

TASK FORCE ON THE DELIVERY OF LEGAL SERVICES

DRAFT MINUTES

Thursday, April 25, 2019

Room 345 A/B, Arizona State Courts Building

1501 W. Washington Street

Phoenix, Arizona 85007

Present: Justice Ann Timmer, Chair; Victoria Ames; Robyn Austin; Betsey Bayless; Justice Rebecca Berch (ret.); Don Bivens; Stacy Butler; Dave Byers; Diane Culin; Whitney Cunningham; Judge Maria Elena Cruz; Jeff Fine; Paul Friedman; Tami Johnson; Judge Joseph Kreamer; John Phelps, Judge Peter Swann; Billie Tarascio; Guy Testini (telephonic); Mark Wilson

Absent: Peter Akmajian

AOC Staff: Jennifer Albright; Kathy Sekardi

Guests: Patricia Norris, ASU School of Law (telephonic); Patricia Sallen, Attorney at Law; Lynda Shely, Attorney at Law

I. REGULAR BUSINESS

The fourth meeting of the Task Force on the Delivery of Legal Services was called to order at 9:03 a.m. Justice Timmer, Chair, welcomed the membership, and others in the room.

The meeting minutes from March 14, 2019, were provided to members in advance. Justice Timmer asked if there were any edits. Having noted edits to attendance and a few grammatical changes, and edits having been made, Mr. Byers moved to approve the minutes. Mr. Fine seconded the motion. The minutes were approved unanimously.

II. PRESENTATIONS

Judge Patricia Norris (ret.) & Judge Maria Elena Cruz, Proposal to Amended Rule 38, Arizona Rules of Supreme Court

Judge Norris explained that she had presented to the Cruz Workgroup on behalf of herself, Sheila Polk, Yavapai County Attorney, and Attorney Sharon M. Flack a proposal to amend Rule 38(d) of Arizona Rules of Supreme Court which provides special exceptions to the standard examinations and admissions process. Specifically, the proposal was to extend to law students post-law school graduation, the same supervised instruction and training in the practice of law for a limited time that law students are allowed.

Judge Norris explained there were two (2) versions of the proposed rule change presented in the task force's meeting materials with the only difference being that Version B removes the current Rule 38(d) signature requirement for supervising attorneys, and instead allows the certified law graduate to sign pleadings under a provision that explicitly makes supervising attorneys

responsible for all documents filed in any court, or with an administrative tribunal, by the law graduate. This removal of signature requirement would only apply to limited jurisdiction court practice. Judge Norris explained that Sheila Polk provided a letter of support, shared in the meeting materials, explaining that this change in the signature requirement for limited jurisdiction court practice only was related to the volume and speed that matters process through those courts.

The changes proposed would establish the “limited practice graduate category,” set eligibility criteria, application requirements, permitted activities, scope of representation, require notice to and consent of clients, list duties of supervising attorneys, duration the certification would last for and the events that would terminate the certification. Judge Norris shared that 19 other states have similar post-law school graduate certifications.

Members discussed the proposal. Questions asked included questions about the termination of the certification. This involved discussion of current practices of the Certification and Licensing Division of the Administrative Office of Courts (AOC) and the time it takes for an application for admission to the bar to be processed. The discussion also included the percentage of complete applications that resulted in admission to the bar generally, and the length of time the process took. Member, Mark Wilson, representing Certification and Licensing shared that a person has 5 years from the time they take the bar examination to seek and gain admission to the Bar. Judge Cruz and Pat Norris shared that both proposals terminated the certification in relation to the taking of the bar examination, thus limiting the time a certified graduate would be able to engage in this type of limited practice.

Having heard comments, and support for Version B, the workgroup agreed to take the proposal to their breakout session later in the meeting and review for edits that would reflect comments and concerns shared by the task force.

Judge Cruz, Proposals related to Ethical Rule 5.4 and Alternative Business Structures.

Judge Cruz then presented the three different options in relation to whether ethical rules should be amended to allow for co-ownership of legal practices by lawyers and non-lawyers. Judge Cruz reviewed Ethical Rule 5.4 (ER 5.4) with the task force, noting which comments to the rule addressed the primary purpose of the rule. She explained the chief purpose of ER 5.4 was client protection and preservation of the independent professional judgment of lawyers.

Judge Cruz explained Option 1 provided for amendment ER 5.4 to remove the explicit prohibition of lawyers and non-lawyers forming legal practice entities. The goal of Option 1 was to amend ER 5.4 to allow business formation possibilities that were broader than seen in Washington D.C.’s ER 5.4, which is the only other jurisdiction in the country to have a rule that removes some of the barriers to lawyers and non-lawyers forming business entities that involve the delivery of legal services. A draft of an amendment to ER 5.4 was provided to members in the meeting, demonstrating amendments that would allow for passive investment, disclosure to clients of being an alternative business structure (ABS), a registration requirement with the State Bar as an ABS, metrics to measure impact of amendments, and addressing the regulation of non-lawyer partners.

Discussion followed. A member asked about how non-lawyer partners in an ABS entity could be regulated by the State Bar considering the Bar regulates persons, not entities, and regulates the practice of law, not the provision of legal services. Discussion included the merits of and a proposal to recommend a shift to entity regulation by the State Bar and a shift to regulate providing legal services, from the current structure of regulating lawyers and the practice of law.

Justice Timmer shared that Bloomberg Law had recently written an article about states considering these kinds of changes to law business ownership and concerns that the big four accounting firms would then own many law practices. This included discussion of conflicts of interest rules and possibility that large investors could own multiple law entities and result in a single investor being “owner of both sides in a particular legal matter.”

Judge Cruz then presented Option 2, being referred to as the “Lassiter approach.” This proposal was presented at the March meeting and involved an application process where proposals to form a legal business owned by lawyers and non-lawyers could be made to a board who would review on a case-by-case basis for a “waiver” of ER 5.4 prohibitions on fee-sharing and this type of business formation. Judge Cruz shared the workgroup’s consideration of comments in relation to this proposal from the task force at the March meeting. This approach was likened to an “innovation sandbox” where a controlled arena for piloting innovative law practice formations could occur and they could be assessed for benefit to public, practice of law, delivery of legal services and risks or harms to the basic goals of ER 5.4 before fully adopting amendments to ER 5.4. A member also shared that Utah was pursuing a model such as this option.

A concern raised in March that such a process may lead to accusations of favoring certain investors, persons, or types of business could be levied against the Court was reasserted at this meeting. It was discussed that a board formed to review applications and clearly and stringently identified criteria for application consideration may mitigate these concerns. It was also discussed whether this model would result in meaningful movement toward permanent change to open up legal business formations to include non-lawyers.

Judge Cruz then presented Option 3, dubbed the “Shely approach.” The proposal eliminates ER 5.4. It in turn requires amendment to or comments to other ERs that involve conflicts and lawyer independence. Examples included amendment to ER 1.2 to emphasize lawyer independence, address conflicts in the context of an ABS in ER 1.7, and amendments to other ERs to clarify that the delivery of legal services is what is being regulated and not regulation of lawyers. The list of amendments or comments to existing ERs included ERs 1.0, 1.6, 1.7, 1.8, 5.1, 5.4, and 5.7.

Discussion followed as to this option. Option 3 was the option most supported by the task force.

Judge Cruz, Report of event at Institute for Advancement of American Legal Profession (IAALS)

Judge Cruz, Justice Berch (ret.), and Whitney Cunningham shared with the task force the events and experiences during a two-day event at Institute for the Advancement of American Legal Profession (IAALS) in Denver, Colorado the previous week. Several states and national organizations were invited by IAALS to discuss the regulation of the practice of law and various efforts in the represented states to innovate and make regulatory changes.

Don Bivens, Presentation of workgroup progress on topic of formation of a limited license non-lawyer tier of legal service providers.

Mr. Bivens shared that the workgroup had spent a great deal of time looking in-depth at subject matter areas within which non-lawyer, licensed legal service providers might practice. He reported that family law was the subject matter area that the workgroup had been able to draft the most detailed scope of practice recommendations for. The other areas for consideration were landlord/tenant, debt collection, limited jurisdiction civil matters, criminal matters in limited jurisdiction courts where no incarceration is possible, and a list of administrative law areas.

Mr. Bivens shared that the work group recommended that a limited license non-lawyer legal practitioner program be developed and went over a list of items that the workgroup agreed upon as to scope of practice and remaining open questions on scope of practice for family law. Mr. Bivens shared the workgroup recommendation will include that, as other states have done, there should be steering committees formed made up of lawyers working in each subject matter practice area, judges with experience in those areas, educators, examination drafters, ethics experts, and other legal stakeholders, to fully develop all nuances of: practice areas and scope of practice; academic and other educational requirements; and regulations and administration of licensing.

Discussion followed. Discussion included an ongoing debate as to the appropriateness of a tier of non-lawyer legal service providers that can give legal advice and appear in court. Members discussed that some of the practice areas, such as landlord/tenant and domestic violence/orders of protection may be better suited for a lay advocate or navigator program. The workgroup agreed that some practice areas may not, in and of themselves, be a viable economic model in light of clients' lack of resources. The workgroup agreed to develop draft recommendations for task force consideration.

Ms. Butler, member of the task force and the workgroup, related that a presentation on a DV Lay Advocate program would be made at the May meeting.

Mr. Bivens ended his presentation noting that the workgroup breakout session would include exploring the charge related to Arizona's Licensed Document Preparers (LDPs) and that several LDPs had been invited and were present to talk with the workgroup.

The task force broke for lunch and went into breakout sessions.

III. WORK GROUP BUSINESS

Work Group Breakouts

Members of the public were able to attend breakout sessions.

The workgroup led by Don Bivens and Stacy Butler had invited several LPDs to speak about their work, their thoughts on changes to, clarification within, or expansions of the LDP program.

Judge Cruz's workgroup invited Patricia Sallen and Lynda Shely to continue to assist in the work related to ABS.

Report Out

The full task force reconvened at 2:05 p.m. to hear from the work groups.

First, Ms. Butler discussed the Bivens/Butler Workgroup breakout session. The workgroup heard from five different LDPs representing multiple areas of the state and multiple business models. Ms. Butler reported that the LDPs that were heard from did not generally seek expansion of their scope of practice, except in a few identified areas. These included a conflict in the rules governing LDPs that allowed them to assist with motions but prevented them for researching and citing the supporting rules of law, cases, etc.; ability to speak in court when directly addressed by a judge or requested or ordered by a judge; and more clarity on and ability to explain options (e.g., difference between guardianship under probate versus in family law). The LDPs who were present unanimously sought more access to continuing education courses in formats that allowed those in rural areas to effectively access those courses, more information about processes for seeking changes to the LDP Code and how to report issues with persons holding themselves out as LDPs,

but who are not licensed; and efforts by the judiciary to educate the public on what LDPs are, what they can do, and to connect LDPs with those most in need of their services.

Member Billie Tarascio then presented on behalf of the Cruz workgroup. Ms. Tarascio shared that the workgroup spend time reviewing Version B of the Rule 38 proposal discussed earlier in the meeting. Members worked on drafting edits. The workgroup reported it would have an edited version to present at the next task force meeting for consideration as part of the final recommendations of the task force.

Ms. Tarascio then shared that the workgroup returned to discussion of the three (3) ABS options, focusing on Option 3. A proposal complete with drafts of ERs affected by Option 3 would be presented at the May task force meeting. Discussion followed about including some kind of “Lassiter” approach or “innovation sandbox” approach in the recommendations as well. It was suggested perhaps both options could be pursued simultaneous as they did not necessarily seem exclusive of one another.

III. OTHER BUSINESS

Call to the Public

The meeting concluded with a call to the public. Two members of the public spoke and answered questions by task force members.

Next Meeting:

Thursday, May 16, 2019, at 9:00 a.m. in Room 119 A/B.

Adjournment:

The meeting adjourned at 3:00 p.m.