.

The Ethical Rules already contemplate the possibility that third parties will attempt to interfere with a lawyer’s independent professional judgment in representing a client. For example, ER 1.8(f) allows a lawyer to accept payment from a third party to represent another only if there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.⁵ In other words, “we let the lawyer take the money and trust her not to let its source, which is generally lay, lead her astray.”⁶ Third-party payors usually have economic interests that differ from those of the lawyer’s client.⁷ Significantly, a third party may not be just an individual who pays a relative’s legal fees, but a powerful

⁵ In addition to the directive in ER 1.8(f), ER 5.4(c) currently provides a similar prohibition: “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.” The petition proposes eliminating ER 5.4 in its entirety but relocating the gist of paragraph (c) to ER 5.3, which deals with nonlawyer assistants. The proposed addition to ER 5.3 would provide that a lawyer’s reasonable supervisory measures include “adopting and enforcing policies and procedures designed ... 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.”

⁶ Stephen Gillers, *The Anxiety of Influence*, 27 Fla. St. U. L. Rev. 123, 127 (1999).

⁷ Reardon, *supra* note 2, at 345.

insurance company that provides the lawyer with a substantial amount of work that results in a substantial profit. And yet, the profession trusts that lawyers will resist any interference with their professional judgment.

Lawyers also already may work for nonlawyer-owned entities that are under the control of lay officers and boards. As noted in the petition, 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.⁸ In that situation, a nonlawyer – the insurance company – employs lawyers who provide legal services to third parties – the insureds.

Lawyers also may work as in-house counsel, providing legal services to their employers. In that role, the lawyer is trusted not only to prevent lay management from interfering with the lawyer’s professional judgment, but to monitor that very lay management:

The trust displayed by our tolerance for this arrangement should not be underestimated. It is lay management, after all, that controls the terms and conditions of the lawyer's job, such as money, title, benefits, company car, support staff, and corner office. This control is present whether or not the lawyer even has a job, and the allocation of interesting work. Despite all this, we let lawyers work as their client's employees while subject to the profound career-affecting power of lay intermediaries whose conduct we expect lawyers to oversee.”⁹

⁸ ABA Formal Ethics Opinion 03-430 (2003).

⁹ Gillers, *supra* note 6, at 129.

In addition, lawyers may work for nonprofit or public interest entities and represent third parties, not the entity itself, or they may work for union members under plans that envision an intermediary role for the union between lawyer and client. *See* ER 5.4(d)(2), (3) (“A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if ... a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or a nonlawyer has the right to direct or control the professional judgment of a lawyer.”) In these arrangements, “[w]e expect and trust that the lay participants will respect the lawyer’s professional obligations.”¹⁰

This same “trust” – that there will not be an incursion into a lawyer’s independent representation of a client – also applies in the most obvious way for lawyers in private practice who are not sole practitioners or equity owners. Many lawyers are employed as associates by law firms and work for a salary. “Their employers – the partners or lawyer shareholders – may be looking over the shoulders of those associates ‘in terms of profit’ just as aggressively as would nonlawyers offering the services of these same lawyers.”¹¹ Even sole practitioners and partners in law firms have financial pressures on them to generate revenue to pay overhead,

¹⁰ *Id.* at 135.

¹¹ Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *Hastings L.J.* 577, 606 (1989).

rent, and salaries. Financial self-interest is not a new concept to lawyers and it is one that lawyers manage to balance because the fees that they charge still must be reasonable for the services performed in accordance with ER 1.5(a). Even if there was no ethical requirement to charge reasonable fees, a firm that consistently overcharges clients and cuts corners to provide poor or insufficient legal services will not remain in business very long.

One commenter to this petition wrote, “I can only imagine a nonlawyer ‘boss’ or ‘owner’ telling his lawyer employee to do something in the interest of profits as opposed to the interest of the client.” But firm management already often requires that lawyers act in the interest of profits. Firm management may tell lawyers to drop clients who cannot afford to pay.¹² In fact, failure to pay legal fees is a permissive ground upon which a lawyer may withdraw from representation. *See* ER 1.16(d)(5) (a lawyer may withdraw from representation if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled”).

Even newly admitted lawyers who may be the least capable of dealing with economic pressures and who work as associates are expected to resist unethical direction and comply with their professional duties. *See* ER 5.2(a) (“[a subordinate] lawyer is bound by the Rules of Professional Conduct notwithstanding that the

¹² Reardon, *supra* note 2, at 249.

lawyer acted at the direction of another person.”). In fact, even the youngest, most inexperienced lawyer is expected, in an appropriate circumstance, to report the lawyer who signs his or her paycheck, if that person has acted unethically. *See* ER 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law”).

There is no evidence that nonlawyers would have more power over lawyers than supervising or employer lawyers and nonlawyers already do.¹³ Allowing nonlawyers to own law firms does not introduce new or unique pressures for lawyers.

2. Being motivated to make a profit is not at odds with private law practice.

While many lawyers in private law practice may have altruistic motives, they also can earn a living because, “[l]aw is now clearly a business, if, debatably, it also remains a profession.”¹⁴ Few lawyers would be in private practice “if they did not anticipate being able to make money, whether for themselves, lawyer partners,

¹³ Andrews, *supra* note 11, at 607.

¹⁴ Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics - II: The Modern Era*, 15 *Geo. J. Legal Ethics* 205, 225 (2002).

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lawyer shareholders, or lawyer associates.”¹⁵ The argument that nonlawyers will care only about profit implies that law firms are not organized to make money.¹⁶ There is certainly nothing inherently wrong with lawyers “devoting themselves entirely to making money, any more than there is anything inherent in the nature of a nonlaw corporation that precludes the principals from recognizing other purposes than making money.”¹⁷

In England and Wales, during the process of adopting legislation that allowed nonlawyer ownership, many lawyers argued against the move “claiming that only legal professionals could be trusted to uphold high ethical standards and not be motivated by profit.”¹⁸ That has not been shown to be true, and there is no evidence from other countries where ABSs are allowed, such as Australia, that they cause any more consumer harm than traditional firms.¹⁹

The experience in Australia, England and Wales shows ABS entities “have proven to be more innovative; to deal better with complaints and to have no more regulatory action taken against them than traditional lawyer only practices.”²⁰

Presuming that nonlawyer owners would engage in misconduct or bully lawyers into acting unethically also suggests that lawyers alone have a moral

¹⁵ Andrews, *supra* note 11, at 602.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Passmore, *supra* note 3, at ¶ 25.

¹⁹ Comment of the Institute for the Advancement of the American Legal System, at 12.

²⁰ Passmore, *supra* note 3, at ¶ 25.

superiority to other business people and professionals. Well-known ethics expert and New York University law Professor Stephen Gillers encapsulated the absurdity of this argument:

Pause here to acknowledge a remarkable fact. In a society that allows nonlawyers to occupy other positions demanding great probity, including positions of high fiduciary responsibility and public trust in government and in powerful financial institutions, suspicion of lay influence is a curious and perhaps even an impolite justification for a broad and nearly absolute prohibition. It becomes more than merely curious, however, when we acknowledge, as we must, that the prohibition can have a significant [effect] on the cost and availability of legal services and the efficiency with which they are distributed.²¹

3. The proposed ABS regulatory structure and changes to Ethical Rules will continue to protect clients.

Not only will applicants for an ABS license be subject to heavy scrutiny, but the obligations on the ABS and its lawyers for maintaining a license will be significant. Lawyers of course will need to comply with their ethical obligations. The ABS and nonlawyers within the ABS, who are not by virtue of being lawyers obligated to comply with the Ethical Rules, also will be required to follow a code of conduct that imports significant portions of the Ethical Rules.

As discussed above, a Supreme Court-appointed committee will recommend, after extensive vetting, whether an ABS should be licensed. Proposed Rule 33.1(b)(2), Ariz. R. Sup. Ct., requires that the Committee on Alternative Business

²¹ Gillers, *supra* note 6, at 126.

Structures 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.

An applicant could be denied a license if “the applicant’s business has a record of conduct constituting dishonesty or fraud on the part of an employee, board member, or the business.” The Supreme Court will make the final decision on whether to grant a license.

Once licensed, ABS entities will need to renew their licenses each year. The Certification and Licensing Department’s staff may audit a license holder to determine if it is in compliance with all rules, regulations, and statutes.

The ABS will be subject to a code of conduct that incorporates the core values or professional independence, confidentiality of client information, and conflict-free representation, including:

- An ABS shall not allow the legal representation of clients, if the representation involves a conflict of interest as governed by Supreme Court Rule 42, ERs 1.7, 1.8, 1.9, 1.10, and 1.13.

- An ABS shall not take any action or engage in activity that interferes with the professional independence of lawyers or others authorized to provide legal services.
- An ABS shall ensure that legal services are delivered with reasonable diligence and promptness.
- An ABS shall not take an action or engage in any activity 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, or by allowing or being complicit in the acts or omissions of others.
- An ABS must hold property of legal services clients separate from the property of the ABS. The requirements of Supreme Court Rule 42, ER 1.15, are applicable to all legal services-related client property.

Investigations into alleged misconduct and any necessary prosecution will be folded into the existing lawyer discipline system. If an ABS is found to have violated any rules and regulations, sanctions could range from having its license revoked to a monetary penalty.

While licensure as an ABS allows an entity through which legal services are provided to be jointly owned by lawyers and nonlawyers, the firm must employ at least one active, licensed Arizona lawyer to provide those legal services and to supervise the provision of any legal services under ER 5.3. Rule 31.1(b), Ariz.. R. Sup. Ct.

To protect core values of professional independence, confidentiality of client information, and conflict-free representation, an ABS also must identify one responsible lawyer who will be its compliance attorney. The compliance attorney will be responsible for establishing policies and procedures within the entity to

assure that nonlawyers (including owners and managers) comply with the Arizona ethical rules that govern these core concepts. The compliance attorney must “[p]ossess credentials and experience in the legal field to ensure that ethical obligations, protection of the public, and standards of professionalism are adhered to.” This is similar to the current requirements that each law firm identify one lawyer who is responsible for assuring that the firm’s trust accounting procedures comply with ER 1.15 and Rule 43.

Additionally, proposed amendments to the Ethical Rules will safeguard against conflicts of interest and maintain client confidentiality. As noted above, proposed amendments to ER 5.3(a)(1) require that supervisory lawyers design policies and procedures 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.

Proposed rules also specifically define, as a conflict of interest, referring clients to nonlegal services performed by others within the firm. Amendments to ER 1.6(e) clarify that regardless whether a client of an ABS 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.

Conflicts considerations are addressed in amendments to ERs 1.7 and 1.10 to avoid, for instance, having a nonlawyer owning opposing law firms. Also, under new ER 1.10(f), if a lawyer or nonlawyer in a firm owns all or part of an opposing party, that conflict is imputed to the entire firm.

4. Other alternatives are not significant enough to make fundamental change.

The Task Force considered and rejected many less-fundamental changes than eliminating ER 5.4.

It considered recommending that the Court amend ER 5.4, possibly similar to Washington D.C.'s version of the rule but determined that amendments would not sufficiently allow the types of innovative legal practices that would lead to lower-cost legal services. The Task Force was also aware that the Washington D.C. Bar was considering exploring further amendments to liberalize its ER 5.4 because the changes it made many years ago were not sufficient to achieve the desired innovation and expansion of access to justice.²²

It also considered but rejected following Utah's "sandbox" approach. Utah adopted a two-year pilot program that would allow the formation of ABSs and regulate those businesses through an independent regulatory body the Utah Supreme

²² A committee is considering expanding or eliminating the rule to allow and nonlawyers to form ABSs. See <https://www.dcbbar.org/about-the-bar/news/DC-Bar-Global-Legal-Practice-Committee-Seeks-Public-Comment-on-Rule-of-Professional-Conduct-5-4.cfm>.

Court would oversee. Utah’s model, however, would allow an ABS formed during the pilot program to remain in business even if the program ends.²³

Several comments suggested that Arizona adopt a pilot program in lieu of permanent rule changes. The Task Force would not be opposed to the Court taking an approach authorizing ABS’s for a period of time (e.g., five to seven years) with a sunset clause on the rules and ACJA section, to monitor and assess the benefits and provide opportunity to address any changes needed to the program.

B. Proposal to adopt Limited License Legal Practitioners

LLLPs would be educated, trained, tested, and vetted before being licensed to give legal advice and represent clients in court in very limited areas. Once licensed, they would be subject to the same continuing education, trust accounting, professionalism and ethics requirements as lawyers. They would pay into the Client Protection Fund and be subject to the same disciplinary system. They also would be subject to additional requirements. As a result, they would be far more regulated than legal document preparers – who are not able to give legal advice or represent people in court – and, considering all the proposed requirements, even more than lawyers.

²³ “Once the designated period of the sandbox finishes, the company can continue with its approved offering if it so wishes, with the non-enforcement authorization still intact.” The Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, 15, 68 (2019) available at <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.

Many lawyers commented that the public will be harmed by the poor quality of work they assume LLLPs will provide. However, this assumption is not supported by evaluations of nonlawyer legal service providers in other jurisdictions. In the United Kingdom a peer review study of the work and competence of solicitors versus nonlawyer advisors showed that nonlawyer advisors performed at a higher level of competence than solicitors.²⁴ Ontario, Canada licenses paralegals to provide the same legal services as lawyers in several practice areas. The Professional Regulation Division of the Law Society of Ontario issues annual reports of lawyer and licensed paralegal complaints, per capita. The reports demonstrate there is the same proportion of paralegal as lawyers subject to complaint each year.²⁵

1. LLLPs would have stiff requirements to become licensed and maintain their licenses, and circumscribed authority to practice.

At a minimum, applicants would have to have a four-year bachelor's degree from an accredited college or university; a master's in law; or a law degree. The four-year degrees require additional studies in paralegal studies or certificate programs, plus additional training and experiential learning.

²⁴ Richard Moorehead *et al.*, *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot* (2001); Legal Services Consumer Panel, "Regulating Will Writing" (2011).

²⁵ Law Society of Ontario, Professional Regulation Committee, Report to Convocation, Feb. 27, 2020, at 35. *See*

<https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/convocation-february-2020-professionalregulationcommittee-report.pdf>

The licensing exam would test “on legal terminology, client communication, data gathering, document preparation, the ethical code for LLLPs, and professional and administrative responsibilities pertaining to the provision of legal services.”

Application and licensing fees would fund the licensing and disciplinary functions, just as lawyer fees do.

Licensed LLLPs would become associate State Bar members but would not be eligible to be an elected member of the State Bar Board of Governors.

Licensed LLLPs would be authorized to, without the supervision of a lawyer:

- Prepare and sign legal documents;
- Provide specific advice, opinions, or recommendations about possible legal rights, remedies, defenses, options, or strategies;
- Draft and file documents, including initiating and responding to actions, related motions, discovery, interim and final orders, and modification of orders and arrange for service of legal documents;
- Appear before a court or tribunal on behalf of a party, including mediation, arbitration, and settlement conferences where not prohibited by the rules and procedures of the forum; and
- Negotiate on behalf of a client in accord with the code of conduct.

They would be limited to restricted practice areas: family law; civil matters before a limited jurisdiction court; criminal misdemeanor matters before a limited jurisdiction court, as long as a penalty of incarceration is not at issue; and any matter before an Arizona administrative agency that allows it.

An LLLP would be required to advise clients in writing that a limited license legal practitioner is not a lawyer and cannot provide any kind of advice,

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opinion or recommendation to a consumer about possible legal rights, remedies, defenses, options, or strategies beyond what the practitioner is specifically licensed to provide authorized services for.

2. The Task Force chose to recommend a nonlawyer tier different from Washington and Utah nonlawyer programs.

The Task Force opted to not recommend following Washington's and Utah's nonlawyer law provider programs, for several reasons.

As originally conceived, the Washington Limited License Legal Technician (LLLT) program had what some consider "overly burdensome licensing requirements"²⁶ (although requiring only an associate's degree as base education) and did not allow its LLLTs to represent clients in court. As a result, there is only a small number of LLLT's in Washington. In contrast, Ontario which began licensing paraprofessionals about ten years ago, has several thousand actively practicing law. During the same period, Ontario has also added more than 10,000 lawyers to their roles, demonstrating that the addition of this new tier of legal service provider is not a guaranteed impediment to lawyers' business interests. In addition, in an order dated May 1, 2019, the Washington Supreme Court, recognizing the benefits of LLLTs to the public, authorized changes expanding the LLLT program to allow LLLTs to

²⁶ Comments submitted by Responsive Law to the State Bar of California Task Force on Access Through Innovation in Legal Services, September 23, 2019, available at https://www.responsivelaw.org/uploads/1/0/8/6/108638213/responsive_law_atils_comments.pdf

begin negotiating with opposing counsel, attending depositions, and appearing and responding to questions from the court.

Utah's Licensed Paralegal Practitioner (LPP) program allows nonlawyers to be licensed to provide legal assistance and advice to clients in family law, landlord-tenant disputes, and certain consumer debt matters. Like Washington's program of LLLTs started out, LPPs cannot advocate on behalf of a client before a tribunal but they may represent a client in mediated negotiations.

The Task Force's proposal not only allows LLLPs to represent clients in limited court action but also allows them to negotiate with opposing counsel.

In addition, Arizona's continuing licensing requirements would be more akin to those of lawyers. In Washington, LLLTs need only take an average of 10 hours per year; in Utah, six hours on average. This LLLP proposal requires that LLLPs accrue the same number of hours per year as lawyers – 15.

C. Conclusion

The Task Force took its assignment to heart and proposed fundamental changes to the *business* of law as well as the *practice* of law in this state. Additional workgroups assisted in developing regulatory frameworks and requirements for licensure for both ABSs and LLLPs.

Lawyers understandably tend to resist change, and their resistance "is particularly intense when the profession's own status and financial interests are at

risk.”²⁷ When England and Wales adopted the legislation that allowed nonlawyers to own law firms, those protective of the status quo

issued warnings that each change would be a disaster, that consumers will lose out and that they (as representatives of the solicitor profession) are the true guardians of the public interest. Despite these dire predictions the world has not ended: reform continues and the public and business are starting to get the choice they deserve.²⁸

Note ethics scholar and Stanford University law Professor Deborah L. Rhode has called the American Bar Association’s last major ethics-review commission, the Commission on Ethics 20/20 created in 2009, “[o]ne of the most prominent missed opportunities” for making fundamental reform. That commission resulted in “a series of relatively minor rule changes,” and the only major proposal it considered, nonlawyer investment in law firms, was abandoned.²⁹ Her assessment:

In no country has the legal profession been more influential and more effective in protecting its right to regulatory independence. Yet that success, and the structural forces that ensure it, has also shielded the profession from the accountability and innovation that would best serve public interests.³⁰

²⁷ Deborah L. Rhode, “Reforming American Legal Education and Legal Practice: Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financial Legal Services,” 16 *Legal Ethics* 243, 244 (2013). *See also* Andrews, *supra* note 11, at 655: “In reviewing the origins and history of these rules, one cannot help but conclude that they owe their surprising tenacity more to the fact that they serve the profession’s economic self-interest than to any valid public purpose.”

²⁸ Passmore, *supra* note 3, at ¶ 45.

²⁹ Rhode, *supra* note 27, at 244.

³⁰ *Id.*

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Resistance and anxiety by lawyers should not deter the Court from adopting and implementing the Task Force's recommendations. The proposals will expand access to justice on two different fronts – by opening law firms from within to the possibility of innovation and by enlarging the universe of legal providers – while at the same time protecting the public. And the public when surveyed and who provide input through Town Hall events, strongly support the proposed changes.

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_____/s/_____
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