TASK FORCE ON DELIVERY OF LEGAL SERVICES

ELECTRONIC BRIEFING BOOK

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ELECTRONIC BRIEFING BOOK

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
ESTABLISHMENT OF THE TASK FORCE ON DELIVERY OF LEGAL SERVICES AND APPOINTMENT OF MEMBERS	)	Administrative Order No. 2018 - 111

"Promoting Access to Justice" is Goal 1 of the Judiciary's Strategic Agenda, *Advancing Justice Together, Court & Communities*. Much has been accomplished through the work of the Arizona Commission on Access to Justice to promote this goal for those with limited financial means to obtain legal services, and those efforts will continue.

Changes in technology, the legal profession, and the economy call for a reassessment of the delivery of legal services to consumers more broadly. Across the nation, judicial and legal community leaders are examining this issue and experimenting with new models, whether by recognizing that certain services can be provided by non-lawyers or by embracing new ways for lawyers to provide legal services, such as unbundled or "limited scope" representation. Arizona likewise has explored new ways of delivering legal services. For some fifteen years, the Court has authorized the certification of legal document preparers and, recently, the State Bar of Arizona implemented a web-based "Find A Lawyer" program connecting those with legal needs with lawyers willing to do the work at an affordable cost. Arizona courts have also worked to expand and clarify ways in which court staff can provide legal information to self-represented parties.

Court rules, however, have not necessarily kept pace with changes impacting the delivery of legal services. For example, Supreme Court Rule 31(d) regarding the requirements for admission to practice has been expanded incrementally to include thirty-one exceptions. At the least, the rule requires restyling, updating and reorganizing. Other court rules should be reassessed given 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.

It is timely to review the regulation of the delivery of legal services in Arizona. This review should focus on how rules and codes governing the practice of law in Arizona can be revised to improve the delivery of legal services to consumers by lawyers and others, such as licensed document preparers. In addition to considering Arizona's current practices, such a review should also consider on-going work by nationally-involved organizations, such as the Conference of Chief Justices (including its 2016 Resolution recommending consideration of the ABA's Model Regulatory Objectives for the Provision of Legal Services) and the Institute for the Advancement of the American Legal System ("IAALS") at the University of Denver; experience in other states

with limited license legal technicians or other non-J.D. licensed professionals; and efforts at the law schools at the University of Arizona and Arizona State University.

Therefore, pursuant to Article VI, Section 3 of the Arizona Constitution,

IT IS ORDERED:

1. ESTABLISHMENT: The Task Force on Delivery of Legal Services is established.

2. PURPOSE: The Task Force shall:

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

3. REPORT AND RECOMMENDATIONS. The Task Force shall present preliminary recommendations to the Commission on Access to Justice and to the Attorney Regulation Advisory Committee for their respective input and, by October 1, 2019, submit a report and recommendations to the Arizona Judicial Council. The Task Force may present findings and recommendations as tasks are completed rather than waiting until all five charges are completed.

4. MEMBERSHIP: The individuals listed in Appendix A are appointed as members of the Task Force effective immediately and ending December 31, 2019. The Chief Justice may appoint additional members as necessary.

5. MEETINGS: Task Force meetings shall be scheduled at the discretion of the Chair. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.

6. STAFF: The Administrative Office of the Courts shall provide staff for the Task Force and shall assist the Task Force in developing recommendations and preparing any necessary report and Supreme Court Rule petitions.

Dated this 21st day of November, 2018.

SCOTT BALES
Chief Justice

Appendix A

TASK FORCE ON DELIVERY OF LEGAL SERVICES

Chair
Justice Ann A. Scott Timmer

Members

Peter Akmajian
Schmidt, Sethi & Akmajian, Tucson

Victoria Ames
Sandra Day O'Connor College of Law, ASU

Robyn Austin
Tucson Federal Credit Union
Public Member

Betsey Bayless
Public Member

Hon. Rebecca White Berch (*Ret.*)

Don Bivens
Snell & Wilmer, Phoenix

Stacy Butler
James E. Rogers College of Law, UA

David Byers, Director
Administrative Office of the Courts

Diane Culin
Court Administrator, Santa Cruz County

Whitney Cunningham
Aspey, Watkins & Diesel, Flagstaff

Hon. Jeff Fine
Clerk-elect, Maricopa County Superior Court

Paul D. Friedman
O'Steen & Harrison, PLC

Hon. Joe Kraemer
Maricopa County Superior Court

Hon. Maria Elena Cruz
Arizona Court of Appeals, Division One

John Phelps
Executive Director, Arizona State Bar

Hon. Peter Swann
Arizona Court of Appeals, Division One

Guy Testini
Chief Counsel
Arizona Industrial Commission

Billie Tarascio
Modern Law, Scottsdale

Mark Wilson, Director
Certification and Licensing Division
Administrative Office of the Courts

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
APPOINTMENT OF A MEMBER TO THE TASK FORCE ON DELIVERY OF LEGAL SERVICES	)	Administrative Order No. 2018 - 117

Administrative Order No. 2018-111 established the Task Force on Delivery of Legal Services. The Order provides that the Chief Justice may appoint additional members as necessary. Therefore,

IT IS ORDERED that the following individual is appointed to the Task Force on Delivery of Legal Services for a term beginning upon signature of this Order and ending December 31, 2019 and whose names are/is added to the updated membership list (Attachment A).

New Appointment
Tami Johnson
U.S. Bankruptcy Court for the District of Arizona
Pro Se Law Clerk

Dated this 5th day of December, 2018.

SCOTT BALES
Chief Justice

Appendix A

TASK FORCE ON DELIVERY OF LEGAL SERVICES

Chair
Justice Ann A. Scott Timmer

Members

Peter Akmajian
Schmidt, Sethi & Akmajian, Tucson

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Paul D. Friedman
O'Steen & Harrison, PLC

Hon. Joe Kreamer
Maricopa County Superior Court

Hon. Maria Elena Cruz
Arizona Court of Appeals, Division One

Tami Johnson
U.S. Bankruptcy Court
District of Arizona
Pro Se Law Clerk

John Phelps
Executive Director, Arizona State Bar

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Arizona Court of Appeals, Division One

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Chief Counsel
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Billie Tarascio
Modern Law, Scottsdale

Mark Wilson, Director
Certification and Licensing Division
Administrative Office of the Courts

Task Force on Delivery of Legal Services

LSTF

Chair

Justice Ann A. Scott Timmer
Arizona Supreme Court

Members

Mr. Peter Akmajian
Schmidt, Sethi & Atkinson

Ms. Victoria Ames
Sandra Day O'Connor College of Law, ASU

Ms. Robyn Austin
Tucson Federal Credit Union

Ms. Betsey Bayless

Honorable Rebecca White Berch (Ret.)
Arizona Supreme Court

Mr. Don Bivens
Snell & Wilmer, Phoenix

Ms. Stacy Butler
James E. Rogers College of Law, UA

Mr. David Byers
Arizona Administrative Office of the Courts

Ms. Diane Culin
Superior Court of Santa Cruz

Ms. Whitney Cunningham
Aspey, Watkins & Diesel

Honorable Jeff Fine
Superior Court of Maricopa County

Mr. Paul D. Friedman
Burg Simpson

Honorable Joe Kraemer
Superior Court of Maricopa County

Honorable Maria Elena Cruz
Arizona Court of Appeals

Ms. Tami Johnson
U.S. Bankruptcy Court, District of Arizona

Mr. John Phelps
State Bar of Arizona

Honorable Peter Swann
Arizona Court of Appeals

Mr. Guy Testini
Arizona Industrial Commission

Ms. Billie Tarascio
Modern Law

Mr. Mark Wilson
Arizona Administrative Office of the Courts

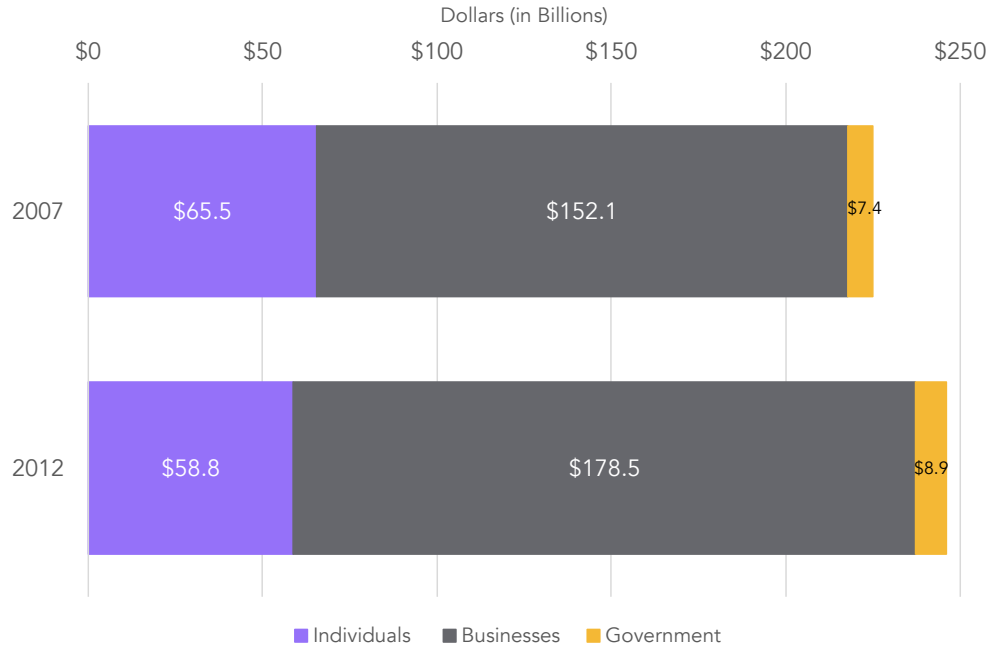
Staff

Ms. Jennifer Albright
AOC Court Programs Unit

Ms. Sabrina Nash
AOC Court Programs Unit

The Decline of the PeopleLaw Sector

Dollars Spent on Legal Services 2017 and 2012, by Client Type



The graphic above tells a simple, painful, and important story about the U.S. legal profession that we can't afford to ignore. The graphic compares the receipts of U.S. law firms in 2007 and 2012 based on "class of customer" data from the Economic Census, the U.S. Census Bureau's official five-year measure of American business. Although total law firm receipts increased from $225 billion to $246 billion, receipts from individuals declined by almost $7 billion. That's a staggering sum.

Data from the Economic Census is available at https://www.census.gov/programs-surveys/economic-census/about.html

Ordinarily, with such a large and sudden drop (10.2%), I worry about data quality. Yet, these data appear to be continuations of trend lines that are several decades old. Further, recent data published by Clio, the cloud-based practice management and time-keeping system used by a large number of solo and small firm lawyers, reveal that the economics of small firm practice are under severe stress.

As a society and a profession, we are heading to a place that none of us wants to go. Our biggest risk factor is failing to acknowledge the full magnitude of the problem.

The two hemispheres of practice

The structural significance of lawyers' clientele – individuals versus organizations – was first noted by Jack Heinz and Edward Laumann in *Chicago Lawyers: The Social Structure of the Bar* (1982) (popularly known as Chicago Lawyers I).

Based on a randomized sample of 800 Chicago lawyers, Heinz and Laumann observed that lawyers tend to serve either individuals or organizations, but seldom both. Further, type of client was strongly correlated with lawyer income, ethnicity, religious background, law school attended, home address, work address, and bar association membership. "Only in the most formal senses, then, do the two types of lawyers constitute one profession" (p. 384). This was the basis for their famous two-hemisphere theory of the legal profession. See also Deborah J. Merritt, *Two Hemispheres*, Law School Cafe, May 2, 2015.

Twenty years later, Heinz, Laumann and other researchers replicated the study based on a sample drawn in 1995. See Heinz et al., *Urban Lawyers: The New Structure of the Bar* (2005) (Chicago Lawyers II). One of their key findings was a dramatic surge of prosperity within the organizational sphere, with real incomes of large firm lawyers and in-house counsel nearly doubling. Conversely, among solo practitioners, who disproportionately served individual clients, incomes fell from $99,159 (in 1995 dollars) to $55,000. By 1995, 32% of solo practitioners were working a second job compared to only 2% in 1975.

These are startling and sober statistics generated by careful social scientists. These findings are also 23 years old.

From stagnation to decline

The Chicago Lawyers I and II studies reveal stagnation taking hold within the PeopleLaw sector. Yet, more recently, we've moved beyond stagnation to a period of actual decline. I do not use these words lightly. Yet this is the picture that emerges when the graphic above, which reflects U.S. Census Bureau data from 2007 and 2012, is combined with findings from Clio's 2017 Legal Trends Report.

The Clio 2017 Legal Trends Report is available at https://www.clio.com/2017-legal-trends-report/#download

Clio is a cloud-based practice management and time-keeping system that has obtained enormous traction with solo and small firm lawyers. The 2017 Legal Trends Report is based on anonymized 2016 data from more than 60,000 U.S. timekeepers.

- The total sample covers 1,026,000 matters, 10,981,000 hours, and $2.6 billion in billings.
- Approximately 84% of matters are billed by the hour.
- The average hourly rate for a lawyer is $260.
- The average matter garnered slightly less than $2,500 in fees, with traffic offenses the lowest average (~$700) and personal

injury the highest (~$3,300).

Yet, what is most striking about the Clio Report is that the average lawyer is billing only 2.3 hours per day. Of that total, 82% is actually invoiced to the client; and only 86% of invoiced fees are collected. This translates into $422/day per lawyer ($260 x 2.6 x 82% x 86%), or $105,000 in gross receipts over a 50-week year. This is a sum that needs to cover office overhead, healthcare, retirement, malpractice insurance, marketing, and taxes, etc. And note, these are averages, not the bottom decile or quartile. Further, these are lawyers at firms that have invested in practice management software.

Of the remaining 6 hours in the workday, lawyers are spending 48% of their time on administrative tasks (e.g., generating bills, configuring technology, client collections) and 33% on business development. The report notes that lawyers spend roughly the same amount of time looking for legal work as they do *performing* legal work (p. 13).

The danger of not saying the obvious

In Post 006, I reported on statistics from The Landscape of Civil Litigation in State Courts report published by the National Center for State Courts (NCSC). The most startling statistic among many is that 76% of cases involve at least one party who is self-represented. The Report frankly states:

> The picture of civil litigation that emerges from the Landscape dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much. As a result, many litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is not economically feasible to litigate those cases (p. v).

These are not the conclusions of a fringe group. The NCSC's research agenda is set in collaboration with the Conference of Chief Justices and the Conference of State Court Administrators. This is the body formed at the urging of Chief Justice Warren Burger.

I'll now state an obvious truth: Our legal system as it pertains to ordinary people is unraveling. Hundreds of millions of people can't afford to hire a lawyer to solve their legal problems. As a result, they go it alone or give up altogether. In turn, as the PeopleLaw sector shrinks, a large number of lawyers are under tremendous economic stress. No amount of tinkering at the edges is going to fix or reverse these trends. Instead, we need a series of fundamental redesigns.

This needs to be said clearly and emphatically. This is because the collective and societal solution to the declining PeopleLaw sector is ***not*** for lawyers and legal education to pivot toward corporate clients who can still pay the freight, though this is undoubtedly the direction of drift if we fail to forcefully acknowledge the woeful imbalance of our current legal system.

Redesign or failure

As a law professor, I support innovations that make legal problem-solving more cost-effective. Indeed, that is the purpose of Legal Evolution. See Post 001 (discussing the problem and consequences of lagging legal productivity). In the segment of the bar that serves corporations, there is tremendous momentum building to make this happen, primarily because corporations feel an urgency to find cost-effective ways to manage the relentless rising tide of legal complexity. This is what is driving the legal operations movement. Yet, I'm confidence that very few lawyers want to live in a society where corporate efficiency has become our primary goal. *There has to be something more*.

As Gillian Hadfield wrote in her recent book, *Rules for a Flat World* (2017), "People who feel as though the rules don't care about them don't care about the rules" (p. 79). The withering of the PeopleLaw sector is moving us closer to a place we don't want to go. We have entered a period where we are either going to redesign our legal institutions or they will fail. It's time for lawyers and legal educators to find creative ways to restore the balance. Step one is acknowledging the magnitude of the problem.

Legal Market Landscape Report

Commissioned by the State Bar of California

July 2018

William D. Henderson

Legal Market Landscape Report
Commissioned by the State Bar of California
July 2018

Executive Summary

Throughout the United States, legal regulators face a challenging environment in which the cost of traditional legal services is going up, access to legal services is going down, the growth rate of law firms is flat, and lawyers serving ordinary people are struggling to earn a living. The primary mechanism for regulating this market is lawyer ethics, including the historical prohibition on nonlawyer ownership of businesses engaged in the practice of law. However, private investors are increasingly pushing the boundaries of these rules by funding new technologies and service delivery models designed to solve many of the legal market's most vexing problems.

There is ample evidence that the legal profession is divided into two segments, one serving individuals (PeopleLaw) and the other serving corporations (Organizational Clients). These two segments have very different economic drivers and are evolving in very different ways. Since the mid-1970s, the PeopleLaw sector has entered a period of decline characterized by fewer paying clients and shrinking lawyer income. Recent government statistics reveal that the PeopleLaw sector shrank by nearly $7 billion (10.1%) between 2007 and 2012. Throughout this period, the number of self-represented parties in state court continued to climb. The Organizational Client sector is also experiencing economic stress. Its primary challenge is the growing complexity of a highly regulated and interconnected economy. Since the 1990s, corporate clients have coped with this challenge by growing legal departments and insourcing legal work. More recently, cost pressure on corporate clients has given rise to alternative legal service providers (ALSPs) funded by sophisticated private investors. Both responses come at the expense of traditional law firms.

What ties these two sectors together is the problem of lagging legal productivity. As society become wealthier through better and cheaper good and services, human-intensive fields such as law, medical care, and higher education become relatively more expensive. In contrast to medical care and higher education, however, a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price.

The legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services. Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession. Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California.

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1. Size and Composition of the U.S. Legal Market

There is widespread consensus among lawyers, judges, legal academics, regulators and sophisticated clients that the legal market is in a period of significant tumult. Further, there is also agreement that this tumult may be the early stages of a fundamental transformation. Yet, what is new and disconcerting for many is that these changes are not being driven by licensed lawyers or the organized bar. Rather, the causes are powerful external market forces that cannot be easily categorized using our familiar and well-established frameworks. At a minimum, our frameworks need updating.

Effective regulation requires (1) an understanding of the marketplace, and (2) the ability to clearly articulate how duly enacted rules, policies and procedures are serving the public interest. The purpose of this landscape report is to describe the rapidly evolving structure of the U.S. legal market (the first prong) so that Trustees of the State Bar of California can better evaluate vital regulatory questions that bear on the protection of the public as required under the State Bar Act.[1]

To establish a clear baseline, Section 1 begins with the most current government statistics on legal services. It then describes facets of the emerging legal economy that are not captured by traditional categories yet reflect significant new business models and novel ways of legal problem-solving. In most cases, these changes require close collaboration between lawyers, technologists, data scientists, and several other disciplines.

1.1. Legal Services Data from the U.S. Census Bureau

Every five years, the U.S. Census Bureau conducts the Economic Census, which is a comprehensive measurement of American business.[2] The most recent Economic Census was conducted in 2012. The information is organized based on the North American Industry Classification System.[3] The four-digit NAICS number for legal services is 5411. In 2012, the U.S. legal services market (NAICS 5411) totaled approximately $261.7 billion in revenue.

As show in Figure 1, the legal services sector has experienced significant growth over the last two decades. It is noteworthy, however, that the pace of growth appears to be slowing. Between 1997 and 2002, the sector grew 43.3 percent ($127.1 to $182.1B), followed by 31.5 percent growth between 2002 and 2007 ($182.1 to $239.4B). However, between 2007 and 2012, growth slowed to 9.3 percent ($239.4 to $261.7B). Further, total employment in the legal services sector has declined by approximately 55,000 jobs since the 2007 high-water mark. In fact, in terms of employment, the legal sector is smaller now than it was in 2002.[4]

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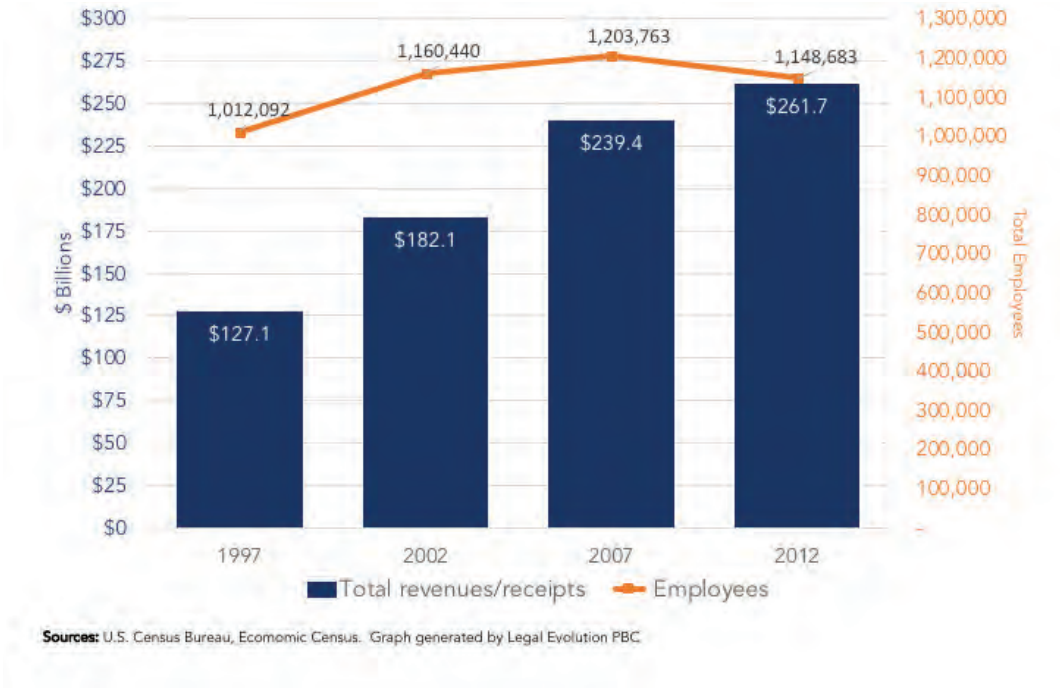
[1] See Business and Professions Code section 6001.1 State Bar— Protection of the Public as the Highest Priority ("Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."). See also, Business and Professions Code sections 6055 et seq., operative Jan. 1, 2018¬ (describing the creation of a voluntary nonprofit association that is a non-governmental entity separate from the State Bar, that assumes the responsibilities and activities of the former sections of the State Bar).

[2] See https://www.census.gov/programs-surveys/economic-census.html (last visited June 22, 2018).

[3] The NAICS system was first introduced in 1997, replacing the Standard Industrial Classification (SIC) system. Thus, we do not have commensurable data for the pre-1997 time period.

[4] According to the U.S. Census County Business Patterns data set, employment in the legal services sectors (5411) totaled 1,137,480 in 2016, which suggests continued stagnant employment.

Figure 1. U.S. Legal Services (NAICS 5411), Receipts and Employment, 1997 to 2012



An important caveat regarding the Figure 1 statistics, however, is that in the Economic Census data, law firm partners are owners rather than employees. Thus, partners are *not* part of the employment count. Data from the ABA suggests that the U.S. legal profession has gotten significantly older over the last half century, with the median age climbing from 39 in 1980 to 49 in 2005.[5] Therefore, it is quite possible that the diminution in legal services employment is occurring because law firms contain more partners who are, on balance, older and less leveraged in terms of associates, paralegals and staff.

The emphasis on law firms is important because, as the official government statistics show, the vast majority of the legal services sector is comprised of offices of lawyers (95.1%). Nonprofit legal service organizations are included in this category but make up a small fraction of the overall market (1.0%). The remaining balance of the legal services sectors is comprised of title abstract and settlement offices (541191) and all other legal services (541199). These figures are summarized in Table 1.

[5] See Bill Henderson, *Is the Legal Profession Showing its Age?*, LEGAL WHITEBOARD, Oct. 13, 2013, http://professorhenderson.com/downloads/Is_the_Legal_Profession_Showing_Its_Age.pdf (last visited June 23, 2018).

Table 1. U.S. Legal Services Market, 2012

Legal Services (5411)	Receipts (5-digit) (thousands)	Receipts (6-digit) (thousands)	Percentage
Offices of Lawyers (54111)	$248,884,540		**95.1%**
Law firms (5411101)		$246,141,231	94.1%
Nonprofit legal aid organizations (5411102)		$2,743,309	1.0%
Other legal services (54119)	$12,810,105		**4.9%**
All other legal services (541199)		$3,256,378	1.2%
Title Abstract and Settlement Services (541191)		$9,553,727	3.7%
Total	**$261,694,645**	**$261,694,645**	**100.0%**

Source: U.S. Census Bureau 2012 Economic Census

According to the same Economic Census data, the California legal services market (5411) in 2012 totaled $38.6 billion, which was 14.7 percent of the $261.7 billion U.S. legal services sector. As shown in Table 2, the composition of California is very similar to the overall U.S. market. The only noteworthy difference is an "all other legal services" sector that is, proportionally, twice the size of the national market (2.5% versus 1.2%).

Table 2. California Legal Services Market, 2012

Legal Services (5411)	Receipts (5-digit) (thousands)	Receipts (6-digit) (thousands)	Percentage
Offices of Lawyers (54111)	36,920,644		**95.7%**
Law firms (5411101)		$36,506,552	94.6%
Nonprofit legal aid organizations (5411102)		$414,092	1.1%
Other legal services (54119)	$1,670,893		**4.3%**
All other legal services (541199)		$717,802	2.5%
Title Abstract and Settlement Services (541191)		$953,091	2.5%
Total	**$38,591,537**	**$38,591,537**	**100.0%**

Source: U.S. Census Bureau 2012 Economic Census

It is noteworthy that since 2002, the "all other legal services" market in California has more than doubled, growing from $312.7 to $717.8 million. Drawing upon the Dun & Bradstreet Reports that tracks private company data, including their NAICS number, there is a wide variety of companies in this space, such as a document retrieval company called Macro-Pro (Long Beach, $12 million in annual reviews, 156 employees); a cloud-based e-discovery software company called Case Central (Pasadena, $7.5 million, 60 employees); a company that files and serves court documents called One Legal (Los Angeles, $4.million, 60 employees); and a company that provides full-service patent and literature search capabilities (San Diego, $1.1 million, 10 employees).

The key takeaway from Tables 1-2 is that official measures of the legal services in the U.S. show a market overwhelmingly comprised of law firms. What is not included, but nonetheless economically significant, consists of:

- In-house lawyers working directly for corporations and nonprofits
- Lawyers working in federal, state and local government
- Lawyers working as part of the gig economy
- Lawyers and allied professionals working in a burgeoning technology and publishing sector that is focused on legal issues and problems

1.2. In-House and Government Lawyers

The U.S. Bureau of Labor Statistics (BLS) compiles information on specific occupations, with breakdowns based on geography and industry. This provides a reliable method of tracking the income and growth of lawyers by sector, including those working in-house or in government.

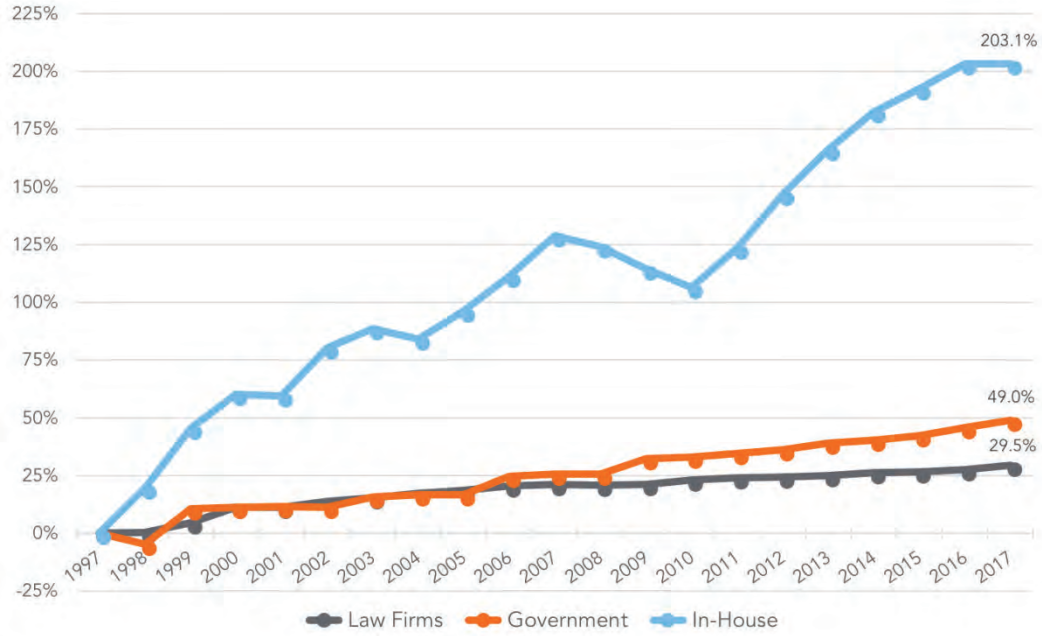
According to the latest government statistics, there are currently 628,370 lawyers employed as W-2 employees working in various parts of the U.S. (Similar to the Economic Census, these government data also do not include law firm partners and solo practitioners.)[6] The largest industry category of employer is legal services (5411), with 388,670 lawyers, followed by lawyers working in government (local 54,920, state 42,250, federal 37,210).[7] For the purposes of this analysis, in-house lawyers are professionals working as lawyers in industries other than legal services or government. In 2017, this number totaled 105,310, which is roughly equivalent to the number of lawyers working in the domestic offices of the 200 largest U.S. law firms based on revenues (Am Law 200).

Figure 2 below shows the growth of lawyers by practice setting with 1997 as the baseline. The most striking feature is the rapid growth rate for in-house lawyers. Note also how employment rates for in-house lawyers tracked the economic downturn in 2008 to 2010. Yet it is also noteworthy that since the mid-2000's, the growth rate for law firm employment has lagged behind the rate for government lawyers. Among the three practice settings, in-house lawyers had the highest incomes ($162,242) followed by law firms ($147,950) and government lawyers ($108,411).

[6] According to ABA statistics, in 2018 there are 1,338,678 active resident attorneys in the U.S. See https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf (last visited July 11, 2018). Thus, it is reasonable to estimate that slightly more than half of lawyers are either law firm partners, shareholders, or solo practitioners. Unfortunately, the number and income of lawyers as business owners is not something tracked and published by the U.S. government. Data on employed lawyers, particularly over time, remain a useful barometer of the vitality of the overall legal economy.

[7] See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, https://www.bls.gov/oes/current/oes231011.htm (last visited June 23, 2018).

Figure 2. Percent Change in Employed Lawyers by Practice Setting, 1997 to 2017



Sources: Bureau of Labor Statistics. Graph generated by Legal Evolution PBC

1.3. Employed Lawyers Working in California

As of May 2017, there were 79,980 "employed" lawyers working in the state of California. This number includes lawyers working in legal departments, public interest organizations and government. It also includes associates, staff attorneys and counsel working in law firms, but excludes partners and shareholders (i.e., owners of the firm). The metro areas of Los Angeles-Long Beach-Glendale and San Francisco-Redwood City-South San Francisco are both in the top 10 for U.S. metropolitan areas based on total employment of lawyers (#3 LA with 27,210 jobs, #9 San Francisco at 11,580).

According to the BLS, employed lawyers in California earned an average of $168,200 per year, which is the highest income among the 50 states, trailing only the District of Columbia at $189,560. When ranked by average income, six of the top 10 metropolitan areas are located in California:

- #1 San Jose-Sunnyvale-Santa Clara ($198,100, 5,470 lawyers)
- #2 San Francisco-Redwood City-South San Francisco ($189,660, 11,580 lawyers)
- #3 Anaheim-Santa Ana-Irvine ($189,150, 7,700 lawyers)
- #5 San Rafael ($180,530, 560 lawyers)
- #9 Oxnard-Thousand Oaks-Ventura ($174,420, 1,200 lawyers)
- #10 Los Angeles-Long Beach-Glendale ($170,210, 27,210 lawyers)[8]

Although limitations in available data make it difficult to pin down the composition and drivers of California's relatively vibrant legal services economy, the author believes that one factor is California's role in the in-house legal department growth movement. California is home to

[8] See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, https://www.bls.gov/oes/current/oes231011.htm (last visited June 23, 2018).

many of the nation's leading technology companies. Personnel from these legal departments – including Cisco, Google, Oracle, NetApp, Yahoo, Facebook and Adobe – were the driving force behind the creation of the Corporate Legal Operations Consortium (CLOC).[9] This organization is a relatively new but large and growing global trade association for legal operations ("legal ops") professionals. All CLOC board members are employed in Fortune 500 legal departments based in northern California. The 1000+ CLOC members tend to be influential in how their organizations buy legal services, often demanding better use of data, process, and technology. This flexing of economic power by legal departments—often through teams of legal ops professionals—is an important development that will be addressed in other parts of this report.[10]

1.4. Lawyers Working in the Gig Economy

In recent years, the gig economy has expanded to include lawyers.[11] Unfortunately, there is no reliable mechanism for tracking the growth and composition of this subsector. Some of the larger and more established managed service companies (also known as alternative legal service providers or ALSPs), such as Axiom, UnitedLex and Counsel On Call, maintain a stable of employed lawyers who are regularly assigned to major clients. Although these lawyers are technically contingent workers, a large portion are W-2 employees who are eligible for benefits through the company.[12] However, these lawyers are the exception rather than the rule. Most lawyers in the gig economy are independent contractors with no guaranteed flow of work and relatively little leverage to negotiate for higher rates or wages.[13]

Lawyers working in the gig economy are likely to be counted through the U.S. Census Bureau's Nonemployer Statistics Program. NES is an annual series on businesses that are subject to federal income tax but have no paid employees.[14] Thus, to be clear, if a solo practitioner employs a secretary, paralegal or associate, this arrangement would qualify as a law firm and would therefore be tracked by other Census Bureau programs.[15] In 2016, the legal services sector (NAICS 5411) had 285,603 nonemployer establishments. Of this number, 54,742 (19.2%) generated revenues in excess of $100,000 per year; 15,312 (5.4%) exceed $250,000 per year. At the other end of the spectrum, 83,439 (29.2%) had revenues of less than $10,000 per year. Table 3 contains a breakdown for the United States and California based on type of entity.

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[9] See www.cloc.org (last visited July 11, 2018).

[10] See Sections 2.4 and 4.2, *infra*.

[11] See, e.g., Claire Bushey, *The gig economy comes to law*, CRAIN'S CHICAGO BUSINESS, May 6, 2017 (reporting on growth of contract lawyers used by major staffing agencies, typically for document review for corporate clients); Emma Ryan, *The gig economy: How freelancing is set to change the business of law*, LAWYERS WEEKLY (Australia), Nov. 30, 2017 (reporting greatest utilization of gig lawyers among in-house legal department); *How the Gig Economy is impacting Legal Services*, TRANSLATEMEDIA, Jan. 13, 2017 (reporting on changing attitudes among younger lawyers but also noting difficulty of simultaneously using contingent worker and maintaining data security).

[12] See William D. Henderson, *Efficiency Engines: Building Systems for Corporate Legal Work*, ABA JOURNAL, June 2017, at 37 (discussing managed services business model and identifying the largest managed services providers).

[13] For a detailed look into the rise and conditions within this subsector, see ROBERT A. BROOKS, CHEAPER BY THE HOUR: TEMPORARY LAWYERS AND THE DEPROFESSIONALIZATION OF THE LAW (2011).

[14] See https://www.census.gov/programs-surveys/nonemployer-statistics.html (last visited June 25, 2018).

[15] Employment within law firms is tracked annually by the County Business Patterns (CBP) program. Annual receipts are captured every five years through the Economic Census.

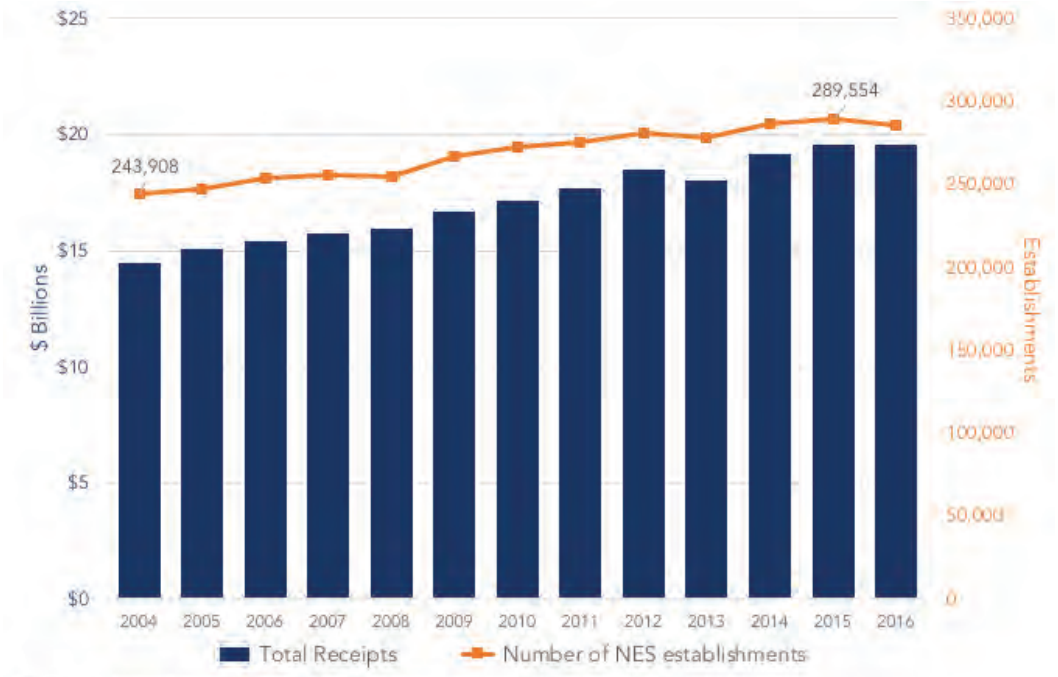
Table 3. 2016 Nonemployer Statistics: Count, Receipts, Average Revenue

Type of Entity	United States			California		
	Number	Total Receipts (thousands)	Avg. Rev.	Number	Total Receipts (thousands)	Avg. Rev.
Individual proprietorships	258,987	$15,987,423	$61,731	43,364	$3,250,949	$74,969
S-corporations	16,070	$1,598,720	$99,485	1,900	$262,889	$138,363
Partnerships	7,421	$1,675,755	$225,813	1,147	$337,061	$293,863
C-corporations / Other	3,125	$304,103	$97,313	649	$82,591	$127,259
All establishments	285,603	$19,566,001	$68,508	47,060	$3,933,490	$83,585

Source: U.S. Census Bureau 2016 Nonemployer Statistics

Despite the imprecision of NES groupings, the NES trends reveal significant changes in the legal economy that are likely connected with the growth of the gig economy for lawyers. Figure 3 shows the growth of receipts and number of nonemployer establishments in the 2004 to 2016 time period.

Figure 3. Total Receipts & Number of Nonemployers, 2016 Legal Services (NAICS 5411)



Sources: U.S. Census Bureau, Nonemployer Statistics. Graph generated by Legal Evolution PBC

Figure 3 should be contrasted with Figure 1, which tracks changes in revenue and employment in the broader legal services industry (overwhelmingly law firms). Whereas employment peaked in the broader legal services market in 2007 and is now lower than 2002 levels, the nonemployer segment, which fully contains the gig lawyer economy, has been moving upward in both receipts and number of establishments. Between 2004 and 2016, the count increased by more than 41,000 establishments (i.e., contract lawyers and/or solos without employees). During this

same period, total employment in the legal services sector declined by 80,870 jobs.[16] These trend lines suggest that traditional law firm employment is slowly giving way to a workforce that is more contingent. This is likely occurring because traditional legal employers are struggling to grow and thus are seeking ways to reduce the risk of adding w-2 employees.

As the gig economy grows and matures, it is also segmenting. One of the most established segments is the market for contract lawyers doing document review for major litigation and information requests from the FTC/DOJ related to antitrust review of proposed mergers. For nearly 20 years, this work has slowly moved out of law firms to contract attorneys provided by a large number of national and regional staffing agencies[17] or managed service firms.

One of the best windows on this market is the Posse List, which is a website founded in 2002 that maintains a large number of Listservs based on geography, subject matter expertise and foreign language proficiency. The staffing agencies and managed service firms post jobs; in turn, interested Posse List subscribers respond. According to a recent story in *Chicago Crain's Business*, the number of attorneys who subscribe to the Chicago portion of the Posse List increased from 1,520 in 2006 to over 5,000 in 2017.[18] The California market has robust coverage, with a statewide Listserv along with separate lists for the Los Angeles, San Francisco, San Diego and Sacramento markets.

In theory, the work brokered by the Posse List is the type of labor-intensive work most susceptible to replacement by legal process outsourcing and artificial intelligence. Yet time zone differences, the complexity of managing language and cultural issues and a shrinking wage differential between the U.S. and abroad have keep a substantial amount of this work in the U.S. Further, at least in 2018, AI technologies are being deployed not to replace lawyers, but to help manage the relentless increase of volume and complexity of information and legal tasks. As a result, recent reports show growing demand in the major markets, causing some work to be diverted to lower-cost U.S. markets.[19] Pay is currently in the $32 to $35 per hour range in major markets – a sum that is probably well below the expectations of most law school graduates.

Another segment of the gig economy for lawyers is centered around the needs of smaller and midsize law firms that occasionally have large projects or surges in demand. This portion of the bar is increasingly served by lawyer-to-lawyer marketplaces that are carefully constructed so that sufficient subject matter information is shared to facilitate bidding on projects and matching subject matter expertise, but not information that would compromise client confidentiality. After a match is made, a conflict check is performed before entering into a project engagement.

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[16] Calculated by Legal Evolution PBC from U.S. Census Bureau County Business Patterns data. In 2004, there were 1,218.350 employers in the legal services sectors (5411). In 2016, that number had declined to 1,137,480.

[17] Many of these staffing agencies are either publicly held companies or owned at least in part by private equity firms. For example, Kelly Law Registry (owned by Kelly Services, traded on the NASDAQ), Special Counsel (owned by Adecco Group, a publicly traded Swiss company), Robert Half Legal (owned by Robert Half International, traded on the NYSE).

[18] See Bushey, *supra* note 11.

[19] See, e.g., Greg P. Bufithis, *Tales from the trenches: the explosion of e-discovery projects in D.C. and NYC*, THE POSSE LIST, June 18, 2018, at http://www.theposselist.com/2018/06/18/tales-from-the-trenches-the-explosion-of-e-discovery-document-review-projects-in-d-c-and-nyc/ (last visited June 26, 2018).

One of the most established marketplaces is Hire An Esquire, which claims to maintain a network of 8,000+ legal professionals in 50 states that have been vetted for quality. Some of these professionals are Hire An Esquire employees, while others are independent contractors. According to a 2017 article Hire An Esquire charges out attorneys at an average of $70/hour, taking a 12 percent fee for 1099 projects and 40 percent for W-2 projects.[20] Hire An Esquire is financed by a combination of angel and venture capital funding.[21]

Other more recent entrants to the lawyer-to-lawyer marketplace space include LawClerk.legal and Lawyer Exchange. In contrast to Hire An Esquire, both of these portals let the price of work float between the contracting law firms and contract lawyers. Further, both enable the contracting firm and contract lawyers to rate their experience with each other, thus enabling a market that reflects not only price but also quality of work and collegial nature of the work environment. In the case of LawClerk.legal, the company appears to elide the risk of multijurisdictional practice and the unauthorized practice of law by holding itself out as "a marketplace through which persons holding a law degree ("Lawclerks") may be engaged in the capacity of a paraprofessional (verses as a lawyer) by attorneys that are admitted to and in good standing with their respective state's bar association ("Attorneys")[.]"[22] The range of typical services includes "preparation of memorandums, pleadings, written discovery, and agreements."[23]

The business model for lawyer marketplaces usually requires the entity running the marketplace to act as a transparent and trustworthy conduit for payment. In most cases, but not all,[24] payment is tied to the amount or volume of work. Although this raises nominal questions related to Rule 5.4 of the ABA Model Rules of Professional Conduct[25] concerning fee-splitting – a fact that all of these businesses took into account before launching – the tension is with the text of the existing rules rather than the underlying policy, which is to safeguard lawyer independence.[26] Thus, when evaluating the propriety of these marketplaces, legal regulators should fully weigh the benefits of these services to both clients and lawyers and require a clear factual basis to show that lawyer judgment is at risk of being compromised to the detriment of clients. The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other.

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[20] See *Need a Freelance Lawyer? 3 Online Contract Marketplaces Compared*, CAPTERRA LEGAL SOFTWARE BLOG, Sept. 26, 2017, at https://blog.capterra.com/need-a-freelance-lawyer-3-online-contract-lawyer-marketplaces-compared/ (last visited June 26, 2018).

[21] See Crunchbase, https://www.crunchbase.com/organization/hire-an-esquire/funding_rounds/funding_rounds_list (last visited June 26, 2018).

[22] See Ethics White Paper, https://www.lawclerk.legal/ethics_whitepaper (last visited June 26, 2018) (focusing on Model Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants" and Model Rule 5.5 "Unauthorized Practice of Law").

[23] Id.

[24] For example, MPlace is a marketplace for contract attorneys working on large corporate project that also maintains and shares ratings on clients and contract lawyers. However, its business model is a single-price annual subscription based on number of review "seats" the client hopes to fill.

[25] Unless otherwise noted, all rule references are to the ABA Model Rules of Professional Conduct.

[26] See Rule 5.4, Comment [1] ("The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer's professional independence of judgment*." (emphasis added)).

1.5. Alternative Legal Service Providers (ALSPs) and LegalTech

In 2018, it is hard to overstate the tremendous economic and technological ferment of the legal ecosystem growing up within and around the traditional legal services market. Various organizations now produce "market maps" of the legal tech and legal startup space. Appendix A contains a representative sample published by Thomson Reuters,[27] which breaks down this crowded and diverse marketplace into the following categories (with number of companies in parentheses).

- Business Development / Marketplaces (19)
- Litigation Funding (6)
- Legal Education (13)
- E-Discovery (11)
- Practice Management (20)
- Legal Research (17)
- Case Management Analytics (10)
- Document Automation (17)
- Contract Management / Analysis (12)
- Consumer (11)
- Online Dispute Resolution (11)

Several of the companies mentioned in this report were launched *after* the creation of the 2016 Thomson Reuter map. The rapid change in this space makes it very difficult to accurately track.

Another window on the massive amount of innovation occurring in the legal services space can be seen in the large number of legal startups that are using artificial intelligence to create "point solutions" related to legal problem-solving.[28] For example, Tel Aviv-based LawGeex is a company that makes automated contract review technology that helps businesses sift through the myriad of contracts that are entered into during the normal course of business, such as NDAs, supplier agreements, purchase orders and SaaS licenses. As of April 2018, it had raised more than $21 million from a syndicate of venture capital companies.[29]

To help distinguish itself within a crowded marketplace, LawGeex recently launched a content marketing campaign[30] that included the creation of its LegalTech Buyer's Guide. This remarkable document provides a detailed breakdown of venture capital funding ($233 million in

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[27] See David Curle, *Legal Tech Startups: Not Just for Silicon Valley Anymore*, LEGAL EXECUTIVE INSTITUTE, August 2, 2016, http://www.legalexecutiveinstitute.com/legal-tech-startups/ (last visited June 26, 2018). CBInsights, which caters to professional investors, also regularly produces a legal tech market map. See, e.g., https://www.cbinsights.com/research/legal-tech-market-map-company-list/ (last visited June 26, 2018).

[28] A point solution is a tech-driven way to handle a narrow category of work. Many point solutions require lawyers and staff to learn many new technologies, which slows overall tech adoption.

[29] See Steve O'Hear, *LawGeex raises $12M for its AI-powered contract review technology*, TECHCRUNCH, Apr. 17, 2018, at https://techcrunch.com/2018/04/17/lawgeex-raises-12m-for-its-ai-powered-contract-review-technology/ (last visited June 28, 2018).

[30] Content marketing is strategy where a company raises awareness for its products and services by providing prospective clientele with information that aids them in their business, often by educating them on complex technical topics. High quality content is a way to signal expertise within a crowded market. Thus, when a prospective client moves closer to a buy decision, they are favorably disposed toward the company that helped educate them. Within the legal industry, see generally JORDAN FURLONG & STEVE MATTHEWS, CONTENT MARKETING AND PUBLISHING STRATEGIES FOR LAW FIRMS (Ark 2013).

2017 across 61 deals) along with information on recent mergers, acquisitions and industry consolidation. What is most useful to buyers, however, is the careful categorization of more than 130 technology companies into 16 different categories. This includes a capsule summary of all 130+ companies, touching on issues of price, user experience, relative drawbacks and limitation compared to competitors and occasional pithy commentary from insiders. What makes the document credible is the fact that LawGeex is described in only *one* of the 16 legal tech categories.

Figure 4 below is a summary of the many AI-enabled legal tech companies based on "use case."

Figure 4. Legal Tech Companies-based Artificial Intelligence Use Case

Even to a researcher focusing on the legal industry, this is a bewildering array of offerings. The author is reminded of an observation made 25 years ago by software engineer Paul Lippe, a legal tech entrepreneur who was then general counsel of Synopsys, an electronic design automation company based in Mountain View, California: "It's only AI when you don't know how it works; once you know how it works, it's just software."[31] This anecdote makes a very important point: there is a lag between the development of new innovations and the ability of laypeople (including lawyers) to accurately understand, contextualize and categorize how these innovations fit into our economy, society and system of government.

The combining of law with technology is driven by powerful economic forces. Now more so than at any other time in history, law is in the process of moving from a pervasive model of one-to-one consultative legal services to one where technology enables one-to-many legal solutions.[32] As momentum grows, more pressure will be placed on a regulatory framework

[31] See Paul Lippe and Daniel Martin Katz, *10 Predictions about how IBM's Watson will impact the legal profession*, ABA JOURNAL, Oct. 2, 2014 (Legal Rebels Series), at http://www.abajournal.com/legalrebels/article/10_predictions_about_how_ibms_watson_will_impact/ (last visited June 28, 2018).

[32] See generally RICHARD SUSSKIND, TOMORROW'S LAWYERS (2nd ed. 2017) (discussing the transition for one-to-one consultative legal services to one-to-many productized legal solutions).

premised on one-to-one legal services. This raises very difficult questions for regulators, as paradigm shifts are rare events that are difficult to recognize. Rather than amend an ethics framework built for a bygone era, the public interest may be better served by a new regulatory structure that includes traditional lawyering side by side with one-to-many legal services, products and solutions created by a wide range of professionals from multiple disciplines. This is the path taken by Australia and the United Kingdom with the likelihood of Canada going next.[33]

Section 2 of this report has additional descriptions and examples of other alternative legal businesses. However, that discussion requires a deeper understanding of how the U.S. legal market is functionally divided into two markets: one serving individuals and a second serving organizational clients.

2. Individual versus Organizational Clients

Drawing upon the social sciences, Section 2 reveals two legal markets: one serving individuals and another serving organizational clients. These markets need to be analyzed separately because they involve different economic drivers that are evolving in very different ways.

2.1. Chicago Lawyers I and II Studies

Two of the most important and informative studies on the legal profession are the Chicago Lawyers I and II studies.[34] Chicago Lawyers I was based on a randomized sample of 800 Chicago lawyers drawn in the year 1975. One of the study's most salient findings was that the legal profession was comprised of two "hemispheres," one serving individuals and the other working for large organizational clients. The specific hemisphere was strongly correlated with a lawyer's income, home zip code, law school attended, ethnicity, religion and bar association memberships, etc. The researchers described these two groups as hemispheres not only because each composed roughly half the profession, but also because their professional interests and networks seldom overlapped.[35]

In 1995, the same core researchers conducted Chicago Lawyers II, which replicated the original study based on a new sample of Chicago lawyers. Over the intervening two decades, the organizational client hemisphere experienced a dramatic surge in work from corporate clients. As a result, the amount of time lawyers devoted to organizational clients doubled compared to the time spent on personal and small-business clients. Thus, the term "hemisphere," as in half, no longer applied. Typical large law firm income increased from $144,985 in 1975 to $271,706 in 1995. In-house counsel also fared well. In contrast, the most economically challenged group was solo practitioners, as these lawyers were much more likely to serve individuals through personal injury, family law, criminal defense and trusts-and-estates work. In 1975, a solo practitioner in the sample earned a median income of $99,159 (in 1995 dollars). By 1995, this

[33] See, e.g., Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEORGETOWN L. INT'L L. 665, 669-70 (2016) (discussing liberalization of legal regulatory changes in the U.K., Australia, continental Europe and Canada).

[34] John P. Heinz & Edward O. Laumann, Chicago Lawyers: The Social Structure Of The Bar (rev. ed. 1994) ("Chicago Lawyers I"); John P. Heinz et al., Urban Lawyers: The New Social Structure Of The Bar 6–7 (2005) ("Chicago Lawyers II").

[35] HEINZ ET AL., *supra* note 34, at 29 ("Only in the most formal of senses ... do the two types of lawyers constitute one profession.").

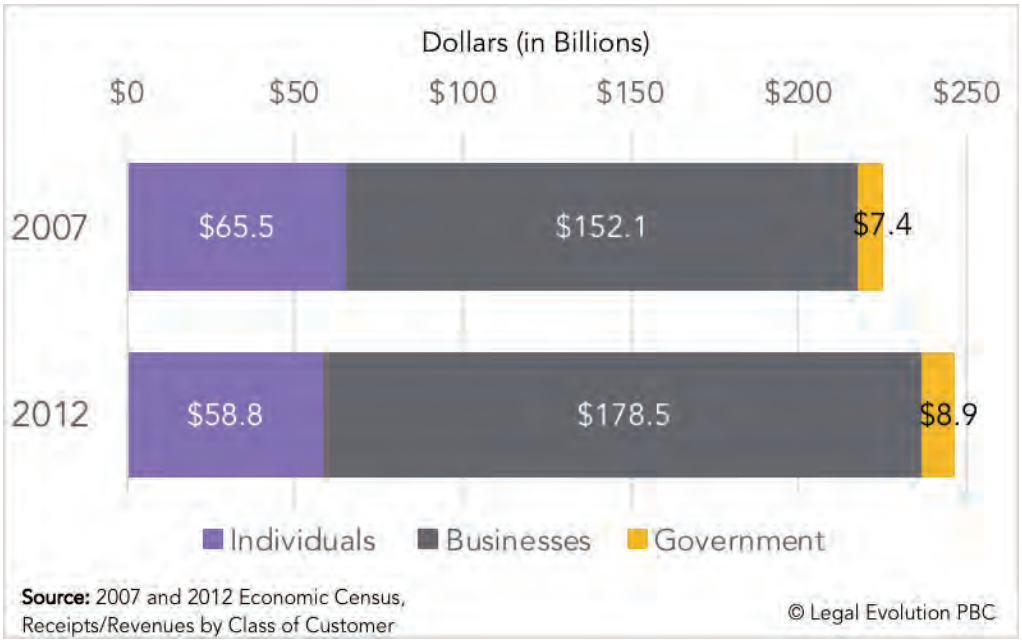
figure had dropped to $55,000. Further, in 1995, 32 percent of these lawyers were working second jobs compared to 2 percent in 1975.

In the remainder of this report, I will refer to the portion of the bar focused on individuals as the PeopleLaw sector. The portion of the bar focused on corporate clients will be referred to as the Organizational Client sector.

2.2. How Type of Client Shapes the Economics of Practice

The Chicago Lawyers hemisphere framework is a very useful lens for understanding the changes that are occurring within the legal profession. The most fruitful place to apply this framework is the U.S. Census Bureau's Economic Census, which includes breakdowns of economic activity based on "class of customer." Figure 5 below compares total spending on legal services in 2007 and 2012 based on individual, business, or government client:

Figure 5. Dollars Spent on Legal Services, 2007 and 2012, by Type of Client



The most striking feature of Figure 5 is that over a five-year span, the total dollar amount for individual clients (PeopleLaw sector) declined by nearly $7 billion. During the same time, the amount allocated to business (Organizational Client sector) increased by more than $26 billion. Although solo and smaller incomes were in the decline in Chicago Lawyers, the actual *shrinkage* of the PeopleLaw sector suggests we are in the midst of an irreversible structural shift..

The stark differences between the PeopleLaw and Organizational Client sectors are made more concrete when the data is broken down by client type. Table 4 presents an estimated breakdown of average legal expenses by type of client:[36]

[36] For a complete discussion of data sources and methodology, see William D. Henderson, "The Legal Profession and Legal Services: Nature and Evolution," in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 1-1.2 (Gregory C. Sisk, ed., 2018).

Table 4. Breakdown of 2012 Law Firm Receipts by Type/Size of Client

Type of Client	Number	Total Receipts for Legal Services (thousands)	Avg. Payment per Client	% of Total Receipts
Individuals	314,000,000	$58,827,000	$187	23.9%
Business: < $1M to $5M	5,359,731	$41,310,000	$7,707	16.8%
Business: > 5M to $100M	344,037	$65,604,000	$774,910	26.7%
Business: > 100M to $4.75B	21,892	$41,500,000	$1,895,670	16.9%
Business: Fortune 500	500	$30,000,000	$60,000,000	12.2%
Government Entities	89,055	$8,900,000	$99,938	3.6%
	319,815,215	$246,141,000	$769.64	100.0%

Source: U.S. Census Bureau 2012 Economic Census, Calculations by Legal Evolution PBC

In 2012, the per capita amount spent on legal services by 314 million U.S. residents was $187. For businesses with less than $5 million in annual receipts, the average legal budget was $7,707. In contrast, for the 500 clients in the Fortune 500, the budget was $60 million. Indeed, in 2012, roughly one out of eight (12.2%) dollars spent on legal services came from a Fortune 500 company – and this does not include the economic value of their large in-house legal departments.

A law practice serving individual "retail" clients is obviously going to require a different business model than a law practice serving the Fortune 500. Thus, it is reasonable to ask whether the public interest would be better served by a regulatory structure that is sensitive to the challenges that exist within these two very different parts of parts of the market.

2.3. The Economics of PeopleLaw

A 2017 study by Clio, a cloud-based matter management and timekeeping company for solo and small firms, provides a window on the challenges of running a "main street" law practice.[37]

The Clio sample is based on timekeepers from 60,000 law firms billing over 10 million hours of time in 2016 totaling more the $2.56 billion. Because the sample is so large and reflects lawyers sophisticated and successful enough to pay for matter management software, it is surprising and disconcerting that the typical small firm lawyer is performing only 2.3 hours of legal work per day. Of that amount, only 82 percent is actually billed to clients; and of the amount billed, only 86 percent is being collected – the equivalent of 1.6 hours. At $260 per hour, which is the average rate for lawyers in the Clio sample, this amounts to a mere $422 a day, or $105,000 in gross receipts over a 50-week year. This is a sum that needs to cover office overhead, health care, retirement, malpractice insurance, marketing, taxes, etc. Of the remaining six hours left in the workday, 33 percent was focused on business development and 48 percent on administrative tasks, such as generating and sending bills, configuring technology and collections.[38]

The average matter in the Clio system was worth approximately $2,500.[39] Building a financially successful law practice out of low-stakes, high-volume cases requires capital for technology and marketing along with significant business acumen and managerial ability. Very few small firm

[37] See 2017 CLIO LEGAL TRENDS REPORT (2017), available online at https://www.clio.com/2017-legal-trends-report/#download (last visited July 1, 2018).

[38] *Id.* at 13.

[39] *See id.* at 8 (calculated from total dollars billed (~$2.56 billion) divided by number of matters (1.03 million matters)).

lawyers possess these resources and skills. Thus, as the Clio data show, they are forced to allocate a lot of their time to relatively ineffective methods of finding work. Under Rule 5.4, which exists in some variation in all 50 states, lawyers must be the exclusive owners of any business that engages in the practice of law.[40] This regulatory constraint may be a primary reason why the PeopleLaw sector has entered a period of serious decline.

2.4. The Economics of Large Organizational Clients

At the same time that the work of lawyers tilts more toward organizational clients, large corporate legal departments are increasingly seeking ways to control their legal expenses. This pressure is building because of the sheer complexity of a highly regulated and interconnected global economy. Although this pressure is experienced by lawyers and clients as a problem of cost, the root cause is lagging legal productivity, a topic discussed in greater detail in Section 3. This focus of this section, however, is the economics of large organizational clients.

For large corporate enterprises with operations throughout the U.S. and abroad, compliance with the law is a necessity. The sheer complexity of this task favors large law firms with a large array of highly specialized lawyers. Since the mid 1980s, *The American Lawyer* has tracked the financial performance of the nation's largest law firms. In 2012, on the 25th anniversary of the Am Law 100, the following statistics described the changes that had occurred among the nation's 100 largest law firms:

- Total gross revenues increased from $7.2 billion to $71.0 billion (+886%).
- Total lawyer headcounts went from 26,000 to 86,272 (+231% rise).
- Average profits per partner grew from $325,000 to $1.48 million (+355%).

During this same time period, the Consumer Price Index climbed 205 percent while the GDP increased 235 percent. Although the overall pie of the U.S. economy was growing, the nation's largest law firms were enjoying a proportionately larger slice.[41] Despite the continued climb of profits in the nation's large firms, the overall demand for corporate legal services, as measured by lawyer hours in law firms, has been relatively flat for the last several years.[42] This reflects a transition period where the firm has a higher proportion of older partners. By dint of experience, these partners bill at higher rates. This will persist in the short- to median term because many senior lawyers do not want to invest in new tools and learning—but neither do their older in-house counterparts. As baby boomer lawyers retire, however, the pace of change will accelerate.

The long-term trend is for in-house lawyers to do more with less.[43] Through the year 2018, the most aggressive cost-saving measures have occurred through insourcing—i.e., adding headcount in the legal department, primarily by hiring large firm associates.[44] Indeed, this trend

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[40] See Rule 5.4.

[41] *See* William D. Henderson, *AmLaw 100 at 25*, AMERICAN LAWYER (June 2012).

[42] *See* JAMES W. JONES, ET AL., 2017 REPORT ON THE STATE OF THE LEGAL MARKET (Georgetown Law, Center for the Study of the Legal Profession 2017) ("Overall, the past decade has been a period of stagnation in demand growth for law firm services, decline in productivity for most categories of lawyers, growing pressure on rates as reflected in declining realization, and declining profit margins.").

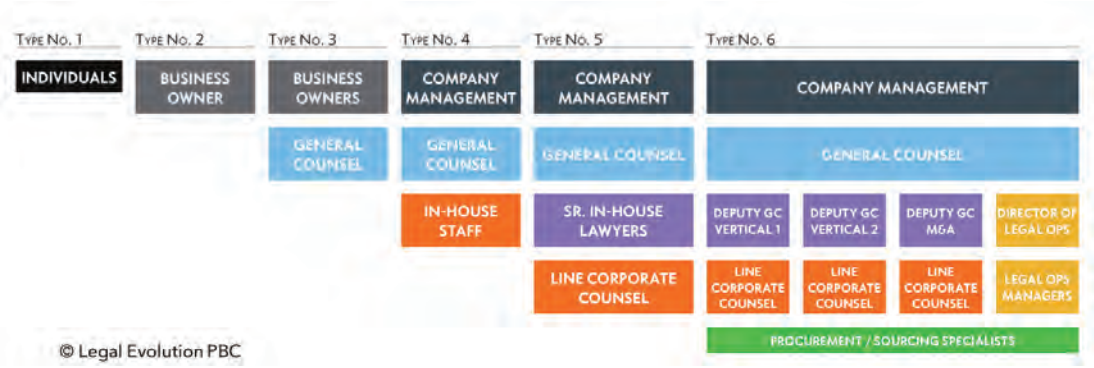
[43] See SUSSKIND, *supra* note 32, at 12 (discussing more-for-less imperative).

[44] See, e.g., Jacob Gershman, *Law Firms Face New Competition – Their Own Clients,* WSJ LAW BLOG, Sept. 14, 2014 ("This year corporations are shifting an estimated $1.1 billion that they used to spend on outside lawyers to their own internal legal budgets ... . That migration cements a trend that took off during the recession[.]"); Henderson,

was observed in Figure 2 in Section 1.2. The growth and proliferation of in-house lawyering have resulted in some legal departments, particularly in heavily regulated or IP-intensive industries, that are several hundred lawyers and thus are the functional equivalent of large law firms embedded inside multinational corporations. The largest and most advanced legal departments are now organized into practice groups. Many also include "legal operations" professionals focused on building processes and leveraging technology to cope with the tremendous complexity of running a company in an interconnected and globalized world.

This section is organized around the two-hemisphere framework. Yet, the structure of the Organizational Client sector has changed dramatically since the Chicago Lawyers II study. Thus, to more accurately conceptualize the current variations of organizational clients, the author created Figure 6.

Figure 6. Six Types of Clients



The Type No. 6 client in Figure 6 is an entirely new structure that only came into being within the last 10-15 years.

In addition to the growth of corporate legal departments, a second cost-saving measure is the diversion of work to alternative legal service providers (ALSPs), which includes companies such as Axiom, UnitedLex, Integreon, QuisLex, Elevate and many others. These are private corporations run by a mix of lawyers and business executives. In the majority of cases, they are financed by prominent venture capital and private equity funds.[45] This movement began with legal process outsourcers in the mid-2000's who specialized in large document review projects connected with the proliferation of electronically stored information. Yet these companies now perform work on sophisticated corporate transactions, albeit in each case under the supervision of either law firm or in-house lawyers.[46]

The steady growth of ALSPs is one of the main reasons that the lexicon on law has gradually shifted from discussions of the "legal profession" to a changing "legal industry." As noted by one investment banker who has provided significant funding to companies in the legal industry, "If law firms themselves can't have outside investors, the market will continue to chip away at

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Efficiency Engines, *supra* note 12, at 42 (Axiom CEO Mark Harris tracing growth of legal department back to "Ben Heineman at General Electric.").

[45] See, e.g., Henderson, *Efficiency Engines*, *supra* note 12, at 42 (discussing prevalence of sophisticated investors among managed services providers).

[46] This supervision is done pursuant to Rules 5.1 (responsibilities of supervisory lawyers) and 5.3 (responsibilities regarding nonlawyer assistants).

every part of a law firm that is not the pure provision of legal advice … . Anything that can be provided legally by a third party will be."[47]

3. The Problem of Lagging Legal Productivity

As discussed in Section 2, the PeopleLaw and Organizational Client sectors are evolving in dramatically different ways. However, they have one crucial commonality: both groups are struggling to afford legal services. In the PeopleLaw market, this manifests itself in more citizens going without access to legal services. In the corporate market, clients cope by insourcing legal work and, when that is not possible, by demanding fee discounts from law firms. Both clients and lawyers view the financial gap between legal budgets and the corporations' legal needs as a problem of price – i.e., that legal services cost too much. Yet, it is more much accurately characterized as a problem of lagging legal productivity.

3.1. Cost Disease

Throughout our modern economy, productivity gains vary widely from sector to sector. Because of improvements in design, technology, production processes and logistics, over the last two to three decades the typical consumer has enjoyed declining costs for thing like clothing, computers, long-distance calling, travel, etc. In some cases, the lowering of cost is also accompanied by significant increases in quality (e.g., safer and more reliable cars; the evolution of cellphones into smart devices).

In contrast, there are other sectors, such as education and medical care, where prices tend to go up much faster than worker income. The reason for the upward spiraling price is that these activities are very human-intensive and involve specialized human capital. Unfortunately, it is the *lack* of productivity gains in these sectors that accounts for their higher cost, as these workers have sufficient market power to raise prices to preserve their relative place in the economy.

This phenomenon is what economists refer to as "cost disease." It was first noted in a book by two economists, William Baumol and William Bowen, focused on the performing arts. The authors observed that the time and human effort it takes to perform a 45-minute Schubert quartet has not changed in hundreds of years.[48] Despite the inability of live musicians to improve productivity, the wages of the musicians continued to rise.

3.2. Law Compared to Medical Care and Higher Education

Along with medicine, education and the performing, law is a field afflicted with cost disease.[49] There is strong evidence, however, that society is adapting to higher relative costs for legal services in a different way than medical care and education.

Specifically, over the last three decades, consumers have generally allocated significantly more of their income to medical care and education. In contrast, the proportion of income allocated

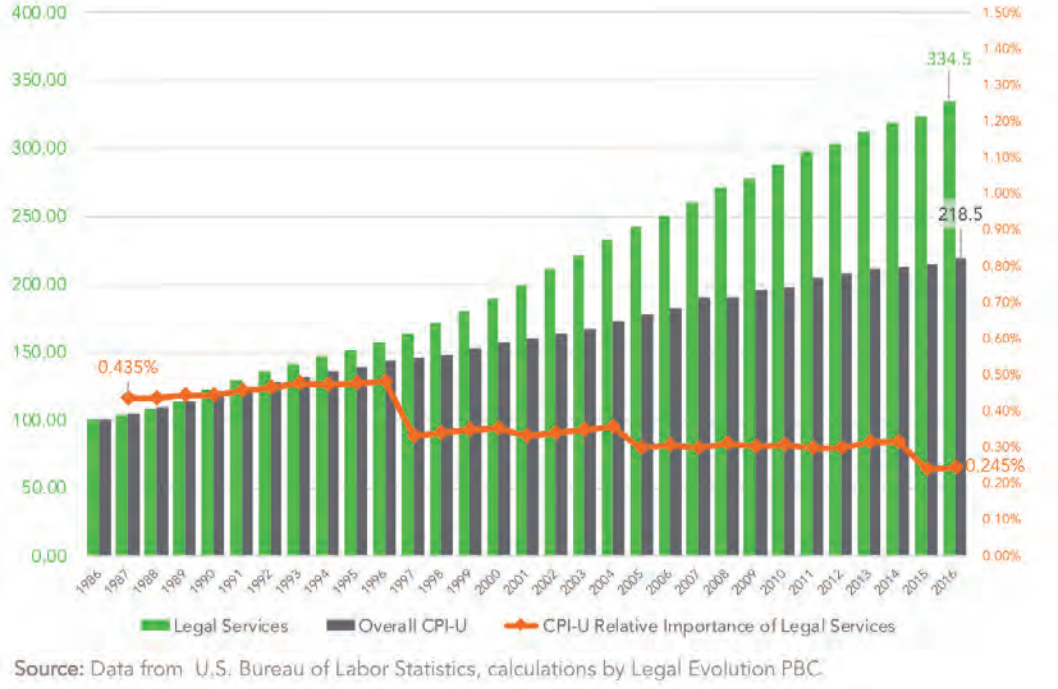
[47] *See* Barbara Rose, *Law, the Investment*, ABA JOURNAL (Sept. 2010) (quoting Nick Baughan of Marks Baughan & Co.).

[48] WILLIAM J. BAUMOL & WILLIAM G. BOWEN, PERFORMING ARTS: THE ECONOMIC DILEMMA 164 (1966).

[49] See generally WILLIAM J. BAUMOL, THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T (2013) (discussing industry afflicted by cost disease along with possible public policy responses).

to legal services has declined by almost 50 percent. Stated more concisely, legal services are losing wallet share among U.S. consumers. Figure 7 shows these two trend lines together.

Figure 7. Legal Services Compared to Overall CPI-U and Relative Importance of Legal Services in CPI Basket



Source: Data from U.S. Bureau of Labor Statistics, calculations by Legal Evolution PBC.

The left axis (green) in Figure 7 is the Consumer Price Index for All Urban Consumers ("CPI-U") with the base year set to 1986 (Index = 100). The green and gray bars show the cost of legal services rising nearly twice as fast as the overall CPI-U basket. The right axis (orange) measures the "relative importance" of legal services within the CPI basket. Basically, as the relative prices of goods and services change, consumers adjust how they allocate their money. The U.S. Bureau of Labor Statistics tracks these changes and uses this data to periodically reweigh the composition of the CPI-U basket.[50] What we observe is a gradual downward trend in which American consumers are finding ways to forgo legal services.[51]

Table 5 compares the change in wallet share of legal services to medical care and college tuition.

Table 5. Change in Relative Importance in CPI-U for Three Sectors

CPI component	Relative importance in CPI-U		
	1987	2016	Change over time
Legal Services	0.435%	0.245%	-43.7%
Medical Care	4.807%	8.539%	+77.6%
College Tuition	0.840%	1.807%	+120.3%

Source: Bureau of Labor Statistics, calculations by Legal Evolution PBC

[50] See https://www.bls.gov/opub/hom/cex/home.htm (last visited July 5, 2018).

[51] The orange line in Figure 7 shows a sudden drop in the relative importance of legal services in 1997 (from 0.480% to 0.329% of consumer spending). This drop occurred because the BLS reweighted the CPI basket for the first time in several years. Yet, the CPI basket is now re-weighs the CPI based on a two-year rolling average.

3.3. Impact on the Practice of Law

Cost disease results in increases in relative prices in sectors that are very human-intensive. The price increases then can set off second-order effects, such as shrinking demand or substitution. The legal sector has all three symptoms.

- *Higher relative cost*: Even within the economically stressed PeopleLaw sector, the average hourly rate for a lawyer is $260.[52] In the Organizational Client sector, profits of large firms have increased much faster than the nation's GDP and Consumer Price Index.[53]
- *Shrinking demand*: Between 2007 and 2011, the PeopleLaw sector shrank by nearly $7 billion, or 10.2 percent.[54] This occurred on the heels of the deteriorating economics of lawyers serving individual clients.[55]
- *Substitution*: The PeopleLaw sector is increasingly served by legal publishers such as LegalZoom, Rocket Lawyer and many others that provide access to tech-enabled forms. In effect, this creates a consumer DIY culture where it is difficult to combine high-quality, low-cost forms with legal advice.[56] In the Organizational Client sector, in-house lawyers have become a substitute for law firms; in turn, ALSPs are a partial substitute for both.[57]

The negative effects of cost disease occur because of lags in productivity between sectors. In the U.S., the market is constrained by the ethics rules with regard to nonlawyer ownership and the unauthorized practice of law. Thus, as a sizable portion of the public struggles to afford a lawyer and a sizable portion of the bar struggles to find sufficient fee-paying client work, legal regulators need to seriously evaluate whether the consumer protection benefits of these ethics rules are worth the cost. This topic is taken up directly in Section 4.

3.4. Courts and Access to Justice

Courts are on the front line of the legal sector's cost disease problem. Yet, as explained below, courts are also partially responsible for cost disease.

Courts are on the front line because they are dealing with a surge in the number of self-represented litigants. This trend was recently documented in a major study conducted by the National Center for State Courts (NCSC).[58] The study was based on all civil matters in 10 large urban counties that were disposed of in those counties over a one-year period, including Santa Clara County.[59] The sample totaled 925,344 cases (approximately 5% of the total civil case load

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[52] See Section 2.3, *supra* at page 14.

[53] See Section 2.4, *supra* page 15.

[54] See Figure 5 and accompanying text.

[55] See Section 2.1, *supra* at page 12.

[56] This is due the ethics rules on fee-sharing (Rule 5.4) and unauthorized practice of law (Rule 7.2).

[57] See Section 2.4, *supra* at page 15.

[58] *See* PAULA HANNAFORD-AGOR JD, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (National Center for State Courts 2015) [hereafter LANDSCAPE STUDY] (building sample based on the July 1, 2012 to June 30, 2013 time period).

[59] The counties were Maricopa County (Phoenix, AZ), Santa Clara County (San Jose, CA), Miami-Dade County (Miami, FL), Oahu County (Honolulu, HI), Cook County (Chicago, IL), Marion County (Indianapolis, IN), Bergen

nationally) and was built to be roughly representative of the nation as a whole. Remarkably, 76 percent of cases involved at least one party who is self-represented, roughly double the number for the most comparable study conducted 20 years earlier.[60]

The increase in self-represented litigants is occurring because of the growing gap between the cost of lawyer representation and the value of the underlying claim. Of the 227,812 cases in the NCSC study that resulted in a nonzero monetary judgment, the median value was a mere $2,441. Further, three-quarters of all judgments were less than $5,100. Only 357 judgments were more than $500,000 and only 165 more than $1 million (i.e., the type that might be reported in the mainstream press). According to the NCSC, the median cost per side of litigating a case, from filing through trial, ranges from $43,000 for an automobile tort case to $122,000 for a professional malpractice case. Thus, "in many cases, the cost of litigation likely outstrips the monetary value of the case shortly after initiating the lawsuit."[61]

Although courts are seriously impacted by cost disease, they are also, in part, one of its causes. This is because the judiciary establishes the procedures lawyers must follow to resolve disputes. These procedures are rooted in lawyer tradition and the idiosyncratic preferences of local jurists. Yet rarely is the system evaluated from the perspective of a citizen with a legal problem. For this reason, the British lawyer and futurist Richard Susskind has posed the question, "Is court a service or a place?"[62]

When court is viewed as a service, the judicial process becomes something that can be re-engineered to lower costs and improve quality. Arguably, the most advanced system exists in British Columbia, Canada, where all civil matters under $5,000 and all strata (i.e., condominiums) disputes are required to be resolved through an online system managed by the recently created Civil Resolution Tribunal ("CRT"). Instead of an adversarial system with lawyers, parties without lawyers are guided through a structured online mediation process that is designed to produce early and amicable resolution. Case managers handle most of the work. Less than 5 percent of matters require formal adjudication by the CRT. Users of the CRT (citizens) are giving the system high marks for convenience, cost and fairness. Lawyers would be interested to know that the consulting practice of PwC, the Big Four accounting firm, built the CRT's online platform.[63]

In the years to come, online dispute resolution ("ODR") is destined to grow. This is because ODR has the potential to lower government administration costs while improving the citizen experience. The European Union has implemented an ODR for all its consumer and online trading disputes. Its homepage reads, "Resolve your online consumer problem fairly and efficiently without going to court."[64] Similarly, in July 2018, two counties in the Greater Austin

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County (Hackensack, NJ), Cuyahoga County (Cleveland, OH), Allegheny County (Pittsburgh, PA), Harris County (Houston, TX).

[60] *See* LANDSCAPE STUDY, *supra* note 58, at 31.

[61] *See* LANDSCAPE STUDY, *supra* note 58 at 25, citing Paula L. Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20(1) Caseload Highlights 1, 2013.

[62] See SUSSKIND, *supra* note 32.

[63] See Richard Rogers & Kandis McCall, The Civil Resolution Tribunal: The World's First Government-Run ODR for Civil Disputes, presentation at the Forum on Legal Evolution, Nov. 9, 2017 (Chicago, IL), at https://forum.legalevolution.org/program/ (last visited July 6, 2018).

[64] See https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN (last visted July 6, 2018).

area in Texas will commence using an online dispute resolution platform built by Tyler Technologies, a publicly traded company specializing in government services. One of the judges who helped implement the system called it "pajama justice" because "[p]eople can sit at home in their pajamas and get emails from the opposite side and see if they can reach a resolution."[65] Yet, the underlying methodology is grounded in a sophisticated understanding of the psychology of negotiations, mediation and settlement. For example, the new platform enables a litigant to request an apology. That, in turn, tends to reduce the payout.[66]

4. Ethics Rules and Market Regulation

In the U.S., ethics rules are the primary mechanism for regulating the market for legal services.[67] Most jurisdictions adopt some variation of the American Bar Association's Model Rules of Professional Conduct.[68] Although California has long promulgated its own ethics code, the substance of the California Rules has generally tracked with the policies of the broader U.S. legal profession. In November 2018, a new edition of the California Rules of Professional Conduct will go into effect that will utilize the same numbering system as the ABA Model Rules, thus facilitating easier referencing of rules across jurisdictions.

The key point of this section is that the ethics rules, particularly those pertaining to the prohibition on nonlawyer ownership (Rule 5.4) and the unauthorized practice of law (Rule 5.5), are the primary determinants of how the current legal market is structured. Without these rules, the market would look very different, as private businesses would be free to offer legal-oriented goods and services to both clients and lawyers. Indeed, as discussed in Section 1.5 of this report, private investors see ample opportunity in the current legal market.

The best way to orient the Trustees to the issues at hand is to describe how the current ethics rules are shaping the U.S. legal market. As noted in Section 2, the legal market is functionally segmented into the PeopleLaw sectors versus the Organizational Client sectors. The ethics rules affect these sectors in different ways.

4.1. The PeopleLaw Sector: LegalZoom and Avvo

Under the ethics rules, any business engaged in the practice of law must be owned and controlled by lawyers.[69] This prohibition limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market. Despite this longstanding policy, private investors are increasingly pushing the boundaries of the existing rules.

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[65] See Claire Osborn & Taylor Goldenstein, *Area judges make plans to try out 'pajama' court*, MY STATESMAN, June 17, 2018, at: https://www.mystatesman.com/news/local/area-judges-make-plans-try-out-pajama-court/8HHpoy1lp4qEv6USfjWubO/ (last visited July 7, 2018).

[66] See *id.* (quoting one of the Texas judges, "A lot of people are OK with getting less money than they want out of the case as long as the other person apologizes.").

[67] See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998) (noting that "[e]thical rules are a form of professional self-regulation enforced by civil liability or professional discipline.").

[68] See https://www.americanbar.org/groups/professional_responsibility/publications.html (last visited July 7, 2018).

[69] The only exception in the U.S. is the District of Columbia, which permits a minority ownership of nonlawyers who "performs professional services which assist the organization in providing legal services to clients." Rule 5. 4(b) of the D.C. Rules of Professional Conduct. This modification of Rule 5.4 is widely viewed as a benign way to facilitate partnership stakes for nonlawyer professionals to do lobbying work on federal legislation.

There are dozens if not hundreds of companies that touch on some facet of the PeopleLaw sector that are also owned in whole or in part by nonlawyer managers and investors. However, the two most well-known examples are LegalZoom and Avvo. For the sake of clarity and simplicity, the author will focus on these two companies to illustrate how the ethical rules shape the legal marketplace serving individuals.

Founded in 1999, LegalZoom specializes in tech-enabled legal documents that fit a wide array of individual and small-business needs. In 2012, LegalZoom filed an S-1 with the U.S. Securities & Exchange Commission (a requirement done in preparation for an initial public offering) but ultimately changed course and instead accepted more than $200 million funding from a European private equity firm.[70] Although LegalZoom is not a law firm and therefore cannot engage in the practice of law, its brand recognition, which it largely built through conventional mainstream media advertising, enables it to direct advisory legal work to a network of practicing lawyers. It is able to partially monetize this influence by running prepaid legal service organizations in various U.S. states as permitted under Rule 7.3.[71] At present, LegalZoom offers prepaid legal services plans for both individuals and small businesses.[72]

Avvo is an online legal marketplace founded in 2006 by the former Expedia general counsel, Mark Britton. To get started, Avvo used public records of state bar rolls to build a website that included a nearly complete universe of U.S.-licensed lawyer profiles. In turn, the company created a 1-10 Avvo lawyer rating that was based on bar records and information scraped from online lawyer biographies on law firm websites. The algorithm generally gave higher ratings to lawyers who "claimed" their Avvo profile, as the lawyer was able to provide more complete biographical information. Over time, Avvo added Q&A forums by practice area, which enables lawyers to showcase legal knowledge and demeanor to potential clients. Avvo monetizes its platform by enabling lawyers to upgrade their profile page for a fee, essentially providing low-cost turnkey marketing solutions to small firm lawyers. Also, until recently, Avvo used its platform and marketing reach to facilitate the sale of flat-fee legal services between lawyer and clients (called Avvo Legal Services).[73] In exchange for providing these matching services, Avvo received a marketing fee. Avvo was capitalized with $132 million of venture capital funding.[74] In 2017, Avvo was acquired by Internet Brands, which is an online marketplace company that uses consumer-oriented content to create industry-specific sales channels. Internet Brands is currently owned by private equity company Kohlberg, Kravis Roberts & Co. (commonly known as KKR).

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[70] See Jason Smith, *LegalZoom.com Plans to Pull Its IPO, Sell Stake to Permira*, WSJ LAW BLOG, Jan. 7, 2014, at https://blogs.wsj.com/law/2014/01/07/legalzoom-com-plans-to-pull-its-ipo-sell-stake-to-permira/ (last visited July 7, 2018).

[71] The newly enacted California Rule of Professional Conduct 7.3, operative on Nov. 1, 2018, tracks the language of the ABA Model Rule. See MODEL RULES OF PROF. CONDUCT, Rule 7.3(d) ("Notwithstanding the prohibitions [on solicitation of clients] in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.").

[72] See https://www.legalzoom.com/attorneys/ (last visited July 7, 2018).

[73] This practice attracted pushback from a several state bars. See Appendix B. In July of 2018, Internet Brands made the decision to end Avvo Legal Services. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAWSITES, July 8, 2018, at https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html (last visted July 12, 2018).

[74] See Crunchbase at https://www.crunchbase.com/organization/avvo#section-acquisition-details (last visited July 7, 2018).

Reflecting on the experiences of LegalZoom and Avvo, what is the gap in cost, quality and/or convenience that is attracting the interest of sophisticated professional investors? As discussed in Section 2.3 (declining size of PeopleLaw sector) and Section 3.4 (courts glutted with self-represented), there is ample evidence that ordinary citizens increasingly cannot afford traditional one-on-one consultative legal services. LegalZoom offers partial DIY solutions that help close this gap. Likewise, it is becoming increasingly difficult for lawyers to attract a sufficient and steady stream of paying clients.[75] Both Avvo and LegalZoom offer marketing services that help address this acute lawyer pain point.

Because of their substantial financial backing, LegalZoom and Avvo have been able to establish brand awareness throughout the United States. This high visibility has resulted in a number of run-ins with state regulators and practicing lawyers regarding allegations of the unauthorized practice of law (Rule 5.5, LegalZoom), impermissible fee-splitting (Rule 5.4, LegalZoom and Avvo) and payment of improper referral fees (Rules 7.2-7.3, Avvo).[76] In effect, these two companies have served as de facto test cases to establish the boundaries of private capital in the legal sector.

The author has reviewed a large number of state bar ethics opinions related to both companies. Although LegalZoom and Avvo have fared slightly better in some jurisdictions than in others,[77] what all of these opinions have in common is a careful textual reading of the ethical rules that cautions against activities that could be construed as a violation of the existing language. These opinions are not necessarily the final word, as they are typically advisory opinions from bar ethics committees. After the Supreme Court's ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[78] there is some basis to believe that these ethics rules and opinions may be subject to federal antitrust scrutiny. In situations where regulators are also "active market participants in the occupation" they are regulating, state-action antitrust immunity is only available when these regulators state are subject to active supervision by the state.[79] For example, the Antitrust Division of the U.S. Department of Justice has filed a statement of interest to intervene in a Florida Bar unauthorized practice of law case against a legal tech company. The company, TiKD, manages traffic tickets through a smartphone app.[80] The DOJ's statement is heavily based on the *North Carolina Board of Dentists* decision.[81]

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[75] See Sections 2.3 and 3.4, *supra*.

[76] See Appendix B.

[77] For example, three committees appointed by the New Jersey Supreme Court jointly concluded that Avvo's legal service plan violated Rules 7.2(c), 7.3(d) and 5.4(a) and that LegalZoom (along with Google-based Rocket Lawyer) were operating unregistered legal plans pursuant to Rule 7.3(e)(4)(vii). The N.J. Supreme Court subsequently denied a petition to review the committees' conclusions. See David Gialanella, *Supreme Court Won't Take Up Avvo's Ethics Case*, NEW JERSEY LAW JOURNAL, Jun. 4, 2018, at https://www.law.com/njlawjournal/2018/06/04/supreme-court-wont-take-up-avvo-ethics-case/ (last visited July 7, 2018). In contrast, the North Carolina State Bar has treated Avvo's legal service plan as a payment for marketing rather than a referral fee. See Proposed 2018 Formal Ethics Opinion 1, Participation in Website Directories and Rating Systems that Include Third Party Reviews, Apr. 19, 2018 (not final rule), at https://www.ncbar.gov/for-lawyers/ethics/proposed-opinions/.

[78] See *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) __ U.S. __ [135 S.Ct.] 1101.

[79] Id. at 1114.

[80] See Nathan Hale, Fla. Bar Says Case Law Shows TIKD Is Unlicensed Practice, Law360, June 5, 2018, at https://www.law360.com/articles/1050404/fla-bar-says-case-law-shows-tikd-is-unlicensed-practice (last visited July 9, 2018).

[81] See *United States Department of Justice Supports Tech Start-Up TIKD's Antitrust Lawsuit Against The Florida Bar*, '4-TRADERS, Mar. 13, 2018 (providing link to complaint), at http://www.4-traders.com/news/United-States-

What is missing from essentially all state ethics opinions on LegalZoom and Avvo – and arguably what is required by *North Carolina Board of Dentist Examiners* – is fact-gathering regarding whether consumers are made better or worse off by technical readings of the rules. Arguably, issues of policy (e.g., what construction of the rule best serves the interests of the public?) are not the province of an ethic committee. Yet, as noted earlier, ethics rules substantially determine the structure and functioning of the legal market. In most jurisdictions, the state supreme court has the authority to modify the rules of professional conduct. However, through norms or established procedure, input is sought from a bar committee of lawyers. Further, these groups, with perhaps the historical exception of California, invariably give substantial weight to ABA Model Rules of Professional Conduct. In turn, the Model Rules must be formally adopted by the ABA House of Delegates.[82] Nowhere in all this deliberation, however, is there an analysis of how the current legal market is serving consumers.

To both summarize and crystallize the issues in this section, the rules implicated in the LegalZoom and Avvo matters are premised on harm to clients that flows from lack of lawyer independence (Rule 5.4), incompetent legal service (Rule 1.1), unauthorized practice of law (Rule 5.5), and the dissemination of biased and/or misleading information (Rules 7.1-7.3). But as documented in Sections 2 and 3, there is very serious consumer harm occurring because ordinary citizens increasingly cannot afford traditional legal services. LegalZoom, Avvo and many other nonlawyer-owned businesses claim that they are a market response to that very need.

Professor Gillian Hadfield of the University of Southern California School of Law, who is both a lawyer and an economist, argues persuasively that outside sources of capital are most needed in the PeopleLaw sector to develop and finance innovative low-cost solutions to legal problems.[83] Following an in-depth analysis of the impact of the ethics rules on market structuring and functioning, Professor Hadfield forcefully concludes:

> The prohibition on the corporate practice of law … hobbles the innovation of lower-cost means of providing legal help to the great majority of ordinary individuals. Many of those lower-cost innovations are within easy reach—if the profession would relax its stranglehold on the practice of law. … Large-scale data and information systems are now available to provide standardized documents, procedures and protocols to meet the needs of a large segment of the population that now muddles through with no help at all in legal proceedings, imposing huge costs on our courts and other litigants. Innovators with one foot in the law and another in software or enterprise development are already at work but facing unnecessary and costly limits on their business models to comply with corporate practice rules that no one has, or could, demonstrate improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all.[84]

Department-of-Justice-Supports-Tech-Start-Up-TIKD-s-Antitrust-Lawsuit-Against-The-Flor--26160154/ (last visited July 9, 2018).

[82] See ABA Constitution and By-Laws, Rules of Procedure for the House of Delegates.

[83] See Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014).

[84] Id. at 77.

Under the State Bar Act, the "protection of the public" is the primary governing principle for the State Bar of California. The author encourages the Trustees to take an expansive view of protection that includes greater access to the legal system. Such a view would be consistent with the State Bar's mission statement in its five-year strategic plan.[85]

4.2. The Organizational Client Sector

Over the last 10-15 years, the evolution of the Organizational Client sector has been significantly shaped by the ethics rules, particularly the prohibition on nonlawyer ownership of businesses engaged in the practice of law.[86]

As noted in Section 2.4, the Organization Client sector is also experiencing cost pressures attributable to lagging legal productivity. The front line of this challenge is a relentless increase in the volume and complexity of legal work that puts pressure on the budgets of corporate legal departments. The first level of response was to grow legal departments to reduce the work going to expensive law firms. The second level of response has been to experiment with ALSPs, particularly for large-scale document reviews.

Because ALSPs are substantially owned by nonlawyer entrepreneurs and investors, they have to navigate ethical duties related to competence (Rule 1.1), effective supervision (Rules 5.1 and 5.3) and unauthorized practice of law (Rule 5.5). In the mid-2000's, a series of California and New York local bar authority ethics opinions were favorable toward the use of ALSPs.[87] In 2008, the ABA issued Formal ABA Ethics Opinion 08-451, which effectively provided ALSP's and their clients with a roadmap for compliance with ethics rules.[88]

This roadmap, however, is somewhat counterintuitive. Despite the fact that most ALSPs employ legions of licensed lawyers, the work of ALSPs is typically characterized as paraprofessional work that must to be supervised by licensed lawyers. This duty, typically memorialized in the engagement letter, assigns supervisor duties to corporate in-house lawyers or outside counsel. This is how ALSPs, many of which are owned and controlled by private equity and venture capital investors, avoid charges of unauthorized practice of law (Rule 5.5) and thus nonlawyer ownership of law firms (Rule 5.4).

Yet this construction of the ethics rules provides a functional exception to Rule 5.4 for nonlawyer-owned companies serving large organizational clients. This is because the majority of legal services in the U.S. are bought by corporations with one or more in-house lawyers.[89] Thus, companies such as Axiom, UnitedLex, Integreon, Pangea3, Elevate and many others have become "lawyer to lawyer" businesses. Likewise, the Big Four accounting firms now routinely supplies legal services to major corporations, albeit under the supervision of the companies' legal departments. For example, roughly 600 tax professionals, many of them lawyers, left the

[85] See http://board.calbar.ca.gov/Goals.aspx (last visited July 7, 2018).

[86] See Rule 5.4.

[87] See James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 2 PENN. ST. INT'L. L. REV. 323, 325-26 (2008) (collecting opinions and providing summary and analysis).

[88] See ABA Formal Opinion 08-451, Lawyer Obligations When Outsourcing Legal and Nonlegal Support Services, Aug. 8, 2008, online at https://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/ethicsopinion08451.authcheckdam.pdf (last visited July 8, 2018).

[89] See Section 2.2, *supra*.

General Electric tax department and were "rebadged" as employees of PwC. In turn, the employees were contracted back to GE to work on their tax compliance tasks.[90]

Despite these inroads by sophisticated investors, Rule 5.4's ban on nonlawyer ownership remains a major roadblock to solving, or mitigating, the lagging legal productivity problem (i.e., cost disease). This is because the efficiency gains of lawyer specialization, which gave rise to law firms, have been fully exhausted. As evidenced by the rise of CLOC and the Type No. 6 client, many legal departments have become as big as large law firms.[91] This is occurring because the complexity of problems facing today's corporate clients requires close collaboration between technologists, process design experts, data scientists and lawyers. Indeed, as suggested by the discussion of artificial intelligence in Section 1.5, the future of law is profoundly multidisciplinary.[92] To foster innovation, the ideal would be to have lawyers and allied professionals working together as co-equals *within the same legal service organization*. Although ALSPs have found a workaround to Rule 5.4, it is still mostly limited to high-volume, highly repetitive legal work. Yet many higher-order quality and productivity problems remain.

The policy that underlies Rule 5.4 is lawyer independence.[93] This independence is necessary because there is a presumption of asymmetric information between lawyers and unsophisticated clients that runs throughout the law of lawyering. If knowledge is asymmetric, clients have little choice but to trust lawyers. Under this policy rationale, lawyers as a group must be completely independent. Yet this asymmetry does not exist in large corporations with legal departments comprised of former large law firm lawyers. In this context, Rule 5.4 is actually *hindering* the creation of solutions most needed by large organizational clients.

4.3. The U.K. and Australian Models

Two other common law jurisdictions, the U.K. and Australia, have already liberalized their rules to permit lawyers to co-venture with other professionals.[94] The primary effect of this change is to create a new layer of "entity regulation" where an organization is responsible for maintaining a system of compliance for ethical rules that protect clients.[95] According to Professor Judith McMorrow, the regulatory changes reflected "a reorientation of legal services from a lawyer-centered focus [such as the Model Rules] to a client and customer-oriented perspective."[96]

In many respects, the enactment of the State Bar Act of 2017 parallels the U.K.'s Legal Services Act 2007. This UK legislation created the Legal Services Board ("LSB"), which oversees all aspects of the legal services market and is charged with promoting eight regulatory objectives,

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[90] See Alex Berry, PwC strikes innovative deal with GE to take on in-house tax law team, LEGALWEEK, Mar. 17, 2017, at https://www.legalweek.com/sites/legalweek/2017/03/17/pwc-strikes-innovative-deal-with-ge-to-take-on-in-house-tax-law-team/ (last visited July 8, 2018).

[91] See Section 1.3 and 2.4, *supra*.

[92] This is also the conclusion of one of the legal industry's most influential knowledge management consultants who is also a law school graduate. See Ron Friedmann, *A Multidisciplinary Future to Solve Legal Problems,* PRISM LEGAL, May 2018, at https://prismlegal.com/a-multidisciplinary-future-to-solve-legal-problems/ (last visited July 8, 2018).

[93] See Rule 5.4, Comment [1] ("The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer's professional independence of judgment*." (emphasis added)).

[94] See Section 1.5, *supra*.

[95] See McMorrow, *supra* note 33, at 669.

[96] *Id.*

the first of which is "protecting and promoting the public interest."[97] In addition, three other objectives are explicitly consumer oriented: "(c) improving access to justice; (d) protecting and promoting the interests of consumers of legal services; [and] (e) promoting competition in the provision of legal services[.]"[98] In 2009, the LSB created the Legal Services Consumer Panel, which is composed of citizens and businesses. The Panel's role is to provide independent advice to the Legal Services Board about the interests of users of legal services."[99] This entails "investigating issues that affect consumers and by seeking to influence decisions about how lawyers are regulated."[100] To summarize, the U.S. system is designed to guard against lawyer impropriety; in contrast, the U.K. system focuses foremost on consumer welfare and polices lawyer impropriety through entity regulation.

A comprehensive history and analysis of the regulatory systems of other common law countries is beyond the scope of this report. Nonetheless, the Trustees should be aware that having undertaken analyses far more exhaustive than this report over the course of nearly a decade, these jurisdictions concluded that it was time to end the prohibition on nonlawyer ownership.[101]

5. Conclusion

Law has long been modeled as a self-regulated profession. The primary means of regulation are ethics rules that govern lawyer duties and conduct. However, there is evidence that a large number of clients and potential clients are being underserved by the legal market.

The core market problem is one of lagging legal productivity that, over time, increases the price of traditional consultative legal services relative to other goods and services. In addition to being very harmful to ordinary citizens, this is a major challenge to lawyers trying to earn a living in the PeopleLaw sector. A second problem affecting the legal market is the relentless growth in complexity that flows from living in a highly interconnected and globalized world. Lawyer specialization by itself is no longer sufficient to meet the finite budgets of even the world's wealthiest corporations.

The legal profession is at an inflection point that requires action by regulators. Solving the problem of lagging legal productivity requires lawyers to closely collaborate with allied professionals from other disciplines, such as technology, process design, data analytics, accounting, marketing and finance. By modifying the ethics rules to facilitate this close collaboration, the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.

Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California. The public policy that underlies the legal ethics rules is one of consumer protection. Legal regulators should take a capacious view of this policy and acknowledge the harm that occurs when ordinary citizens cannot afford cost-effective legal

[97] See https://www.legislation.gov.uk/ukpga/2007/29/section/1 (lasted visited July 7, 2018).

[98] See Legal Services Act 2007, at https://www.legislation.gov.uk/ukpga/2007/29/section/1 (last visited July 12, 2018).

[99] See http://www.legalservicesconsumerpanel.org.uk/ (last visited July 12, 2018)

[100] Id.

[101] See generally McMorrow, *supra* note 33.

solutions to life's most basic problems, such as sickness, housing, old age, family planning and access to government benefits. The law should not be regulated to protect the 10 percent of consumers who can afford legal services while ignoring the 90 percent who lack the ability to pay. This is too big a gap to fill through a renewed commitment to pro bono. This is a structural problem rooted in lagging legal productivity that requires changes in how the market is regulated.

The author is grateful and humbled by the opportunity to write this report.

Appendix A


Business Development / Marketplaces
foxwordy
lawcus
ROCKET LAWYER
Avvo
LIBRA
Derecho 24
upcounsel
lawanswers
lawgo
LAWGIVES
LEGALREACH
DirectLaw
Lawpolis
LEXBLOG
HIRE AN ESQUIRE
Lexicata
Litigation Funding
LEGAL FUNDING CENTRAL
CASEHUB
CrowdDefend
25 Litigation Funding
LexShares
CROWD LAW
Legal Education
Quimbee
ADAPTIBAR
LEGALSWIPE
HOTSHOT
ChartaCourse
RainmakerVT
LawMeets
Lawline
LEGAL TALK NETWORK
apex CLE
InterActive Legal
E-discovery
Ategra
detavue
logikcull
lexbe
GoldFynch
Bend Law Group, PC
bitproof.io
KCura
Everlaw
Legal Tech Startup Landscape
THOMSON REUTERS
Practice Management
LawRuler
CaseFleet
Attorney's Black Office
LegalLogs
BIGTIME
Clio
Firmex
LEGAL FLOW
HOUDINIESQ
Intake123
TENDER SCOUT
LawStudio
mycase
MerusCase
NetLex
VINDULA
Smokeball
rocket matter
netlex
Voltaire
Legal Research
BookLawyer
DOCKET ALARM
DATY
KNOMOS
blueJ
fastcase
Jurify
caseflex
PACER PRO
JUDICATA
ROSS
COURT LISTENER
Global-Regulation
AI Patents
BESTLAW
BriefMine
casetext
Case Mgmt /Analytics
TRAKLIGHT
JURISPECT
Lex Machina
KNOMOS
RAVEL
JURIST/T
AppealTrack
ALLEGORY
LEGAL ROBOT
NEOTA LOGIC
Document Automation
FairDocument
WORDRAKE
HOTdocs
Captain Contrat
AfterLine
ROCKET LAWYER
DirectLaw
includecounsel
ALGO VALUE
DraftLaw
Legalix
lubenda
lawdeal
CASERAILS
inkdit
Docasaurus
Contract Management / Analysis
Brevia
Clausehound
Counselytics
Precisely
BEAGLE
LEVERTON
kira
Contractually
ContractCloud
CLEAR CONTRACT
avtal
RAVN
Consumer
Clearpath
coparently
everplans
DC2
supportpay
CREDITSWARM
DIVORCEMAIL
LARA
KINSO
frag-einen-anwalt.de
Thistoo
Online Dispute Resolution
bidsettle
ClaimCast
Zipcourt
MODRIA
FAIR &
swiftcourt
Pactanda
Divorce Secure
yurJURY

Appendix B

Table of Ethics Opinions on Avvo*

Jurisdiction	Citation	Digest
Illinois	Client-Lawyer Matching Services Study, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (June 25, 2018)	Prohibiting lawyers from participating in or sharing fees with for-profit services that refer clients to or match clients with participating lawyers is not a viable approach, because the prohibition would perpetuate the lack of access to the legal marketplace.
Indiana	Opinion #1-18 (April 2018)	Avvo Legal Services risks violation of Rules 1.2(c), 5.4(a), 5.4(c), 7.2(b), 7.3(d), 7.3(e).
New Jersey	ACPE Joint Opinion 732; CAA Joint Opinion 44; UPL Joint Opinion 54 (June 21, 2017)	Avvo Legal Service improperly requires lawyer to share legal fee with a nonlawyer in violation of Rule 5.4(a) and pay impermissible referral fee in violation of Rules 7.2(c) and 7.3(d).
New York	Ethics Opinion 1132 (Aug. 9, 2017)	A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).
North Carolina	Proposed Amendment to Rule 5.4 (July 26, 2017 (pending approval)	Proposed amendment to Rule 5.4 by Subcommittee on Avvo Legal Services that would allow paying reasonable portion of a legal fee to a credit card processor or online platform for hiring a lawyer if business relationship will not interfere with lawyers's professional judgment on behalf of client.
Ohio	Opinion 2016-03 (June 3, 2016)	To comply with Rules 7.1-7.3, hypothetical referral service similar to Avvo would need to be registered with the state of Ohio and meet its requirements. Marketing fees raise issues of impermissible fee-sharing (Rule 5.4).

* Avvo Legal Services was discontinued in July of 2018. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAWSITES, July 8, 2018, at https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html (last visted July 12, 2018).

Jurisdiction	Citation	Digest
Oregon	Oregon State BarMeeting of the Board of Governors (Nov. 17, 2017)	Giving progress report on proposed changes to 7.3 (liberalizing referral fees affecting Avvo), 5.4 (nonlawyer fee-sharing) and permitting partial ownership of law firms by licensed paraprofessionals.
Pennsylvania	Formal Opinion 2016-200 (Sept. 2016)	Avvo Legal Services product likely violates RPC 5.4(a) and Rule RPC 1.15(i), which requires legal fees paid in advance to be deposited in the lawyer's Trust Account. Also raises issues with Rule 1.2, 1.6, 1.16, 5.3, and 7.7.
South Carolina	Ethics Advisory Opinion 16-06 (2016)	Avvo Legal Services violates Rule 5.4 (a) prohibition of sharing fees with a non-lawyers. Arrangement would also violate the Rule 7.2(c) prohibition of paying for a referral and is not saved by the exceptions found in Rule 7.2(c)(1), (2), or (3).
Utah	Opinion No. 17-05 (Sept. 27, 2017)	Hypothetical legal service similar to Avvo legal services violates Rule 5.4's prohibition on splitting fees with a non-lawyer. It also violates Rule7.2's restrictions on payment for recommending a lawyer's services and may violate a number of other Rules elated to client confidentiality, lawyer independence, and safekeeping of client property.
Virginia	In re Legal Ethics Opinion 1885 (Oct. 27, 2017) (pending Supreme Court approval)	Avvo Legal Services violates Rule 5.4(a) and Rule 7.3(d). Rules should not be rewritten to permit this service, as consumer benefits are not outweighed by anticompetitive effects.

About the Author

Professor William Henderson

Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession.

Professor Henderson's focuses primarily on the empirical analysis of the legal profession and has appeared in leading legal journals, including the *Stanford Law Review*, the *Michigan Law Review*, and the *Texas Law Review*. In addition, he regularly publishes articles in *The American Lawyer*, *The ABA Journal*, and *The National Law Journal*. His observations on the legal market are also frequently quoted in the mainstream press, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Atlantic Monthly*, *The Economist*, and National Public Radio. Based on his research and public speaking, Professor Henderson was included on the *National Law Journal's* list of The 100 Most Influential Lawyers in America (complied every ten years). In 2015 and 2016, he was named the Most Influential Person in Legal Education by *The National Jurist* magazine.

In 2010, Professor Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. Lawyer Metrics (now LawyerMetrix) was acquired by AccessLex Institute in 2015. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

ATTACHMENT B

Excerpt from LegalZoom Terms of Use

. . . .

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From time to time, LegalZoom may perform certain attorney access services and introduce our visitors to attorneys through various methods, including but not limited to (i) legal plans, (ii) third party attorney directory listings, and (iii) third party limited scope agreements. At no time is an attorney-client relationship fostered or created with LegalZoom through the performance of any such services.

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. . . .

Source: https://www.legalzoom.com/legal/general-terms/terms-of-use (Accessed on July 13, 2018.) (Emphasis in original.)

Excerpt from AVVO.COM Terms of Use

. . . .

3. Information on the services

Our Services display both Avvo-created content and content that is not created or developed by Avvo (the "Legal Information"). We may review third party-content to determine whether it is illegal or violates our policies, and we may remove or refuse to display content that we reasonably believe violates our policies or the law. But we do not routinely screen third-party content that is published via our Services. This includes the Legal Information that lawyers post on Avvo, and we cannot guarantee the accuracy, adequacy or quality of any such Legal Information, or the qualifications of those posting it.

4. No formation of an attorney-client relationship

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5. Legal services for consumers

Avvo is a platform where lawyers unaffiliated with Avvo can offer information and interact with consumers. We provide a number of methods by which you can purchase legal services or have a direct, confidential discussion of your legal issues with a lawyer. Although some of these methods involve Avvo processing a transaction on your behalf, in all instances, Avvo is simply the intermediary in such transactions. You are liable for paying the lawyer for the services provided. Avvo has no liability, either primarily or secondarily, for paying the lawyer other than as an agent on your behalf. The fees you pay for such services are charged by the lawyer and passed through to the lawyer once services have been rendered. Any attorney-client relationship formed as a result of such discussions is between you and the lawyer you speak with—not between you and Avvo. Furthermore, you understand that Avvo cannot be held responsible for the quality or accuracy of any information or legal services provided by lawyers you connect with via Avvo.

. . . .

Source: https://www.avvo.com/support/terms (Accessed on July 13, 2018.)

CURRENT Rule 31. Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction*. Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

2. *Definitions*.

A. "Practice of law" means providing legal advice or services to or for another by:

(1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

(2) preparing or expressing legal opinions;

(3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;

(4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or

(5) negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

(1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a); or

(2) using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 38(a), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

C. "Legal assistant/paralegal" means a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

D. "Mediator" means an impartial individual who is appointed by a court or government entity or engaged by disputants through written agreement to mediate a dispute. Serving as a mediator is not the practice of law.

E. "Unprofessional conduct" means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. In any proceeding before the Department of Economic Security or Department of Child Safety, including a hearing officer, an Appeal Tribunal or the Appeals Board, an individual party (either claimant or opposing party) may be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

2. An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.

3. An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.

4. A person who is not an active member of the state bar may represent a party in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.

5. In any proceeding in matters under Title 23, Chapter 2, Article 10 of the Arizona Revised Statutes, before any administrative law judge of the Industrial Commission of Arizona or review board of the Arizona Division of Occupational Safety and Health or any successor agency, a corporate employer may be represented by an officer or other duly authorized agent of the corporation who is not charging a fee for the representation.

6. An ambulance service may be represented by a corporate officer or employee who has been specifically authorized by the ambulance service to represent it in an administrative hearing or rehearing before the Arizona Department of Health Services as provided in Title 36, Chapter 21.1, Article 2 of the Arizona Revised Statutes.

7. A person who is not an active member of the state bar may represent a corporation in small claims procedures, so long as such person is a full-time officer or authorized full-time employee of the corporation who is not charging a fee for the representation.

8. In any administrative appeal proceeding of the Department of Health Services, for behavioral health services, pursuant to A.R.S. § 36-3413 (effective July 1, 1995), a party may be represented by a duly authorized agent who is not charging a fee for the representation.

9. An officer or employee of a corporation or unincorporated association who is not an active member of the state bar may represent the corporation or association before the superior court (including proceedings before the master appointed according to A.R.S. § 45-255) in the general stream adjudication proceedings conducted under Arizona Revised Statutes Title 45, Chapter 1,

Article 9, provided that: the corporation or association has specifically authorized such officer or employee to represent it in this adjudication; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation or association; and the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provision, the court may require the substitution of counsel whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the other litigants. In addition, the court may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

10. An officer or full-time, permanent employee of a corporation who is not an active member of the state bar may represent the corporation before the Arizona Department of Environmental Quality in an administrative proceeding authorized under Arizona Revised Statutes. Title 49, provided that: the corporation has specifically authorized such officer or employee to represent it in the particular administrative hearing; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation; the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation; and the corporation has been provided with a timely and appropriate written general warning relating to the potential effects of the proceeding on the corporation's and its owners' legal rights.

11. Unless otherwise specifically provided for in this rule, in proceedings before the Office of Administrative Hearings, or in fee arbitration proceedings conducted under the auspices of the State Bar of Arizona Fee Arbitration Committee, a legal entity may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

12. In any administrative appeal proceeding relating to the Arizona Health Care Cost Containment System, an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

13. In any administrative matter before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a taxpayer may be represented by (1) a certified public accountant, (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), or (3) in matters in which the dispute, including tax, interest and penalties, is less than $5,000.00 (five thousand dollars), any duly appointed representative. A legal entity, including a governmental entity, may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or

operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

14. If the amount in any single dispute before the State Board of Tax Appeals is less than twenty-five thousand dollars, a taxpayer may be represented in that dispute before the board by a certified public accountant or by a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1).

15. In any administrative proceeding pursuant to 20 U.S.C. § 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a party may be represented by an individual with special knowledge or training with respect to the problems of children with disabilities as determined by the administrative law judge, and who is not charging the party a fee for the representation. The hearing officer shall have discretion to remove the individual, if continued representation impairs the administrative process or causes harm to the parties represented.

16. Nothing in these rules shall limit a certified public accountant or other federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), from practicing before the Internal Revenue Service or other federal agencies where so authorized.

17. Nothing in these rules shall prohibit the rendering of individual and corporate financial and tax advice to clients or the preparation of tax-related documents for filing with governmental agencies by a certified public accountant or other federally authorized tax practitioner as that term is defined in A.R.S. § 42-2069(D)(1).

18. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

19. Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.

20. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

21. Nothing in these rules shall prohibit the preparation of tax returns.

22. Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.

23. Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.

24. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.

25. Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.

26. Nothing in these rules shall prohibit a property tax agent, as that term is defined in A.R.S. § 32-3651, who is registered with the Arizona State Board of Appraisal pursuant to A.R.S. § 32-3642, from practicing as authorized pursuant to A.R.S. § 42-16001.

27. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

28. In matters before the Arizona Corporation Commission, a public service corporation, an interim operator appointed by the Commission, or a non-profit organization may be represented by a corporate officer, employee, or a member who is not an active member of the state bar if:

(A) the public service corporation, interim operator, or non-profit organization has specifically authorized the officer, employee, or member to represent it in the particular matter,

(B) such representation is not the person's primary duty to the public service corporation, interim operator, or non-profit organization, but is secondary or incidental to such person's duties relating to the management or operation of the public service corporation, interim operator, or non-profit organization, and

(C) the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

Notwithstanding the foregoing provisions, the Commission or presiding officer may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented.

29. In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.

30. A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

31. Nothing in these rules shall prohibit an active member or full-time employee of an association defined in A.R.S. §§ 33-1202 or 33-1802, or the officers and employees of a

management company providing management services to the association, from appearing in a small claims action, so long as:

(A) the association's employee or management company is specifically authorized in writing by the association to appear on behalf of the association;

(B) the association is a party to the small claims action.

MEMORANDUM

To: Task Force on Delivery of Legal Services

From: John W. Rogers. Staff Attorney, Arizona Supreme Court

Date: December 31, 2018

Re: Notes on Rough Draft of Restyled Supreme Court Rule 31

Last November, Justice Timmer asked me to take a stab at preparing a rough draft of a "restyled" Supreme Court Rule 31. The resulting draft is being submitted to the Task Force under separate cover,and follows the general restyling principles used in the restyling projects for the civil, criminal, family law, and probate procedural rules. The draft also benefited from extensive comments from Mark Meltzer and Jennifer Albright, two AOC policy analysts.

The main changes from the current rule are as follows:

(a) Consistent with other restyling efforts, the current rule has been broken up in to four separate rules, with draft Rule 31 incorporating current Rule 31(a), draft Rule 31.1 incorporating current Rule 31(b), draft Rule 31.2 incorporating current Rule 31(c), and draft Rule 31.3 incorporating current Rule 31(d). This restructuring is intended to make the rule less intimidating to read.

(b) The subpart numbering and margin conventions that are currently used in the Supreme Court Rules were followed, which are a little different from the conventions followed in the Arizona civil and criminal procedural rules. (You also should note that the formatting and conventions used in the current Supreme Court Rules differ a little from rule to rule.)

(c) Consistent with the restyling conventions, efforts were made to state the rule in the active voice and eliminate ambiguous words (especially "shall") and archaic terms (e.g., herein, thereto, etc.). The rules were also restated in a positive—rather than prohibitory—manner (i.e., "a person may" rather than "a person may not," and changed "nothing in this rule prohibits" to "a person or entity may"). Generous use of "listing" also was made, which makes each of a rule's requirements and subparts stand out.

(d) When issues arose that the Task Force should address or be aware of, commentary to that effect was included in brackets.

(e) The changes were too extensive to allow for track-changes or redlining. Therefore, a reference appears after each draft rule (or subpart) that identifies where the rule can now be found in current Rule 31. The reference is italicized and bolded, e.g., ***[Rule 31(a)(2)]***.

The changes shown in draft Rules 31 through 31.2, when compared to their counterparts in the current rule, are mostly stylistic. There is one major exception, however. Currently, the

"authority to practice" in Rule 31(b) and the "unauthorized practice of law" in Rule 31(a)(2)(B) seem to say that one is authorized to practice law only if he or she is active member of the State Bar of Arizona. That is not quite right, as Rules 38 and 39 authorize non-Bar members (such as in-house counsel and out-of-state lawyers admitted *pro hac vice*) to practice law in Arizona. Consequently, draft Rule 31.2(a) takes that into account.

The most extensive changes occurred in current Rule 31(d), which the draft rule denominates as Rule 31.3. The following is worth noting:

(a) The main problem is that Rule 31(d) currently has thirty-one subsections with no rhyme or reason to their order. To make the rule a little less unwieldy, subsection (d) was reorganized into ten subsections in draft 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.

(b) The "Generally" section (draft Rule 31.3(a)) provides that although the activities described in the rule are "excepted" from the general rule in Rule 31.2(a), a person who engages in such an activity is still subject to the Arizona Supreme Court's jurisdiction with respect to that activity.

(c) Subsection (a) also contains the following sentence: "A person who falls within Rule 32.2(b) [disbarred and suspended Bar members] may not engage any of the activities specified in this rule unless this rule specifically authorizes it." That sentence comes from the introductory clause of current Rule 31(d): "but subject to the limitations of section (c) unless otherwise stated." The new sentence is intended to reflect what the current clause is trying to say, but the clause is a bit ambiguous. This difficulty in the language, and the fact that it seems a little draconian, are issues for the Task Force to resolve.

(d) To the extent practicable, an effort was made to conform the rules to one another. In particular, the current rules pertaining to administrative hearings and agency proceedings tend to have the same requirements but express those requirements in different ways. Efforts were made, however, not to make any major substantive changes, recognizing that the Task Force is charged with doing that. Issues identified by the drafter are noted in the annotations to the rules.

One of the biggest remaining headaches in revising draft Rule 31.3 is figuring out when nonlawyers may represent legal entities in administrative hearings. There is no rhyme or reason to the current rules. Some rules allow nonlawyers to represent corporations, others allow representation of corporations and unincorporated associations, yet others allow representation of corporations and limited liability companies, and one other just refers to the representation of a "legal entity."

No attempt was made to resolve these inconsistencies. It seems difficult in principle, however, to allow a nonlawyer to represent a corporation, but not allow a nonlawyer to represent any other type of entity (e.g., LLC, association, partnership). That favors using the term "legal entity," defining it broadly in Rule 31.1, and then using that term and the same conditions in every provision discussing the representation of a legal entity. It also would allow the rules to be further simplified. Indeed, it might be possible to include many of the administrative hearing rules in Rule 31.3 in a single rule by eliminating the references to particular agencies and having common conditions on all appearances in administrative hearings and proceedings.

A related issue (and perhaps a bigger headache) is when a nonlawyer may represent a corporate or other legal entity in court. Again, the restyled rules in draft Rule 31.3(b) merely follow the current rules. And again, it might be better to use a defined term "legal entity" that encompasses more entities than merely corporations, LLCs, and associations. The harder question (which the draft does not address) is whether (or when) to allow nonlawyers represent legal entities in superior court. Currently, the rules allow this in only one narrow set of circumstances (a general stream adjudication proceeding).

A second-level issue is whether a nonlawyer may receive a fee for representing a person or legal entity. Many of the rules say "no," a smaller number do not address the issue, and one says a fee may be charged if the nonlawyer is working under the supervision of a lawyer. Another second-level issue is whether the person representing a legal entity must be a "full-time" or permanent officer or employee. Some of the rules include that requirement and others do not. Again, no effort was made to resolve these inconsistencies.

PART V. REGULATION OF THE PRACTICE OF LAW

Rule 31. Supreme Court Jurisdiction

Any person or entity engaged in the "practice of law" or "unauthorized practice of law" in Arizona, as those terms are defined by these rules, is subject to the Arizona Supreme Court's jurisdiction. ***[Rule 31(a)(1)]***

Rule 31.1 Definitions. *[Rule 31(a)(2)]*

(a) "Practice of law" means providing legal advice or services to or for another by:

(1) preparing or expressing legal opinions to or for another person or entity;

(2) representing a person or entity in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration or mediation;

(3) preparing a document, in any medium, on behalf of a specific person or entity for filing in any court, administrative agency, or tribunal;

(4) negotiating legal rights or responsibilities on behalf of a specific person or entity; or

(5) preparing a document, in any medium, intended to affect or secure a specific person's or entity's legal rights.

(b) "Unauthorized practice of law" includes, but is not limited to:

(1) a person or entity engaging in the practice of law if the persons or entity is not authorized to practice law in Arizona under Rule 31.2(a); or

(2) a person or entity using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words if the person or entity is not authorized to practice law in Arizona under Rule 31.2(a), if the use of the designation is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in Arizona.

(c) "Mediator" means an impartial individual who is appointed by a court or government entity or engaged by disputants through written agreement to mediate a dispute. [**Note:** Deleted the last sentence in the definition: "Serving as a mediator is not the practice of law." The sentence overlaps and conflicts with Rule 32.3(g) (current Rule 31(d)(25). Also, consider whether this definition is necessary. It really doesn't add much to an understanding of Rule 32.3.]

[**Note:** The definitions of "Legal assistant/paralegal (now in Rule 31(a)(2)(C)) and "Unprofessional conduct" were deleted because the terms/phrases are not used elsewhere in the current Rule 31 or the restyled rules set forth here.]

Rule 31.2. Authorized Practice of Law *[Rules 31(b) & (c)]*

(a) Generally. Only a person who is an active member in good standing of the State Bar of Arizona, or who is specifically authorized under Rules 38 or 39 to practice law, may engage in the practice of law in Arizona, or represent that he or she is authorized to engage in the practice of law in Arizona. [**Note:** References to Rules 38 and 39 were included because those rules authorize non-Bar members (such as in-house counsel and those admitted *pro hac vice*) to engage in the practice of law in Arizona. Does there also need to be a carve-out for those who practice

exclusively in the federal courts (e.g., U.S. attorneys) or federal administrative agencies (e.g., INS)? I am not familiar with the Bar's current position with respect to those categories of practitioners.]

(b) Restrictions. A person may not engage in the practice of law in Arizona, or represent in any way that he or she may engage in the practice of law in Arizona, if the person:

(1) is a member of the State Bar of Arizona but is currently suspended or currently on disability active status; or

(2) has been disbarred.

Rule 31.3 Exceptions to Rule 31.2. ***[Rule 31(d)]***

(a) Generally. Notwithstanding Rule 31.2(a), a person or entity may engage in legal-related activities as specified in this Rule 31.3 even if doing so would otherwise constitute the unauthorized practice of law. A person or entity who engages in such an activity is subject to the Arizona Supreme Court's jurisdiction with respect to that activity. A person who falls within Rule 32.2(b) may not engage any of the activities specified in this rule unless this rule specifically authorizes it. ***[New]*** [**Note:** The last sentence is derived from the introductory clause in Rule 31(d) ("but subject to the limitations of section (c) unless otherwise stated").]

(b) Governmental Activities and Court Forms.

(1) An officer or employee of a governmental entity may perform the duties of his or her office and carry out the government entity's regular course of business. ***[Rule 31(d)(23)]***

(2) The Supreme Court, Court of Appeals, superior court, and limited jurisdiction courts may create and distribute forms for use in Arizona courts. ***[Rule 31(d)(19)]***

(c) Corporations, Limited Liability Companies, Associations, and Other Entities.

(1) A business may prepare documents incidental to its regular course of business if they are for the business's use and are not made available to third parties. ***[Rule 31(d)(20)]***

(2) An officer of a corporation or a managing member of a limited liability company may represent that entity before a justice court or municipal court if:

(A) the entity has specifically authorized the officer or managing member to represent it in justice court or municipal court;

(B) such representation is not the officer's or managing member's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation;

(C) the entity is an original party to or a first assignee of a conditional sales contract, conveyance, transaction, or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose; and

[(D) the officer or managing member is not receiving separate or additional compensation for representing the corporation or the limited liability company (other than receiving reimbursement for costs). ***[Rule 31(d)(3)]*** [**Note:** This clause (D) is not in the current rule, but was included here because it appears in similar rules in Rule 31(d).]]

[(2') A full-time officer or full-time employee of a corporation may represent a corporation in small claims court, so long as such person is a full-time officer or authorized full-time employee of the corporation who is not charging a fee for the representation. ***[Rule 31(d)(7)]*** [**Note:** Is this provision necessary? It seems to cover most of the same subject matter as in (2), but it has different terms. This rule and (2) need to be reconciled and then merged.]

(3) A person may represent an association, as defined in A.R.S. §§ 33-1202 or 33-1802, in a small claims action in justice court if:

(A) the person is an active member or full-time employee of the association, or is an officer or employee of a management company providing management services to the association;

(B) the association has specifically authorized the association's member or employee, or the management company, to appear on the association's behalf; and [**Note:** The current rule says the authorization must be "in writing." That requirement does not appear in similar provisions in (d). It should either be excluded here or inserted in the other provisions.]

(C) the association is a party to the small claims action. ***[Rule 31(d)(31)]***

(4) An officer or employee of a corporation or unincorporated association may represent the corporation or association in superior court in a general stream adjudication proceeding conducted under A.R.S. §§ 45-251 et seq. (including a proceeding before a master appointed under A.R.S. § 45-255) if:

(A) the corporation or association has specifically authorized the officer or employee to represent it in the proceeding;

(B) such representation is not the officer's or employee's primary duty to the corporation but is secondary or incidental to other duties related to the corporation's or association's management or operation; and

(C) the officer or employee is not receiving separate or additional compensation for representing the corporation or association (other than receiving reimbursement for costs).

Despite these provisions, the court may order the corporation or association to appear only through counsel if it determines that lay representation is interfering with the litigation's orderly progress or is imposing undue burdens on the other litigants. Additionally, the court may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct. [**Note:** Is this last sentence necessary? It does not have anything to do with the rest of the rule. Additionally, doesn't the superior court have this inherent authority anyway?] ***[Rule 31(d)(9)]***

(5) A person may represent a corporation or other legal entity in an administrative hearing or other agency proceeding as is provided in 31.3(d) and (e). ***[New]***

(d) Administrative Hearings and Agency Proceedings.

(1) A person may represent a legal entity in a proceeding before the Office of Administrative Hearings, if:

(A) the person is a full-time officer, partner, member or manager (in the case of a limited liability company), or employee of the entity; [**Note:** Why "full-time"? If it is important, then it should be added to all the rules pertaining to representing legal entities.]

(B) the entity has specifically authorized the person to represent it in the particular matter;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs). ***[Rule 31(d)(11)]*** [**Note:** The fee arbitration provision that was part of this rule was put in a separate rule in "Other" in (j).]

(2) In any proceeding before the Arizona Department of Economic Security or Arizona Department of Child Safety (including proceedings before a hearing officer, an Appeal Tribunal, or the Appeals Board), a person may represent a claimant or an opposing party if:

(A) the party specifically authorized the person to represent the party in the proceeding and the person is not charging a fee for representing the party (other than receiving reimbursement for costs), or, if the person is charging a fee, an active member of the State Bar of Arizona is responsible for, and is supervising, the person; or

(B) the person is a self-represented employer or, if the employer is a corporation, the person is a corporate officer or employee that the corporation has authorized to represent it in the proceeding. ***[Rule 31(d)(1)]***

(3) In any proceeding before any administrative law judge of the Industrial Commission of Arizona or review board of the Arizona Division of Occupational Safety and Health or any successor agency under A.R.S. §§ 23-401 et seq., a corporate officer or agent may represent the corporation in the proceeding if:

(A) the corporation has specifically authorized the officer or agent to represent it in the proceeding; and

(B) if the person is an officer of the corporation, the officer is not receiving separate or additional compensation for such representation (other than receiving reimbursement for costs); and

(C) if the person is a corporate agent but not a corporate officer, the agent is not is not charging a fee for the representing the corporation (other than receiving reimbursement for costs). ***[Rule 31(d)(5)]***

(4) In any administrative hearing or rehearing before the Arizona Department of Health Services under A.R.S. §§ 36-2232 et seq., a corporate officer or employee may represent a corporate ambulance service in the proceeding if the corporation has specifically authorized the officer or employee to do so. ***[Rule 31(d)(6)]***

(5) In any administrative appeal before the Arizona Department of Health Services under A.R.S. § 36-3413 in connection with behavioral health services, a person may represent a party if:

(A) the party has specifically authorized the person to represent the party in the appeal; and

(B) the person is not is not charging a fee for the representing the party (other than receiving reimbursement for costs). ***[Rule 31(d)(8)]***

(6) In any administrative proceeding before the Arizona Department of Environmental Quality under A.R.S. §§ 49-101 et seq., a corporate officer or full-time, permanent [**Note:** Why "full-time, permanent"?] employee may represent the corporation in the proceeding if:

(A) the corporation has specifically authorized the officer or employee to represent it in the particular administrative hearing;

(B) such representation is not the officer's or employee's primary duty to the corporation but is secondary or incidental to other duties related to the corporation's management or operation;

(C) the officer or employee is not receiving separate or additional compensation for such representation (other than receiving reimbursement for costs); and

(D) the corporation has been provided with a timely and appropriate written general warning relating to the potential effects of the proceeding on the corporation's and its owners' legal rights. ***[Rule 31(d)(10)]***

(7) In any proceeding before the Arizona Corporation Commission, a person may represent a public service corporation, an interim operator appointed by the Commission, or a non-profit organization if:

(A) the person is an officer, employee, or member of the public service corporation, interim operator, or non-profit organization;

(B) the public service corporation, interim operator, or non-profit organization has specifically authorized the officer, employee, or member to represent it in the particular matter;

(C) such representation is not the person's primary duty to the public service corporation, interim operator, or non-profit organization, but is secondary or incidental to such person's duties relating to the management or operation of the public service corporation, interim operator, or non-profit organization; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs).

Despite these provisions, the Commission or presiding officer may require the public service corporation, interim operator, or nonprofit organization to proceed only through counsel if it determines that lay representation is interfering with the proceeding's orderly progress, imposing undue burdens on the other parties, or harming the represented parties. ***[Rule 31(d)(28)]***

(8) In any administrative proceeding under 20 U.S.C. §§ 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a person may represent a party if:

(A) the hearing officer determines that the person has special knowledge or training with respect to the problems of children with disabilities; and

(B) the person is not charging a fee for representing the party (other than receiving reimbursement for costs).

Despite these provisions, the hearing officer may order that the party appear only through counsel or in some other manner if he or she determines that the person representing the party is impairing the administrative process or harming the represented parties. ***[Rule 31(d)(15)]***

(9) In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, a person may represent a party if:

(A) the party has specifically authorized the person to represent the party in the proceeding; and

(B) the person is not is not charging a fee for the representing the party (other than receiving reimbursement for costs). ***[Rule (d)(29)]***

(e) Tax-Related Activities and Proceedings.

(1) A person may prepare a tax return for an entity or another person. ***[Rule 31(d)(21)]***

(2) A certified public accountant or other federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)) may:

(A) render individual and corporate financial and tax advice to clients and prepare tax-related documents for filing with governmental agencies;

(B) represent a taxpayer in a dispute before the State Board of Tax Appeals if the amount at issue is less than $25,000; and

(C) practice before the Internal Revenue Service or other federal agencies if authorized to do so. ***[Rules 31(d)(14), (d)(16) & (d)(17)]***

(3) A property tax agent (as that term is defined in A.R.S. § 32-3651), who is registered with the Arizona State Board of Appraisal under A.R.S. § 32-3642, may practice as authorized under A.R.S. § 42-16001. ***[Rule 31(d)(26)]***

(4) A person may represent a party in a small claims proceeding in Arizona Tax Court conducted under A.R.S. §§ 12-161 et seq. ***[Rule 31(d)(4)]***

(5) In any proceeding before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Arizona Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, a person may represent a taxpayer if:

(A) the person is:

(i) a certified public accountant,

(ii) a federally authorized tax practitioner (as that term is defined in A.R.S. § 42-2069(D)(1)); or

(iii) in matters in which the amount in dispute, including tax, interest and penalties, is less than $5,000, the taxpayer's duly appointed representative; or

(B) the taxpayer is a legal entity (including a governmental entity) and:

(i) the person is full-time officer partner, member or manager (in the case of a limited liability company), or employee of the entity;

(ii) the entity has specifically authorized the person to represent it in the proceeding;

(iii) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(v) the person is not receiving separate or additional compensation for such representation (other than receiving reimbursement for costs). ***[Rule 31(d)(13)]***

(f) Legal Document Preparers. A certified legal document preparer may perform services in compliance with Arizona Code of Judicial Administration § 7-208. This exception is not subject to Rule 31.2(b) if the disbarred attorney or member has been certified as provided in the Arizona Code of Judicial Administration § 7-208. ***[Rule (d)(24)]***

(g) Mediators.

(1) A person who is not authorized under Rule 31.2(a) to engage in the practice of law in Arizona may prepare a written agreement settling a dispute or file such an agreement with the appropriate court if:

(A) the person is employed, appointed, or referred by a court or government entity and is serving as a mediator at the direction of the court or a governmental entity; or

(B) the person is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.

(2) Unless specifically authorized in Rule 31.3(g)(1), a mediator who is not authorized under Rule 31.2(a) to engage in the practice of law in Arizona and who prepares or provides legal documents for the parties without attorney supervision must be certified as a legal document preparer in compliance with the Arizona Code of Judicial Administration § 7-208. ***[Rule 31(d)(25)]*** [**Note:** I included the "not authorized under Rule 31.2(a)" phraseology in (1) and (2) to underscore that the provisions apply only to nonlawyer mediators. I expect that lawyer-mediators will be concerned about this issue and will want the qualifying phrases included.]

(h) Nonlawyer Assistants and Out-of-State Attorneys.

(1) A nonlawyer assistant may act under the an attorney's supervision in compliance with ER 5.3 of the Arizona Rules of Professional Conduct. This exception is not subject to Rule 31.2(b). ***[Rule 31(d)(18)]*** **[Note:** The phrase "nonlawyer assistant" comes from the title of ER 5.5. Also note that Comment 2 to the ER defines who is a "nonlawyer assistant."]

(2) An attorney licensed in another jurisdiction may engage in conduct that is permitted under ER 5.5 of the Arizona Rules of Professional Conduct. ***[Rule 31(d)(27)]***

(i) Fiduciaries. A person licensed as a fiduciary under A.R.S. § 14-5651 may perform services in compliance with Arizona Code of Judicial Administration § 7-202 without acting under the supervision of an attorney authorized under Rule 31.2(a) to engage in the practice of law in Arizona. Despite this provision, a court may suspend the fiduciary's authority to act without an attorney if it determines that lay representation is interfering with the proceeding's orderly progress or imposing undue burdens on other parties. ***[Rule 31(d)(30)]***

(j) Other.

(1) These rules do not limit the rights granted in the Arizona or United States Constitutions. ***[Rule 31(d)(22)]***

(2) An employee may designate a person as a representative who is not necessarily an attorney to represent the employee before any board hearing or any quasi-judicial hearing dealing with personnel matters, but no fee may be charged (other than for reimbursement of costs) for any services rendered in connection with such hearing by any such designated representative who is

not authorized under Rule 31.2(a) to engage in the practice of law in Arizona. ***[Rule 31(d)(2)]*** [**Note:** Does the reference to "board" suggest this provision applies only to governmental entities? If so, it should go in (d)(1) and refer to any "public entity's board hearing . . ." If not, it should stay here and refer to any "public or private entity's board hearing . . ."]

(3) A person may represent a legal entity in a fee arbitration proceeding conducted under the auspices of the State Bar of Arizona Fee Arbitration Committee, if:

(A) the person is a full-time officer, partner, member or manager (in the case of a limited liability company), or employee of the entity; [**Note:** Why "full-time"? If it is important, then it should be added to all the rules pertaining to representing legal entities.]

(B) the entity has specifically authorized the person to represent it in the particular matter;

(C) such representation is not the person's primary duty to the entity, but is secondary or incidental to other duties relating to the entity's management or operation; and

(D) the person is not receiving separate or additional compensation for representing the entity (other than receiving reimbursement for costs). ***[Rule 31(d)(11)]***

Hon. David. B. Gass
Maricopa County Superior Court
East Court Building
101 W. Jefferson, Suite 914
Phoenix, Arizona 85041

Petitioner

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION FOR AMENDMENTS TO ARIZONA SUPREME COURT RULE 31	Supreme Court No. R-__-____ **Petition to Amend Rule 31 of the Rules of the Supreme Court of Arizona**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petitions this Court to adopt amendments to Rule 31 of this Court's rules, as proposed in the attached Appendix A.

In Arizona's courts and other proceedings, the specters of legal fees or default judgments sink small business litigants before they even start. A longstanding-yet-convoluted Rule 31 prohibits them from representing their interests in most proceedings without the aid of an active State Bar of Arizona member. The rule has become exceedingly

protectionist and outmoded in certain respects. The law has evolved to favor corporate autonomy and to allow self-representation, including corporate self-representation. Targeted and narrowly tailored changes to Rule 31, Rules of the Arizona Supreme Court, would improve access to justice for small business litigants and would modernize the rule.

Rule 31 has, for more than three decades, set forth (a) this Court's jurisdiction over the practice of law, (b) the authority to practice law conferred only by active membership in the State Bar of Arizona, (c) the converse lack of authority had by those disbarred or inactive, and (d) exemptions from the general rule set forth in subsection (b) of the rule. Petitioner seeks to reorganize and reform those subsection (d) exemptions from the unauthorized practice of law (UPL) rule with the aims of promoting both access to justice and clarity.

The exemptions from Rule 31(d)'s ambit equal its rule number. What began as a simple prohibition on the UPL, has become a hydra. Despite its many exemptions, Rule 31 has not fully evolved to acknowledge the self-representation capabilities of Arizona's corporate entities.

Rule 31(d)'s current form fails to acknowledge the efficiencies to be

gained, and the access to justice granted, by allowing many corporate entities to represent themselves. The proposed changes streamline Rule 31(d)'s exemptions and promote efficiencies. Those changes align with (1) this Court's focus on increasing access to justice via clarified and simplified rules, (2) state and national case law on corporate autonomy, (3) the desire to lessen the burdens imposed by litigation on parties and courts, and (4) modern alleviation of once-legitimate concerns about the UPL by corporate entities. After discussing the proposed amendments, Petitioner will address those four aspects.

I. THE PROPOSED AMENDMENTS

Simply put, and respectfully, Rule 31(d) of this Court's rules is difficult to apply, administer, and comply with. Meanwhile, the era when small businesses could afford a lawyer to represent them in any number of proceedings is long past. In the interest of increasing access to justice for both individual Arizonans and the corporate entities in which they have elected to organize themselves, Petitioner seeks to simplify Rule 31. Petitioner also seeks to expand when corporate entities—other than those known as "issuing public corporations" under A.R.S. § 10-2701 (colloquially, publicly traded corporations)—might

represent themselves. Petitioner does not intend that anyone engage in the UPL but does intend to modernize and clarify its exemptions.

Petitioner proposes these intentions occur in the following ways:

- Reorganize the exemptions to Rule 31(d) into the following logical groupings, for ease of reading and application: general exemptions, including the new Rule 31(d)(9); administrative-proceeding-related exemptions; tax-related exemptions; and the probate, or fiduciary, exemption.
- Consolidate the corporate-self-representation-related exemptions into a new Rule 31(d)(9). This new provision meaningfully, yet thoughtfully, expands when corporate entities may represent themselves in Arizona.
- Revise exemptions that include both corporate and individual components to remove the corporate components (as they are covered by the new Rule 31(d)(9)) and to clarify the components applying to individuals remain unaltered.

Specifically, the general exemptions are currently those that appear in subparts 22 (constitutional), 23 (government officers and employees), 19 (court forms), 18 (non-lawyer assistants), 20 (documents

created in the regular course of business), 24 (certified legal document preparers), 25 (mediators), and 27 (lawyers licensed in other jurisdictions). Petitioner proposes to begin the exemption list with the general exemptions. Appendix A shows the renumbering of those exemptions as subparts 1-8, respectively, and shows the new, collective exemption for corporate self-representation as subpart 9.

Subparts 3, 4, 5, 6, 7, 9, 10, 11, 28, and 31, related to corporate self-representation, are consolidated in new subpart 9. After amendment, Rule 31(d)(9)—the new, collective exemption—would appear as follows:

> **(d) Exemptions.** Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:
>
> . . .
>
> **9.** A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation, as that term is defined in A.R.S. § 10-2701, before any court in this state and in any proceeding, including but not limited to any quasi-judicial hearing, any administrative, agency, hearing officer, or board hearing, rehearing, or appeal, any small claims procedure or proceeding, and in any fee arbitration proceeding. For purposes of this rule, "any entity that is not an issuing public corporation" includes, but is not limited to, closely held corporations, limited liability companies, partnerships, non-profit corporations, public service corporations and interim operators appointed by the Arizona Corporation Commission, management companies,

> and unincorporated associations. "Any entity that is not an issuing public corporation" does not include an individual, and the entity must specifically authorize such person to represent it in the particular matter; such representation must not be the person's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the person must not receive separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provisions, any presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented. Any presiding officer may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

The revised corporate self-representation exemption broadens the situations when corporate entities may represent themselves but retains traditional safeguards against the ills of the UPL. Namely, any corporate entity that is not an issuing public corporation may be represented by "a person who is not an active member of the state bar" before any court and in any proceeding. Petitioner proposes excluding publicly traded corporations from the broadened exemption, as they have duties to others beyond those who have chosen expressly to organize themselves into that particular corporate entity.

The exemption was crafted with the canon of construction *ejusdem*

generis[1] in mind, as it further defines the terms "proceeding" and "any entity that is not an issuing public corporation" with references to non-exclusive classes of things that expressly include other things of the same kind or nature. The term "any entity that is not an issuing public corporation" excludes individuals.

Pursuant to the proposed exemption, the entity seeking to self-represent must have certain UPL safeguards in place. Those are:

- The corporate entity must have specifically authorized the person to represent it in the particular matter,
- The representation must be secondary or incidental to the authorized non-lawyer person's other duties relating to the management or operation of the entity, and
- The authorized person must not receive separate or additional compensation for representing the corporate entity in the particular matter.

The proposed Rule 31(d)(9) exemption contains an additional justice system safeguard. "[A]ny presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines

[1] "*ejusdem generis* . . . [Latin 'of the same kind or class'] (17c) . . . ." EJUSDEM GENERIS, Black's Law Dictionary (10th ed. 2014).

that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties" that the authorized person represents.

Petitioner proposes further continuing the reorganization of Rule 31(d) by renumbering as subparts 10-16 the administrative-proceeding-related exemptions that currently appear as subparts 1 (Department of Economic Security/Department of Child Safety proceedings), 2 (employees in board or quasi-judicial personnel proceedings), 8 (Department of Health Services administrative appeals), 12 (Arizona Health Care Cost Containment System administrative appeal proceedings), 13 (administrative proceedings before various State agencies), 15 (federal free appropriate public education proceedings),[2] and 29 (landlord/tenant disputes before Arizona Department of Fire, Building and Life Safety).

Proposed renumbered subparts 17-22 are the existing tax-related exemptions in subparts 4 (small claims procedures in the Arizona Tax Court), 14 (State Board of Tax Appeals disputes involving less than $25,000), 16 (authorized practice before the Internal Revenue Service),

[2] This subpart remains in its current place as Rule 31(d)(15), as other subparts were reorganized around it.

17 (authorized financial and tax advice and related documents), 21 (tax return preparation),[3] and 26 (registered property tax agents).

Finally, current subpart 30 (licensed fiduciaries) is renumbered as a final exemption 23.

For good cause, including that of easing needless burdens on the courts and litigants and increasing access to justice, Petitioner asks this Court to revamp Rule 31(d) and adopt the amended form discussed above and shown in full in Appendices A and B to this Petition.

II. RULE 31(d) CURRENTLY CONTAINS THIRTY-ONE EXCEPTIONS, WITH VARIOUS SUBPARTS, MAKING IT DIFFICULT TO APPLY AND ADMINISTER.

From their inception, exemptions to Rule 31 focused on efficiencies for corporate entities and access to justice. And Arizona has provisions for non-lawyer representation in both Rule 31(d) and in the state constitution. *See* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 PROF. LAW 79, 114-16 (2012) (citing Ariz. R. Supreme Ct. 31 and ARIZ. CONST. art. 26). Corporate self-representation was actually the impetus behind the very first exemption—adopted in 1979—from Rule 31's general prohibition

[3] This subpart remains in its current place as Rule 31(d)(21).

on anyone other than an active member of the State Bar representing another and engaging in activities that could be termed the practice of law. In a number of situations, it began to make economic sense to allow corporate self-representation and recognize corporate autonomy. Rule 31(d)(3), Ariz. R. Supreme Ct., today provides that:

> An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.

Thus, corporate entities may represent themselves—through their managing members and officers—in justice or police courts, so long as (1) there is specific authorization by the entity, (2) the officer or member is not acting as a *de facto* in-house counsel, (3) the entity was an original party or initial assignee to the transaction or occurrence giving rise to the case, and (4), if the corporate entity is an assignee, then no collection purpose was had for the assignment. Petitioner seeks to

expand on this original exemption and promote the access-to-justice principles it embodies. As discussed below, the expansion is consistent with the modern trend of case law and previous Rule 31 amendments.

The Legislature[4] added the original exemption to what was then A.R.S. § 32-267 in 1977. Many have been added since. Petitioner respectfully suggests the time has come to combine and streamline those exemptions in the interests of certainty, clarity, and judicial economy. Courts, parties, and counsel all will benefit from a reorganized, simplified, and clarified Rule 31. Rule 31 exemptions have sprouted persistently in a less-than-manicured field, but as the Executive Director of the Institute for the Advancement of the American Legal System has noted, the need for artful pruning has become more urgent:

> The poorly tended field was the civil court system itself, where, for the last two decades, cases have indeed taken far too long to resolve and cost way too much. There is no world in which it would have made sense to take a $600 claim to court, or even a $6,000 claim. Many would argue that it would not even make sense to take a $60,000 claim to court.

[4] Prior to the early 1980s, the Arizona Revised Statutes included regulations on the practice of law in Title 32, along with the rest of the laws pertaining to professions and occupation. By 1981, the Arizona Supreme Court had exercised its constitutional rulemaking power and began to enact rules for lawyer regulation. *See* ARIZ. CONST. art. 6, § 5.

See Rebecca Love Kourlis, "Tending the Field: Bolstering the Courts to Compete with Arbitration," November 4, 2015, *available at* http://iaals.du.edu/blog/tending-field-bolstering-courts-compete-arbitration. Those dollar amounts make far less economic sense for small Arizona corporate entities that Rule 31 forces to hire a lawyer to pursue such claims. In most cases, the amount in controversy would be spent before the complaint is fully drafted. This outcome is inconsistent with this Court's Strategic Agenda for 2014-2019, entitled "Advancing Justice Together: Courts and Communities" (the Strategic Agenda). The first goal of the Strategic Agenda is to promote "access to justice as technology and our State's population and economy continue to change." Amending Rule 31(d) is a solid step in that direction.

III. THE PROPOSED AMENDMENTS DOVETAIL WITH THIS COURT'S CONTINUED FOCUS ON CLARIFYING AND SIMPLIFYING RULES TO INCREASE ACCESS TO JUSTICE.

This Court's Strategic Agenda also includes as a significant item "the review of certain Arizona court rules to restyle, simplify, and clarify" them.[5] *See* ADMIN. ORDER No. 2014-116, dated November 24,

[5] *Available at* http://www.azcourts.gov/portals/0/AdvancingJusticeTogetherSA.pdf, at 6 (Agenda).

2014. In establishing the Task Force on the Arizona Rules of Civil Procedure, this Court said, "Arizona court rules require periodic review and revision to keep pace with technology, to accommodate changing case management systems, and to ensure that our courts are accessible to litigants, whether represented by counsel or self-represented." *Id.* Though it has been amended 35 times in about as many years, a careful reading of Rule 31(d)'s exemptions demonstrates the need for a thorough review and revision. *See generally* Ariz. R. Supreme Ct. 31(d). Rule 31 should be revised to be more accessible to litigants, including corporate litigants, whether they are self-represented or have counsel.

As this Court noted in establishing its Committee on Civil Justice Reform, Arizona courts do not shirk from meaningful reforms accomplished via rule change. ADMIN. ORDER 2015-126, dated December 23, 2015. Indeed, Arizona's judiciary has a long history of reform through rule changes, including the myriad changes to Rule 31. This Court has stressed that "[i]deas for further civil justice reforms should be informed by careful consideration of recent national efforts and studies." *Id.* Given the trend in state and national case law, meaningful revisions to Rule 31—especially those promoting corporate self-

representation under the right circumstances—have become necessary.

IV. THE PROPOSED AMENDMENTS ARE IN LINE WITH STATE AND NATIONAL CASE LAW REFLECTING CORPORATE AUTONOMY.

Modern judicial trends expand corporate self-determination, including corporate self-representation. This trend, based in decisional and constitutional law, militates in favor of reforming Rule 31. *Cf. Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 117, ¶46 (2017) (Bolick, J., dissenting) ("Freedom of contract allows individuals to order their affairs and exchange goods and services, without coercion, in accord with their personal values and priorities.").

The proposed changes to Rule 31 also honor the legal fiction of corporate personhood. Corporate entities may act only through the people who form them. The purpose of the legal fiction and the purpose of the proposed changes is to provide greater protections for human beings who both organize themselves into corporate entities and are subject to court rules, individually and as corporate entities. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

Further, this Court amended Rule 31 more than 30 years ago to specifically overrule appellate case law holding that lay employee who was not an agent under attorney supervision could not represent a

corporate employer before the Unemployment Insurance Appeals Board of the Department of Economic Security. *See* 1986 Amendment to Rule 31 (adding what now appears as Rule 31(d)(1) to allow a corporate employer to "represent itself through an officer or employee" and effectively overruling *Anamax Min. Co. v. Arizona Dep't of Econ. Sec.*, 147 Ariz. 482 (App. 1985)); *see also* Suzannah R. McCord, Comment, *Corporate Self-Representation: Is It Truly the Unauthorized Practice of Law*, 67 ARK. L. REV. 371 (2014). This Court should continue the long-time trend of expanding corporate self-representation via rule change.

V. THE PROPOSED AMENDMENTS WOULD LESSEN BURDENS ON COURTS AND PARTIES.

The proposed changes to Rule 31 are not an end-run around the UPL rules and would not significantly increase risks that inspire the regulation of the practice of law. To the contrary, the proposed changes measurably would lessen burdens on courts and parties—the human beings involved in litigation—especially those parties that seek to represent themselves.[6]

The proposed changes align with this Court's Strategic Agenda

[6] The changes to Rule 31, Ariz. R. Supreme Court, proposed by this Petition require no corresponding changes to and have no untoward effects on Rule 8.1, Ariz. R. Civ. P. regarding commercial court cases.

goals. At least six goals relate to services for self-represented litigants prominently set forth under the Strategic Agenda's Goal One of Promoting Access to Justice. (Strategic Agenda, p. 2.) Access to justice "is advanced not only by examining legal representation for moderate and low-income persons, but also by helping self-represented litigants and others navigate the judicial process . . . ." *Id.* Arizona courts have worked extremely hard to provide services for self-represented litigants (SRLs)—i.e., to teach the skills and provide the tools necessary for people to represent themselves. The corporate entities in which people have chosen to organize themselves should not be left behind. Just as individuals may be priced out of our system of justice, so may small or less-well-funded corporate entities.

The judicial branch has expanded individual SRLs access to web-based forms and made court forms easily understandable for SRLs. Somewhat ironically, the main court form related to Rule 31 highlights the lack of access for corporate entities that seek to represent themselves and gives individual SRLs the tools to slam the courthouse door on those corporate entities. *See* 3 ARIZ. LEGAL FORMS, DEBTOR-CREDITOR § 9.39.2 "Motion to Strike Answer for Failure to Obtain

Counsel for [LLC] [Corporation]" (2d. ed. September 2017) (citing Rule 31 of this Court's rules).

A common objection to allowing corporate entities to represent themselves is the flawed assumption that those corporate entities are doomed to lose. The current Rule 31 guarantees that outcome because it forecloses those corporate entities' access to the courts. They lose by default because they, like many individuals, cannot afford to hire a lawyer. *See id.* This Court should amend Rule 31(d) to give them the chance to win. Is it not better for those corporate entities to have litigated and lost than to never have litigated at all? The proposed changes seek to remedy this situation.

VI. PAST CONCERNS ABOUT THE UPL MOTIVATED THE NOW-UNWIELDY RULE AND HAVE BECOME OUTMODED.

Because Arizona's UPL regulations and the extension of self-representation rights to corporate entities claim the same purpose, marrying them as proposed makes sense. According to the State Bar of Arizona, the "purpose of the unauthorized practice of law system is to

protect the public."[7] The purpose of extending additional rights to corporate entities is to protect people who choose to organize themselves into a corporate form. As Justice Alito wrote in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014):

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

The longstanding purpose of Rule 31's subsections has been to increase access to justice and to decrease costs associated with participation in our justice system in a variety of settings. Nearly two decades ago, Petition R-99-0004 sought to add several exemptions related to administrative proceedings. Diverse and sophisticated

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[7] "Regulation of Non-Lawyers," STATE BAR OF ARIZONA, *available at* http://www.azbar.org/lawyerconcerns/regulationofnon-lawyers (last accessed December 11, 2017).

Arizona corporate entities roundly supported the proposal. The Arizona Hospital and Healthcare Association said, "Injecting lawyers into the hearing process will do nothing to enhance the process . . . but will significantly increase healthcare providers' administrative costs of participating in [the Arizona Health Care Cost Containment System]." (*See* Statement of Arizona Hospital and Health Care Association in Support of Proposed Changes to Rule 31, dated June 3, 1999, at 2.)

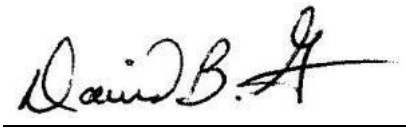
Petitioner respectfully submits the time has come to decrease the costs and burdens of litigation for self-represented corporate entities, such as small businesses. Re-envisioning Rule 31(d) as proposed in Appendix A would work toward exactly that.

VII. CONCLUSION

Rule 31(d)'s myriad exceptions, yet countless strictures, place courts and parties in a bind, stifling access to justice and corporate autonomy. Small business litigants, in particular, would benefit from an updated rule that improves access to justice and recognizes corporate autonomy. Given that, Petitioner urges adoption of the streamlined Rule 31(d) proposed for this Court's consideration in Appendix A.

RESPECTFULLY SUBMITTED this 8th day of January, 2018.

HON. DAVID B. GASS

By 

Hon. David B. Gass
Judge of the Superior Court,
Maricopa County

4837-2281-0201

Appendix A – Blackline of Proposed Amendments to Rule 31

Rule 31. Regulation of the Practice of Law

*** * ***

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.

2. Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.

3. Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.

4. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

5. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

6. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.

7. Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.

8. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

9. A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation, as that term is defined in A.R.S. § 10-2701, before any court in this state and in any proceeding, including but not limited to any quasi-judicial hearing, any administrative, agency, hearing officer, or board hearing, rehearing, or appeal, any small claims procedure or proceeding, and in any fee arbitration proceeding. For purposes of this rule, "any entity that is not an issuing public corporation" includes, but is not limited to, closely held corporations, limited liability companies, partnerships, non-profit corporations, public service corporations and interim operators appointed by the Arizona Corporation Commission, management companies, and unincorporated associations. "Any entity that is not an issuing public corporation" does not include an individual, and the entity must specifically authorize such person to represent it in the particular matter; such representation must not be the person's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the person must not receive separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provisions, any presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented. Any presiding officer may assess an appropriate sanction

against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

~~1.~~**10.** In any proceeding before the Department of Economic Security or Department of Child Safety, including a hearing officer, an Appeal Tribunal or the Appeals Board, an individual ~~party~~ (either claimant or opposing party) may be represented by a duly authorized agent who is not charging a fee for the representation; ~~an employer, including a corporate employer, may represent itself through an officer or employee; or~~and a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

~~2.~~**11.** An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.

~~**3.** An officer of a corporation or a managing member of a limited liability company who is not an active member of the state bar may represent such entity before a justice court or police court provided that: the entity has specifically authorized such officer or managing member to represent it before such courts; such representation is not the officer's or managing member's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the entity was an original party to or a first assignee of a conditional sales contract, conveyance, transaction or occurrence that gave rise to the cause of action in such court, and the assignment was not made for a collection purpose.~~

~~**4.** A person who is not an active member of the state bar may represent a party in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.~~

~~**5.** In any proceeding in matters under Title 23, Chapter 2, Article 10 of the Arizona Revised Statutes, before any administrative law judge of the Industrial Commission of Arizona or review board of the Arizona Division of Occupational Safety and Health or any successor agency, a corporate employer may be represented by an officer or other duly authorized agent of the corporation who is not charging a fee for the representation.~~

~~**6.** An ambulance service may be represented by a corporate officer or employee who has been specifically authorized by the ambulance service to represent it in an administrative hearing or rehearing before the Arizona Department~~

~~of Health Services as provided in Title 36, Chapter 21.1, Article 2 of the Arizona Revised Statutes.~~

~~**7.** A person who is not an active member of the state bar may represent a corporation in small claims procedures, so long as such person is a full-time officer or authorized full-time employee of the corporation who is not charging a fee for the representation.~~

~~8.~~12. In any administrative appeal proceeding of the Department of Health Services, for behavioral health services, pursuant to A.R.S. § 36-3413 (effective July 1, 1995), an individual ~~party~~ may be represented by a duly authorized agent who is not charging a fee for the representation.

~~**9.** An officer or employee of a corporation or unincorporated association who is not an active member of the state bar may represent the corporation or association before the superior court (including proceedings before the master appointed according to A.R.S. § 45-255) in the general stream adjudication proceedings conducted under Arizona Revised Statutes Title 45, Chapter 1, Article 9, provided that: the corporation or association has specifically authorized such officer or employee to represent it in this adjudication; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation or association; and the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provision, the court may require the substitution of counsel whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the other litigants. In addition, the court may assess an appropriate sanction against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.~~

~~**10.** An officer or full-time, permanent employee of a corporation who is not an active member of the state bar may represent the corporation before the Arizona Department of Environmental Quality in an administrative proceeding authorized under Arizona Revised Statutes. Title 49, provided that: the corporation has specifically authorized such officer or employee to represent it in the particular administrative hearing; such representation is not the officer's or employee's primary duty to the corporation but secondary or incidental to other duties related to the management or operation of the corporation; the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs)~~

~~for such representation; and the corporation has been provided with a timely and appropriate written general warning relating to the potential effects of the proceeding on the corporation's and its owners' legal rights.~~

~~11.~~ ~~Unless otherwise specifically provided for in this rule, in proceedings before the Office of Administrative Hearings, or in fee arbitration proceedings conducted under the auspices of the State Bar of Arizona Fee Arbitration Committee, a legal entity may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.~~

~~12.~~13. In any administrative appeal proceeding relating to the Arizona Health Care Cost Containment System, an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

~~13.~~14. In any administrative matter before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, an individual ~~taxpayer~~ may be represented by (1) a certified public accountant, (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), or (3) in matters in which the dispute, including tax, interest and penalties, is less than $5,000.00 (five thousand dollars), any duly appointed representative. ~~A legal entity, including a governmental entity, may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.~~

15. In any administrative proceeding pursuant to 20 U.S.C. § 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational

placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a party may be represented by an individual with special knowledge or training with respect to the problems of children with disabilities as determined by the administrative law judge, and who is not charging the party a fee for the representation. The hearing officer shall have discretion to remove the individual, if continued representation impairs the administrative process or causes harm to the parties represented.

16. In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.

17. A person who is not an active member of the state bar may represent an individual in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.

~~**14.**~~**18.** If the amount in any single dispute before the State Board of Tax Appeals is less than twenty-five thousand dollars, an individual ~~taxpayer~~ may be represented in that dispute before the board by a certified public accountant or by a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1).

~~**16.**~~**19.** Nothing in these rules shall limit a certified public accountant or other federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), from practicing before the Internal Revenue Service or other federal agencies where so authorized.

~~**17.**~~**20.** Nothing in these rules shall prohibit the rendering of individual and corporate financial and tax advice to clients or the preparation of tax-related documents for filing with governmental agencies by a certified public accountant or other federally authorized tax practitioner as that term is defined in A.R.S. § 42-2069(D)(1).

~~**18.** Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).~~

~~**19.** Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.~~

~~**20.** Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.~~

21. Nothing in these rules shall prohibit the preparation of tax returns.

~~**22.** Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.~~

~~**23.** Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.~~

~~**24.** Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.~~

~~**25.** Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:~~

~~**(A)** the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or~~

~~**(B)** the mediator is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.~~

~~In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.~~

~~**26.**__**22.**__ Nothing in these rules shall prohibit a property tax agent, as that term is defined in A.R.S. § 32-3651, who is registered with the Arizona State Board of Appraisal pursuant to A.R.S. § 32-3642, from practicing as authorized pursuant to A.R.S. § 42-16001.

~~**27.** Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.~~

~~**28.** In matters before the Arizona Corporation Commission, a public service corporation, an interim operator appointed by the Commission, or a non-profit organization may be represented by a corporate officer, employee, or a member who is not an active member of the state bar if:~~

~~**(A)** the public service corporation, interim operator, or non-profit organization has specifically authorized the officer, employee, or member to represent it in the particular matter,~~

~~**(B)** such representation is not the person's primary duty to the public service corporation, interim operator, or non-profit organization, but is secondary or incidental to such person's duties relating to the management or operation of the public service corporation, interim operator, or non-profit organization, and~~

~~**(C)** the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.~~

~~Notwithstanding the foregoing provisions, the Commission or presiding officer may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented.~~

~~**29.** In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.~~

~~**30**~~**23.** A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

~~**31.** Nothing in these rules shall prohibit an active member or full-time employee of an association defined in A.R.S. §§ 33-1202 or 33-1802, or the officers and employees of a management company providing management services to the association, from appearing in a small claims action, so long as:~~

~~**(A)** the association's employee or management company is specifically authorized in writing by the association to appear on behalf of the association;~~

~~**(B)** the association is a party to the small claims action.~~

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Appendix B – Clean Version of Proposed Amendments to Rule 31

Rule 31. Regulation of the Practice of Law

*** * ***

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended or on disability inactive status and no former member who has been disbarred shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. Nothing in these rules shall affect the rights granted in the Arizona or United States Constitutions.

2. Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity.

3. Nothing in these rules shall prohibit the supreme court, court of appeals, superior courts, or limited jurisdiction courts in this state from creating and distributing form documents for use in Arizona courts.

4. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

5. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

6. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208. This exemption is not subject to paragraph (c) of this rule, as long as the disbarred attorney or member has been certified as provided in § 7-208 of the Arizona Code of Judicial Administration.

7. Nothing in these rules shall prohibit a mediator as defined in these rules from preparing a written mediation agreement or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified as a legal document preparer in compliance with the Arizona Code of judicial Administration, Part 7, Chapter 2, Section 7-208.

8. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

9. A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation, as that term is defined in A.R.S. § 10-2701, before any court in this state and in any proceeding, including but not limited to any quasi-judicial hearing, any administrative, agency, hearing officer, or board hearing, rehearing, or appeal, any small claims procedure or proceeding, and in any fee arbitration proceeding. For purposes of this rule, "any entity that is not an issuing public corporation" includes, but is not limited to, closely held corporations, limited liability companies, partnerships, non-profit corporations, public service corporations and interim operators appointed by the Arizona Corporation Commission, management companies, and unincorporated associations. "Any entity that is not an issuing public corporation" does not include an individual, and the entity must specifically authorize such person to represent it in the particular matter; such representation must not be the person's primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the person must not receive separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provisions, any presiding officer in any proceeding may require counsel in lieu of lay representation whenever it determines that lay representation is interfering with the orderly progress of the proceeding, imposing undue burdens on the other parties, or causing harm to the parties represented. Any presiding officer may assess an appropriate sanction

against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct.

10. In any proceeding before the Department of Economic Security or Department of Child Safety, including a hearing officer, an Appeal Tribunal or the Appeals Board, an individual (either claimant or opposing party) may be represented by a duly authorized agent who is not charging a fee for the representation; and a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.

11. An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.

12. In any administrative appeal proceeding of the Department of Health Services, for behavioral health services, pursuant to A.R.S. § 36-3413 (effective July 1, 1995), an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

13. In any administrative appeal proceeding relating to the Arizona Health Care Cost Containment System, an individual may be represented by a duly authorized agent who is not charging a fee for the representation.

14. In any administrative matter before the Arizona Department of Revenue, the Office of Administrative Hearings relating to the Arizona Department of Revenue, a state or county board of equalization, the Arizona Department of Transportation, the Arizona Department of Economic Security, the Department of Child Safety, the Arizona Corporation Commission, or any county, city, or town taxing or appeals official, an individual may be represented by (1) a certified public accountant, (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), or (3) in matters in which the dispute, including tax, interest and penalties, is less than $5,000.00 (five thousand dollars), any duly appointed representative.

15. In any administrative proceeding pursuant to 20 U.S.C. § 1415(f) or (k) regarding any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for a child with a disability or suspected disability, a party may be represented by an individual with special knowledge or training with respect to the problems of children with disabilities as determined by the administrative law judge, and who is not charging the party a fee for the representation. The hearing

officer shall have discretion to remove the individual, if continued representation impairs the administrative process or causes harm to the parties represented.

16. In any landlord/tenant dispute before the Arizona Department of Fire, Building and Life Safety, an individual may be represented by a duly authorized agent who is not charging a fee for the representation, other than reimbursement for actual costs.

17. A person who is not an active member of the state bar may represent an individual in small claims procedures in the Arizona Tax Court, as provided in Title 12, Chapter 1, Article 4 of the Arizona Revised Statutes.

18. If the amount in any single dispute before the State Board of Tax Appeals is less than twenty-five thousand dollars, an individual may be represented in that dispute before the board by a certified public accountant or by a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1).

19. Nothing in these rules shall limit a certified public accountant or other federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(D)(1), from practicing before the Internal Revenue Service or other federal agencies where so authorized.

20. Nothing in these rules shall prohibit the rendering of individual and corporate financial and tax advice to clients or the preparation of tax-related documents for filing with governmental agencies by a certified public accountant or other federally authorized tax practitioner as that term is defined in A.R.S. § 42-2069(D)(1).

21. Nothing in these rules shall prohibit the preparation of tax returns.

22. Nothing in these rules shall prohibit a property tax agent, as that term is defined in A.R.S. § 32-3651, who is registered with the Arizona State Board of Appraisal pursuant to A.R.S. § 32-3642, from practicing as authorized pursuant to A.R.S. § 42-16001.

23. A person licensed as a fiduciary pursuant to A.R.S. § 14-5651 may perform services in compliance with Arizona code of judicial administration, Part 7, Chapter 2, Section 7-202. Notwithstanding the foregoing provision, the court may suspend the fiduciary's authority to act without an attorney whenever it determines that lay representation is interfering with the orderly progress of the proceedings or imposing undue burdens on other parties.

RULE RESTYLING
Key Principles and Examples

Objectives: Improve the rules' organization, clarity, and consistency, and adopt plainer, more easily understood language.

Key Resource: Bryan Garner, *Guidelines for Drafting and Editing Court Rules* (1996).

Key Principles:

1. ***Formatting:*** To make it easier to find what you are looking for, make generous use of subparts and subheadings. Also use left-side indents so that a rule's hierarchy is displayed graphically.

Example: Current Rule 32.4(a)

Rule 32.4. Commencement of proceedings

a. Form, Filing and Service of Petition. A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of all post-conviction relief proceedings. In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h). The notice shall bear the caption of the original criminal action or actions to which it pertains. On receipt of the notice, the court shall file a copy of the notice in the case file of each such original action and promptly send copies to the defendant, the county attorney, the defendant's attorney, if known, and the attorney general or the prosecutor, noting in the record the date and manner of sending the copies. If the conviction occurred in a court other than the Superior Court, the copy shall be sent to the office of the prosecuting attorney who represented the state at trial. The state shall notify any victim who has requested notice of post-conviction proceedings.

As revised:

Rule 32.4. Commencing Proceedings for Post-Conviction Relief

(a) Commencement. A petitioner may commence a proceeding by timely filing a notice of post-conviction relief with the court in which the petitioner was convicted.

(b) Notice of Post-Conviction Relief.

(1) ***Form.*** The court must make available forms that petitioners may use when filing a notice of post-conviction relief. The notice must bear the caption of the original criminal action or actions to which it pertains.

(2) ***Timing.***

(A) *As-of Right Cases.* In a Rule 32 of-right proceeding, the petitioner must file the notice within 90 days after the trial court enters judgment and sentence, or within 30 days after the appellate court issues the final order or mandate in the petitioners first petition for post-conviction relief proceeding, whichever is ‘later.

(B) *Other Non-Capital Cases.* In all other non-capital cases, the petitioner must file the notice within 90 days after the trial court enters judgment and sentence, or within 30 days after the appellate court issues the final order and mandate in the direct appeal, whichever is later.

(C) *Capital Cases*. In a capital case, the Supreme Court clerk must promptly file a notice for post-conviction relief with the trial court upon issuing a mandate affirming the defendant's conviction and sentence on direct appeal.

(D) *Late Filing.* If a petitioner fails to timely file a notice, he or she may raise claims only under Rule 32.1(d), (e), (f), (g) or (h).

(c) Filing and Delivery.

(1) ***Filing.*** On receipt of a notice, the court must file a copy of the notice in the case file of each action to which the notice pertains.

(2) ***Delivery.***

(A) *Generally.* On receipt of a notice, the court [the clerk?] must promptly mail or otherwise deliver a copy of the notice to the defendant, the county attorney, the defendant’s attorney (if known), and the attorney general or the prosecutor. If the conviction occurred in a court other than the superior court, the court must may to otherwise deliver a copy of the notice to the prosecutor who represented the State of Arizona at trial.

(B) *Record of Delivery.* The court [clerk?] must note in the record the date when it mailed or otherwise delivered the notice, and the manner used to deliver it.

(3) ***Victim Notification.*** Upon receipt of a notice, the attorney general or prosecutor who represented the State of Arizona at trial must notify any victim who has requested notice of post-conviction proceedings.

2. Run-On Sentences: Break-up or simplify overlong sentences.

Example: From current Rule 32.3

> If a defendant applies for a writ of habeas corpus in a trial court having jurisdiction of his or her person raising any claim attacking the validity of his or her conviction or sentence, that court shall under this rule transfer the cause to the court where the defendant was convicted or sentenced and the latter court shall treat it as a petition for relief under this rule and the procedures of this rule shall govern.

As revised:

> If a defendant applies for a writ of habeas corpus and attacks the validity of his or her conviction or sentence, the court with jurisdiction over the proceeding must transfer the action to the court in which the defendant was convicted or sentenced. The court to which the action is transferred must treat the action as a petition for relief under this rule and apply this rule's procedures.

Another example: Current Rule 31.25(b)(1)

> **(1) Briefs filed prior to a decision by the Court to grant review.** Unless otherwise ordered by the Court, an amicus brief in support of a petition for review or a response to a petition for review accompanied by written consent of all parties, or a motion for leave to file the brief shall be filed no later than 21 days after the filing of the response to the petition for review. Such briefs shall comply with the form and length requirements of Rule 31.19(c) exclusive of any appendix.

As revised:

(1) ***Briefs Filed Before a Decision Whether to Grant Review.*** Unless the Court orders otherwise, a person filing an amicus brief must file or lodge the brief no later than 21 days after the deadline for filing a response to the petition for review. The brief must comply with Rule 31.19(c)'s form and length requirements, exclusive of any appendix.

3. Ambiguous Terms: Avoid using ambiguous terms.

Do not use "shall," which has lost all meaning over the years. Instead, use "must," "may," "should," "will," or "is/are," depending on the context. Note that the word "should" is generally considered the preferred word of choice if a rule's command is "directory" but not mandatory. And sometimes it is better to use the present tense of the operative verb if the rule does not involve an act or duty of a court or party (*e.g.*, Rule 1.1 "These rules *govern* the procedure in all criminal proceedings" rather than "These rules *shall govern* the procedure in all criminal proceedings").

Use "enter" or "file" instead of "issues" (*e.g.*, Rule 31.19(a) ("Within 30 days after the Court of Appeals issues its decision")). Some people understand the term "issue" to mean the date when a judge signs an order rather than the date when the order is filed.

Use "order" instead of "direct" when describing court actions. Courts enter orders, not directions.

4. Redundant Terms: Avoid saying the same thing twice, and especially avoid "redundant intensifiers."

Use "may" instead of "may, in its discretion" (*e.g.*, Rule 16.3(b) "The court, in its discretion, may limit or deny oral argument on any motion.")). Same for "may, if appropriate."

Use "must show" rather than "must show affirmatively."

Use "unless the court orders" rather than "unless the court expressly orders."

Use "on its own, a court may" not "on its own initiative, a court may."

5. Archaic Terms: Avoid archaic, outdated "legalistic" terms such as "hereto," "therein," "thereto," "hereinafter," "thereafter," "therewith," "wherein." Either restructure the sentence or use a demonstrative pronoun such as "that," "this," "these," or "those."

6. Simpler Words and Proper Word Choice: Prefer simpler words over the more complex and choose words that have the meaning you intend (not a near-miss). For example:

Use "if" instead of "in the event that" or "on the condition that."

Use "later" rather than "subsequently." Similarly, use "after" rather than "subsequent."

Use “before” rather than “prior to.”

Use “under,” “by,” or “provided in” rather than “pursuant to” or “provided by.”

Use “unless” rather than “provided that.”

Unless there is a temporal element (i.e., something has to happen when an act occurs), use “on” instead of “upon” (*e.g.*, “serve on”, not “serve upon”).

The word “where” is not to be used as a synonym for “if” (*e.g.*, “If there are multiple parties on a side,” not “Where there are multiple parties on a side”). “When” is appropriate in some limited circumstances, but, in most cases, “if” should be preferred to “when.”

Use “a party who” rather than “a party that.”

Use “affected” rather than “impacted.” (*e.g.*, Rule 15.8(c)).

7. “Of” Phrases: Minimize the use of “of” phrases. Use possessives if needed.

Use “Supreme Court clerk” rather than “clerk of the Supreme Court” (*e.g.*, Rule 31.19(h)).

Use “superior court clerk” or “clerk” rather than “clerk of the superior court.”

Say “Commencing Proceedings” rather than “Commencement of Proceedings” (*e.g.*, Rule 32.4).

Say “after counsel’s appointment” rather than “after appointment of counsel” (*e.g.*, Rule 32.7).

Say “Supreme Court justices” rather than “justices of the Supreme Court” (*e.g.*, Rule 31.19(h)).

Say “opposing counsel’s brief” rather than “the brief of opposing counsel.”

Say “court’s order” rather than “the order of the court.”

8. The Active Voice: Use the active voice, i.e., the subject of the sentence is performing an action, which is reflected by the verb.

Example: Rule 32.4(a) “A proceeding is commenced by the timely filing of a notice of post-conviction relief”

As revised: "A petitioner may commence a proceeding by filing a notice of post-conviction relief"

Example: Rule 32.8 "In superior court, the hearing shall be recorded."

As revised: "In superior court, the court must record the hearing."

Example: Rule 32.9(d) "For any other relief granted to a defendant, a stay pending further review is within the discretion of the trial or appellate court."

As revised: "For any other relief, the trial or appellate court may grant a stay pending further review."

9. Comments:

(a) ***Deletion of No Longer Useful Comments:*** In reviewing a rule, consider whether any of the comments can be profitably deleted altogether. Some of the comments are so old that they may be of questionable use to practitioners. (*E.g.*, Rule 8.7 (1990 Rule 8 Guidelines in Maricopa County).)

(b) ***Insertion of a Comment into the Rule:*** If a comment sets forth a requirement not found in the rule and you decide that the requirement is worth retaining, consider adding the requirement to the rule's text.

(c) ***"Applicability" Notes:*** Delete notes entitled "Application," which generally indicate that a rule is not applicable during certain time periods that have long ago expired (*e.g.*, Rules 10.2, 15.7, & 31.17)/

(d) ***Placement of Comments:*** Currently, some comments appear right after the heading for a rule (*e.g.*, Rule 12). In all cases, if a comment still has currency, it should appear after the end of the rule.

Terms, Phrases & Words of Choice
and Other Style Conventions
(Revised 11/30/15)

1. General Rule: Use the style conventions used in the Federal Rules of Civil Procedure, unless there is a good reason for not doing so. The Federal Rules provide easily identified, and readily accessible, "default" conventions.

2. Terms/Words of Choice

(a) ***Shall:*** Consider changing references to "shall" to "must," "should," "may," "will" or "is/are," as the context dictates. *See* Bryan Garner, *Guidelines for Drafting and Editing Court Rules* (the "*Guidelines*") at 29. Note that the word "should" is generally considered the preferred word of choice if a rule's command is "directory" but not "mandatory."

(b) ***Clerk:*** Currently, the Arizona rules refer to "clerk of court," "court clerk," or "clerk." The federal rules use "clerk"—*see, e.g.*, Fed. R. Civ. P. 79(a)(1). Unless the context of the rule calls for a more specific reference (*i.e.*, if distinguishing a superior court clerk from an appellate court clerk or a justice court clerk), use "clerk."

(c) ***Days:*** The current rules sometimes use words (*e.g.*, "ten"), sometimes use numbers instead of words (*e.g.*, "10" instead of "ten") and sometimes does both (*e.g.*, "ten (10)"). The convention used in the federal rules is to use numbers only if the number is above two. *See, e.g.*, Fed. Rs. Civ. P. 6(d) & 12(a), 18(b) ("two"). Follow the federal convention.

(d) ***Service:*** When cross-referencing Rule 4 service of process use the phrase "in the same manner that a summons and pleading are served under Rules 4, 4.1, or 4.2, as applicable." Note that Rule 4, 4.1 and 4.2 refer *only* to the service of a summons and pleading. Thus, for service of other items (such as a subpoena or a Rule 27 petition), it makes no sense to say that it should be served "under Rules 4.0, 4.1 or 4.2, as applicable."

(e) ***Avoid redundancies.*** Thus: ***"may"*** and not ***"may, in its discretion."***

(f) ***"Upon" v. "on":*** Unless there is a temporal element (i.e., something has to happen when an act occurs), use "on," *e.g.*, "serve on", not "serve upon."

(g) ***Where/When vs. If:*** The word "where" is not to be used as a synonym for "if" (*e.g.*, "If there are multiple parties on a side," not "Where there are multiple parties on a side"). "When" is appropriate in some limited circumstances, but, in most cases, "if" should be preferred to "when." *See Guidelines* at 5.

(h) Use ***"if"*** instead of ***"in the event that"*** or "***on the condition that."***

(i) Use ***"later"*** rather than ***"subsequently."*** Similarly, use ***"after"*** rather than ***"subsequent."***

(j) Use ***"before"*** rather than ***"prior to."***

(k) Use ***"under," "by," "prescribed by" or "provided in"*** rather than ***"pursuant to" or "provided by."***

(l) ***Hereof, herein, thereof, therein:*** Avoid use of these words. Either restructure the sentence or use a demonstrative pronoun such as "that," "this," "these," or "those."

(m) Use ***"on its own,"*** not ***"on its own initiative."*** *See*, *e.g.*, Fed. Rs. Civ. P. 39(a)(2), 56(f)(3) & 60(a).

(n) Use ***"after a pleading is filed"*** rather than ***"after filing of the pleading"***; similarly, use ***"after a pleading is served"*** rather than ***"after service of the pleading."*** If giving direction to the same person/party who just filed/served, **"after filing/serving a pleading."**

(o) Use ***"a party who"*** rather than ***"a party that."*** *See*, *e.g.*, Fed. R. Civ. P. 35(b)(1) & 65(b)(3).

(p) Use ***"attorney's fees"*** not ***"attorneys' fees."*** *See*, *e.g.*, Fed. R. Civ. P. 37(d)(3).

(q) Use ***"attorney,"*** not ***"lawyer."*** *See*, *e.g.*, Fed. R. Civ. P. 5(b)(1).

(r) Use ***"local rule"*** rather than ***"Local Rules of Practice."*** See Ariz. R. Civ. P. 83.

(s) Use ***"the State of Arizona"*** when referring to the governmental entity; use ***"Arizona"*** when referring to activity or persons within or outside state boundaries.

(t) When referring to a specific number of days or a specific number of items, use ***"fewer than"*** rather than ***"less than."*** But note, if you are talking about a period of time, the proper phrase is "less than." (*E.g.*, "Not many of these buildings are less than thirty years old.")

(u) Use **"no later than"** rather than **"not later than."** (Synonymous, but "no later than" is considered less formal.)

(u) ***Other Words:*** *See Guidelines* at 33-34.

3. Other Style Conventions

(a) ***Cross-references:*** References to other rules or other subdivisions should refer to the rule (i.e., "Rule 15(a)(2)") and ***not*** use the words "subpart," "subdivision" or similar words (i.e., "Rule 15(a)(2)" and not "subpart (a)(2)"). If it does not cause confusion and is on the same level, refer simply to the subdivision (*e.g.*, "if allowed in (b)", not "if allowed in subpart (b)"). *See Guidelines* at 35. When referring to "this rule" or "these rules," the first letter of "rule(s)" should not be capitalized.

(b) ***Heading & Subheading Titles:***

(i) If the heading or subheading of a federal rule counterpart differs from the state rule's heading or subheading, adopt the federal rule's heading or subheading, unless you have a good reason for not doing so.

(ii) ***Capitalization:*** Note that the Arizona rules are inconsistent in capitalizing the first letter in each major word in a rule's heading.

A. If there is a federal rule counterpart, follow the capitalization used in the headings and subheadings for the federal rule.

B. Capitalize the first letter of the first word in a heading or subheading, even the rules below indicate that you should not capitalize the first letter of the word.

C. If there is no federal rule counterpart, capitalize the first letter in major words in the rule's title or subheading, consistent with the federal rules' current format.

D. Capitalize the first letter in the words "Not," "Are," "Is," and "Be."

E. Do not capitalize the first letter of a conjunction: "but," "and," "or. "

E. Unless the word begins the heading or subheading, the first letter in the words "to," "and," "or," "but," and "as." should not be capitalized.

F. Prepositions: Generally, the first letter of preposition should be capitalized only if it is 5 letters or more. This appears to be the convention in the federal rules. Thus, the following should be capitalized: "After," "Against," "Before,"

"Between," "Outside," "Through," "Within," and "Without." The following should not be capitalized: "with," "for," "if," "by," "on, "in," "at."

(iii) ***Bolding & Italics:***

(A) The heading to each rule should be in **bold**.

(B) Each first-level lettered subdivision (*e.g.*, (a)) should have a subheading, which should appear in **bold**.

(C) Each second-level numbered subdivision (*e.g.*, (a)(1)) also should have a subheading, which should appear in ***bolded italics***.

(D) Each third-level letter subdivision (*e.g.*, (a)(1)(A)) should have a subheading, which should appear in *unbolded italics*.

(E) In contrast to the subheadings, all alpha-numeric subdivision designations (*e.g.*, (a), (1), (A) & (iv)) should be in **bold** and not be in italics or bolded-italics. (For an illustration, *see* Fed. R. Civ. P. 45(a)(1)(A)(iv).)

(iv) ***Use of Parenthesis:*** Subheading alpha-numeric designations should appear in parenthesis (i.e., "(a)(1)(A)(ii)," not "a.1.A.ii.").

(v) ***Use of Periods:***

(A) In the title of a rule, the rule number should be followed by a period, but a period should not follow the title of the rule (*e.g.*, "Rule 4. Summons").

(B) In all the subdivisions of a rule, the subheading should be followed by a period, but not the alpha-numeric designation (*i.e.*, "(b) Issuance.", not "b. Issuance").

(c) ***Indentation:*** Use the federal format for indentation:

(i) The heading of each rule (*e.g.*, "Rule 1.") should be flush with the left margin. The rest of the heading should start at least three spaces to the right. If the heading goes on to a second line, the text should start at least three spaces after the start of the text on the second line. (*See*, *e.g.*, Fed. R. Civ. P. 37.)

(ii) The first-level subdivision heading (*e.g.*, (a)) should be flush with the left margin, with the subheading generally starting one space after the letter designation. The left margin for the second line should be the same as where the heading for the subdivision begins.

(iii) Generally, add one space for each additional subdivision heading (*e.g.*, (a)(1), (b)(2)(A), (c)(3)(B)), and follow the convention set forth in (i).

(iv) For a good general illustration of (ii)-(iii), look at Fed. R. Civ. P. 45.

(d) ***Bullets:*** Contrary to the recommendation in the *Guidelines*, do not use "bullets" to separate subdivisions.

(e) ***Comments:***

(i) *Placement of Comments:* Currently, some comments appear in the middle of a rule following the subdivision to which the comment pertains (*e.g.*, Rule 13(a)), and sometimes comments appear right after the heading for a rule (*e.g.*, Rule 39). In all cases, move such comments so they appear after the end of the rule (and not just the subdivision).

(i) *Note:* Moving a comment to the end may require the title of the comment (or the comment itself) to be modified to identify the subdivision to which the comment pertains. For example, if a comment refers only to subdivision of a rule but that is not clear from the comment's text, consider inserting the subdivisions alpha-numeric designation into the title of the comment. For example, in moving the first comment to Rule 11(a) to the end of the rule, consider modifying the comment to say "1984 Amendment <u>to Rule 11(a)</u>." (Addition underscored.)

(ii) *Comment Titles:* Currently, comments to the Arizona rules have various titles, depending on who wrote them—State Bar Committee Notes, Committee Comment, Comment, Court Comment, Supplemental Note. For now, if you decide to keep a comment, retain its existing title. The title should be centered over the comment, and, generally, only the first letter in each major word in the comment title should be capitalized.

(f) ***Abrogated Subdivisions:*** The current rules are littered with subdivisions that are totally "abrogated" (*e.g.*, Rule 5(e)), "deleted" (*e.g.*, Rule 26(h)),

"renumbered" (*e.g.*, Rule 42(d)), or "repealed" (*e.g.*, Rule 53(g)). Unless it would cause confusion or there is some other reason for not doing so, all the references to these subdivisions should be deleted and the remaining subdivisions renumbered.

(g) ***Font, Spacing and Margins:*** Consistent with the Arizona Supreme Court's preferred font style and size for rule amendments, use Times New Roman, 13 point font, except, at the beginning of each rule, the words "Rule X." should be in 14 point font. Each subdivision should be single spaced, with each subdivision separated by a 6 point space (including the title of the rule and the first subdivision). Each rule should be separated from the next rule by a 24 point space. The margins should be standardized, and be right-justified.

(h) ***Commas:*** In an enumerated series, use the serial comma before the conjunction. Thus: "books, documents, or tangible things" and not "books, documents or tangible things."

ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 7: Administrative Office of the Courts
Chapter 2: Certification and Licensing Programs
Section 7-208: Legal Document Preparer

A. Definitions. In addition to ACJA § 7-201(A), the following definitions apply:

"Board" means the Board of Legal Document Preparers.

"Designated principal" means the individual associated with a certified business entity, on file with the Certification and Licensing Division, who is a certified legal document preparer and is responsible for supervising all certified legal document preparers, trainees and staff working for the business.

"Legal document preparer" means an individual or business entity certified pursuant to this section to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self representation in any legal matter. An individual or business entity whose assistance consists merely of secretarial or receptionist services is not a legal document preparer.

"Trainee" means a person who would qualify for certification as a legal document preparer but for the lack of required experience, and who is seeking to gain the required experience to qualify as a certified legal document preparer by working under the supervision of a designated principal, on behalf of a certified business entity, to perform authorized services, as set forth in this section.

B. Applicability. This section applies to individuals or business entities that provide services within the exemption to the prohibition of the unauthorized practice of law set forth in Rule 31 (a)(2)(B), Rules of the Supreme Court. In order to qualify to provide legal document preparation services under the specified exemption pursuant to Rule 31 (d)(23), legal document preparers and business entities who provide legal document preparation services shall hold valid certification and perform their duties in accordance with subsections (E) and (F). A person or qualified business entity shall not engage in the preparation of legal documents as specified in subsection (F)(1) without the supervision of an attorney in good standing with the State Bar of Arizona, unless the person or qualified business entity is certified pursuant to this section. A person or business entity shall not represent they are a certified legal document preparer unless the person or business entity, if applicable, holds an active certificate as a certified legal document preparer. This section is read in conjunction with ACJA § 7-201: General Requirements. In the event of any conflict between this section and ACJA § 7-201, ACJA § 7-208 shall govern.

C. Purpose. The supreme court has inherent regulatory power over all persons providing legal services to the public, regardless of whether they are lawyers or nonlawyers. The court recognizes, however, that the need to protect the public from possible harm caused by nonlawyers providing legal services must be balanced against the public's need for access to legal services. Accordingly, this section is intended to:

1. Protect the public through the certification of legal document preparers to ensure conformance to the highest ethical standards and performance of responsibilities in a professional and competent manner, in accordance with all applicable statutes, ACJA §§ 7-201 and -208, and Arizona court rules; and

2. Result in the effective administration of the legal document preparer program.

D. Administration.

1. Role and Responsibilities of the Supreme Court. In addition to the requirements of ACJA § 7-201(D), the supreme court shall review recommendations from the board for certification or renewal of certification of applicants subject to the provisions of subsection (E)(3)(c) or (G)(3) and make a final determination on the certification or renewal of certification of these applicants.

2. Establishment and Administration of Fund. The supreme court shall establish a legal document preparer fund consisting of monies received for certification fees, costs and civil penalties. The supreme court shall administer the legal document preparer fund and shall receive and expend monies from the fund.

3. Role and Responsibilities of the Division Staff. These responsibilities are contained in ACJA § 7-201(D).

4. Board of Legal Document Preparers. In addition to the requirements of ACJA § 7-201(D) the following requirements apply:

   a. The Board of Legal Document Preparers is established, comprised of the following eleven members:

      (1) Five certified legal document preparers who have each worked as a legal document preparer for at least five years;
      (2) One judge or court administrator;
      (3) One clerk of the superior court or designee;
      (4) One attorney;
      (5) Two public members; and
      (6) One additional member appointed by the chief justice of the supreme court.

   b. The board shall issue certificates to qualified applicants pursuant to subsections (E) and (G) and shall make recommendations to the supreme court regarding the certification and renewal of certification of applicants subject to the provisions of subsections (E)(3)(c) or (G)(3).

E. Certification. In addition to the requirements of ACJA § 7-201(E) the following requirements apply:

1. Necessity. A person or qualified business entity shall not represent they are a certified legal document preparer, or are authorized to prepare legal documents, without holding valid certification pursuant to this section.

2. Eligibility for Applying for Individual Standard Certification.

   a. From and after July 1, 2006, all potential applicants for individual certification, in addition to meeting the requirements set forth in subsection (E)(3)(a), shall meet the examination requirements of this subsection.

      (1) Potential applicants for standard certification shall successfully pass the examination prior to submitting an application for certification.
      (2) Upon a potential applicant passing the examination, division staff shall forward notice to the potential applicant of the potential applicant's fulfillment of the examination requirement and provide the potential applicant with an individual standard certification application form.

   b. Administration of the Examination. In addition to the requirements of ACJA § 7-201(E):

      (1) The examination for standard individual certification shall consist of a test on legal terminology, client communication, data gathering, document preparation, ethical issues, and professional and administrative responsibilities pertaining to legal document preparation, as identified through a job analysis conducted at the direction of the board. The examination shall be administered in a board approved format and delivery method.
      (2) Administration of reexaminations. These requirements are contained in ACJA § 7-201(E).

3. Individual Standard Certification.

   a. Fingerprinting. Pursuant to A.R.S. § 12-102 and ACJA § 7-201(E), an applicant shall furnish fingerprints for a criminal background investigation.

   b. Eligibility for Individual Certification. Except for applicants subject to the provisions of subsections (E)(3)(c) or (G)(3) the board shall grant a standard individual certificate to an applicant who possesses the following qualifications:

      (1) A citizen or legal resident of the United States;
      (2) At least eighteen years of age;
      (3) Of good moral character;
      (4) Complies with the laws, court rules, and orders adopted by the supreme court governing legal document preparers in this state; and
      (5) The applicant has successfully passed the legal document preparer examination.

(6) The applicant shall also possess one of the following combinations of education or experience:
   (a) A high school diploma or a general equivalency diploma evidencing the passing of the general education development test and a minimum of two years of law-related experience in one or a combination of the following situations:
      (i) Under the supervision of a licensed attorney;
      (ii) Providing services in preparation of legal documents prior to July 1, 2003;
      (iii) Under the supervision of a certified legal document preparer after July 1, 2003; or
      (iv) As a court employee;
   (b) A four-year bachelor of arts or bachelor of science degree from an accredited college or university and a minimum of one year of law-related experience in one or a combination of the following situations:
      (i) Under the supervision of a licensed attorney;
      (ii) Providing services in preparation of legal documents prior to July 1, 2003;
      (iii) Under the supervision of a certified legal document preparer after July 1, 2003; or
      (iv) As a court employee;
   (c) A certificate of completion from a paralegal or legal assistant program approved by the American Bar Association;
   (d) A certificate of completion from a paralegal or legal assistant program that is institutionally accredited but not approved by the American Bar Association, and that requires successful completion of a minimum of 24 semester units, or the equivalent, in legal specialization courses;
   (e) A certificate of completion from an accredited educational program designed specifically to qualify a person for certification as a legal document preparer under this section;
   (f) A degree from a law school accredited by the American Bar Association; or
   (g) A degree from a law school that is institutionally accredited but not approved by the American Bar Association.

c. Any applicant for certification who has been disbarred by the highest court in any state, and who has not been reinstated, or who has been denied admission to the practice of law in Arizona, is subject to the additional requirements specified in subsection (E)(4).

d. Eligibility for Business Entity Standard Certification.

   (1) All corporations, limited liability companies, partnerships, and all sole proprietorships that offer authorized legal document preparation services to non-represented parties and employs certified legal document preparers, or supervises trainees pursuant to subsection (F)(5), shall obtain certification as a business entity. The business entity shall execute and submit a principal form designating a certified individual legal document preparer pursuant to this section. The designated principal shall have the duties and responsibilities set forth in subsections (F)(4), (F)(5) and (F)(6). In the event a designated principal is no

longer able or willing to serve as the principal, a certified business entity shall immediately designate another certified individual legal document preparer as the new designated principal and within twenty days file an updated designated principal form with the division staff.

(2) The owner or officers of a certified legal document preparer business entity are not required to hold individual certification, provided the business entity has a designated principal who holds valid individual certification as a legal document preparer.

(3) A sole proprietor who does not employ certified legal document preparers or supervise trainees pursuant to subsections (A) and (F)(5), is not required to hold certification as a business entity, provided the sole proprietor holds valid certification as an individual legal document preparer.

(4) The board may grant a waiver of the business entity application fee to a corporation, limited liability company, or partnership that essentially operates as a sole proprietorship because it does not employ more than one certified legal document preparer, does not supervise trainees pursuant to subsections (A) and (F)(5), provided:
   (a) The individual operating the business holds valid certification as an individual legal document preparer; and
   (b) The business entity has applied for and obtained a business entity certification fee exemption.

(5) The board will review each fee exemption request individually.

(6) If the board approves a business entity certification fee exemption, the board shall refund the fees submitted with the exempted business entity's application.

(7) A person who has been disbarred by the highest court in any state, and who has not been reinstated, may not:
   (a) retain any ownership interest in a certified legal document preparer business; or
   (b) provide any legal document preparation or legal services to or on behalf of a certified legal document preparer business, including training and legal research, whether for or without compensation. This prohibition does not apply to a person certified as an individual providing legal document preparation services in compliance with Rule 31, ACJA § 7-201 and this section.

(8) A person whose individual application has been denied or whose individual certificate has been revoked by the board may not:
   (a) retain any ownership interest in a certified legal document preparer business; or
   (b) provide any legal document preparation or legal services to or on behalf of a certified legal document preparer business, including training and legal research, whether for or without compensation.

e. Procedures for Business Entity Certification. In addition to the requirements contained in ACJA § 7-201(E), a verified designated principal form and a list of all certified legal document preparers and subsection (F)(5) trainees acting for or on behalf of the business entity shall accompany the application for initial business entity certification.

4. Decision Regarding Certification. In addition to the requirements of ACJA § 7-201(E) the following requirements apply to an applicant for certification who has been disbarred by the highest court in any state, and who has not been reinstated, or who has been denied admission to the practice of law in Arizona.

   a. The board shall review the application of the applicant during a board meeting. If the board is satisfied the applicant meets the requirements of this section, and by majority vote of the board in public session, recommends certification of the applicant, the board shall forward a written recommendation for certification, along with the application, to the supreme court for review by the court.

   b. The court may decline review, or it may grant review on its own motion. If the court declines review, the board's recommendation for certification is final and the applicant shall be issued certification. If the court grants review, the court may issue such orders as appropriate for its review, including remanding the matter to the board for further action, ordering transmittal of the applicant's file, or ordering the applicant to provide additional information. If the court is satisfied the applicant meets the requirements of this section and approves the certification, the division staff, upon notice from the court, shall issue a certificate to the applicant in accordance with this section and ACJA § 7-201(E).

   c. The board, or the court when considering applicants subject to the provisions of subsection (E)(3)(c), may refuse to issue a certificate if the board or court finds that any of the following applies:

      (1) The applicant has been disbarred by the highest court in any state and has not been reinstated; or
      (2) The applicant has been denied admission to the practice of law in Arizona.

   d. An applicant who is subject to the provisions of subsection (E)(3)(c) and who is denied certification by the board may exercise the right to hearing pursuant to ACJA § 7-201(E)(2)(c)(5). The decision of the court to deny certification to an applicant who is subject to the provisions of subsection (E)(3)(c) is final and the hearing provisions of ACJA § 7-201(E)(2)(c)(5) do not apply.

F. Role and Responsibilities of Certificate Holders. In addition to the requirements of ACJA § 7-201(F) the following requirements apply:

1. Authorized Services. A certified legal document preparer is authorized to:

a. Prepare or provide legal documents, without the supervision of an attorney, for a person or entity in any legal matter when that person or entity is not represented by an attorney;

b. Provide general legal information, but may not provide any kind of specific advice, opinion, or recommendation to a person or entity about possible legal rights, remedies, defenses, options, or strategies;

c. Provide general factual information pertaining to legal rights, procedures, or options available to a person or entity in a legal matter when that person or entity is not represented by an attorney;

d. Make legal forms and documents available to a person or entity who is not represented by an attorney; and

e. File, record, and arrange for service of legal forms and documents for a person or entity in a legal matter when that person or entity is not represented by an attorney. A certified legal document preparer may not sign any document he or she prepares for or provides to a person or entity, but this provision does not prohibit the signing of (i) 20-Day Notices prepared pursuant to A.R.S. § 33-992.01, (ii) notices related to condominium or planned community association liens that are created pursuant to A.R.S. § 33-1256 (condominiums) and § 33-1807 (planned communities); (iii) health care provider liens that are created pursuant to A.R.S. § 33-932, or (iv) mechanic's liens created pursuant to A.R.S. § 33-993.

2. Code of Conduct. Each certified legal document preparer shall adhere to the code of conduct in subsection J.

3. Identification. Beginning July 1, 2003, a certified legal document preparer shall include the legal document preparer's name, the title "Arizona Certified Legal Document Preparer" or the abbreviation "AZCLDP" and the legal document preparer's certificate number on all documents prepared by the legal document preparer, unless expressly prohibited by a non-judicial agency or entity. A legal document preparer providing services on behalf of a certified business entity shall also include the business entity name and certificate number on all documents prepared, unless expressly prohibited by a non-judicial agency or entity. The legal document preparer shall also provide their name, title and certificate number to any person upon request.

4. Notification of Changes. In addition to the requirements of ACJA § 7-201(F) the following requirements apply:

a. If the status of an individual certificate holder changes from being associated with a business entity, the legal document preparer shall, within 30 days of the change, notify the division staff in writing.

b. A designated principal shall notify the division staff in writing within 30 days of the termination of employment when an employee who is a certified legal document preparer or an (F)(5) trainee leaves the employment of the business entity.

5. Supervision of Trainees.

a. If a certified business entity employs a person who would qualify for certification as a legal document preparer but for the lack of required experience, the designated principal may train the employee to perform services authorized by this section until such time as the trainee meets the minimum eligibility requirements for individual certification pursuant to subsection (E)(3)(b) for a period not to exceed two and one-half years.

b. The trainee may perform authorized services, as set forth in subsection (F)(1) of this section, only under the supervision of the designated principal. Neither the trainee nor the designated principal may represent that the trainee is a certified legal document preparer.

c. Any designated principal who undertakes to train an employee shall:

(1) Assume personal professional responsibility for the trainee's guidance in any work undertaken and for supervising, generally or directly, as necessary, the quality of the trainee's work;
(2) Assist the trainee in activities to the extent the designated principal considers it necessary;
(3) Ensure the trainee is familiar with and adheres to the provisions of ACJA §§ 7-201 and -208;
(4) Provide the designated principal's name and certificate number, as required by subsection (F)(3), on any documents prepared by the trainee under the designated principal's supervision; and
(5) Prepare and submit a written acknowledgement of the roles and responsibilities of the designated principal and trainee pursuant to subsections (F)(5) and (F)(6). The written acknowledgement shall include the name, address, start date of the trainee, and the anticipated date the trainee will meet the minimum eligibility requirements to seek individual certification.

6. Designated Principal. The designated principal of a certified business entity shall:

a. Prepare and submit, with the business entity application, a list of all certified legal document preparers and subsection (F)(5) trainees acting for or on behalf of the business entity;

b. File with the division staff , by May 1st of each year, a list of all certified legal document preparers and a list of all subsection (F)(5) trainees acting for or on behalf of the business entity;

c. Actively and directly supervise all other certified legal document preparers, subsection (F)(5) trainees, and staff working for the certified business entity; and

d. Represent the business entity, at the discretion of the entity, in any proceeding under this section.

7. Notification of Discipline. A certificate holder who has been disbarred from the practice of law in any state since original certification as a legal document preparer shall provide the information regarding the disbarment to the board within 30 days of service of the notice of the disbarment.

8. Notification of Denial of Admission. A certificate holder who has been denied admission to the practice of law in Arizona since original certification as a legal document preparer shall provide the information regarding the denial to the board within 30 days of service of the notice of the denial.

G. Renewal of Certification. In addition to the requirements contained in ACJA § 7-201(G) the following requirements apply:

1. Expiration Date. All standard certifications expire at midnight, on June 30th of each odd numbered year.

2. Continuing Education. All certified legal document preparers shall complete ten hours of continuing education each year for a total of twenty hours every certification period pursuant to subsection (L).

3. Decision Regarding Renewal. In addition to the requirements contained in ACJA § 7-201(G), the review and certification decision and hearing provisions of subsection (E)(4) shall apply to a certificate holder who has been disbarred or who has been denied admission to the practice of law since the date of the original certification.

H. Complaints, Investigation, Disciplinary Proceedings and Certification and Disciplinary Hearings. These requirements are contained in ACJA § 7-201(H).

I. Policies and Procedures for Board Members. These requirements are contained in ACJA § 7-201(I).

J. Code of Conduct. This code of conduct is adopted by the supreme court to apply to all certified legal document preparers in the state of Arizona. The purpose of this code of conduct is to establish minimum standards for performance by certified legal document preparers.

1. Ethics.

    a. A legal document preparer shall avoid impropriety and the appearance of impropriety in all activities, shall respect and comply with the laws, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the legal and judicial systems.

    b. A legal document preparer shall be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest.

    c. A legal document preparer shall promptly make full disclosure to a consumer of any relationships which may give the appearance of or constitutes a conflict of interest.

    d. A legal document preparer shall refrain from knowingly making misleading, deceptive, untrue, or fraudulent representations while assisting a consumer in the preparation of legal documents. A legal document preparer shall not engage in unethical or unprofessional conduct in any professional dealings that are harmful or detrimental to the public.

2. Professionalism.

    a. A legal document preparer shall treat information received from the consumer as confidential, yet recognize and acknowledge that the privilege of attorney – client confidential communications is not extended to certified legal document preparers.

    b. A legal document preparer shall be truthful and accurate when advertising or representing the legal document preparer's qualifications, skills or abilities, or the services provided. A legal document preparer shall demonstrate respect for the legal system and for those who serve it, including judges, judicial staff, attorneys, other legal document preparers and public officials. A legal document preparer shall not make a statement the legal document preparer knows is false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, public legal officer, attorney, other legal document preparer or judicial staff.

    c. A legal document preparer shall maintain and observe the highest standards of integrity and truthfulness in all professional dealings.

    d. A legal document preparer shall keep abreast of current developments in the law as they relate to legal document preparation and shall fulfill ongoing training requirements to maintain professionalism and the skills necessary to perform their duties competently.

3. Fees and Services.

    a. A legal document preparer shall, upon request of a consumer at any time, disclose in writing an itemization of all rates and charges to that consumer.

b. A legal document preparer shall determine fees independently, except when otherwise established by law, entering into no unlawful agreements with other legal document preparers on the fees charged to any user.

c. A legal document preparer shall at all times be aware of and avoid impropriety or the appearance of impropriety, which may include, but is not limited to:
   (1) Establishing contingent fees as a basis of compensation;
   (2) Directly or indirectly receiving of any gift, incentive, reward, or anything of value as a condition of the performance of professional services; and
   (3) Directly or indirectly offering to pay any commission or other consideration in order to secure professional assignments.

d. A legal document preparer may consult, associate, collaborate with, and involve other professionals in order to assist the consumer.

4. Skills and Practice.

a. A legal document preparer shall provide completed documents to a consumer in a timely manner. The legal document preparer shall make a good faith effort to meet promised delivery dates and make timely delivery of documents when no date is specified. A legal document preparer shall meet document preparation deadlines in accordance with rules, statutes, court orders, or agreements with the parties. A legal document preparer shall provide immediate notification to the consumer of any delays.

b. A legal document preparer shall accept only those assignments for which the legal document preparer's level of competence will result in the preparation of an accurate document. The legal document preparer shall decline an assignment when the legal document preparer's abilities are inadequate for that assignment.

5. Performance in Accordance with Law.

a. A legal document preparer shall perform all duties and discharge all obligations in accordance with applicable laws, rules or court orders.

b. A legal document preparer shall not represent they are authorized to practice law in this state, nor shall the legal document preparer provide legal advice or services to another by expressing opinions, either verbal or written, or by representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process, except as authorized in Rule 31(d), Rules of the Supreme Court. A legal document preparer shall not attend court with a consumer for the purpose of assisting the consumer in the court proceeding, unless otherwise ordered by the court.

c. A legal document preparer shall not provide any kind of advice, opinion or recommendation to a consumer about possible legal rights, remedies, defenses, options, or strategies. This shall not, however, preclude a certified legal document

preparer from providing the type of information permitted in subsection (F)(1) of this section. A legal document preparer shall inform the consumer in writing that a legal document preparer is not a lawyer, is not employed by a lawyer, and cannot give legal advice, and that communications with a legal document preparer are not privileged. A legal document preparer shall not use the designations "lawyer," "attorney at law," "counselor at law," "law office," "JD," "Esq.," or other equivalent words, the use of which is reasonably likely to induce others to believe the legal document preparer is authorized to engage in the practice of law in the state of Arizona.

K. Fee Schedule.

1. Standard Certification Fees

a. Individual Certification for Two Year Certification Period	$650.00
(1) For certification expiring **more** than one year after application date	$650.00
(2) For certification expiring **less** than one year after application date	$325.00
b. Fingerprint Application Processing. Rate set by Arizona law and subject to change.	
2. Business Entity Certification for Two Year Certification Period	$650.00
a. For certification expiring **more** than one year after application date	$650.00
b. For certification expiring **less** than one year after application date	$325.00
3. Examination Fees	
a. New Applicants for Certification	$ 50.00
b. Reexaminations	$ 50.00
(For any applicant who does not pass the examination on the first attempt. The $50.00 fee applies to each reexamination.)	
c. Reregistration for Examination	$ 50.00
(For any applicant who registers for an examination date and fails to appear at the designated site on the scheduled date and time.)	
4. Renewal Certification Fees.	
a. Individual Renewal for Two Year Renewal Period	$600.00
b. Business Entity Renewal for Two Year Renewal Period	$600.00

c. Inactive Status	$200.00
d. Late Renewal	$ 50.00
e. Delinquent Continuing Education	$ 50.00

5. Miscellaneous Fees.

a. Replacement of Certificate or Name Change	$ 25.00
b. Public Record Request per Page Copy	$ .50
c. Certificate of Correctness of Copy of Record	$ 18.00
d. Reinstatement Application	$100.00

(Application for reinstatement to certification after suspension or revocation of certification.)

L. Continuing Education Policy.

1. Purpose.

   a. Ongoing continuing education ("CE") is one method to ensure legal document preparers maintain competence in the field after certification is obtained. Continuing education also provides opportunities for legal document preparers to keep abreast of changes in the profession and the Arizona judicial system.

   b. Pursuant to ACJA § 7-201(D) the board shall make recommendations to the supreme court regarding rules, policies, and procedures to implement and enforce the requirements regarding legal document preparers, including continuing education. This subsection is intended to provide direction to legal document preparers to ensure compliance with the continuing education requirements and to provide for equitable application and enforcement of the continuing education requirements.

2. Applicability.

   a. Pursuant to subsection (G)(2), all legal document preparers who hold individual certification shall attend ten hours of approved continuing education each year between the period of May 1st and April 30th of the following year, for a total of no less than twenty hours of continuing education completed on or before April 30th of every odd numbered year. The continuing education requirements do not apply to certified legal document preparer business entities. Hours of participation are not transferable to certification periods other than the one in which the participation occurred.

b. All certified legal document preparers shall comply with the continuing education policies in this subsection.

3. Responsibilities of Legal Document Preparers.

a. It is the responsibility of each legal document preparer to ensure compliance with the continuing education requirements, maintain documentation of completion of continuing education, and to submit the maintained documentation to the legal document preparer program upon the request of the board or division staff.

b. Upon request, each legal document preparer shall provide any additional information required by the board or division staff when reviewing renewal applications and continuing education documentation.

c. Continuing education not recognized for credit upon board review does not in any way relieve the legal document preparer of the responsibility to complete the required hours of continuing education.

4. Authorized Continuing Education Activities.

a. A CE activity shall address the areas of proficiency, competency, and performance of legal document preparation, impart knowledge and understanding of the profession, the Arizona judiciary, legal process, and increase the participant's understanding of the responsibilities of a certified legal document preparer. Authorized continuing education activities include the following subjects:

(1) The role and responsibility of certified legal document preparers including ACJA §§ 7-201, -208 and Rule 31.
(2) Ethics for legal document preparers and business entities, including cooperation with judges, attorneys, court staff, and other certified legal document preparers, professional courtesy and impartiality to all litigants, and information versus legal advice. Each certified legal document preparer shall complete a minimum of one hour of the total continuing education requirement each year in an ethics based curriculum.
(3) The Arizona court system including the state and federal constitution, branches of government, Arizona court jurisdiction and responsibilities, Arizona tribal court system, resource materials including Arizona Revised Statutes, Arizona Rules of Court, administrative orders and rules, as well as current issues in the Arizona court system.
(4) Research skills including utilizing reference materials and libraries and research techniques.
(5) Management issues including public relations, customer service, accounting, time management, human resources, financial and retirement planning, and office management. The maximum hours of continuing education credits earned as business management credit shall not exceed three hours per year of the total number of continuing education hours required for renewal.
(6) The maximum hours of continuing education credits earned from tax related

curriculum shall not exceed three hours per year of the total number of continuing education hours required for renewal.

b. Conferences. A legal document preparer may receive continuing education credit for attendance at a conference relevant to the profession. A legal document preparer may receive 100 percent of the continuing education credits for attendance at the conference, if the conference is directly related to the legal document preparer profession. Introductory remarks sessions, breaks, meals, business meetings, and general sessions of the conference do not qualify as continuing education hours.

c. University, college and other educational institution courses. A legal document preparer may receive continuing education credit for a course provided by a university, college or other institutionally accredited educational program if the legal document preparer successfully completes the course with a grade of "C" or better or a "pass" in a pass/fail grading system. A legal document preparer may receive continuing education credit if the course is relevant to the legal document preparer profession, up to two times the number of credit hours awarded by the educational institution. The maximum hours of continuing education credits earned from educational course work shall not exceed 50 percent of the total number of continuing education hours required for renewal.

d. Self study. A legal document preparer may receive continuing education credit for self study activities, including video and audio tapes, online computer seminars, and other methods of independent learning. The maximum hours of continuing education credits earned in a self study format shall not exceed 50 percent of the total number of continuing education hours required for renewal.

e. Serving as faculty. A legal document preparer may receive continuing education credit for serving as faculty, instructor, speaker, or panel member of an instructional seminar directly related to the profession of legal document preparation. A legal document preparer may receive continuing education credit for the presentation time and up to two hours of preparation time for each hour of presentation. The maximum hours of continuing education credits earned as faculty credit shall not exceed 50 percent of the total number of continuing education hours required for renewal and a legal document preparer shall not receive duplicate credit for repeating a presentation during the certificate period.

5. Minimum time. Each continuing education activity shall consist of at least 30 minutes of actual clock time spent by a legal document preparer in actual attendance at and completion of a continuing education activity. “Actual clock time” includes the total number of hours attended, minus the time spent for introductory remarks, breaks, meals, and business meetings. After completion of the first 30 minutes of a continuing education activity, credit shall be recognized in fifteen minute increments.

6. Maximum credit. Unless the board otherwise determines a continuing education activity is directly related to the legal document preparer profession, a legal document preparer shall

not receive more than 50 percent of the credit requirement for the certificate period through one activity.

7. Non-Qualifying Activities.

   a. The following activities shall not qualify for continuing education credit for legal document preparers:

      (1) Educational course work and training completed to qualify for certification;
      (2) Trainee supervision activities. A legal document preparer shall not receive continuing education credit for trainee supervision;
      (3) Attendance or participation at professional or association business meetings, general sessions, elections, policymaking sessions or program orientation;
      (4) Serving on committees or councils or as officers in a professional organization; and
      (5) Activities completed as required by the board as part of a disciplinary action.

   b. Repeat of an Activity. Continuing education activities repeated during a certificate period do not qualify for credited duplicate hours.

   c. If a legal document preparer attends part, but not all of a continuing education course, the legal document preparer holder is not eligible to claim partial credit completion.

8. Documentation of attendance or completion. When attending or completing a continuing education activity, each legal document preparer shall obtain documentation of attendance or completion from the sponsoring entity. At a minimum, this documentation shall include the:

   a. name of the sponsor;

   b. name of the participant;

   c. topic of the subject matter;

   d. number of hours actually attended or the number of credit hours awarded by the sponsoring entity;

   e. date and place of the program; and

   f. signature of the sponsor or an official document from the sponsoring entity.

9. Compliance and Non-Compliance.

   a. Affidavit of compliance. A legal document preparer shall submit an affidavit of continuing education compliance when applying for renewal of certification. The affidavit shall be in the format provided by division staff.

b. Proration of continuing education requirement. A legal document preparer whose certificate expires less than one year from the effective date of certification shall complete no less than ten hours of continuing education credit during the balance of the certification period. In subsequent certification periods, the legal document preparer shall complete the biannual twenty hour continuing education requirement. Proration of the continuing education requirement does not apply to a legal document preparer who previously held certification and allowed their certification to lapse.

c. Extension or waiver of continuing education requirements**.** A legal document preparer seeking renewal of certification who has not fully complied with the CE requirements may request an extension or waiver of the CE requirements under the following conditions:

(1) The legal document preparer submits a notarized written statement to the board, explaining the facts regarding non-compliance and requesting an extension or waiver of the requirements no later than the May 15th preceding the June 30th expiration of the certificate. Upon a showing of extenuating circumstances, the board may grant an extension of a maximum of 90 days for the legal document preparer to complete the continuing education requirement.
(2) The board shall determine whether extenuating circumstances exist. In reviewing the request, the board shall consider if the legal document preparer has been unable to devote sufficient hours to fulfill the requirements during the certificate period because of:
  (a) full-time service in the armed forces of the United States during a substantial part of the certificate period;
  (b) an incapacitating illness documented by a statement from a currently licensed health care provider;
  (c) a physical inability to travel to the sites of approved programs documented by a statement from a currently licensed health care provider; or
  (d) any other special circumstances the board deems appropriate.
(3) A legal document preparer whose certificate has been suspended or revoked by the board is not eligible to request a waiver or extension of the continuing education requirement.
(4) The board or division staff may request documentation or additional information from a legal document preparer applying for renewal to verify compliance with the continuing education requirements. If the legal document preparer fails to provide the requested documentation or additional information, the board may deem the application for renewal incomplete and deny renewal of certification.

d. Random audits of continuing education compliance. During each renewal review period, the board shall direct division staff to randomly select a specified number of legal document preparers to demonstrate continuing education requirement compliance through submission of proof of continuing education participation. Refusal or failure to respond to a board or division staff request for audit documentation of continuing education compliance may result in denial of renewal of certification or disciplinary action pursuant to ACJA § 7-201(H) and this section.

e. A legal document preparer who fails to complete the continuing education requirement, completes any portion of the continuing education requirement after April 30th of each odd numbered year, falsifies documents, or misrepresents attendance or an activity is subject to any or all of the following actions of the board;

(1) Assessment of the delinquent continuing education fee;
(2) Denial of renewal of certification; and
(3) Disciplinary action pursuant to ACJA § 7-201(H) and this section.

10. Board Decision Regarding Continuing Education Compliance.

a. Upon a review of continuing education documentation and any applicable additional information requested, the board may:

(1) Recognize legal document preparer compliance with the continuing education requirement;
(2) Require additional information from the legal document preparer seeking renewal before making a decision;
(3) Recognize partial compliance with the requirement and order remedial measures; or
(4) Enter a finding of non-compliance.

b. The division staff shall promptly notify the legal document preparer, in writing, of the board's decision. A legal document preparer may appeal the decision by submitting a written request for review to the legal document preparer program within fifteen days of receipt of notification of the board's decision. The legal document preparer requesting review may request to appear before the board at the next available regularly scheduled board meeting.

c. The certification of a legal document preparer who timely appeals a decision by the board regarding continuing education shall continue in force until a final decision is made by the board.

d. The board shall make the decision on the appeal in writing. The decision is final and binding.

Adopted by Administrative Order 2003-14, effective April 1, 2005. Amended by Administrative Order 2003-64, effective June 6, 2003. Amended by Administrative Order 2004-95, effective November 24, 2004. Amended by Administrative Order 2005-24, effective April 7, 2005. Amended by Administrative Order 2006-75. The amended section takes effect January 1, 2007, unless otherwise delineated in the administrative order adopting the section. Amended by Administrative Order 2012-85, effective November 21, 2012. Rescinded by Administrative Order 2012-94, effective December 6, 2012. Amended by Administrative Order 2013-39, effective April 10, 2013.

LINK TO INFORMATION ON NON-LAWYER LEGAL SERVICES PROGRAMS

ARIZONA:	Arizona Legal Document Preparer Program
	ACJA § 7-208
WASHINGTON:	Washington Limited License Legal Technician
	Rules and Regulations
	LLLT Rules of Professional Conduct
UTAH: (development in progress)	Overview Slide Deck and Summary article
	Licensed Paralegal Practitioner Committee
	Supreme Court Task Force to Examine Limited Legal Licensing Report, and Steering Committee Charge
	Rule 14-802 Authorization to practice law
ONTARIO, CANADA:	Licensed Paralegal Program Homepage
	Report to the Attorney General of Ontario: 5 year report on licensed paralegal program
	Licensed Paralegal Program Webcast

ARIZONA SUPREME COURT RULES,
RULE 42, RULES OF PROFESSIONAL CONDUCT
ER 1.2

ER 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Credits:
Amended June 9, 2003, effective Dec. 1, 2003;
The Arizona Court Rules are current with amendments received through 8/1/18.

Unbundled Legal Services

What Is Unbundling?

Unbundling, or limited scope representation, is an alternative to traditional, full-service representation. Instead of handling every task in a matter from start to finish, the lawyer handles only certain parts and the client remains responsible for the others. It is an a la carte option for legal services.

Good for Clients, Courts and Attorneys

Clients get just the advice and services they need so they pay a more affordable overall legal fee.

Lawyers expand their client base because their services are more affordable to a broader span of the population.

Otherwise self-represented litigants receive necessary counsel making interactions with court personnel and judges more efficient.

Advancing Unbundling

3 out of 5 litigants in civil cases do not have a lawyer.

Yet seven out of ten people are not at all familiar with unbundling as an option for affordable legal services.

What can we do?

- Petition courts to expand upon the rules of professional conduct clarifying unbundling.
- Provide resources that help lawyers understand their obligations and provide limited scope services.
- Create a section or group dedicated to advancing unbundling.
- Maintain a directory of lawyers who provide unbundling.
- Create pipelines from clients to lawyers who provide unbundling.
- Educate young lawyers and law students on unbundling as an option.

Where can we start?

The ABA Standing Committee on the Delivery of Legal Services maintains an Unbundling Resource Center with rules, cases, ethics opinions, articles and more. Go to www.ambar.org/delivery and click on "Resources."

Source: SRLN Brief: How Many SRLs? (SRLN 2015)

Source: Perspectives on Finding Personal Legal Services, ABA Standing Committee on the Delivery of Legal Services (November 2011)

UNBUNDLING
LEGAL SERVICES:

Options for
CLIENTS, COURTS & COUNSEL

A TOOLKIT FOR COURT LEADERSHIP

AFCC

IAALS
EMPOWERING IMPROVEMENT. ADVANCING EXCELLENCE.
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM
UNIVERSITY of DENVER

Unbundling Legal Services:

A Toolkit for Court Leadership

Janice B. Davidson
Senior Advisor, *Honoring Families Initiative*

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a "think tank" that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

Rebecca Love Kourlis	Executive Director
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Honoring Families is an initiative of IAALS dedicated to developing and promulgating evidence-informed processes and options for families involved in divorce, separation, or parental responsibility cases that enable better outcomes for children and that provide greater accessibility, efficiency, and fairness for all parties, including those without counsel.

Acknowledgements

The *Honoring Families Initiative* and IAALS would like to extend sincere thanks to Hon. Christine M. Durham, Nancy J. Sylvester, and Marcus Reinkensmeyer for providing their invaluable insights and expertise. This project would not have been possible without their help.

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Introduction

In 2010, the New York Times featured a call to action from two former state chief justices, who called upon the legal profession to promote the availability and use of unbundled legal services to help close an ever-widening "justice gap." *See* John H. Broderick & Ronald George, *A Nation of Do-It-Yourself Lawyers* (2010), available at: http://www.nytimes.com/2010/01/02/opinion/02broderick.html.

Unbundled legal services, in which a client hires an attorney for agreed-upon discrete tasks, is indeed a partial solution to the access to justice problem in our nation's courts, and has become increasingly used and accepted in the last several decades. And, proponents believe that in cases involving divorce, separation, or parenting time, the use of unbundled legal services by parties who have never sought the advice of counsel can increase the number of prepared litigants and result in more available docket, court staff, and judge time.

Although unbundled legal services provide more flexibility to a litigant, and is usually far less costly than full service representation, too few attorneys offer it, and too many litigants do not know about it. While there are more attorneys offering unbundled legal services and a growing list of jurisdictions recognize it, the access crisis remains, the justice gap continues to widen, and too many litigants remain unaware of the option of seeking targeted legal assistance.

Securing access to justice in the court system is a fundamental goal and responsibility of judicial leadership. The support of the courts is absolutely essential in order for unbundled legal services to take hold. Chief justices and chief judges are uniquely positioned to help close the justice gap through hands-on encouragement and support of unbundled legal services within their respective jurisdictions.

The purpose of this toolkit is to provide judicial leaders quick access to information on unbundled legal services and ways to promote its availability and use. It is formatted to suggest alternative means by which chief justices, chief judges, clerks of court, court administrators, and other judicial leaders can encourage and support this legal services model to improve litigant outcomes, public trust and confidence, and court efficiency in cases involving divorce, legal separation, and parenting responsibilities.

A Brief Essay:
Why Should Courts Encourage Unbundled Legal Services?

I. *A Description of the Problem: Access to Justice, Procedural Fairness, and Court Efficiency*

> "There is widespread consensus that this 'justice gap' between rich and poor litigants threatens the credibility of the justice system, undermines public confidence in the law, and distorts the accuracy of judicial decision-making."
> – Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 453 (2011).[1]

Most agree that litigants benefit from attorney representation in the court system. Yet, in some state courts, more than 80% of court cases involving divorce, legal separation, or allocation of parenting responsibilities involve at least one party who does not have an attorney. Legal representation has been effectively priced out of reach for those of modest means and, increasingly, even the middle class cannot afford the cost of a lump sum retainer or the full services of a lawyer. Moreover, many litigants, even if they can afford it, simply do not want a lawyer involved in their divorce case: they are concerned that once they engage an attorney, counsel fees for full representation will become prohibitive, or they mistrust lawyers and fear they will lose control over their case.

For the vast majority of Americans, contact with general jurisdiction courts is through family law cases. When entirely unrepresented by counsel, this large portion of our population often comes to court uninformed and overwhelmed, seeking substantial help from court staff and the judge. As a result:

- Court staff spend substantial time assisting self-represented litigants, often without guidance on how to navigate the line between providing legal information and legal advice;

- Judges spend valuable court time explaining the issues and proceedings to self-represented litigants while navigating the balance between enforcing applicable procedures and ensuring access to justice;

- Represented parties and self-represented litigants risk not having their cases heard in a timely manner;

[1] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960765.

- Self-represented litigants often leave frustrated and unsatisfied, viewing the court system as unfair and unresponsive.

Although many jurisdictions have developed on-site or internet-based self-help centers or provide in-court assistance by non-lawyer personnel tasked with helping the self-represented litigant navigate the tangle of forms and procedures, very few assistance programs provide litigants with actual legal advice. Thus, even if a self-represented litigant shows up in court at the right place and with a completed form, without the information and guidance usually obtained from lawyers, he or she is perhaps not best equipped to follow court procedure or to make informed legal decisions. Litigants "need to know more than which forms to use, how to docket their cases and what time to appear in court. They need assistance with decision-making and judgment. They need to know their options, possible outcomes and the strategies to pursue their objectives."[2]

II. What Are Unbundled Legal Services?

"Unbundled legal services," or discrete task representation, refers to a method of legal services delivery in which a client hires an attorney to assist with specific elements of the matter. These tasks may include any or all of the following: gathering facts; advising the client; discovering facts of the opposing party; researching the law; drafting correspondence and documents; negotiating; reviewing a particular document; and/or representing the client in court. The client and the attorney agree on the specific tasks to be performed by each. Depending on the nature of the involvement, the attorney may enter an appearance with the court. The client represents himself/herself in all other aspects of the case.

Discrete task representation is not new. It is standard practice outside of the arena of adjudicatory matters, particularly in transactional work and estate planning. Because lawyers traditionally have been taught to approach litigated cases systemically, they have been slower to embrace unbundling for matters requiring adjudication. However, that attitude is changing due to the increasing availability of education and training to help attorneys identify which cases or clients are suitable for a discrete task approach; clarification of professional ethical concerns; availability in an increasing number of jurisdictions of rules and forms governing entry and withdrawal of limited appearances; and the changing legal marketplace, including an increasing need for legal services for people of low and middle income and a lack of available work for newly-minted lawyers.

[2] *See* ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 5 (2009), *available at* http://apps.americanbar.org/legalservices/delivery/downloads/prose_white_paper.pdf.

III. How Unbundled Legal Services Provide a Partial Answer

"The better the litigant is prepared, the more efficiently the court operates. While judges would no doubt prefer fully represented litigants, the choice in most venues is a self-represented litigant who is well prepared or one who is not. Courts can avoid litigants who are in a procedural revolving door when those litigants have access to the services lawyers provide."[3]

Although they provide valuable assistance, online self-help forms and court-based facilitators are not a substitute for lawyers. Only lawyers can provide legal analysis specific to the facts of the case or give strategic direction in completing forms, preparing documents, or presenting a case in court.

While it is true that unbundled legal services is not appropriate for every situation, as an accepted form of legal services delivery, it can enable attorneys to serve people who otherwise would not have had the benefit of the advice of counsel. In turn, the use of unbundled legal services can increase the number of prepared self-represented litigants, facilitate informed settlements, and, by smoothing the flow of the adjudicatory process, free docket, staff, and judge time to resolve disputes in a timely and efficient manner.

[3] *Id*. at 6.

Talking Points for Courts on Unbundled Legal Services/Discrete Task Representation

On the practice of unbundled legal services …

- Unbundled legal services or discrete task representation describes a legal service delivery model whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end.

- This type of practice is standard among transactional and estate planning attorneys, and is increasingly moving into the adjudication context. Legal aid providers around the country have been leveraging this model of service delivery for years.

On the scope and types of unbundled legal services …

- Through an unbundled legal services model, an attorney and his/her client agree on the specific tasks that each will perform.

- Depending on the agreement, an attorney may engage in any number of discrete tasks:

  - Drafting pleadings, briefs, or orders;
  - Reviewing documents and organizing discovery materials;
  - Conducting legal research;
  - Negotiating with opposing parties or counsel;
  - Engaging in alternative dispute resolution;
  - Coaching on strategy;
  - Advising on courtroom procedures or appropriate courtroom behavior;
  - Preparing exhibits;
  - Providing legal guidance and advice;
  - Making an appearance in court.

- For unbundled legal services agreements that anticipate representation in court, an attorney can properly limit the scope of services by filing a Limited Entry of Appearance with the court and a Notice of Termination of Appearance at the conclusion of the service(s).

On the need for unbundled legal services …

- **Cost of Legal Representation**: The cost of obtaining full-service legal representation is prohibitive for low-income individuals, and, increasingly, the middle class cannot afford representation. As a result, the percentage of cases in which one or both parties are without legal representation is increasing, with very real impacts on case outcomes, as well as public trust and confidence in the legal system.

- **Growing Demand for Client Control**: Armed with legal information, rules and procedures, and court forms easily accessible online, clients increasingly desire greater involvement in and control over their legal matters. An unbundled practice model enables clients to drive the course of their legal matter, leveraging only those services they truly need without feeling that they have relinquished control of their case.

- **Pressures Placed on Court Staff and Judges**: Self-represented litigants often come to court uninformed, unprepared, and overwhelmed. The task of assisting and directing them falls to court staff who are both unable to provide much of the advice for which litigants are looking and unequipped to handle the growing numbers of litigants coming to them. Judges, too, struggle in working with self-represented litigants, as they navigate the balance between enforcing applicable procedures and ensuring access to justice. An unbundled legal services model can increase the number of prepared litigants, facilitate informed settlements, and help to smooth the flow of adjudicatory proceedings.

- **A Changing Practice**: The practice of law is changing. As a growing number of litigants are proceeding through the court process without legal representation, law practices increasingly have to adapt to the changing marketplace for legal services. This shifting practice environment often affects new lawyers, as more and more struggle to find work after law school. Offering unbundled legal services allows attorneys to respond to market demands and expand—potentially significantly—their client pool to include those who otherwise could not or would not have sought the help of legal counsel.

On responding to criticisms of unbundled legal services …

- **Ethical Concerns**: The ABA Model Rules of Professional Conduct's provisions relating to limited scope representation, adopted in most states, authorize this practice so long as the limitation is reasonable under the circumstances and the

client gives informed consent. Over forty states have specific ethics rules, above and beyond the ABA Rules, authorizing and regulating the practice.

- **Suitability for Certain Cases**: Not all cases are suitable for unbundled legal services. By talking with clients, evaluating the circumstances of the legal matter(s), and assessing clients' abilities, attorneys can adequately screen cases and clients prior to engaging in an agreement to limit the scope of representation.

- **Adequacy of Piecemeal Representation for Interconnected Issues**: It is true that legal issues are often interconnected. In many cases, however, it is possible to identify discrete tasks. Furthermore, many—if not most—of the clients who would benefit from unbundled legal services would not otherwise hire an attorney for full representation. For these clients, partial representation is often better than no representation.

Call to action …

- Courts should explicitly support the delivery of unbundled legal services and provide clarification on unclear or ambiguous ethics guidelines, including the development of rules and forms governing entrance and withdrawal of limited appearances.

- Courts must ensure education and communication among court staff and judges, so that treatment of limited scope representation cases and messaging about unbundled legal services more broadly is consistent.

- Courts must encourage the state, local, and specialty bars to promote the practice of unbundled legal services, including encouraging the bar to develop a user-friendly directory of attorneys available to offer limited scope services. Courts should be aware of the unbundled listings and actively encourage litigants appearing in court to consider consulting the listings.

- Courts should work with bar leadership to encourage listings of lawyers offering unbundled services and promotion to the public of these services as ongoing functions of the bar associations.

- Courts should encourage the formation of an unbundled services bar section that will offer CLEs and other support services to section members. The court should maintain an active role in supporting the section and offer participation in CLEs, such as panel discussions by judges on unbundled best practices in the courtroom.

- Courts should support interaction between their own self-help centers and any unbundled legal services bar section. The self-help centers can help self-represented litigants identify the type of services they need from a lawyer who offers unbundled legal services.

Model Document: Encouraging Family Law Bar to Provide Education and Training in Unbundled Legal Services

Low-income and increasing numbers of the middle class cannot afford the costs of full-service legal representation. The percentage of cases in which one or both parties are without legal representation is increasing, with very real impact on case outcomes, as well as public trust and confidence in our legal system.

For the vast majority of **[***INSERT local population***]**, contact with our general jurisdiction courts is through family law cases. Although most litigants are better served when represented by counsel, we know that in more than **[***INSERT jurisdiction-specific statistics on rates of self-representation***]** of cases involving divorce, legal separation, or allocation of parenting responsibilities, at least one side does not have an attorney.

Although they may be armed with online court forms, without the advice and counsel from an attorney, unrepresented litigants can come to our family courts uninformed, unprepared, or simply overwhelmed. The task of assisting and directing them has fallen to our court staff, which is unable to provide much of the advice litigants seek and unequipped to handle the growing number of litigants seeking help. Our family court judges spend less time adjudicating cases and more time working with unrepresented litigants, navigating the balance between enforcing applicable procedures, and ensuring access to justice.

Discrete task representation, or unbundled legal services, describes a legal service delivery model whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end. It is authorized in **[***INSERT state or local jurisdiction***]** pursuant to **[***INSERT local rule/opinion***]**; *see also* **[***INSERT state rules on entry and termination of appearance, if any***]**. As **[***INSERT author title***]**, I am convinced that this service model is an important part of a solution to addressing the growing numbers of family court litigants whose legal needs are unmet.

While self-help forms and in-court facilitators provided by our family courts are useful, they are not a substitute for lawyers. Only lawyers can provide legal advice, guidance, and analysis specific to the facts of the case, or give strategic direction in completing forms, preparing documents, or presenting a case in an adjudicatory forum. And, while discrete task representation certainly is not appropriate for every situation, it nonetheless enables attorneys to serve people who never would have sought the advice of counsel. Offering unbundled legal services allows attorneys to respond to market

demands and expand—potentially significantly—their client pool to include those who otherwise could not or would not have sought the help of legal counsel.

Most importantly, providing unbundled legal services results in more prepared self-represented litigants, better informed settlements, and by smoothing the flow of the adjudicatory process, it frees docket, staff, and judge time to resolve disputes in a timely and efficient manner.

Yet, despite these obvious benefits, discrete task representation remains an underutilized service delivery model. Numerous lawyers remain unfamiliar with the nature of the practice, and of those who may have some awareness of it, many have unfounded ethical or liability concerns.

To address this, I am urging **[***INSERT audience, e.g., state, local, or specialized bar association***]** to develop and provide to attorneys specific education and training on unbundled legal services for cases involving separation, divorce, and allocation of parenting responsibility. This training should include information on the **[***INSERT state rules of procedure***]**, in particular the entry and withdrawal of appearance, ethics rules, insurance coverage information, client and issue screening guidelines, as well as the nuts and bolts of a limited scope practice. You also might consider forming an unbundled services section of your bar organization that will offer CLEs and other support services to section members.

[*INSERT I/We***]** stand ready to assist your efforts, including participation by **[***INSERT state judicial branch***]** in CLEs relating to the practice of unbundled legal services.

Model Document: Encouraging Civil Rules Committee/Ethics Committee to Develop Rules on Unbundled Legal Services

Low-income individuals and increasing numbers of the middle class cannot afford the costs of full-service legal representation. As a result, the percentage of cases in which one or both parties are without legal representation is increasing, with very real impact on case outcomes, as well as public trust and confidence in our legal system.

For the vast majority of **[***INSERT local population***]**, contact with our general jurisdiction courts is through family law cases. And, while significant issues are decided in family cases that have long-term implications for the families involved, in more than **[***INSERT jurisdiction-specific statistics on rates of self-representation***]** of cases involving divorce, legal separation, or allocation of parenting responsibilities, at least one side does not have an attorney.

Although self-represented litigants may be armed with online court forms and self-help materials, without advice and counsel from an attorney, many can come to our family courts uninformed, unprepared, or simply overwhelmed. The task of assisting them has fallen to our court staff, which is unable to provide much of the information and advice for which litigants are looking and is increasingly ill-equipped to handle the growing number of litigants seeking help. Our family court judges often find themselves precariously navigating a balance between enforcing applicable procedures, and ensuring access to justice for self-represented litigants, an especially tricky task when one party is represented and the other is not.

Discrete task representation, or unbundled legal services, describes a legal service delivery model whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end. As **[***INSERT author title***]**, I am convinced that this service model is an important part of a solution to address the growing numbers of family court litigants whose legal needs are unmet.

Although the self-help coordinators and in-court facilitators we provide are useful, they are not a substitute for lawyers. Only lawyers can provide legal advice, guidance, and analysis specific to the facts of the case, or give strategic direction in completing forms, preparing documents, or presenting a case in an adjudicatory forum. And, while unbundled legal services certainly is not appropriate for every situation, it nonetheless enables attorneys to respond to market demands and expand—potentially significantly—their client pool to include those who otherwise could not or would not have sought the help of legal counsel.

Most importantly, providing unbundled legal services results in more prepared self-represented litigants, better-informed settlements, and ensures that docket, court staff, and judge time are focused on resolving disputes in a timely and efficient manner.

Despite these obvious benefits, however, limited scope representation remains an underutilized service delivery model. This is due, in part, to existing rules of procedure and professional conduct in our jurisdiction, which can be confusing and suggest that our courts are unfriendly to an unbundled legal practice. For example, some judges within our jurisdiction do not allow an attorney to withdraw until the end of a case regardless of the fact that the written entry of appearance by the attorney is specifically limited.

In order to help to remedy this, on behalf of **[***INSERT court***]**, I am requesting that the **[***INSERT applicable committee(s), e.g., civil rules committee, ethics committee, judicial council, family law task force, etc.***]** develop rules of professional conduct and rules of civil procedure designed to facilitate and guide limited representation of clients in family law cases. These rules should define the parameters of unbundled legal services and give guidance on ethical and procedural issues.

I want to assure you that you will not be writing on a blank slate. Most states now have some rules on unbundled legal services, which can be used as examples. You can find detailed information on the existing rules across the country through the ABA Standing Committee on the Delivery of Legal Services' Pro Se/Unbundling Resource Center, available at: http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html.

Model Document: Encouraging Court Leadership to Promote Unbundled Legal Services

Low-income individuals and increasing numbers of the middle class cannot afford the costs of full-service legal representation. As a result, we are seeing in our courts an increase in the number of cases in which one or both parties are without legal representation. Every day, countless self-represented litigants come to our clerks' office and courtrooms, many of whom are unprepared, uninformed, or simply overwhelmed.

The task of assisting these litigants has largely fallen to our staff members, who are unable to provide much of the information and advice for which litigants are looking. In the courtrooms, many of you find yourself precariously navigating a balance between enforcing applicable procedures and ensuring access to justice for self-represented litigants, an especially tricky task when one party is represented and the other is not.

Our court is increasingly ill-equipped to handle the growing number of self-represented litigants seeking help. We are exploring promising in-court resources and practices that can better position us to respond to the needs of litigants. These resources and staff, however, are not a substitute for lawyers. Only lawyers can provide legal advice, guidance, and analysis specific to the facts of the case, or give strategic direction in completing forms, preparing documents, or presenting a case in an adjudicatory forum.

While we can no longer expect that all—or even most—family court litigants will be represented by legal counsel, there are programs that attempt to provide self-represented litigants with some degree of legal advice and assistance. Discrete task representation, or unbundled legal services, describes a legal service delivery model whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end. Attorneys in our state are authorized to practice in this manner pursuant to **[***INSERT applicable rules***]**. I am convinced that this service model is an important part of a solution to address the growing numbers of family court litigants who come before us with unmet legal needs.

I encourage each of you, in your daily interactions with family court litigants, to educate those who are without representation on the options for unbundled legal services available in the community. **[***OPTIONAL* **[***INSERT local bar association***]** has prepared a directory of attorneys who provide unbundled legal services, which should be

visible and readily available in the clerk's office of each family court as well as the supreme court clerk's office.**]**

I also encourage you to facilitate better coordination between self-help resources available on-site and the section of the bar charged with delivery of legal services or access to justice issues. The self-help resources can aid self-represented litigants in identifying the type of services they need from a lawyer who offers unbundled legal services.

Model Document: Letter from Family Court Chief Judge to Self-Represented Litigants Explaining Unbundled Legal Services and Promoting Use

Dear Petitioner or Respondent:

You have a family law case in **[***INSERT applicable court***]**. You may be faced with a number of very important issues that will affect your future and the future of your children, including how your property will be divided, how much time you will spend with your children, and who will make decisions regarding the children. This can be a very difficult time, and our court is dedicated to making the process as easy as possible for you and your family.

We understand that you may be under a great deal of financial strain at the moment. If you are going through the process without a family law attorney, the court has a number of resources that may be of help to you in preparing your case. **[***INSERT court resources for self-represented litigants.***]**

These resources are not a substitute for the individualized advice and counsel of an experienced attorney. Having the help of your own attorney can decrease the confusion of the legal process for you and lead you to a more informed and better resolution of your case. Some people hire an attorney to represent them for their whole case, from beginning to end. It is also possible to hire an attorney for certain parts of your case only, such as helping to write legal documents. This type of legal service is called "unbundled legal services," in which you and your attorney divide the work in a way that makes sense to you and is more affordable for you.

With an attorney offering unbundled legal services, you could receive help with different parts of your case, including:

- Help writing the initial divorce petition
- Help completing financial documents
- Advice about parenting time options
- Help preparing for negotiation or mediation sessions
- Help writing settlement documents
- Representation in one or more court hearings

Through unbundled legal services, it is possible to obtain the legal help you need to resolve your case at a cost you can afford. If you would like more information about how unbundled legal services can help you, please visit the clerk's office **[***OPTIONAL* for a list of attorneys who provide these services**]**.

As a last word, I urge you to remember, throughout your case, that no matter how you decide to move forward, your actions during this time can greatly affect your children, if you have them. Consequently, it is very important for you to keep in mind that you and your former partner must do all that you can to avoid involving the children in your disagreements. Even if you don't have children, working through your issues together and in a constructive manner will surely lead to a better outcome.

Sincerely,

Family Court Chief Judge

Model Document: Encouraging Family Law Bar Association to Make Available a List of Attorneys Who Provide Unbundled Legal Services

Low-income individuals and increasing numbers of the middle class cannot afford the costs of full-service legal representation. As a result, the percentage of cases in which one or both parties are without legal representation is increasing, with very real impact on case outcomes, as well as public trust and confidence in our legal system. For the vast majority of **[***INSERT local population***]**, contact with our courts is through family law cases. And, while significant issues are decided in family cases that can have long-term implications for the families involved, in more than **[***INSERT jurisdiction-specific statistics on rates of self-representation***]** of cases involving divorce, legal separation, or allocation of parenting responsibilities, at least one side does not have an attorney.

Although self-represented litigants may be armed with online court forms and self-help materials, without advice and counsel from an attorney, many can come to our family courts uninformed, unprepared, or simply overwhelmed. The task of assisting them has fallen to our court staff, which is unable to provide much of the information and advice for which litigants are looking and which is increasingly ill-equipped to handle the growing number of litigants seeking help. Our family court judges often find themselves precariously navigating a balance between enforcing applicable procedures and ensuring access to justice for self-represented litigants, an especially tricky task when one party is represented and the other is not.

Discrete task representation, or unbundled legal services, describes a legal service delivery model whereby an attorney assists a client with specific elements of the matter, as opposed to handling the case from beginning to end. It is authorized in **[***INSERT state or local jurisdiction***]** pursuant to **[***INSERT local rule/opinion***]****[***OPTIONAL state rules on entry and termination of appearance***]**. As **[***INSERT author title***]**, I am convinced that this service model is a partial solution to addressing the growing numbers of family court litigants whose legal needs are unmet.

Although the self-help coordinators and in-court facilitators we provide are useful, they are not a substitute for lawyers. Only lawyers can provide legal advice, guidance, and analysis specific to the facts of the case, or give strategic direction in completing forms, preparing documents, or presenting a case in an adjudicatory forum. Providing unbundled legal services results in more prepared self-represented litigants, better-informed settlements, and ensures that docket, court staff, and judge time are focused on resolving disputes in a timely and efficient manner. Moreover, while limited

task representation certainly is not appropriate for every situation, it nonetheless enables attorneys to respond to market demands and expand—potentially significantly—their client pool to include those who otherwise could not or would not have sought the help of legal counsel.

Yet, despite these obvious benefits, limited scope representation remains an underutilized service delivery model. This is due, in part, to a lack of knowledge by the public of its availability.

An important way to remedy this is to make available a user-friendly directory that lists:

1) Attorneys who provide unbundled legal services;
2) The legal matters in which those services are provided;
3) The payment structures offered by the individual lawyers;
4) The geographical areas of the state where those lawyers offer services;
5) The foreign languages spoken by those lawyers.

I strongly encourage you to develop and maintain this list, which should be visible and readily available in the clerk's office of each family court and in the clerk's office of our Supreme Court, as well as available on-line through the court's website.

Tool #8

Model Document: Court Provided Letter/Form to Be Sent by Bar Association to Attorneys to Join List of Lawyers Offering Unbundled Legal Services

Dear **[***INSERT state or local bar association***]** member:

As you are likely aware, our jurisdiction has enacted rules that make it easier for attorneys to provide unbundled legal services, allowing you to assist a client with one or more parts of a case, without being required to handle the case from start to finish.

For example, you may agree to assist with one particular hearing or motion. The client would then continue to handle all other matters related to the case. The exact nature of your involvement would be spelled out in a Notice of Limited Appearance **[***INSERT applicable local rule/form***]**, that you would file with the Court, signed by you and your client, to both spell out the scope of your representation and ensure that you are not inadvertently listed as counsel of record.

We have been asked by the **[***INSERT state or local jurisdiction***]** to compile and maintain a list for **[***INSERT judicial district or county***]** of attorneys who are willing to be on this list. If you are willing to participate, please fill out and return the enclosed form. A master list will be compiled and given to court clerks, who will then distribute the list to self-represented litigants as needed.

Unbundled legal services enable attorneys to reach a larger segment of the population who would otherwise go unrepresented. **[***INSERT state or local bar association***]** strongly encourages your participation.

Sincerely,

Bar Association Representative

Unbundled Legal Services Sign-Up

Yes, I am willing to offer unbundled legal services in cases involving divorce, separation, or parenting responsibilities. Please add me to the list.

Attorney Name: _____

Firm Name: _____

Street Address: _____

City, State, Zip: _____

E-mail Address: _____

Practice Specialty(ies) (if any): _____

_____

Geographical Area of Practice: _____

Payment Structures Offered: _____

_____

Foreign Language(s) Spoken (if any): _____

Attorney Signature: _____ Date: _____

Please complete and return this form by email to: _____

or by mail to: _____

[*INSERT* state or local bar association]

Tool #9

Checklist: What Court Leadership Should Know About the Status of Unbundled Legal Services in Their State

- □ Is there a civil/family court/professional conduct/ethics rule of procedure for the practice of unbundled legal services in our courts?
- □ Do we have civil/family court/professional conduct/ethics rules of procedure and forms concerning the manner in which the lawyer creates the entry of limited appearance?
- □ Do we have rules of procedure/forms concerning client consent?
- □ Do we have civil/family court/professional conduct/ethics rules of procedure for withdrawal/termination or completion of limited appearance?
- □ What, if any, is our rule on ghostwriting of pleadings and/or briefs?
- □ What is our rule of procedure/ethics rule concerning communication with self-represented parties?
- □ What are our rules/forms concerning notice of limited representation to opposing parties and/or their counsel?
- □ Do we have rules concerning service of papers on a limited scope lawyer?
- □ What are the state ethics opinions relevant to unbundled legal services? Have we adopted ABA Model Rule 1.2(c)(concerning the ethics of providing unbundled legal services)?
- □ Do our state malpractice insurance carriers specifically insure the provision of unbundled legal services?

Tool #10

Unbundled Legal Services: Court Rules, Articles, and Publications

1. Compilation of Court Rules: National Center for State Courts, Self-Representation State Links: Unbundling Rules: http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx?cat=Unbundling%20Rules

2. Report of the Joint Iowa Judges Association and Iowa State Bar Association Task Force on Pro Se Litigation: http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/iowaprosetaskforcereport2005.authcheckdam.pdf

3. Connecticut Bar Task Force on Limited Scope Representation, *Report of the CBA Task Force on Limited Scope Representation* (rev. Oct. 8, 2012): http://c.ymcdn.com/sites/www.ctbar.org/resource/group/641186f5-de53-4d42-87c6-bf25a3280c29/Litigation_Section/Report-of-Task-Force-on-Limi.pdf?hhSearchTerms=%22limited+and+scope+and+representation%22

4. Judith L. Kreeger, "*To Bundle or Unbundle? That is the Question*, 40 FAM. CT. REV. 1, 87 (2002). Abstract: http://onlinelibrary.wiley.com/doi/10.1111/j.174-1617.2002.tb00821.x/abstract

5. *Modest Means Program*, OREGON STATE BAR: http://w.w.w.oregonstatebar.org/public/ris

6. State Family Law Advisory Committee Members, OREGON JUDICIAL DEPARTMENT: http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/sflac/pages/members.aspx

7. Trial Court of Massachusetts, *Limited Assistance Representation Training Manual*: http://www.mass.gov/courts/docs/lar-training-manual.pdf

8. Merrie-Roxie Crowell, Chair, *Report of the Unbundled Legal Services Monitoring Committee* (March 3, 2005): http://www.floridabar.org/TFB/TFBResources.nsf/0/B591E315F65F20FC85256FE1007766E3/$FILE/SpecialUnbunLegalServMonitorRpt..pdf?OpenElement

9. Forrest Mosten, Unbundling Legal Services in 2014: Recommendations for the Courts, 53 JUDGES J. 10 (Winter 2014): http://www.americanbar.org/publications/judges_journal/2014/winter/unbundling_legal_services_in_2014_recommendations_for_the_courts.html

10. Rochelle Klempner, Unbundled Legal Services in Litigated Matters in New York State: http://www.courts.state.ny.us/ip/partnersinjustice/Unbundled.pdf

11. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS (2014): http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf

12. *Report of the Special Committee on Limited Scope Representation* (Missouri 2004): https://www.courts.mo.gov/file/Report%20on%20Limited%20Scope%20Representation.pdf

13. John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, NEW YORK TIMES, Jan. 1, 2010: http://www.nytimes.com/2010/01/02/opinion/02broderick.html?_r=1

14. Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, 50 JUDGES J. 16 (Fall 2011): http://www.zorza.net/JJ-Turner.pdf

15. "20 Things Judicial Officers can do to Encourage Attorneys to Provide Limited Scope Representation," *reprinted from* The Bench, news journal of the California Judges Association (2003): http://calbar.ca.gov/LinkClick.aspx?fileticket=qF-Ast5g59M%3D&tabid=216

16. American Bar Association, Resources, Standing Committee on the Delivery of Legal Services: http://www.americanbar.org/groups/delivery_legal_services/resources.html.

17. Unbundling Fact Sheet, Standing Committee on the Delivery of Legal Services, American Bar Association: http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf

18. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS (2014): http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf

19. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS (2009): http://apps.americanbar.org/legalservices/delivery/downloads/prose_white_paper.pdf

20. Colorado Bar Association, *Practical and Ethical Considerations to Integrated Unbundled Legal Services* (2015): https://www.cobar.org/repository/ModestMeans/Practical_and_Ethical_ModerateIncome.pdf

21. Mark A. Juhas, *A Judge's View on the Benefits of 'Unbundling'*, CAL. B.J. (2015): http://calbarjournal.com/July2015/Opinion/JudgeMarkAJuhas.aspx

LINK TO INFORMATION ON UNBUNDLING OF LEGAL SERVICES

IAALS: Institute for the Advancement of the American Legal System	Report from 2017 Conference: *Better Access through Unbundling: Recommendations to Increase Access*
	Unbundling Legal Services: A Toolkit for Court Leadership
	Unbundled Legal Services Today and Predictions for the Future by Forrest S. Mosten
ABA: American Bar Association	Unbundling Resource Center
	Lawyers Use of and Attitudes Toward Unbundling, results of 2017 ABA Survey

ARIZONA SUPREME COURT RULES,
RULE 42, RULES OF PROFESSIONAL CONDUCT
ER 5.4

ER 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price:

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement: and

(4) a lawyer may share court-awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) 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.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) 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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Credits:
Amended June 9, 2003, effective Dec. 1, 2003. Amended on an emergency basis effective April 6, 2010. Amended on a permanent basis effective Sept. 2, 2010;
The Arizona Court Rules are current with amendments received through 8/1/18.

District of Columbia
Rules of Professional Conduct:

Rule 5.4--Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and

(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(c) 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.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees with nonlawyers. (On sharing fees among lawyers not in the same firm, *see* Rule 1.5(e).) These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. 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 professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

[8] Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any

other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

[9] The term "individual" in subparagraph (b) is not intended to preclude the participation in a law firm or other organization by an individual professional corporation in the same manner as lawyers who have incorporated as a professional corporation currently participate in partnerships that include professional corporations.

[10] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the lawyer's fees does not inherently compromise the lawyer's professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.

Task Force on Access Through Innovation of Legal Services

Studying ways to increase access to justice for all Californians by responsibly harnessing the power of technology.

Background

Too many Californians needing legal services cannot afford an attorney or don't have meaningful access. A 2018 Legal Market Landscape Report, commissioned by the State Bar, concluded:

- As in healthcare, education, and other knowledge-intensive professions, the cost of traditional legal services is increasing.
- Access to legal services is decreasing. A growing proportion of consumers are choosing to forgo legal services rather than pay the high price. In a recent study conducted by the National Center for State Courts, 76% of civil cases involved at least one party who was self-represented, roughly double the number 20 years earlier.
- Law is moving rapidly from a model of one-to-one consultative legal services to one where technology could enable affordable, one-to-many legal solutions.
- The public interest may be better served by regulatory approaches that encourage innovation in one-to-many legal solutions created by professionals from multiple disciplines.
- Modifying ethics rules premised on one-to-one legal services to facilitate greater collaboration across law and other disciplines could have many benefits: driving down costs; improving access; increasing predictability and transparency of legal services; aiding the growth of new businesses; and elevating the reputation of the legal profession.

By harnessing innovative approaches from the tech sector while maintaining our paramount commitment to protect the public, the State Bar hopes to help improve access.

The State Bar's Task Force on Access Through Innovation of Legal Services is charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services.

The Task Force will deliver its final report to the Board of Trustees no later than December 31, 2019. In keeping with the State Bar's Strategic Plan goals and objectives, each recommendation is expected to balance the dual goals of public protection and increased access to justice.

Task Force Charter

The Task Force will address three broad areas:

1. **Definition of unauthorized practice of law**

   Review the current consumer protection purposes of the prohibitions against unauthorized practice of law as well as the impact of those prohibitions on access to legal services with the goal of identifying potential changes that might increase access while also protecting the public. In addition, assess the impact of the current definition of the practice of law on the use of artificial intelligence and other technology- driven delivery systems, including online consumer self-help legal research and information services, matching services, document production and dispute resolution;

2. **Marketing, advertising, partnerships, and fee-splitting**

   Evaluate existing rules, statutes and ethics opinions on lawyer advertising and solicitation, partnerships with non-lawyers, fee splitting (including compensation for client referrals) and other relevant rules in light of their longstanding public protection function with the goal of articulating a recommendation on whether and how changes in these laws might improve public protection while also fostering innovation in, and expansion of, the delivery of legal services and law-related services, especially in those areas of service where there is the greatest unmet need; and

3. **Non-lawyer ownership or investment**

   With a focus on preserving the client protection afforded by the legal profession's core values of confidentiality, loyalty and independence of professional judgment, *prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non-lawyer ownership or investment in businesses engaged in the practice of law*, including consideration of multidisciplinary practice models and alternative business structures.

Task Force Composition

The Task Force has 23 members, a majority of whom are non-attorneys. A non-attorney majority helps ensure that the recommendations of the Task Force are focused on protecting the interests of the public.

Chair: Lee Edmon, Presiding Justice, California Court of Appeal Second Appellate District, Division 3

Vice-Chairs: Toby Rothschild, Of Counsel, OneJustice; and Joyce Raby, Executive Director, Florida Justice Technology Center

Alternative Business Structures

Frequently Asked Questions

What are 'Alternative Business Structures' ("ABS")?

ABS is a generic reference to any form of business model through which legal services are delivered that is different from the standard sole proprietorship or partnership model. ABS can include non-legal ownership of law firms, publicly traded law firms, external investment, or any other innovative way to offer legal services outside of the traditional partnership firm model.

At least four different ABS models have been identified to date:

(1) Legal service entity providing legal services only in which individuals who are not licensed attorneys own a minority interest in the entity;

(2) Legal service entity providing legal services only in which there are no restrictions on non-lawyer ownership;

(3) Business entity providing legal and non-legal services in which non-lawyers own a minority interest in the entity; and

(4) Business entity providing legal and non-legal services in which there are no restrictions on non-lawyer ownership.

What jurisdictions presently allow for ABS?

At present there are only two non-U.S. jurisdictions that allow ABS – Australia and England & Wales.

In Australia ABSs, called "incorporated legal practices" (ILP), have been permitted since 2001. New South Wales, the most populous State in Australia was the first jurisdiction to allow ABSs.[1] All of the other Australian jurisdictions have since followed suit.[2]

In England and Wales ABSs have been permitted since 2007 although the first licenses were issued in 2012.

In the United States, only the District of Columbia ("DC") explicitly allows for a limited form of ABS. Specifically, pursuant to the DC Bar Rules of Professional Conduct, Rule 5.4, "[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs

[1] On 1 July 2001 legislation was enacted in NSW, Australia permitting legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners: see the Legal Profession (Incorporated Legal Practices) Act 2000 and the Legal Profession (Incorporated Legal Practices) Regulation 2001.

[2] Legal Profession Act 2006 (ACT) Part 2.6; Legal Profession Act 2004 (NSW) Part 2.6; Legal Practitioners Act 2006 (NT) Part 2.6; Legal Profession Act 2004 (Vic) Part 2.7; Legal Practice Act 2003 (WA); Legal Profession Act 2007 (Qld) Part 2.7: Legal Profession Act 2007 (Tas) Part 2.5; Legal Practitioners Act 1981 (SA), Schedule 1.

professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by the [D.C. Bar] Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and] (4) The foregoing conditions are set forth in writing."

In practice, very few ABS firms have organized in DC. At least two potential issues temper their use. First, because DC attorneys are routinely licensed in one or more other U.S. jurisdictions, and no other U.S. jurisdiction allows ABS, an attorney who is dual-licensed in DC and another jurisdiction may be concerned that the formation of or participation in an ABS in DC will constitute a violation of the Rules of Professional Conduct in the other jurisdiction in which the attorney is also licensed. Second, the prohibition on ABS in all U.S. jurisdictions other than DC limits the ability of a DC ABS law firm to expand beyond DC's boundaries.

Washington State recently amended its Rules of Professional Conduct to allow Limited License Legal Technicians ("LLLTs") to own a minority interest in a law firm. *See* Washington State Court Rules, Rules of Professional Conduct, Rule 5.9. LLLTs are considered lawyers in Washington State and arguably, therefore, Rule 5.9 does not allow ABS. LLLTs, however, are limited in their scope of practice. Thus, viewed from that perspective and whether labelled as ABS or not, Washington State is the only other U.S. jurisdiction, besides DC, that authorizes someone other than a fully licensed lawyer to own an interest in a law firm and share profits and fees from the firm.

What was the rationale for permitting ABS?

In Australia the rationale for introducing new forms of legal structures in 2001 was multi-fold. Reasons included removing the regulatory barriers between states and territories to facilitate a seamless, truly national legal services market and regulatory framework; providing greater flexibility in choice of business structures for law practices; enhancing choice and protection for consumers of legal services; and enabling greater participation in the international legal service's market.[3] There was also a growing perception in Australia that the traditional structure of law firms no longer met the needs of many practitioners and clients.[4]

How many ABSs are there in jurisdictions that have permitted them?

Today ILPs comprise about 30% of firms in Australia. In New South Wales for example, as at May 2015, there are 1788 ILPs. Three law firms have listed their practice on the Australian Stock Exchange.[5]

[3] S. Mark and T. Gordon, Innovations in Regulation - Responding to a Changing Legal Services, 22 Geo. J. Legal Ethics 501 (2009)

[4] Law Council of Australia, (2001) '2010: A Discussion Paper: Challenges for the Legal Profession', available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=0BE36A97-1C23-CACD-2225-CBD6713A3E09&siteName=lca

[5] The first law firm to seek public listing was Slater & Gordon. Slater & Gordon's decision to publicly list in May 2007 saw them move from being a traditional partnership to becoming a publicly listed law firm. Following Slater & Gordon's listing, Integrated Legal Holdings (IHL), a Western Australian based law firm, listed on the ASX on 17 August 2008 and in May 2013, Shine Lawyers became the third law firm to publicly list in Australia.

It has now been just over three years since the Solicitor Regulation Authority (SRA) commenced accepting applications from firms wanting to offer legal services as ABSs.[6] During this time over 387 law firms have been granted ABS licences.[7] They vary widely from large new entrants to the legal market to existing firms tying up with other service providers, or firms seeking external investment from private equity companies and firms wishing to promote non-lawyers to partnership level. ABS licences have been awarded to a number of high profile firms over the past two years including Co-operative Legal Services, Riverview Law, Direct Line, Genus Law and PwC Legal.

The impact of ABSs to date on the legal services marketplace in England and Wales is interesting. According to the SRA, research indicates that ABSs "have achieved a significant share of the overall market in certain areas of legal work." The SRA found that ABSs accounted for a third of all turnover in the personal injury market; ABSs have captured a significant percentage of turnover in mental health, non-litigation (e.g. mergers and acquisitions and probate), consumer and social welfare; and, ABSs are spread relatively evenly across a range of different legal work types. [8] Of most interest, the survey found that "[T]he most significant changes that ABSs have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment.

How do these jurisdictions regulate ABSs?

(a) Who oversees the regulation of ABSs?

In Australia individual state and territory statutory regulators and professional associations licence and regulate ILPs. For example, in New South Wales, the Law Society of New South Wales handles the licencing of ILPs whilst the regulation of ILPs is handled by the NSW Office of the Legal Services Commissioner (OLSC).

In England and Wales the Legal Services Board (LSB) is the oversight regulator. Only regulators designated as a "licensing authority" by statutory instrument can license and regulate an ABS. At present these regulators include as follows:

1. The Solicitors Regulation Authority (SRA);
2. The Council for Licensed Conveyancers;
3. The Chartered Institute of Patent Attorneys;
4. The Institute of Trademark Attorneys; and
5. The Institute of Chartered Accountants in England and Wales.

(b) What are the regulatory requirements for being granted an ABS licence?

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[6] Applications for the ABS licences commenced in October 2011: http://www.legalservicesboard.org.uk/news_publications/press_releases/2010/pdf/23022010_abs_press_release.pdf

[7] As at 15 April 2015: Solicitors Regulation Authority, *Search for an alternative business structure webpage*, http://www.sra.org.uk/absregister/

[8] Solicitors Regulation Authority, Research on alternative business structures (ABSs) Findings from surveys with ABSs and applicants that withdrew from the licensing process, May 2014, p.3, file:///C:/Users/Tahlia/Downloads/abs-quantitative-research-may-2014.pdf; See also ICF GHK, Qualitative Research into Alternative Business Structures (ABSs), May 2014, file:///C:/Users/Tahlia/Downloads/abs-qualitative-research-may-2014%20(1).pdf

In Australia a firm wishing to become an ILP must notify the relevant professional association in writing when it intends on providing to provide legal services; begins to engage in legal practice or ceases to engage in legal practice as an ILP.[9] There is no application form or fee to become an ILP.

In England & Wales, a firm wishing to become an ABS must complete an application form; provide any additional information required by the licencing authority and pay an application fee. The firm must also set out which reserved activities the applicant wishes to be licensed to carry out.

(c) What are the regulatory requirements for operating as an ABS?

In Australia, every ILP must appoint a legal-practitioner director.[10] The legislation required that a legal practitioner director must be an Australian legal practitioner who holds and unrestricted practising certificate. The rationale for this requirement is to ensure that a legal practitioner maintains a direct interest and accountability in the management of legal services of the practice.[11]

Secondly, every ILP must establish and maintain a management framework, legislatively coined "appropriate management systems", to enable the provision of legal services in accordance with the professional and other obligations of lawyers.[12] The responsibility for establishing and implementing "appropriate management systems" rests with the legal-practitioner director. The legislation provided that failure to establish and maintain "appropriate management systems" is capable of being professional misconduct.[13]

The introduction of legislation requiring "appropriate management systems" was unique not only to legal profession regulation but to regulation generally. It was not based on any pre-existing model and the regulators were not given any guidance from the legislators as to what "appropriate management systems" or a management based system for law firm should comprise.

Consequently the regulator in NSW was forced to think about the concept of "appropriate management systems" and what an appropriate management system for a law firm should comprise. After an extensive period of consultation with the profession and key stakeholders the regulators created the content for "appropriate management systems" for law firms. They did so by considering the types of complaints that were made against lawyers and what elements would comprise of sound legal practice. The regulator came up with ten such elements:

1. **Negligence** (providing for competent work practices).
2. **Communication** (providing for effective, timely and courteous communication).
3. **Delay** (providing for timely review, delivery and follow up of legal services).
4. **Liens/file transfers** (providing for timely resolution of document/file transfers).

[9] For a copy of the required notification form see: http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/008711.pdf
[10] Section 140(1) Legal Profession Act 2004 (NSW).
[11] S, Mark and T. Gordon, Innovations in Regulation - Responding to a Changing Legal Services, 22 Geo. J. Legal Ethics 501 (2009), 506.
[12] Section 140(3) of the Legal Profession Act 2004 (NSW).
[13] Section 140(5) of the Legal Profession Act 2004 (NSW).

5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer).
6. **Conflict of interests** (providing for timely identification and resolution of "conflict of interests", including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc).
7. **Records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests).
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, costs assessors).
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services).
10. **Trust account requirements** (providing for compliance with Part 3.1 Division 2 of the *Legal Profession Act 2004 (NSW)* and proper accounting procedures).[14]

The regulator then developed a process by which law firms could assess themselves against the ten objectives. The process was based on a self-assessment. That is, the legal practitioner director of the law firm assesses the appropriateness of their management systems using a self-assessment document (developed by the regulator) that is forwarded after completion by the legal practitioner director to the regulator for review.[15] The self-assessment document takes into account the varying size, work practices, and nature of operations of different firms. Legal practitioner directors rate firm compliance with each of the ten objectives as either 'Fully Compliant,' 'Compliant,'' 'Partially Compliant,' or 'Non-Compliant.'[16] In addition to developing the framework for appropriate management systems, the regulator in NSW also developed processes and procedures to assist incorporated legal practices through the self-assessment process, and to improve their management systems.

In England and Wales the Legal Services Act 2007 sets out the statutory requirements for ABS licences. The 2007 Act requires that a head of legal practice (HOLP) and head of finance and administration (HOFA) be appointed within each ABS. The SRA decided that all practices, including those which are not ABS practices, must appoint someone to these positions. The SRA has termed these roles compliance officer for legal practice (COLP) and compliance officer for finance and administration (COFA). It is the SRA Authorization Rules for Legal Services Bodies and Licensable Bodies that outlines the requirements for these roles.[17] The designated COLP or COFA must be an individual; be a manager or an employee of the law firm; consent to their designation as the COLP and/or COFA; be of sufficient seniority and responsibility to fulfil the role; and not be disqualified from being a Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA).

[14] Office of the Legal Services Commissioner, *Appropriate Management Systems to Achieve Compliance*, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html
[15] Office of the Legal Services Commissioner, Self-Assessment Process, http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html
[16] Ibid.
[17] See Solicitors Regulation Authority, COLPs and COFAs, http://www.sra.org.uk/solicitors/colp-cofa.page

The Compliance Officer for Legal Practice (COLP) is responsible for overseeing risk and compliance within their firm and be the SRA point of contact. COLPs are responsible for ensuring that the law firm complies with relevant statutory obligations that are set out in the SRA's Handbook; recording any failure(s) to comply and informing the SRA of such noncompliance. The COLP must report any material failure to the SRA as soon as reasonably practical.[18]

The Compliance Officer for Finance and Administration (COFA) are responsible for the role and its obligations. COFA's are responsible for the overall financial management of the firm. COFA's are required to ensure that the law firm, including its employees and managers, comply with any obligations imposed under the SRA Accounts Rules; keep a record of any failure to comply and make this record available to the SRA.[19] COFA's are also required to report any material failure (either taken on its own or as part of a pattern of failures) to the SRA as soon as reasonably practical.

Individuals who are COLPs and COFAs must be fit and proper to undertake the role/s.[20] Fit and proper is assessed by taking into account the criteria in the SRA Suitability Test 2011 and any other relevant information. The assessment as to whether an individual is a fit and proper person is undertaken upon initial approval. If the COLP or the COFA is deemed unfit and improper, the SRA may withdraw its approval. The COLP is the SRA's principal point of contact within the firm but is not intended to take the full responsibility of ensuring law firm compliance. The entire management, and to some extent all regulated individuals, are held responsible for the firm's conduct.

Is there annual registration?

There is no annual registration in Australia. However upon becoming an incorporated legal practice an incorporated legal practice must provide to the regulator (OLSC) a self-assessment form demonstrating that it has "implemented and maintained appropriate management systems."

In England and Wales, individual lawyers must renew their licenses annually. Entities are only required to have initial authorization but must nonetheless submit certain details on an annual, or more frequent basis (e.g. insurance details, diversity statistics etc). New entities established under the regulation of the SRA must become either recognized bodies (traditional law firms) or licensed bodies (ABS businesses), a process collectively termed 'authorization'. Authorization must be received from the relevant authorities before commencing a practice and any changes in the composition of the management of the entity (or in the nature of the business of a licensed body) are also subject to prior approval.[21]

What jurisdictions are in the process of allowing ABS (i.e. more than just considering it as an option)?

[18] See Solicitors Regulation Authority, Responsibilities of COLPs and COFAs, http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page
[19] Ibid.
[20] See Solicitors Regulation Authority, What is a COLP and a COFA, http://www.sra.org.uk/solicitors/colp-cofa/ethos-roles.page
[21] The Law Society of England and Wales, Setting up a Practice: Regulatory Requirements, https://www.lawsociety.org.uk/support-services/advice/practice-notes/setting-up-a-practice-regulatory-requirements/

Singapore: On October 7, 2014 the Ministry of Law submitted the *Legal Profession (Amendment) Bill 2014* for its First Reading in Parliament.[22] The Bill establishes a new regulator, the Legal Services Regulatory Authority, and a frame work for entity regulation as well as permitting ABSs. The Minister's Second Reading Speech of the Bill describes the new arrangement for entity regulation and ABS briefly. [23] On November 4, 2014 the Bill was adopted as law in Parliament. Legal Disciplinary Practices ("LDPs) will be permitted, where non-lawyer managers / employees will be allowed to own equity and/or share in the profits of the LDP. LDPs will only be allowed to provide legal services.

What are the advantages of ABS?

The advantages of becoming an ABS are multiple. They include as follows:

- Equity can be raised from a broader base of potential partners, members or directors including other professionals and non-solicitor employees.
- Non-solicitor employees may be rewarded by partner, member or director status, with a direct stake in the firm.
- The ability to diversify the range of legal services provided by the practice.
- Equity can be raised from outside the legal sector without the need for non-lawyer involvement at the management level. This has the potential to allow firms to attract new investment from different markets.
- You can provide a wider range of services to clients through an ABS than you can through an ordinary law firm.

What concerns have been expressed about ABS?

- They could dilute the core values of the profession.
- A conflict of duties could emerge between a lawyer's duty to the Court, the client and a shareholder.
- Questions have been raised whether the model will positively increase profits.
- Doubts have been raised that they will positively impact on access to justice.

What Does the Research Say About ABS?

In 2008, a research study by Dr. Christine Parker of the University of Melbourne Law School in conjunction with the NSW regulator assessed the impact of ethical infrastructure and the self-assessment process in NSW to assess whether the process is effective and whether the process is leading to "better conduct" by firms required to self-assess.[24] The research focused on the number of complaints relating to incorporated legal practices after incorporation and

[22] See *Legal Profession Amendment Bill 2014*, http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20(Amendment)%20Bill%2036-2014.pdf

[23] See Ministry of Law, Second Reading Speech by Minister for Law, K Shanmugam, on the Legal Profession (Amendment) Bill, https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/2R-speech-Min-LPA-bill-2014.html

[24] C.E. Parker, T. Gordon, S. Mark, 2010, Regulating law firms ethics management: an empirical assessment of an innovation in regulation of the legal profession in New South Wales, Journal of Law and Society, Vol 37, issue 3, Blackwell Publishing, UK, pp. 466-500.

comparing this with prior to incorporation. The research found that complaints rates for incorporated legal practices were two-thirds lower than non-incorporated legal practices after the incorporated legal practice completed their initial self-assessment. The research also revealed that the complaints rate for incorporated legal practices that self-assessed was one-third of the number of complaints registered against similar non-incorporated legal practices.

Moreover, in another recent research study conducted on incorporated legal practices in NSW, by Professor Susan Saab Fortney of Hofstra University, New York, in conjunction with the NSW regulator, revealed that a majority (84%) of respondents reported that they had revised policies and procedures related to the delivery of legal services.[25] Seventy-one percent of the respondents indicated that they had actually revised firm systems, policies and procedures. Close to half (47%) of the respondents reported that they had adopted new systems, policies, and procedures. In terms of encouraging training and initiatives, 29% indicated that their firms devoted more attention to ethics initiatives and 27% implemented more training for firm personnel.

According to the Legal Services Consumer Panel in England and Wales "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialized."[26] The Panel state in their 2014 Consumer Impact Report, released on 5 December 2014, as follows:

> "There have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data. Our Tracker Survey isn't able to segment between ABS and non-ABS firms, but does show that overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011."[27]

Although it is only early days for ABSs in England & Wales, these statements by the Legal Services Consumer Panel are an unequivocal affirmation that ABSs in practice do not appear to pose a threat to ethics or professionalism.

For More Information . . .

Much has been written about ABS. In addition to the articles and other materials cited in the text and footnotes, above, for additional information please consider the following articles on the topic:

Grech, A. and Gordon, T. (2015). Should Non-Lawyer Ownership of Law Firms be Endorsed and Encouraged? (available at http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Grech-Gordon-Non-Lawyer-Ownership-Paper-Final.pdf)

Gordon, T. and Mark, S. (2014). Access to Justice: Can You Invest In It? (available at http://www.researchgate.net/publication/275608762_Access_to_Justice_Can_you_Invest_in_it)

[25] S. Fortney & T. Gordon, Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, 10 St. Thomas L.J. 152 (2012).
[26] Legal Services Consumer Panel, 2014 Consumer Impact Report, 5 December 2014, p.15, http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf
[27] Ibid.

Mercer, M. (2014). A Different Take on ABS – Proponents and Opponents Both Miss the Point. (available at http://www.slaw.ca/2014/10/31/a-different-take-on-abs-proponents-and-opponents-both-miss-the-point/)

Robinson, N. (2014). When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access and Professionalism. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878)

McGrath, S., Mercer, M., et al. (2014). Alternative Business Structures and the Legal Profession in Ontario. A Discussion Paper. (available at https://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf)