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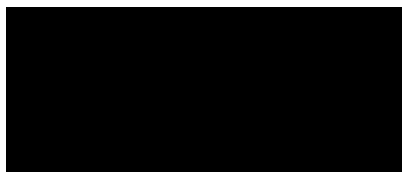
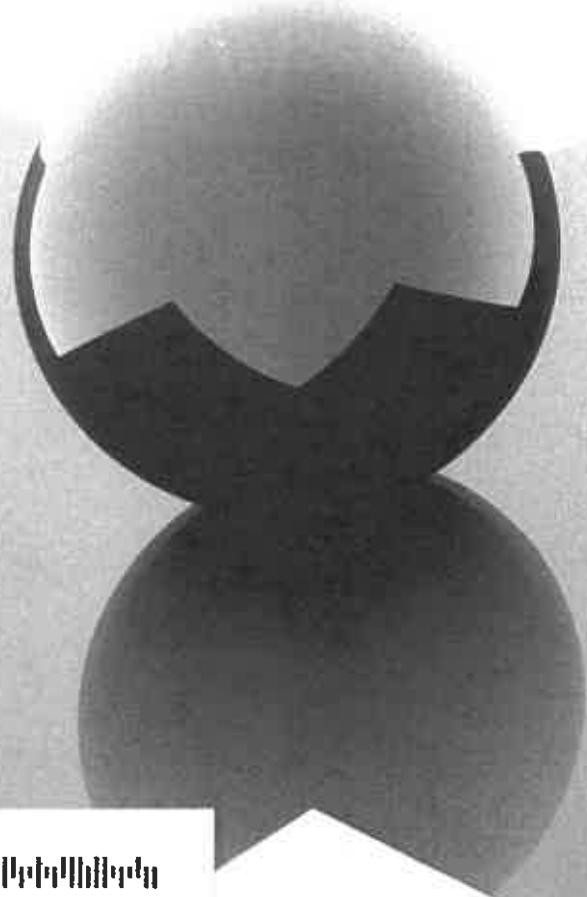
ARIZONA

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APRIL 2020

Law Practice at a Crossroads

Proposed changes to the delivery of legal services



6455 B314 P2

In This Issue:

BY HON. ANN A. SCOTT TIMMER

20

**Task Force on the
Delivery of Legal Services:
An Overview**

22

Survey Data

BY DANIEL B. RODRIGUEZ

26

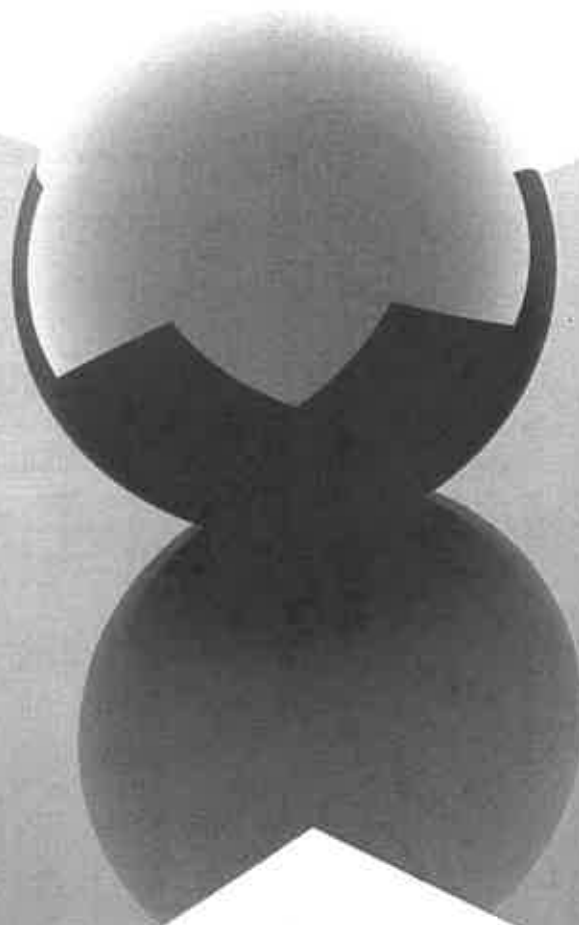
**Legal Services Reform at
the Bleeding Edge: Moving
the Access-to-Justice Needle**

BY WHITNEY CUNNINGHAM

34

**PRO:
In Favor of Alternative
Business Structures**

Law Practice at a
Crossroads



BY HON. PETER SWANN

35

CON:
The Case Against the
Elimination of ER 5.4

BY CRISPIN PASSMORE

42

A View From Abroad

BY DON BIVENS

48

Meeting Consumers
Where They Are

BY STACY BUTLER

50

The Licensed Legal
Advocate

Rule changes pending before our Supreme Court could yield shifts in legal services delivery—and those shifts could be dramatic. In this issue, we focus on the proposals and how the amendments would affect the legal landscape—for consumers and attorneys.

Born out of concerns about access to justice and the broad unaffordability of legal services, the Court is considering recommendations put forth by a task force. These potential changes are part of a national conversation about modernizing law practice and making it more accessible. Related to that, the American Bar Association passed a resolution in February supporting and encouraging changes that are similar to the ones pending in Arizona.

The ABA resolution is advisory only—our Court's changes would not be.

Among the petition's proposals are two that will garner much conversation:

- The elimination of ER 5.4, "which in general prohibits lawyers from sharing legal fees with nonlawyers, prohibits nonlawyers from having any financial interest in law firms, and prohibits a lawyer from forming a partnership with a nonlawyer if any of the partnership's activities consist of the practice of law. ... because no modern compelling reason for maintaining the rule exists."
- The adoption of a new category of nonlawyer legal-service provider, the Limited License Legal Practitioner, "who would be licensed and able to provide limited legal services to clients, including appearing in court and administrative hearings in limited practice areas, such as family law."

To effectuate these changes, there also would be multiple other amendments to the Ethical Rules.

Arizona is not the first to consider broad changes, but we're in the leading wave.

The Court and the State Bar encourage you to add your thoughts about the draft changes. Comments regarding Petition R-20-0034 can be submitted here: <https://www.azcourts.gov/Rules-Forum> (under the sub-forum "Rules of the Supreme Court").

Questions, ideas or thoughts about how we should cover these changes in the future? Write to us at tim.eigo@staff.azbar.org

Task Force on the Delivery of Legal Services: An Overview

BY HON. ANN A. SCOTT TIMMER

In the fall of 2018, then-Chief Justice Scott Bales asked me to chair the Court's Legal Services Task Force. I welcomed the opportunity to lead a group of lawyers, nonlawyers, educators, and judges in examining the delivery of legal services in Arizona with the primary goal of expanding access to legal services and the secondary goal of considering amendments to the ethical rules to accommodate modern-day practice. Scrutiny of our profession in the twenty-first century was overdue.

Most of us know that many people simply can't afford lawyers. They therefore either ignore legal problems or tap into the technology-based "do it yourself" market that operates without any regulatory oversight. According to one ABA report, more than 100 million Americans have civil justice problems, and lawyers would have to provide an additional 900 pro bono hours each to assist all households.¹

Unsurprisingly, courts are clogged with people trying to represent themselves and looking for self-help resources. Meanwhile, many small-firm lawyers, who typically represent ordinary people, are struggling to earn a living. A 2017 trends report based on information gathered from more than 60,000 solo and small-firm lawyers found that the surveyed lawyers gross \$422 per day on average.² This translates to \$105,000 per year (assuming a two-week vacation)—before paying overhead. It would certainly be unfair to expect these lawyers to work pro bono or "low bono" to assist more people with legal problems.

Against this backdrop, the Task Force was charged with making recommendations concerning existing and potential new programs and the utility of existing ethical rules for lawyers. The entire Task Force met publicly from January through September 2019, taking comments from both spectators and

invited speakers with expertise in or experience with different modes of practicing law. The Task Force issued its report in October 2019 (www.azcourts.gov/Publications-Reports), making 10 recommendations:

1 recommendation

Remove the barrier to lawyers and nonlawyers sharing legal fees or co-owning businesses that engage in the practice of law while preserving the dual goals of ensuring the professional independence of lawyers and protecting the public. To accomplish this, ERs 5.4 and 5.7 would be eliminated and ERs 1.0 through 5.3 would be amended to tighten rules concerning client confidentiality, lawyer independence, and conflicts of interest. Notably, it was reported to the Task Force that Washington, D.C., and places outside the United States that permit lawyers and nonlawyers to co-own legal entities have not received significant complaints about the delivery of legal services through these entities.

The Task Force also recommended that a steering committee convene to construct a separate regulatory framework for legal entities owned by lawyers and nonlawyers. This framework would include licensing requirements, ethical rules and a discipline system.

2 recommendation

Amend the "advertising rules," ERs 7.1 through 7.5, to conform with 2018 amendments to the ABA Model Rules, which account for technological advances in the delivery of legal services as well as cross-border marketing of legal services. The recommended amendments simplify

the rules and accommodate multijurisdiction advertising. Of particular interest, the proposed amendment to ER 7.3 defines "solicitation" and permits solicitation of people who regularly hire lawyers for business legal services. The advertising rules retain the primary regulatory standard for advertising—communications must be truthful and not misleading.

Perhaps the most significant proposed amendment, which is not part of the ABA Model Rule amendments, would eliminate ER 7.2(b)'s prohibition against giving anyone anything of "value" for client referrals. Taken literally, the provision prohibits giving a firm paralegal a gift card for referring a family member to the firm. The Task Force concluded that ER 7.2(b)'s prohibition serves no productive regulatory purpose as no quantifiable data suggests that paying for referrals confuses or harm consumers.

3 recommendation

Promote education and provide information about "unbundled legal services" to the bench, bar and public to encourage expanded use of these services. Arizona has allowed lawyers to engage in limited scope representation since 2003.³ Although family law practitioners engage in limited scope representation, lawyers practicing in other areas of law do not generally do so. Education is needed to kickstart use of these services.

4 recommendation

Revise Supreme Court Rule 38(d) to clarify that graduates from accredited law schools can practice law under the supervision of a lawyer while awaiting bar results and admis-



sion to the bar. The qualifications for this program are set forth in the proposed rule.

5 recommendation

Restyle Supreme Court Rule 31(d), which currently provides 31 licensing exemptions for practicing law, to make the rule easier to navigate and understand.

6 recommendation

Develop a tier of “limited license legal practitioners” (LLLPs), qualified by education, training and examination, to provide limited legal services to clients, including representation in court and in administrative proceedings. Because the Task Force lacked the time and expertise to identify permissible practice areas and construct a regulatory framework for LLLPs, it recommended appointment of a steering committee to perform that function. Specifically, that committee would identify the appropriate scope of practice for LLLPs, set education and licensing requirements, draft an ethics code, and establish a discipline regime.

The goal of this recommendation is not to replace lawyers—the gold standard for legal representation—but to provide competent legal assistance to people who otherwise would not hire a lawyer (or when a lawyer would not otherwise represent the person) due to the economics of the matter or the person’s finances. It also permits lawyers to employ LLLPs to assist clients, where warranted, in a more cost-effective manner. Other places outside the United States, such as Ontario, Canada, have experienced success with such limited license practitioners.

7 recommendation

Authorize a pilot program for licensed legal advocates to expand the delivery of legal services to domestic violence survivors. This program was developed by the Innovation for Justice Program at the University of Arizona James E. Rogers College of Law and would operate in Tucson through the Emerge! Center Against Domestic Abuse.

8 recommendation

Authorize a pilot program for legal document preparers serving domestic violence survivors serviced by the Bar Foundation’s Domestic Violence Legal Assistance Project.

9 recommendation


Make changes to improve access to and the quality of legal services provided by certified legal document preparers.

10 recommendation

Encourage local courts to establish “navigator” programs in which trained nonlawyers provide legal information about court processes to self-represented litigants.

In January, the Task Force filed rule petitions asking the Supreme Court to amend its rules as recommended. These petitions can be read and commented upon in the Court’s rules forum, <https://www.azcourts.gov/Publications-Reports>. The details regarding proposed legal entity regulation (recommendation 1) and LLLP practice (recommendation 6) will be set forth in

the Code of Judicial Administration. Those proposed code sections will be set forth in the Code forum, and the public can comment on them. Initial comments are due on March 30. After any response by the Task Force by April 27, more comments will be accepted until May 26. The Court will meet in late August to discuss the rule petitions and either grant, grant as modified, deny, or continue the petitions for further study.

The Task Force recognized that many of its recommendations would encounter resistance. Change is difficult. The knee-jerk reaction of many of us was that some of these changes were unworkable or inadvisable. But pushing past first impressions resulted in creative thinking and robust debates that resulted in these recommendations. I ask that lawyers similarly keep an open mind, carefully review the rule petitions, and provide constructive commentary in the rules and Code forums. 

endnotes

1. ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* 14 (2016) (citing Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS 5 (2014)). [ABA Report available at <https://bit.ly/2Txx1YJ>].
2. Clio, *2017 Legal Trends Report*, 17 (2017), <https://www.clio.com/resources/legal-trends/2017-report/>.
3. ER 1.2(e), ARIZ.R.S.Ct. 42.

HON. ANN A. SCOTT TIMMER is the Vice Chief Justice of the Arizona Supreme Court and chaired the Court’s Task Force on the Delivery of Legal Services.

Legal Delivery Reform Public Opinion Survey Results

The Task Force petition that is the subject of this issue's coverage was filed on January 31, 2020. In the week that preceded that, the task force commissioned and launched a public opinion survey on two central aspects of the proposed rule changes. What follows is a summary of the findings.

Of interest to task force members were sentiments regarding the proposal to:

- license nonlawyers to provide limited legal services at a lower cost to consumers
- remove the requirement that restricts exclusively to lawyers the ownership of any business that engages in the practice of law

Methodology and Sample

The strategy of the survey, disseminated by HighGround Inc., was to pretest respondents with a question, followed by sharing a series of related educative statements, and concluding with a posttest that asked the initial question a second time.

There were 400 respondents, balanced for population:

AGE: 19 percent: 18 to 29
19 percent: 30 to 39
22 percent: 40 to 49
22 percent: 50 to 64
18 percent: 65+

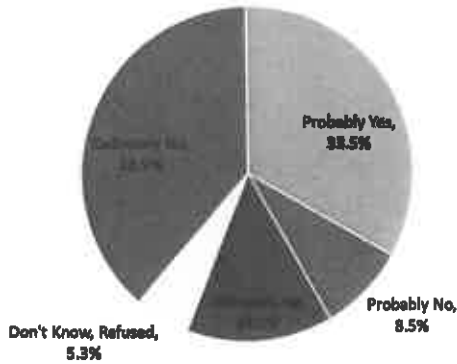
GENDER: 51 percent: female
49 percent: male

REGION: 61 percent: Maricopa County
15 percent: Pima County
24 percent: rural

REGISTRATION: 26 percent: Republican
25 percent: Democrat
24 percent: Independent/Other
25 percent: not registered

Limited Services Pre-Test

CHART 1



**Total: 72.0% Yes
22.8% No**

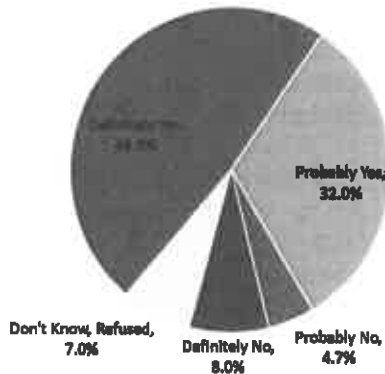
GOP: 76.9% Yes
Dem: 62.0% Yes
IND: 70.8% Yes
None: 78.0% Yes

Maricopa: 68.0% Yes
Pima: 78.3% Yes
Rural: 78.1% Yes

Lawyer: 78.4% Yes
Non: 72.7% Yes

Limited Services Post-Test

CHART 2



**Total: 80.3% Yes
12.7% No**

GOP: 77.9% Yes
Dem: 79.0% Yes
IND: 83.3% Yes
None: 81.0% Yes

Maricopa: 80.7% Yes
Pima: 78.3% Yes
Rural: 80.2% Yes

Lawyer: 83.8% Yes
Non: 81.3% Yes

The survey also categorized respondents as *Lawyer* or *Nonlawyer*. Those who are lawyers or whose immediate family member is a lawyer were categorized in the Lawyer category.

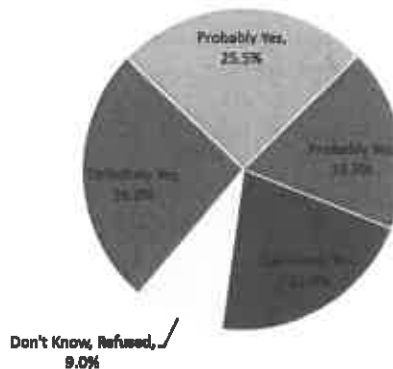
Limited Legal Services

Respondents were asked:

The Arizona Supreme Court is considering a proposal to license non-lawyers who have been trained, tested, and

Non-Lawyer Ownership Pre-Test

CHART 3



**Total: 51.5% Yes
39.5% No**

GOP: 56.7% Yes
Dem: 51.0% Yes
IND: 43.8% Yes
None: 54.0% Yes

Maricopa: 55.3% Yes
Pima: 43.3% Yes
Rural: 46.9% Yes

Lawyer: 43.2% Yes
Non: 52.6% Yes

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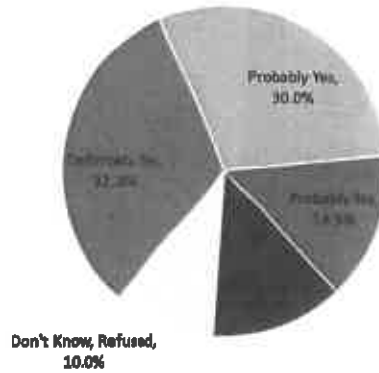
certified to be able to provide limited legal services at a lower cost to the consumer. Knowing just what you know right now, would you support or oppose this proposal?

Pretest responses are shown in Chart 1.

Respondents then were asked to assess their level of agreement to seven statements, including:

- The costs of hiring a lawyer in Arizona are too high. We need to find ways to make legal assistance more affordable.
- Most people living in poverty and the majority of moderate-income individuals do not receive the legal help they need. This proposal would be a way to get more people legal services.
- In the past, only doctors could perform most, if not all, medical procedures—even on smaller issues like drawing blood or treatment for the flu. The creation of nurse practitioners helped improve health care and treat more people. This proposal would create a similar legal role, sort of like a nurse

Non-Lawyer Ownership Post-Test



**Total: 62.3% Yes
27.7% No**

GOP:	72.1% Yes
Dem:	62.0% Yes
IND:	55.2% Yes
None:	59.0% Yes
Maricopa:	63.5% Yes
Pima:	65.0% Yes
Rural:	57.3% Yes
Lawyer:	54.1% Yes
Non:	65.8% Yes

practitioner for limited legal services.

They then again were asked the opening question, with the response illustrated in Chart 2.

Data show a significant change in sentiment. Whereas the pretest showed 72 percent supporting the LLLP proposal and 22.8 percent in opposition, the posttest had 80.3 percent in support and 12.7 percent in

opposition.

Nonlawyer Ownership

Respondents were asked:

Currently in the State of Arizona, only lawyers can own or serve as partners in a law firm. The Arizona Supreme Court is considering a proposal to remove the current requirement that restricts the ownership of any business that engages in the practice of law exclusively to



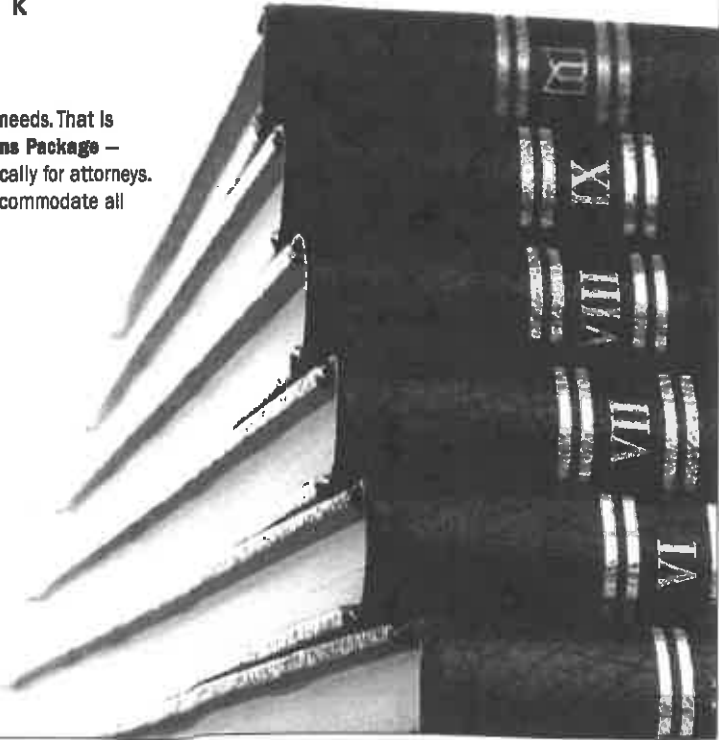
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PART 2 – Non-Lawyer Ownership

lawyers. Knowing just what you know right now, would you support or oppose this proposal?

Pretest responses are shown in Chart 3.

Respondents then were asked to assess their level of agreement to seven statements, including:

- This proposal would allow lawyers to team up with other professionals such as mortgage and real estate specialists to offer a “one stop shop” to do things like refinance home loans, stop foreclosures, or participate in short sales
- Under the current law, executives such as the firm’s chief financial officer or chief technology officer could not be partners unless they are lawyers. This proposal would allow firms to bring in qualified professionals to serve in critical non-legal roles.
- Allowing certain individuals to have an ownership stake or partnership in a law firm makes sense, but there must be strict rules to must ensure that disbarred lawyers, individuals convicted of fraud,

To the best of your knowledge, are individuals who are not lawyers allowed to own or be a partner in a law firm in the State of Arizona?

**Total: 24.8% Yes
36.3% No**



**GOP: 40.4% Don't know
Dem: 40.0% Don't know
IND: 41.7% Don't know
None: 34.0% Don't know**

**Maricopa: 37.7% Don't know
Pima: 48.3% Don't know
Rural: 36.5% Don't know**

**Lawyer: 32.4% Don't know
Non: 39.7% Don't know**

and other bad actors cannot participate.

They then again were asked the opening question, with the response illustrated in Chart 4.

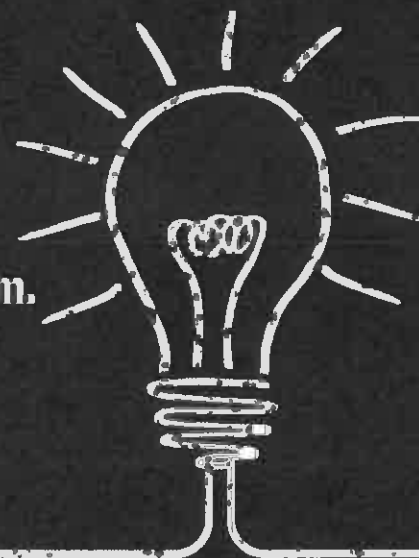
Again, data show a significant change in sentiment. Whereas the pretest showed 51.5 percent supporting the nonlawyer-ownership proposal and 39.5 percent in opposition, the posttest had 62.3 percent in sup-

port and 27.7 percent in opposition.

One other significant finding to note: A large percentage of respondents do not know that current rules preclude nonlawyer ownership of law firms. The lack of widespread understanding of this core, longtime tenet of the legal profession indicates the need for broader public education about the profession—whatever rules of practice are in place. **AV**

—Tim Elgo

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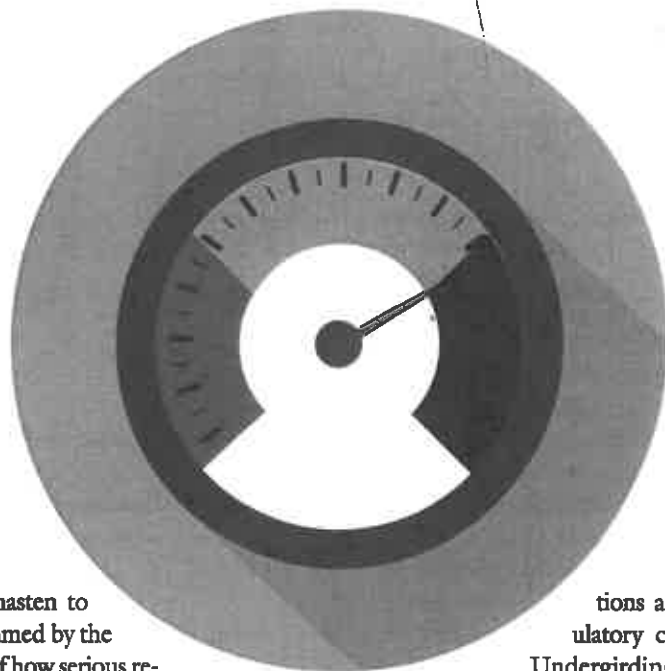
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Legal Services Reform at the Bleeding Edge

Arizona Moves the Access-to-Justice Needle

BY DANIEL B. RODRIGUEZ



Arizona continues to move headlong into regulatory reform, building strategies from the good work of the Arizona Task Force on the Delivery of Legal Services.¹ The focal point of these efforts has been to increase access to justice—the gap between consumer needs and the accessibility of the civil justice system being acute in Arizona as elsewhere in the United States. A centerpiece of these efforts has been the expansion of the use of individuals not credentialed as lawyers to provide service to individuals in need. The details of these strategies are complex, and a key threshold question is the scope of this representation by allied legal professionals. What are the legal areas in which such service should be provided?

The ultimate decisions with regard to the contours of this reform will be made by the Arizona Supreme Court, consistent with their processes and incorporating the views of essential stakeholders. My comments here are less addressed to the structure of these Arizona-specific reforms (I am not an Ari-

zona lawyer, I hasten to add!), but are framed by the larger question of how serious reforms can enhance access to justice.

Changes Driven by Access to Justice

From a global perspective, it is crucial to see the efforts underway in Arizona and other states as supporting the goal of enhancing access to justice. This goal is embedded in the many efforts over the years to improve legal services delivery. The American Bar Association's Commission on the Future of Legal Services (on which I had the privilege of serving) recommended various innovations. However, more to the point, it encouraged state judiciaries and bar investigations to explore ways of closing the access to justice gap through innovation solutions.² Soon after the conclusion of the Commission's work, the ABA adopted a set of Model Regulatory Objectives directed toward state authorities who would consider new regula-

tions and regulatory change.³

Undergirding all these efforts was the imperative of addressing individuals' important legal needs—especially what the ABA has termed “basic human needs.”

Arizona's proposals are derived from this access to justice imperative. So too are ambitious efforts in Utah,⁴ California,⁵ and New Mexico,⁶ all of whom have comparably wide-ranging reports that urge serious efforts at creating solutions to the problems of insufficient justice—or, perhaps more simply, injustice. Indeed, the case for state experimentation in this space is well supported by the combination of these reports, and the data and sophisticated analysis in them.

Significant Proposals

Two major reform recommendations are especially noteworthy, not only for what they represent as efforts to change the playing field in key ways, but also for how bold they are in the face of a history of resistance to change—and even manifest protectionism—among groups of lawyers and within the ABA and elsewhere.

One change is the modification of the rule governing nonlawyer ownership of law firms. The prohibition against such arrangements—notably permitted in the U.K. and some other foreign jurisdictions—stems from the Arizona rules that in essence follow the ABA's Model Rule 5.4, a rule that

DANIEL B. RODRIGUEZ is Dean Emeritus and the Harold Washington Professor of Law, Northwestern University Pritzker School of Law. The author has served as a member of the American Bar Association's Commission on the Future of Legal Services and as chair of the ABA Center for Innovation. The work on this article was completed while serving as a visiting professor of Techlaw at the University of Arizona, James E. Rogers College of Law. The author thanks Dean Marc Miller and his colleagues for being exceptionally hospitable hosts.

By way of disclosure, the author is currently serving on a subcommittee of the Arizona Supreme Court Task Force that considers how best to implement the recommendation regarding nonlawyer legal services providers. Nothing in this article represents the views of this subcommittee or anyone involved in the work of the task force.



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in the name of lawyer independence forbids ownership by those who are not obliged to follow ethical rules specific to lawyers.

Building on an influential report in California and the fast-moving work in Utah, the Arizona task force has proposed rescinding key parts of the relevant Arizona rules to permit nonlawyer ownership. As they note, "The task force ultimately concluded that no compelling reason exists for maintaining ER 5.4 because its twin goals of protecting a lawyer's independent professional judgment and protecting the public are reflected in other ethical rules which can be strengthened."

Nonlawyer ownership has long been a "third-rail" issue within the ABA, and in recent years the House of Delegates has beaten back efforts to rescind, or even seriously consider modifying, Rule 5.4. Indeed, when the suggestion was recently made to encourage states to experiment with various reforms, including possibly permitting non-lawyer ownership, influential state bars, in-

cluding New York, Ohio, New Jersey, Illinois and Pennsylvania, fiercely opposed even this fairly modest proposal.

It is in light of this history that Arizona's boldness with regard to nonlawyer ownership is especially remarkable. The core question is whether such efforts at nonlawyer ownership will generate significant investment in law firms such that they can improve their performance and, with it, aid in the cause of enhancing access to justice. That is an open question.

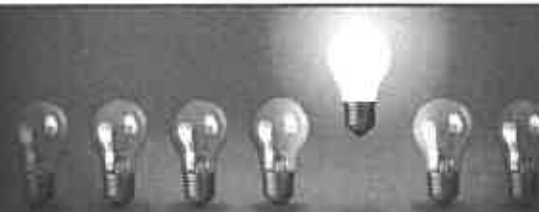
Even among enthusiasts of nonlawyer ownership, as I am, we must candidly admit that we do not yet know whether the access to justice needle will be moved by permitting nonlawyer ownership. The evidence from the United Kingdom is ultimately indeterminate, even a dozen years after the enactment of the Legal Services Act that, among other reforms, permits nonlawyers to work with lawyers to form alternative business structures.

At bottom, the case for reform of these

prohibitive rules rests on a worry that the taut regulatory strictures on nonlawyer ownership limits innovation and, in fact, may even imperil some law firms who lack access to capital and will struggle to perform effectively on behalf of clients and in the pursuit of justice. And it rests on a belief that under current circumstances, experimentation is warranted that will generate valuable data to use in considering future pathways.

One way that Utah has framed this issue is as a reform that creates a so-called "regulatory sandbox"—a space for focused experimentation, perhaps sunsetted in scope and carefully analyzed.⁷ This model is well known in the area of financial regulation, but it is a new concept in law. It is not inconceivable that Arizona ultimately may adopt a model similar to this regulatory sandbox. Likewise, California has embarked on an ambitious reform agenda. An earlier iteration of its proposals, which have many common elements with Arizona's final

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recommendations, proposed significant and immediate changes.⁹ Following a lengthy period of open hearings and solicitation of comments, the California Task Force, which will conclude its work in the next few weeks, has proposed a regulatory sandbox model for its reforms.⁹

The other key reform initiative under consideration by Arizona is the use of “nonlawyer legal service providers” in various areas of law, and with appropriate training. This proposal builds on Arizona’s unique history with Legal Document Preparers and other innovations in states (including, prominently, Washington, which has had for a number of years limited licensed legal technicians in certain areas of family law). The objective is to widen access by significantly expanding the number of

As the Arizona task force recognizes explicitly, serious progress in this space requires an expansion of the group able to furnish legal advice and, in some instances, representation of individuals.

trained and supervised professionals who could provide legal services.

Tools to Close the Gap

The gap persists between consumers’ legal needs and the availability of affordable, effective legal representation. The right to counsel in criminal proceedings has long been part of our federal constitutional law. *Gideon v. Wainwright*¹⁰ established this right more than a half century ago. The effort at extending this right to the bulk of civil proceedings—often styled as “Civil Gideon”—has been rhetorically captivating but has had minimal effect in the American civil justice

system. And I do not see that changing in any meaningful way. Nor do I see the answer to the access to justice gap in efforts to expand legal aid at the national and state level and exhorting lawyers to provide more pro bono legal services. These are pieces of the puzzle, to be sure, but they are likely, for various reasons, to prove inadequate in addressing the large needs of consumers who cannot access the justice system, whether as plaintiffs or defendants.

As the Arizona task force recognizes explicitly, serious progress in this space requires an expansion of the group able to furnish legal advice and, in some instances, representation of individuals who are or might be intertwined with the civil and administrative justice systems. This group of allied legal professionals—often infelicitously



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referred as “nonlawyers”—would, through proper training and supervision, be able to assist individuals with relatively simple legal claims, both in the transactional and litigation context. The category of legal areas in which these professionals would be able to provide legal services is presently being debated among members of task forces in Arizona, just as similar debates are taking place in a number of other states (California, Utah and New Mexico included).¹¹ But taken as a whole, the effort is an important palliative at least—or a promising solution at most—to provide meaningful assistance to individuals with legal needs.

The task force confronted directly the concern that has animated debates in this space for many years: Will the expansion on lawyer representation harm the economic welfare of lawyers? The report notes:

Evidence exists that licensing nonlawyers to provide limited legal services will not undermine the employment of lawyers. First, the legal needs targeted

for LLLPs involve routine, relatively straight-forward, high-volume but low-paying work that lawyers rarely perform, if ever. Second, other recommendations in this report would allow lawyers to team with LLLPs to provide complementary services, thereby increasing business opportunities for lawyers. Moreover, to date no jurisdiction that allows certified nonlawyers to provide limited legal services has reported any diminution in lawyer employment. The task force acknowledges that some lawyers may prove instinctive skeptics on this issue, but the task force can find no empirical evidence that lawyers risk economic harm from certified LLLPs who provide limited legal services to clients with unmet legal needs.¹²

Whether and to what extent this reassurance will convince skeptical lawyers remains to be seen, of course. But it is impressive at least that the task force confronts this issue

directly and also focuses on the lack of evidence to support the frequent objection that these negative impacts on lawyers are inevitable.

Representation Beyond Lawyers

As to the overall case for this expansion of nonlawyer representation, most believe that this expansion is a second-best solution; after all, if more lawyers would serve these individuals, then the gap would be effectively narrowed. This is especially pertinent to the dilemma of residents of more rural areas, where there are precious few lawyers and inadequate incentives for lawyers to expand their services to these rural residents. However, I want to suggest, perhaps more radically, that this strategy need not be seen as such. Let me explain.

A comprehensive approach to the access to justice gap must be built on three strong legs.

First, the central place of appropriately credentialed and experienced lawyers (working with judges) to furnish legal advice and

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representation that calls for the special skills that lawyers can and should provide. That lawyers should be the fulcrum for access to justice efforts should be obvious, but it is important to be made explicit and prominent in all relevant discussions. Second, allied legal professionals should be a coherent cohort of individuals who are well-trained—in both the specific areas in which they work and also in the structure of our legal system, in legal reasoning, and in ethics, as I have written about here. We know from unfortunate experience with unscrupulous notaries, in the Southwest and elsewhere, that simply handing over responsibilities to individuals who promise low-cost assistance without intervention by lawyers is not the answer.

Nor is the answer, in my opinion, widening without too much careful reflection the functions of paralegals. As to the latter, these skilled professionals are key elements of our

We are in an era of enormous technological progress, some of which has been trained to improve legal service and access to justice. Some of these innovations are the product of

entrepreneurs seeking remuneration—to put it more bluntly, these are for-profit business endeavors; others originate in non-profit settings. With careful regulation and, where appropriate, targeted subsidy and other support, we can expect that technology can be used

It is critical that innovations—be they apps, chatbots, advice portals, schemes of online dispute resolution or whatever else—be designated with consumer needs and expectations in mind.

legal profession and of justice, but the design of the paralegal profession is not geared directly to the tasks contemplated by the current space of legal services reform.

to facilitate effective, usable legal services and to help close the access to justice gap.

Third, there is an important role to be played by technology and technological innovations that can enhance legal services.

To add another word to this discussion of technology, which I believe is an essential part of any access to justice-focused regulatory reform project: It is not enough that the technology be developed; it is critical

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that these innovations—be they apps, chatbots, advice portals, schemes of online dispute resolution or whatever else—be designed with consumer needs and expectations in mind. A number of skilled lawyers and technologists are hard at work at developing and testing technology-centered devices to ensure that they can move effectively from the idea to the work bench to the field. To take just one example close to home: Professor Stacy Butler at the University of Arizona's law school is doing great work on access to justice, in her Innovation for Justice program.¹³ (For an article by Professor Butler, see page 48.) This program focuses on harnessing creative solutions and fomenting experiments in this space, including the use of existing and new technology and multidisciplinary mechanisms to expand access to justice. Having seen these efforts firsthand, they are rigorous in design, data-driven in assessment, and with a human-face. Always central is the question “Will this work?”

Conclusion


The efforts to expand access to justice by developing a cohort of allied legal professionals to provide legal services and, as well, using technology to support these efforts is not a second-best to traditional lawyer representation. Rather, it is a key foundation in a comprehensive effort to close the access to justice gap insofar as it draws together in a common effort a wider group of stakeholders than just licensed lawyers to define and meet individuals' legal needs. Moreover, it captures the advantage of multidisciplinary knowledge and emerging technology advances.

Law and legal services are no longer only about lawyers. This undergirds Arizona's reform strategies currently being debated. Furthermore, what lawyers need to thrive in a dynamic environment are meaningful partnerships with folks outside the formal four corners of the legal profession and, as well, a consumer-focused mentality.

It is too early to know exactly the deliverables that the present efforts at reform will yield. But if we remain committed to the ideal of improvement of legal services delivery and of justice, alongside the important commitment to the welfare of lawyers, then whatever results will be an improvement on

the status quo.

And one last comment: Arizona is emerging as a leader in regulatory innovation and creative strategies to enhance access to justice. Under our system of bar federalism, it will fall to other states to decide whether and to what extent the path Arizona is forging is appropriate to local conditions

and circumstances. However, when Justice Brandeis famously described the states as “laboratories of experimentation,” it is likely that he had in mind what is occurring in Arizona as a model for what experimentation can produce. As a visitor to the Grand Canyon State, it is truly exciting to watch all this unfold! 

endnotes

1. Arizona Supreme Court, *Task Force on the Delivery of Legal Services: Report and Recommendations*, Oct. 4, 2019, available at <https://bit.ly/38M99oa>.
2. American Bar Association, *Report on the Future of Legal Services in the United States*, 2016, available at www.scln.org/system/files/attachments/2016%20ABA%20Future%20of%20Legal%20Services%20-Report-Web.pdf.
3. Available at <https://bit.ly/2ucPgHE>.
4. See <https://bit.ly/2SJRYaB>.
5. See <https://bit.ly/32dsxrv>.
6. See <https://bit.ly/32azMkb>.
7. See *supra* note 4.
8. See <https://bit.ly/2SI7bPX>.
9. See the description of this sandbox at <https://bit.ly/2V6PQSi>.
10. 372 U.S. 335 (1963).
11. For a map of regulatory reform efforts underway throughout the United States, see this Legal Innovation Regulatory Survey: <http://legalinnovationregulatorysurvey.info/>
12. Task Force, *supra* note 1, at 40.
13. <https://law.arizona.edu/innovation-for-justice>

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BY WHITNEY CUNNINGHAM

In Favor of Alternate Business Structures



The Arizona Supreme

Court Task Force proposes to eliminate ER 5.4, which generally prohibits sharing fees with nonlawyers, and specifically disallows nonlawyer ownership or managerial control of a law practice, is a good and important proposal whose time has come.

Lawyers have been prohibited from partnering with nonlawyers for a long time, and so too deliberations of whether they should be. In 1982, the ABA's Kutak Commission proposed allowing alternate business structures in which lawyers might ply their trade within organizations owned or managed by nonlawyers so long as there would be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, confidences would be maintained, and fees would be fair.¹

That proposal was rejected. Traditional hierarchical law firm structures were preserved, and an entire generation's worth of entrepreneurship and innovation within the legal industry quelled on pain of professional discipline.

There are good reasons why lawyers should want to explore new ways of doing business, several of which are contained in the task force report. Most obvious may be the large swath of our communities that are

unable to access affordable legal services. The proof, set forth elsewhere in this issue, that the legal needs of many are unmet, is compelling and un rebutted.

Ethics rules such as 5.4, by design, are intended to restrict the ability of lawyers to deploy innovative solutions to meet market demands. This is done under a regime of prophylactic limitations (no partnering with nonlawyers, no fee-sharing with nonlawyers). The argument goes that professional independence is key, so nonlawyers must not be allowed to sway the judgments of lawyers.

The irony is that as lawyers we spend our days helping clients navigate legal and moral challenges, but we are apparently so lacking in skills of self-reflection that we cannot navigate such challenges for ourselves. We must be cocooned from the pernicious influence of those who have not sat for the bar exam.

Eliminating ER 5.4 removes an unnecessary constraint and facilitates innovation. To be clear, permitting alternate business structures is not an access to justice initiative, though new structures may further that goal better than all our collective sermonizing about the importance of pro bono work.

New partnerships will reach underserved market segments to the benefit of legal service consumers—and profitably for the companies that do it well. Those practicing in traditional law firms will no longer be required to repurpose their most skilled lawyers as business managers to run the firms. They may instead partner with actual business managers and keep their skilled lawyers doing what they do best. Current partnership structures and tax rules that more or less mandate emptying operating accounts at the end of each fiscal year are not conducive to raising capital, but new structures that permit lawyers to team with capital managers will improve the profession's ability to compete in a capital-intensive marketplace. The list of advantages new business structures will bring is as diverse as the businesses themselves are likely to be.

Some of these changes may be disruptive, but to block change to avoid disruption is merely protectionist unless a compelling case can be made that lawyers are unable to navigate this new system. There is no compelling case of that. Consider that lawyers who represent businesses often assist their clients in partnering with others who bring value, such as expertise or capital. Lawyers create these partnerships by writing contracts that define who makes decisions, how work gets done, and, if profits come, how they are divided. For clients, these partnerships bring access to expertise, capital, innovation, technology, scalability and myriad other advantages.

—continued on p. 36

WHITNEY CUNNINGHAM is a former President of the State Bar of Arizona and is the managing partner at Aspey Watkins & Diesel in Flagstaff.

BY HON. PETER B. SWANN

The Case Against the Elimination of ER 5.4



This proposal is important.

It is as worthy of your attention as any issue that has ever been discussed in this publication. If adopted, it will permanently upend the Arizona legal system, with no way back. After the many task forces and rule changes that our profession has seen over the past few years, it's easy to get "rule fatigue," ignore the changes and assume life will just go on as usual. Not so here.

By opposing the alternative business structure proposal, I am not (as the lead article might suggest) nostalgically clinging to a Jimmy Stewart image of the legal profession from years gone by. Nor am I of the view that all is currently well with the legal profession. But the proposal currently before the Supreme Court is the wrong medicine that will make today's problems seem quaint by comparison.

Legal services are too expensive, and the legal system has evolved to make resolution of even simple disputes so slow and labor-intensive that most of the public is denied meaningful access to the courts. The task force was supposed to look for solutions to these problems, and it is no small irony that when lawyers gathered together under the auspices of the Supreme Court, they turned their attention to finding ways to enrich themselves. (I suggested that the task force look at ways of streamlining court processes to deliver justice efficiently, but this idea received little traction in the task force).

As Mr. Cunningham acknowledges, this is "not an access to justice initiative." Vague

references to "innovation" and "a capital-intensive marketplace" make good fodder for brochures, but they do nothing to explain how this proposal would benefit the public or the profession. And they do nothing to explain why those with no concern for fiduciary obligations (including disbarred lawyers) should own the profession. Perhaps that's why no other state has adopted such a proposal.

So what would this proposal do? It would allow literally any individual or corporation, foreign or domestic, to own law practices—as many as they want. As we all know, a partner has a very different impact on a business than a lender. Businesspeople, including lawyers, instinctively know that they have to operate in a way that benefits their partners. When those partners are lawyers, there is an intrinsic understanding of what the profession requires. But when they are not, profit becomes the sole motivation.

My roots are in the private sector, and I embrace the notion that to boost profits, one can: (1) raise rates, (2) cut costs and (3) compete more effectively. So what would this look like in a real practice?

Start with the insurance defense model. Thanks to ER 1.5, a lawyer representing an insured party owes an undivided loyalty to the insured, despite the fact that the insurer pays the bills. But the insurers are savvy consumers, and frequently restrict the services that they will pay for without regard to the client's interests. Ask anyone who does that work, and they will tell you that their professional life is more difficult with such restrictions and they often fear for their clients' interests. (They also generally earn less than other lawyers.) Yet insurance companies have a critical attribute that investors do not: They have skin in the game. An insurer has an incentive to win cases, because it will ultimately bear the full cost of defeat.

While an insurer's self-interest provides an incentive to provide adequate representation, an investor's self-interest does not. An investor has no reason to care if a client has prevailed—it cares only about whether the value of its capital has been maximized. Investors can be expected to require practice techniques that represent the lowest cost,

—continued on p. 40

HON. PETER B. SWANN is the Chief Judge of the Arizona Court of Appeals, Div. I. Judge Swann served on the Task Force that advanced the proposal to eliminate ER 5.4, as did Judge Maria Elena Cruz of Division I. The views expressed here are those of Judge Swann—they are not advanced on behalf of the Court of Appeals.

—continued from p. 34

If lawyers are permitted to participate in this arena of varied business structures, they too will gain access to the same advantages. The winners of this shift will include consumers of legal services, who will see new ways to access legal help, at affordable prices, provided by lawyers (or, if the Supreme Court approves another recommendation of the task force, by a new category of licensed legal technician).

Arguments against eliminating ER 5.4 sometimes give voice to a nostalgic reaction to preserve an honorable profession and way of life.

In reality, the argument against the rule change is really an expression of a lack of confidence in lawyers to do our jobs under changing market conditions. If lawyers are not prohibited from partnering with nonlawyers, the argument implies, then we will fail to preserve confidentiality, loyalty and professional independence.

The idea that nonlawyer profit-seekers

and the pressures they would bring would be the legal industry's boogeyman is a myth. Lawyers already operate under the pressures of profit-taking. Every spring we read about the latest eye-popping profits-per-partner statistics for the AmLaw 100, and every fall the equally eye-popping end-of-year associate

The argument against the rule change is really an expression of a lack of confidence in lawyers to do our jobs under changing market conditions.

bonuses for these same firms. Young associates labor under the billable hour and collections requirements of their bar-credentialed employers. All practitioners navigate the demands made by clients, partners, opposing counsel, judges, banks, landlords and even family. Lawyers in industry and insurance law departments already balance

the pressures of their corporate boards. Lawyers as well as anyone know how to handle pressure.

As lawyers, we are committed to key, impactful duties, such as confidentiality (ER 1.6), loyalty (ER 1.7), and professional independence (ER 1.8). The Task Force proposes no rule change that lessens any of these obligations. The new partnerships that will result by allowing nonlawyers and lawyers to be in business together must preserve these and other fundamental aspects of lawyering currently and prospectively set forth in the Ethics Rules. A lawyer who violates them in the name of entrepreneurship will be disciplined accordingly.

Stated differently, allowing nonlawyer ownership does not mean *any* nonlawyer ownership structure or business practice is permissible. The range of possibilities is broad, but it is bounded by our core, fundamental obligations to clients.

The rule changes proposed by the task

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force do not give nonlawyer investors and managers any rights not already held by lawyer investors and managers. Every lawyer partner in a professional corporation has the same right to profitability that a nonlawyer would have. Eliminating ER 5.4 does not create this tension. Keeping ER 5.4 does not alleviate it. Of all professions, though, lawyers are specially equipped to create these new structures in a way that preserves the fundamentals of our profession.

The time to act is now. It may be true that the attorney-client relationship is a sacred fiduciary relationship, but only for those corporations and individuals wealthy enough to participate in our current system. Increasingly, individuals and businesses are looking for ways to avoid us altogether. When this is not possible, affording legal help comes at a steep price. Anyone whose practice includes representing middle-class individuals or mom-and-pop businesses knows

that accessing legal help involves tapping retirement accounts or credit cards, and mortgaging future plans and dreams. Even well-funded clients actively pursue alterna-

Accessing legal help involves tapping retirement accounts or credit cards, and mortgaging future plans and dreams.

tives to traditional legal services—which is why the fastest growing segment of employers of lawyers is corporate law departments, not law firms or the government.

A final note concerning regulation of entities. Our Supreme Court is considering proposals on how to regulate entities in which nonlawyers may have ownership or managerial interests, and such regulation will undoubtedly play a helpful role to ensure core duties are preserved, but the task

force recommendation to eliminate ER 5.4 does not depend on such entity regulation. The duties imposed by the Ethics Rules apply to lawyers, irrespective of the business structure in which they practice. Law firms are not disciplined. Lawyers are. One lawyer's transgression is not, under the current system, imputed to other partners unless that other partner individually committed sanctionable conduct. In other words, we as lawyers have the same duties, but there is no unified duty.

We hold ourselves individually responsible, and we will continue to do so moving forward. ■

endnote

1. ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures, April 5, 2011, available at <https://bit.ly/2SJUNPJ>.



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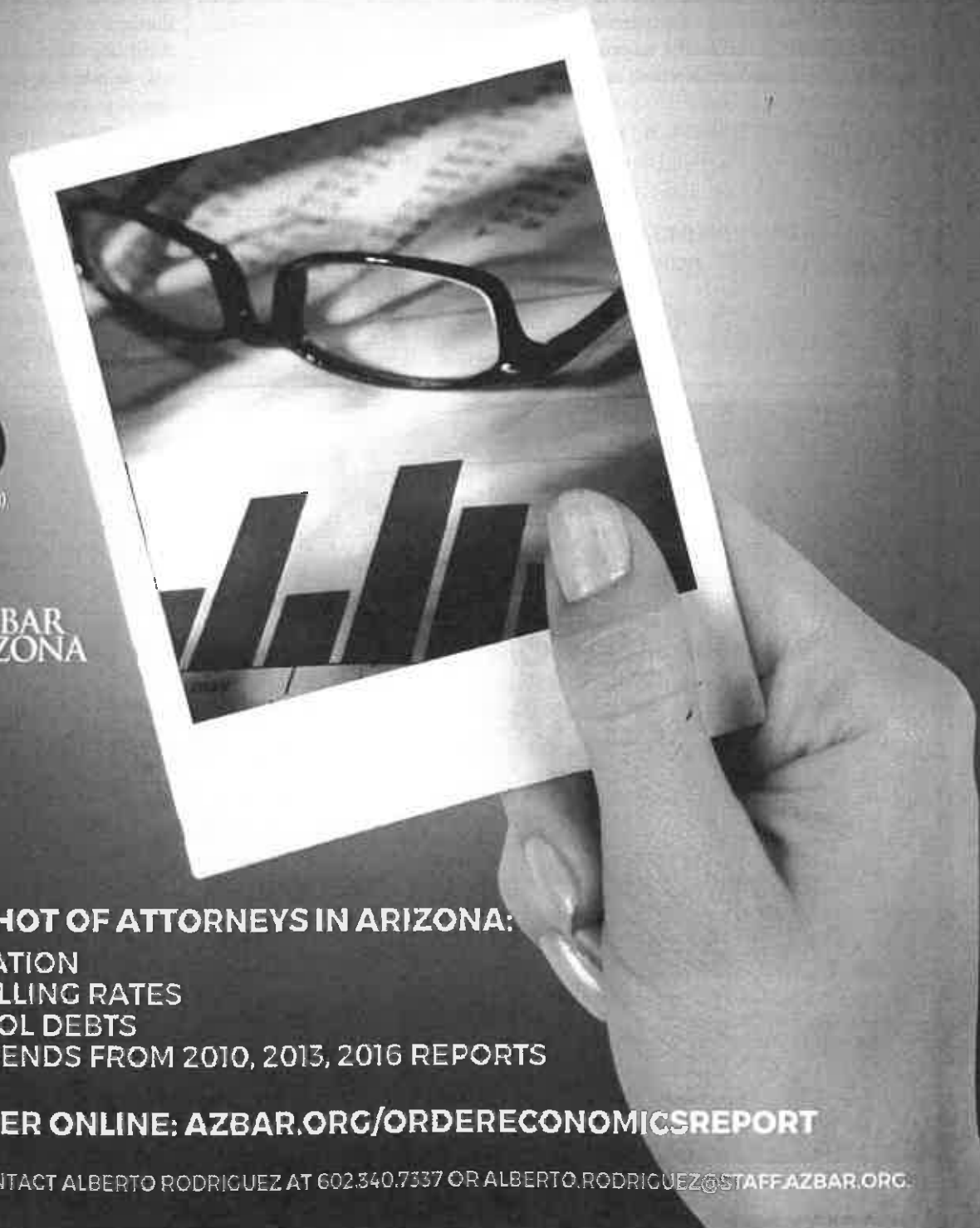
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—continued from p. 35

not the best measures for a client. And if the notion is that consumers will somehow enjoy lower-cost services, the necessary consequence is that many lawyers will earn less while working in a more regimented environment.

Under current law, lawyers owe an undivided fiduciary duty to their clients. Lawyers who have partners are safe in the knowledge that those partners, by virtue of their status as lawyers, owe the same duties to their clients. The current proposal would shatter that model. Lawyers in partnership with nonlawyers would take

Under current law, lawyers owe an undivided fiduciary duty to their clients. But the proposal creates conflicts of interest rather than combats them.

on new fiduciary duties to their partners, and those duties will frequently conflict with the duties they owe to their clients. In effect, the proposal *creates* conflicts of interest rather than combats them.

The response by the proponents is that lawyers already face tough challenges subordinating their personal interests to those of clients, so what's another challenge? Lawyers, under this view, already have ethical spines of steel and are well-equipped to deal with the challenges that partner-

ships with nonlawyers will present.

Anyone who has spent time in the profession knows that this is wishful thinking. Lawyers are already pushed to their psychological limits by the demands of the profession, and many would be unable to resist the instructions of the entity writing their paycheck. Lawyers, after all, are human.

At best, the task force proposals are unfinished work. There is no provision for regulating the new entities it would create, only an acknowledgment that entity regulation is an important topic for future study. And there is no meaningful impediment to nonlawyers evading the conflict-of-interest rules that now govern (and would still govern) lawyers. Under the proposal, a nonlawyer could own multiple firms—even on different sides of the same case. In smaller communities, a nonlawyer could effectively monopolize the entire practice of law. And nothing in the proposed rules would



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require transparency—a client would not need to be told that her lawyer is in partnership with an entity, much less one that might also be controlling the other side of the dispute.

Who owns these investors? We won't know, because the proposal includes no disclosure requirements. Even lawyers working in one of these law firms would not necessarily know where the true capital is coming from. In federal court, lawyers must submit disclosure statements concerning the ownership of their corporate clients to ensure that the judges do not have hidden conflicts. Under this proposal, the law firms themselves would carry an intrinsic risk of undisclosed conflicts. These are real problems that the task force simply did not address.

Lawyers enjoy a privileged position in the court system and are frequently referred to as officers of the court. As member of the court system, I take that status very seriously. Indeed, that judicial imprimatur is part of what lawyers have to sell, and the Court

should resist the suggestion that it make that status available for sale by anyone and everyone. It is not merely that a lawyer has managed to pass the bar exam—a lawyer also undertakes a solemn oath to the legal system and endures significant restrictions on his or her freedom for the privilege of practicing law.

Most lawyers struggle mightily to fulfill their duties under the current system, but many already fall short. Yet under this proposal, entities who need not be identified, and individuals who would never pass character and fitness, will be free to call the shots for lawyers without any concern for ethical rules. The response, again, is that lawyers themselves are still bound by the rules and can be trusted to say “no” to the demands of their new partners. This is an inspiring notion, but it is also completely unrealistic.

Entities who need not be identified will be free to call the shots for lawyers without any concern for ethical rules.

The proposal imposes no limits on *which* nonlawyers can participate in the practice of law. It contains no architecture for benign alternative business structures. And it contains no “pilot project” element. The pending petition asks the Arizona Supreme Court to become an island in the American legal system, not merely dipping an exploratory toe in the water but irrevocably leaping off the cliff into a completely uncharted future. When you ask why no other state has adopted such a proposal, bear these facts in mind. Though some creative approaches to systemic reform are doubtless worth study, this proposal is simply not ready for prime time. **BY**



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Broadening Legal Services A View From Abroad

BY CRISPIN PASSMORE

As Arizona leads U.S. states towards reform of legal regulation, many commentators look at the experience of England & Wales (E&W) to back up their arguments. The reforms are often misunderstood and even misrepresented. Let us look at the evidence.

The reforms to regulation were broad—creation of regulators independent of our Law Society (equivalent to the Arizona State Bar), Parliament setting out objectives that regulators must consider when exercising their functions and increasing the variety of legal professionals that operate in the legal market. And, of course, permitting nonlawyer ownership of law firms—what we call Alternative Business Structures, or ABS—a reform that Arizona is now exploring following its task force report.¹

All of this took place against a history and backdrop very different from the U.S. E&W has no “unauthorised practice of law” regime—it never has. There is a list of reserved activities that emerged² over more than 300 years for political (and sometimes even religious) reasons.³

This means that legal advice is not reserved to regulated lawyers.⁴ There has always been a market for the delivery of legal services beyond that controlled by regulation. This unregulated legal market is very

significant in some sectors—such as divorce, will writing, health and safety, employment and tax.⁵ This all predates the reforms that allowed nonlawyer ownership.

There are multiple regulators⁶ for legal services in E&W, and entity regulation is well established. But the Solicitors Regulation Authority (SRA) is the major player—perhaps accounting for 85 percent of the regulated legal market. And most other types of lawyers work in firms regulated by the SRA. The SRA reforms are market shaping.

It is right to be cautious with direct comparison between England & Wales and Arizona. But let's see what we can observe.

The rationale for change in Arizona is being driven by the very high levels of unrepresented litigants in courts, and linked to that, the desire to increase supply of advice for those facing divorces by allowing non-lawyers to assist with that activity. In E&W, reform was driven predominantly by a desire to increase competition⁷—because competition drives quality, access and value in the U.K. and the U.S.⁸ The focus in E&W has been as much on access for small business as for individuals, and on value for money and choice for corporate clients or access to general advice for individuals, as for access to representation in the courts. In both jurisdictions the desire for innovation (that can drive better quality, access and value) under-



pins the pressure to change.

Against this background it is right to be cautious with direct comparison between reforms in E&W and those being considered in Arizona and other U.S. states. But let's see what we can observe in E&W and what lessons we might draw.

The single most important research on impact of the reforms is the Centre for Strategy & Evaluation Services' independent evaluation⁹ for the SRA. This is unequivocal:

The impact of these reforms has been gradual and incremental. Early indications show that users of legal services are beginning to see benefits. Introducing [alternatives] and removing restrictions on firm ownership have allowed new entrants (including foreign law firms, firms owned by professional services firms, local authority owned firms and

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retail brands) into the market. This has resulted in improved access, choice and quality of service for legal service users and innovation in provision. There was no evidence to suggest that these reforms have detrimentally impacted, or resulted in a greater risk to, users of legal services.

What exactly did the SRA allow that merits this positive evaluation? It allowed nonlawyer ownership of law firms. To be clear, this does not change the fact that any individual undertaking the reserved activities noted above still needs to be authorized as an individual lawyer. And it does not change the fact that law firms can utilize nonlawyers (under effective supervision). This is just about ownership and control of regulated legal businesses.

At the start of the reforms there was a narrowness of imagination among many

commentators. That showed as an expectation that the reforms simply meant that law firms would get investment and carry on as before.

The emerging world is more diverse (and perhaps more exciting) than that. What sort of nonlawyer ownership do we now see?

The first SRA-regulated ABS was Co-Op Legal Services. The Co-Op is a mutual organization. With roots going back to the mid-19th century, it is owned by its customers to promote ethical trading.¹⁰ This was not the introduction of rapacious capitalism to the legal market. The first ABS beyond the SRA was Premier Property Lawyers¹¹—doing work that document preparers in Arizona can do.

Many small or solo lawyers have taken their husband or wife into the business as an owner—perhaps for tax reasons. Many other law firms, especially larger and regional firms,

have included their CEO, Finance or IT Director in the partnership. These sorts of firms continue to work in much the same way as they did before taking nonlawyer ownership. Perhaps they already rewarded nonlawyers on a profit-sharing basis but want to formalize that.

There are cultural aspects to taking senior nonlawyers into ownership. One large international law firm expects 25 percent of its senior people will be nonlawyers within five years. The cultural and delivery implications of setting them apart, excluding them from partnership or ownership, are likely to be significant. How can they develop collegiate and collaborative work practices when they describe in terms of *lawyer* and *nonlawyer*? Creating a different model allows them to attract the very best talent across all the skills and disciplines that they need to meet their clients' needs.

Not only are traditional law firms extending ownership, they are seeking external finance and are willing to give up some ownership to attract and reward that investment. There are now seven law firms that are floated on the U.K. stock market. Ince Gordon Dadds¹² has grown substantially since it raised £20M at float. DWF raised £95M against a valuation of £366M¹³—and is now seeking to expand its international footprint including through an alliance with Wood, Smith, Henning & Bergman,¹⁴ which has offices in Phoenix. Knights has grown through a series of acquisitions financed by its float. And Keystone Law¹⁵ has created a whole new approach to constructing and running a law firm¹⁶ that has seen its share price rise from £1.60 to over £5.00 in two years. Rosenblatts,¹⁷ Gateley¹⁸ and MJ Hudson¹⁹ complete the set, the latter being an interesting multidisciplinary practice.

There are many models in between the neutral taking of a spouse into ownership and

a full float on the stock market. Of course, we have seen the Big Four enter the regulated legal market, but it is important to remember that they already worked giving tax advice, helping manage legal process and much more besides, employing many lawyers. But they are all now serious players in

One of the lessons is that lawyers, set free, have skills that can combine and add to many other professions and disciplines.

the E&W (and global) legal markets. What is different is that they are now regulated as legal services businesses. That helps maintain standards and protections.

Other multidisciplinary practices have also emerged. Often they are focused on specific market segments. Tees Law²⁰ combines wealth management and legal services; Z Group brings architects, accountants and

lawyers together. Others combine lawyering with family support services and counseling; land agents and rural services; reputation management; even with international relations and diplomacy.

One of the lessons of this is that lawyers, set free, have skills that can combine and add to many other professions and disciplines.

We have also seen Legal Zoom²¹ and Rocket Lawyer²² grow in the U.K. Twenty-five million U.S. adults have an account with Rocket Lawyer even though it is operating outside of legal regulation. In the U.K. it

employs lawyers who are regulated—to do legal services short of those that are reserved. Legal Zoom is a regulated legal business with a long track record of solving consumers' legal problems.

Firms like Elevate, Axiom, United Lex, LOD and more are also operating effectively in the U.K. market. Some own regulated law firms or operate an agency model to hire

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Questions about the Convention? Contact Karolyn Kiburz at 602-340-7203 or Karolyn.Kiburz@staff.azbar.org
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lawyers to corporate client GCs. E&W offers great flexibility to firms, ranging from operating outside of reserved legal services with nonlawyers, employing lawyers and becoming a fully regulated law firms.

One area that Arizona is keen to see change is divorce law. In E&W we have a fabulous example of innovation in *amicable*.²³ This document preparer and support or counseling service is breaking open the divorce courts for those who want a simple and friendly (amicable even) support service. It is able to help a couple through the legal and administrative process (without litigating or representing them in court, which is reserved to regulated lawyers) for a low fixed fee. It is popular, and the courts appear to like it because it improves how litigants in person handle their cases. It is not regulated at all beyond consumer and competition law but is well respected.

So having seen the exciting innovations that have emerged, what has been the impact? In E&W we start from the basis that lawyers should be able to work in any way

that does not lead to harm to clients, the public or the rule of law and administration of justice. The onus is on regulators to justify maintaining restrictions rather than justify removing them.²⁴ The aim of SRA reforms (that go far beyond allowing nonlawyer ownership) is to tackle economic rules that serve little or no ethical purpose but undermine an innovative, competitive and consumer-focused legal market.

None of the ethical rules is weakened or removed. Each individual lawyer remains bound by a strong Code of Conduct.²⁵ There is also a Code of Conduct for entities²⁶ that SRA regulates. SRA regulation includes approval of nonlawyer owners and managers of law firms/legal businesses.

ABS have a good track record so far. Research²⁷ shows that they:

- are more open to new ideas than non-ABS organizations
- have higher levels of investment in research and development
- generate a higher proportion of turnover

from new services than non-ABS organizations

- are innovating across more aspects of their activities than non-ABS organizations
- spend on average more than twice as much of their turnover on reputation and branding than do non-ABS
- are nearly three times as likely to be using some form of intellectual property protection

In further research²⁸ into experiences and effectiveness of solicitors' first-tier complaints handling processes, it was found that 62 percent of surveyed ABS provide training on identifying and managing complaints, compared to 50 percent of non-ABS. In addition, 98 percent had a written complaints process as opposed to 84 percent of other firms.

The SRA have also used its internal data to assess the action taken against ABS. The data on the outcome of investigations shows that ABS are no more prone to serious misconduct than other firms. Business structure



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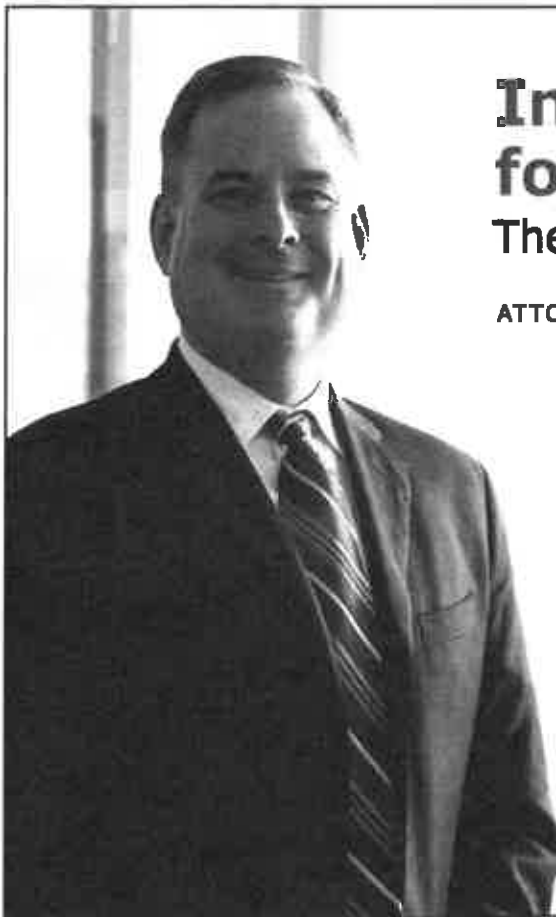
does not affect rates and severity of misconduct. In comparison, other factors—such as whether a firm conducts conveyancing and holds client money—do affect the likelihood of misconduct. There is no difference between ABS and non-ABS regarding the likelihood of enforcement action.

Lawyers have nothing to fear from reform. Those who do not want to change their individual or business practice need not do so. Those that want to innovate, work differently and reach out to clients currently underserved by the current ways of practice may. It is clients, the public and

the courts that will decide what they value. The evidence from E&W is that they value variety, choice and competition. If Arizona pushes ahead, its legal market will grow and more people will benefit from the expert advice of lawyers, legal businesses and other properly regulated advisers. **AV**

endnotes

1. Arizona Supreme Court, *Task Force on the Delivery of Legal Services: Report and Recommendations*, Oct. 4, 2019, available at <https://bit.ly/38M99oa>.
2. <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>
3. Broadly, they are: advocacy in higher courts, litigation, probate, conveyancing real estate, notarial activity and commissioning oaths.
4. It is important to note that a regulated firm or individual is regulated (broadly—there are some exceptions to this) for all the legal services that they deliver, not just the reserved activities.
5. <https://research.legal-servicesboard.org.uk/wp-content/media/Economic-insight-in-depth-unregulated-research.pdf>
6. As well as the Solicitors Regulatory Authority (SRA), there is a regulator for Barristers, Legal Executives, Trademark Attorneys, Patent Attorneys, Notaries, Costs lawyers, Accountants authorised to undertake probate and Licensed Conveyancers.
7. See <https://bit.ly/2HGrc31>.
8. *National Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (Antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services”).
9. <https://bit.ly/2umbCqs>.
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11. www.premierpropertylawyers.com.
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Meeting Consumers Where They Are Nonlawyer Legal Service

BY DON BIVENS

Let's say you suddenly need a car. You go to a place that sells cars to discover that, by law, they only sell Cadillacs. You say, "I cannot afford a Cadillac. But I need basic transportation. Do I have any options?" To which the dealer replies, "Under current market regulations, I can only offer you a Cadillac. By the way, the market regulations I describe are meant to protect you from harm."

You might think, "These guys are 'protecting' me right out of my access to what I need!"

Sound farfetched? Maybe so in the context of cars, because a robust transportation market offers consumers many different alternatives at different price points. But in the legal market "Cadillacs only" often translates to "lawyers only" as an unaffordable market option for people who need basic legal services. Most lawyers and judges recognize that most people cannot afford to retain a lawyer for most legal needs.

So I will dispense with the statistics. It is a market reality. We have a justice system that too often "protects" people right out of their access to justice.

We lawyers and judges have a responsi-

bility to "serve and protect the public with respect to the provision of legal services and access to justice." Those words come directly from the State Bar's stated reasons for existence.

So what to do?

People who think the government should do more to assist people with unmet legal needs make a good argument. But not everyone agrees with that approach. And government resources are pinched across the board.

Moreover, current government regulations—in the form of professional rules that generally permit only lawyers to provide legal help—are part of the access-to-justice problem. When our inherited professional rules restrict most people's access to legal help, can we only wring our hands? Is that consistent with an obligation to serve justice? Whose interests do the current rules really protect?

That question has led an increasing number of state supreme courts, including ours in Arizona, to consider creating a new tier of trained and licensed—but nonlawyer—legal service providers, intended to offer limited, basic services to people who cannot otherwise afford legal help.

Arizona years ago took a step in this direction with the creation of licensed Legal Document Preparers, who do offer the public valuable services. But Document Preparers cannot provide legal advice or represent people in



court. Those limitations, while appropriate, do not meet the people of Arizona where they really stand with their legal needs.

Where does Arizona presently stand?

Nothing definite is yet decided. The Task Force on the Delivery of Legal Services has proposed, and the Arizona Judicial Council has approved, that the Arizona Supreme Court form a Steering Committee to study and recommend subject areas in which nonlawyers might be trained and licensed to provide basic legal services to people who need them, but who cannot afford lawyers.

The most conspicuous need is family law, where huge numbers of unrepresented people brave (and often clog) the court system alone, because they cannot afford a lawyer. These people, our friends and neighbors, face serious legal issues that bear on the most fundamental of human rights and relationships.

Read Petition R-20-0034
and comment on it at:

<https://www.azcourts.gov/Rules-Forum>

(under the sub-forum
"Rules of the Supreme Court").





DON BIVENS is a former President of the State Bar of Arizona, and former Chair of the ABA Litigation Section. He is the current Chair of the ABA's Center for Innovation. He is a partner with Snell & Wilmer, L.L.P.

Would existing Legal Document Preparers become part of this new tier of Limited License Legal Practitioners? No. Legal Document Preparers would continue as they currently exist. But it seems likely that some Legal Document Preparers might want to become credentialled to a new, higher tier, which would permit them to advise and represent clients in court beyond the current limitations on their services.

The task force could find no empirical evidence that the credentialing of nonlawyers to provide limited, basic legal services would affect lawyers negatively. The intended

beneficiaries are people who cannot afford lawyers. But coupled with unbundled lawyer services, and with the task force's other recommendations to permit lawyers to share fees and co-own law firms with nonlawyers, the task force does envision that creative lawyers—aided by technology—will find new ways to provide competent legal services to their clients in conjunction with a new tier of Limited License Legal Providers.

In sum, our indisputable justice gap tells us it is time to re-examine our historic regulations and to re-envision better ways serve and protect the public in our own time—a time replete with people who need legal services but who encounter a legal market offering unaffordable “Cadillacs only.” The status quo we have created is hard to defend. We can do better. We have the duty to try. **AB**

Could a trained nonlawyer usefully advise and represent a person in a consensual divorce on the basics of court process, property division and spousal maintenance? The task force concluded “Yes.” Should nonlawyers be allowed to handle complicated divisions of pensions plans, or contested child-custody issues? The task force concluded “No”—but recognized that only lawyers and judges with experience in family law should be deciding such parameters. Hence, the task force’s recommendation for a Steering Committee with specialized knowledge to make refined recommendations for the Supreme Court’s consideration.

The task force identified other potential subjects in which trained and licensed nonlawyers might help close the justice gap. Small civil claims, small criminal matters that do not involve incarceration, landlord-tenant issues, routinized administrative law

issues, and debtor/creditor issues all come to mind.

So how would these nonlawyers be trained, licensed and regulated to protect the public?

For the most part, just like lawyers. The task force recommended that the State Bar set the educational and testing requirements to credential Limited License Legal Practitioners in particular subject areas. The same character and fitness standards would apply to nonlawyers. The same ethical rules would apply, with a parallel disciplinary process. Offending providers would lose their license, just like lawyers. The same public protections that apply to lawyers would also apply to licensed nonlawyers. The task force also checked with Arizona universities, who confirmed their ability and interest to provide the required professional training to qualified nonlawyers.

The Licensed Legal Advocate Pilot

Applying Participatory Design to A2J

BY STACY BUTLER

The Licensed Legal

Advocate Pilot at the University of Arizona is the first project in the United States to reform unauthorized practice of law (UPL) restrictions and create a new type of legal service provider specifically for an underrepresented population: survivors of domestic violence (DV).

Built using participatory design methodology, the pilot will provide lay legal advocates at Emerge Center Against Domestic Abuse (“Emerge”) with legal training specific to DV-related issues and certify them as Licensed Legal Advocates (LLAs). LLAs will be a new tier of civil legal service professional equipped to provide legal advice and assistance to DV survivors with respect to specific, high-need issues.

The legal profession has turned to regulation in response to the chasmic justice gap in this country. DV survivors are in that gap. In 2017, 97 percent of low-income survivors of DV in the United States experienced a civil legal problem such as the need for a protective order, divorce, child custody order, consumer protection or housing assistance.¹ They received inadequate or no professional legal help for approximately 86 percent of those civil legal problems.² Many survivors are re-victimized while navigating the civil legal system alone. Some

simply do not engage with the system at all. In both cases, opportunities to break the cycle of violence through legal intervention are lost.

Working with and for the people excluded from traditional service models and building new pathways aligned with their legal needs is the goal of participatory design. Participatory design includes potential service beneficiaries in the creation of novel solutions to justice problems. It is one of the primary methodologies we apply in the Innovation for Justice Program (i4J) at the University of Arizona James E. Rogers College of Law.³ Participatory design is a well-developed, multistep process that involves empathizing with community members’ needs, identifying system failures that adversely affect them, thinking creatively about how to dismantle barriers to access, and testing possible solutions in the real world before investing resources in them.

Here’s how we applied those steps as we built and tested the LLA Pilot.

Frame the Project

i4J assessed the landscape of legal services in the Pima County area, searching for bottlenecks and opportunities. During that process, we connected with the lay legal advocate program at Emerge. These providers

already had legal training and could offer legal *information*. They could not, however, provide legal *advice*. Lay legal advocates reported to us how the UPL restriction on providing advice often precluded them from meaningfully assisting survivors who navigate common, DV-related civil legal issues.⁴ The program presented a unique opportunity to explore whether regulatory reform could provide a new, replicable and greatly needed form of legal empowerment for DV survivors. Jeffrey Willis, then-Arizona State Bar President, and the Hon. Karen Adam, a retired family law judge, joined me and 12 graduate and undergraduate students from multiple disciplines on this project.

Empathize

Our team mapped the civil legal system process as it is *intended* to work, but then we shifted our perspective.⁵ Beginning a project with empathy means to stand in the shoes of the person experiencing the problem you are trying to solve, so we invited Emerge leadership, lay legal advocates, and DV survivors to walk through the actual process with us, explaining the various points where they experienced navigation failures. This journey-mapping process helped us identify specific barriers and problem areas.

Define

We invited other members of the community to help us unpack what we’d learned about civil legal system failure for DV survivors, including family law and DV experts; judges and attorneys who had expressed opposition to the idea of paraprofessional legal services; social service providers; government representatives; domestic violence survivors; students; and interested community members.⁶ Encouraging discussion among these stakeholders, who sometimes had opposing views, helped us identify the

STACY BUTLER has two decades of experience in community advocacy and expanding the reach of civil legal services for underserved populations. Prior to launching the i4J Program, she worked in the United States District Court for the District of Arizona and served as an adjunct professor at University of Arizona Law. In 2017, she launched Step Up to Justice, a pro bono civil legal center that has delivered over \$3 million in free civil legal services to low-income families. She earned a B.A. from Trinity University and a J.D. from the University of Arizona. Butler was named one of the Top 50 Pro Bono Attorneys in Arizona in 2006, 2014 and 2015.

areas where community consensus existed regarding where and how LLAs could serve meaningfully within the system. Four areas of limited-scope service emerged from this dialogue: advice at intake regarding urgent legal issues, advice during the completion of forms, advice about how to prepare for court, and sitting with survivors during court hearings as a quiet advisor.

Ideate

Building an interdisciplinary team creates a more robust environment for creative problem solving. Teams of students, supervised by Mr. Willis, Judge Adam and me, worked collaboratively on the building blocks of the policy proposal. Given the four categories of limited scope service that LLAs would provide, we had to consider how LLAs would be trained and certified; how they would be regulated; how the bench, bar and public would be educated about this new professional role; and how the pilot would be evaluated.

The students' thoughtfulness and creativity were apparent. One of the teams, working closely with Emerge and instructional resources at UArizona, discovered that an online curriculum with weekly in-person meetings could successfully credential lay legal advocates participating in the pilot to become LLAs. Another student team charged with educating the public, bench and bar designed a comic strip-style video to make the LLA pilot more accessible.⁷

Prototype and Test

Testing a project while it is still in development is a valuable strategy for exposing hidden assumptions and confirming that one's design aligns with the community's needs. To evaluate the components of our LLA pilot, students created visual displays explaining in plain language how the pilot would


operate.⁸ Then, over 50 members of the community joined us and walked through the visual representation of our proposal, engaging with students and sharing feedback. Students captured that feedback and made changes to the LLA pilot based on the most common themes that emerged.

Field Test

In the fall of 2020, we will test the LLA pilot in the field. With an Arizona Supreme Court Administrative Order authorizing the pilot and funding from the State Justice Institute, lay legal advocates at Emerge will receive LLA training. Assuming they pass the rigorous licensure test required by the Supreme Court, they will spend a year providing LLA advice and assistance. We will track whether survivors' civil legal needs are met through LLA services and gather

data regarding adjudicatory outcomes and time to disposition. We also will survey survivors regarding their views on procedural fairness and satisfaction with their case outcomes.

The research findings generated by this pilot have the potential to change the delivery of civil legal services for low-income populations nationwide. Not only does the pilot create a new, sustainable tier of providers for the non-profit, civil legal aid and social service communities, it also puts that innovation to the test. The Innovation for Justice Program is proud to partner with the Arizona Supreme Court and Emerge on this project.

To learn more about the Licensed Legal Advocate Pilot, check out our report and video at law.arizona.edu/i4J under the "Projects" tab. 

endnotes

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3. Participatory action research (PAR) combines local knowledge with social science expertise to gather information to use for change on social or environmental issues. For a deeper understanding of PAR and its collaborative values, see Davydd J. Greenwood et al., Participatory Action Research as a Process and as a Goal, 46 J. HUMAN RELATIONS 175, 177 (1993); RACHEL PAIN ET AL., PARTICIPATORY ACTION RESEARCH TOOLKIT 2 (2011), <https://bit.ly/3bUWP76>; Jakob Trischler et al., The Value of Codesign: The Effect of Customer Involvement in Service Design Teams, 21 J. SERV. RESEARCH 75, 77 (2017).
4. See, e.g., pages 3-7 of our Report to the Arizona Supreme Court Task Force on Delivery of Legal Services, available at law.arizona.edu/i4J under the Projects tab, and in the May 2019 Task Force materials available at <https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force/LSTF-Meeting-Information>.
5. As a framework for this mapping exercise, we referenced AZCourts.gov's online article, "How a Case Moves Through the Court System," available at <https://bit.ly/2SZtkZ7>.
6. A complete list of individuals and organizations that engaged with i4J on this project is available at law.arizona.edu/i4J under the "Thanks" tab.
7. Worth a watch. Check out the video here, starting at the 24:25 timestamp: <https://bit.ly/38QyT25>
8. The students storyboarded their proposal using a prototyping tool called Scenes. Learn more about this open-source tool at <https://bit.ly/2HTDSE5>.