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**IN THE SUPREME COURT
STATE OF ARIZONA**

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|-----------------------------|---|-------------------------------------|
| In the Matter of |) | |
| |) | Arizona Supreme Court No. R-20-0030 |
| PETITION TO AMEND |) | |
| RULE 42, OF THE SUPREME |) | REPLY |
| COURT RULES, ERs 7.1 to 7.5 |) | |
| _____ |) | |

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Task Force on the Delivery of Legal Services (“Task Force”) petitioned the Court to amend Rule 42 of the Arizona Rules of the Supreme Court, as reflected in the attachments hereto, effective January 1, 2021. This reply addresses the single comment to the petition.

I. Background.

As noted in the petition, the petition was filed as a result of recommendations by the Task Force on the Delivery of Legal Services, established by Arizona

¹ Mr. Byers files this petition in his capacity of a member of the Task Force.

Supreme Court Administrative Order 2018-111. The term of the task Force expired in December 2019.

The proposed amendments address lawyer advertising and incorporate many of the amendments to the Model Rules of Professional Conduct that the American Bar Association made in 2018. They also fulfill the Task Force's charge to identify issues and improvements in the delivery of legal services. As detailed in the petition, the proposed amendments to the advertising-related ethical rules would:

- retain the rules' primary regulatory mandate that lawyers refrain from making false and misleading communications;
- set forth the requirements for who may identify themselves as a "certified specialist" in an area of law;
- maintain reasonable restrictions on direct solicitation of specific potential clients; and
- eliminate obsolete and anticompetitive provisions that unreasonably restrict the dissemination of truthful advertising.

The most significant amendment, which goes beyond the 2018 ABA Model Rule amendments, would eliminate current ER 7.2(b)'s prohibition against giving anyone anything of "value" for recommending a lawyer or referring a potential client to a lawyer.

II. Sole Comment to R-20-0030.

At the close of the comment period, only one comment was filed, but the commenter's concerns have been stated by others; at least one comment to R-20-0034 notes a similar concern. The filed comment focused on the proposed elimination of ER 7.2(b) only. The author noted concern that lawyers will be able to give cash payments to clients and friends, among others, for client referrals. The comment also expressed apprehension that even though the amended Rules would still prohibit direct (in person) solicitation of prospective clients (including by others on the lawyer's behalf), clients, friends, and family of a lawyer may still be motivated to solicit for the lawyer, knowing that they may be paid a referral fee. The author of the sole comment to the Petition urges that the rule be revised to permit only de minimis gifts (defined as the Court deems appropriate) to persons for recommending a lawyer's services to avoid opening "the floodgates to permit a lawyer to give anything of value to a person – no matter the value – for recommending his or her services." Note that current Comment [5] to Rule 7.2 already permits de minimus gifts that are not a *quid pro quo* for specific referrals.

III. Reply and Recommended Revision.

ER 7.2

Current ER 7.2 sets forth specific rules concerning lawyer advertising. The petition recommends deleting this rule and moving the substance of current ER 7.2(c) to new ER 7.1(c). Existing ER 7.2(b) would be eliminated entirely.

Two issues are intertwined in eliminating ER 7.2(b): participating in for-profit lawyer referral services and allowing lawyers to pay bare referral fees.

Current ER 7.2(b) prohibits giving anything of value for recommending a lawyer's services, except that a lawyer may participate in a not-for-profit or qualified lawyer referral service. Because Arizona does not have any mechanism for "qualifying" for-profit lawyer referral services, ER 7.2(b) means an Arizona lawyer cannot participate in a for-profit lawyer referral service because no for-profit services have been "qualified." Nevertheless, many online marketing platforms that send potential client leads to lawyers exist, even though they technically violate this Rule by requiring marketing payments per lead.

Current Comment [6] to ER 7.2 explains what constitutes a "referral service":

[. . .] A lawyer referral service, on the other hand, is any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this ER only permits a lawyer to pay the usual charges

of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority, such as the State Bar of Arizona, as affording adequate protections for the public.

Thus, under the current Rule, any payment by a lawyer per lead sent to the lawyer would violate Rule 7.2(b), unless the website/person/entity is a non-profit service. There is no evidence, however, either that consumers actually believe all “referral services” are “consumer-oriented organizations” or that paying per referral lead will cause significant consumer harm.

The Rule also means that Arizona lawyers may not pay pure referral fees to others – lawyers or non-lawyers – who refer cases to them. This means that a law firm is prohibited from giving a nonlawyer employee of the firm any bonus or payment for referring a friend or family member, giving gifts in excess of \$100 to any referral source, such as doctors, realtors, bankers, or even paying another lawyer for referring a client to the firm (which currently is permitted in several other states), unless the payment complies with ER 1.5(e).

Under that rule, a lawyer who refers a case to another lawyer may be compensated only by performing work on the case or by accepting joint responsibility for the case.

Eliminating ER 7.2(b) would allow Arizona lawyers to participate in for-profit lawyer referral services. But, as the commenter noted, it also would mean that a law firm could send pricey thank-you gifts to clients who refer business to the law firm

and also lawyers could accept pricey thank-you gifts from other lawyers to whom the firm referred potential clients. In addition, eliminating ER 7.2(b) also would mean that if Lawyer 1 refers a client to Lawyer 2 (in a different firm), Lawyer 2 could pay Lawyer 1 a referral fee and the two lawyers would have no reason to enter into an ER 1.5(e) fee-sharing arrangement because Lawyer 1 is being compensated without providing any legal services or taking responsibility for the legal matter.

The Task Force discussed these scenarios and determined that although paying referral fees to lawyers (and others) will be a cultural shift for Arizona lawyers, other states have permitted straight referral fees (to other lawyers) for years. Moreover, lawyers already give cash payments to clients, friends, family, and employees – usually phrasing it as something else. The Task Force acknowledged that clients, friends, family, or employees may send leads to a firm just to get a payment – but it will (still) be up to lawyers to decide who they represent. The Task Force did not believe that this would create actual consumer harm, especially considering that lawyers do it now but have to disguise it and there is no discipline case history of actual significant consumer harm.

One alternative to the concerns that eliminating ER 7.2(b) would open the door to consumer harm would be to revise the rule-change proposal to include a customized version of ABA Model Rule 7.2(b) that would only permit payments to referral services, certain gifts, and payments to other lawyers.

The Rule could be customized to allow lawyers to participate in for-profit referral services but would eliminate the requirement that for-profit referral services be “qualified.” Some of the existing language in ER 7.2(b)(2) that deals with the percentage of fees that may be paid to a referral organization could be added. The rest of the existing custom language would not be necessary because for-profit lawyer referral services would be allowed.

Adopting a modified Rule also would mean that Arizona could adopt a provision similar to the ABA Model Rule 7.2(b)(4), which allows lawyers to refer clients to other lawyers and professionals under a non-exclusive, reciprocal referral arrangement. This provision simply memorializes what lawyers already are allowed to do – refer clients to other professionals, as long as the client is informed and no conflict results. Several states already have provisions similar to Model Rule 7.2(b)(4)’s non-exclusive referral arrangement provision.

Finally, adopting a modified Rule 7.2(b) also would codify the language currently in Comment [5] that lawyers may give de minimis gifts that are not compensation for referring a particular client. As the comment to the ABA Model Rule explains, MR 7.2(b)(5) allows a token gift, “as might be given for holidays, or other ordinary social hospitality” and would be prohibited “if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.” In short,

adding MR 7.2(b)(5), rather than just having the gift language in the Comment would simply make clear that lawyers may do what any businessperson does – provide tokens of appreciation – without fear that doing so is viewed not as advertising or business cultivation but as referral compensation.

The rule change as originally proposed would eliminate all of ER 7.2. If the Court is inclined to keep a version of the ban on referral fees (currently in ER 7.2(b)), it could be retained as a standalone provision of ER 7.2.

Applying the above, Arizona ER 7.2 would then read:

A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a ~~not-for-profit or-qualified~~ lawyer referral service; which may include, in addition to any membership fee, a fee calculated as a percentage of legal fees earned by the lawyer to whom the service or organization has referred a matter, provided that any such percentage fee shall not exceed ten percent ~~and shall be used only to help defray the reasonable operating expenses of the service or organization and to fund public service activities, including the delivery of pro bono legal services.~~ The fees paid by a client referred by such service shall not exceed the total charges that the client would have paid had no such service been involved;(3) pay for a law practice in accordance with ER 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement;
and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

A second alternative would be to adopt language similar to the District of Columbia's Rule 7.1(c) that permits payments to referral services but not general payments for recommending a lawyer. The District of Columbia Rule provides:

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

(1) Pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(A) The reciprocal agreement is not exclusive, and

(B) The client is informed of the existence and nature of the agreement.

However, Petitioner continues to move the Court to adopt the proposal as drafted by the Task Force and submitted in the petition. The Task Force determined that consumer protection afforded by current ER 7.2 can be provided by less non-competitive provisions. For instance, the rules on conflicts of interest, including ERs 1.7, 1.8, and 1.10, protect clients/consumers because they restrict a lawyer's (and firm's) representation of a client if the lawyer's own interests could "materially limit" the lawyer's independent professional judgment in representing the client. Thus, a lawyer cannot be "forced" to represent a client simply because the client was

referred by someone whom the lawyer pays as a referral source. The conflict of interest rules control who and how a lawyer may represent a client, and such representations must be free of any conflict that could materially limit the lawyer's objectivity. Additionally, disclosures revealing that a lawyer will pay referral fees sufficiently informs consumers about the referral system. Such disclosures may be required to comply with ER 7.1's "false and misleading" standard to assure that adequate information is conveyed to website visitors or referral sources about the fact that the site is not a nonprofit operation.

Existing Rule 7.2(b) unreasonably restricts lawyers' ability to provide accurate information to the public about the availability of legal services by prohibiting lawyers from using legitimate online marketing platforms that charge a fee for each referral. If the alleged concern is that the referral service (or friends or colleagues referring clients to a lawyer) will force a lawyer to take a client the lawyer is not competent to represent, that very same concern would exist for nonprofit referral services, which lawyers currently *can pay* for referrals. However, there is no indication that lawyers who pay a referral fee to a nonprofit referral service take on clients for which they are not competent to handle. The existing Rule's restrictions are outdated and an unreasonable restraint on lawyers that is not necessary to protect the public.

III. Conclusion

Petitioner respectfully requests that the Court adopt the proposed amendments as submitted in its petition with an effective date of January 1, 2021.

DATED this 1st day of June, 2020.

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