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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITON FOR AMENDMENTS TO ARIZONA SUPREME COURT RULE 31	R-18-0004 **ATTORNEY GENERAL'S COMMENT TO PETITION TO AMEND RULE 31 OF THE RULES OF THE SUPREME COURT OF ARIZONA**

The Arizona Attorney General hereby submits this comment in support of the R-18-0004 Petition to Amend Rule 31, Rules of the Supreme Court of Arizona.

Respectfully submitted this 21st day of May, 2018.

MARK BRNOVICH
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MEMORANDUM OF POINTS AND AUTHORITIES

The Petition to Amend Rule 31 of the Arizona Rules of the Supreme Court, filed January 8, 2018, seeks "to improve access to justice for small business litigants and to reorganize and modernize the rule." Judge Gass's Petition, R-18-0004 (hereinafter "Proposed Amendments"). The Proposed Amendments will accomplish both goals by authorizing corporate entities to responsibly self-represent, streamlining the exemptions under the Rule, and increasing access to justice for small businesses who experience the dual threats of unreasonable settlement demands and frivolous lawsuits. For these reasons, the Office of the Arizona Attorney General strongly supports the adoption of the Proposed Amendments.

I. Historical Background

The Arizona Constitution created three distinct branches of state government, vesting in the judicial department courts of law as well as exclusive authority over the practice of law in Arizona. Ariz. Const. Art. III. *See In re Smith*, 189 Ariz. 144, 146 (1997). An Arizona statute previously prevented the unauthorized practice of law, A.R.S. tit. 32, ch. 2, but that statute was repealed in 1985. The governing authority of the practice of law has since resided in the Rules of the Arizona Supreme Court. The Court observed that the "constitutional power

to regulate the practice of law extends to non-lawyers as well as attorneys admitted to bar membership." *In re Creasy*, 198 Ariz. 539, 541 (2000).

Although representing a party in a court proceeding is practicing law under *In re Creasy*, the Court has long recognized the importance of an exception allowing litigants to represent themselves. In *State ex rel. Frohmiller v. Hendrix*, the Arizona Supreme Court confirmed the widespread acceptance of self-representation:

> It has been accepted in the past without question in this state that one may appear and present or defend any action wherein he is the plaintiff or defendant, without the assistance of a regularly licensed attorney… But it seems to be accepted as a general principle that one who acts only for himself in legal matters is not, in the meaning of similar statutes, practicing law… We know of no cases in which it is held that a plaintiff or defendant may be represented in court by an agent who is not himself the plaintiff or a licensed attorney.

State ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 190-191 (1942). The Court concluded that the State's auditor general, like a corporation or other artificial person, was unable to personally appear in court without an attorney. Although the State's auditor general was required to litigate through licensed counsel, the Court strongly affirmed the general principle of self-representation.

The right to represent oneself in court dates back to the founding of our nation. *Faretta v. California*, 422 U.S. 806, 813-14. Without recourse to self-representation, many litigants simply could not defend against a lawsuit, unless an attorney would be willing to provide *pro bono* representation. The Arizona Court

of Appeals has affirmed the role of self-representation in providing meaningful access to the courts:

> It is now beyond any doubt that … every person has a right of access to the courts which is protected by the United States Constitution… The right encompasses both the right to some form of legal assistance when needed and the individual's right to represent himself in court. The right to appear *in propria persona* is well established in Arizona and elsewhere.

White v. Lewis, 167 Ariz. 76, 86 (Ct. App. 1990) (internal citations omitted). Yet corporations, which for most legal purposes are considered to be equivalent to persons (*See U.S. v. Amedy*, 24 U.S. 392, 412 (1826) "That corporations are, in law, for civil purposes, deemed persons is unquestionable"), are still prohibited from defending against lawsuits without paying for the services of an attorney. Small businesses and other corporate entities with limited resources risk exclusion from the courts without the protection of self-representation.

In recognition of this dilemma, over time, the Court has established a series of piecemeal exemptions for corporate entities in justice court, police court, tax court, administrative hearings before the Industrial Commission of Arizona or the review board of the Division of Occupational Safety and Health, Department of Health Services hearings, small claims, general stream adjudication proceedings, Department of Environmental Quality hearings, Office of Administrative Hearings, and Arizona Corporation Commission matters. Ariz. R. Sup. Ct., Rule 31(d)(3-7, 9-11, 28, 31).

II. Summary of Proposed Amendments

The new Rule 31(d)(9) would eschew that patchwork of exemptions in favor of a streamlined approach, as follows:

> A person who is not an active member of the state bar may represent any entity that is not an issuing public corporation, as that term is defined in A.R.S. §10-2701, before any court in this state and in any proceeding, including but not limited to any quasi-judicial hearing, any administrative, agency, hearing officer, or board hearing, rehearing, or appeal, any small claims procedure or proceeding, and in any fee arbitration proceeding.

Judge Gass's Petition, R-18-0004, p. 5. The Proposed Amendments define "any entity that is not an issuing public corporation" as including, but not limited to:

> Closely held corporations, limited liability companies, partnerships, non-profit corporations, public service corporations and interim operators appointed by the Arizona Corporation Commission, management companies, and unincorporated associations.

Id. Notably, the definition of "any entity that is not an issuing public corporation" requires a specifically authorized person for representation to avoid problems around the unauthorized practice of law. The Petition also outlines the exact criteria to qualify for exemption under the practice of law regulation:

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

Id. at 7.

III. The Proposed Amendments Would Meaningfully Reduce Harm Inflicted on Small Businesses by Frivolous Lawsuits

The most significant effect of the Proposed Amendments is that the amendments would improve access to the courts for small businesses. On November 8, 2017 the United States Senate Judiciary Committee held a hearing entitled "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators." Chairman Grassley brought to the Committee's attention the havoc wreaked on small businesses around the country by frivolous lawsuits:

> The sheer cost of modern litigation—on time, emotions, and financial resources of the parties involved—has become a leveraging opportunity for those who wish to make a quick buck. This is particularly true in the small business sphere… These settlement shakedowns come in many forms. Last year, a 60 Minutes episode highlighted the rise of so-called "drive by" litigation under the Americans with Disabilities Act (ADA). In some cases, lawyers would simply drive down the street—or even use pictures on Google Maps—to look for any possible technical violation of the ADA by local businesses. This is quickly followed up by a demand letter to the business or a lawsuit. Instead of seeking a correction to the alleged violation, the demand letter offers the business owner an out through a quick settlement.

Prepared Statement by Senator Chuck Grassley of Iowa Chairman, Senate Judiciary Committee, November 8, 2017.

At the hearing, an attorney representing the National Federation of Independent Business (NFIB) explained how litigation costs create incentives for frivolous lawsuits:

> For the small business owner with 10 employees or less, the problem is the $5,000 and $10,000 settlements not the million-dollar verdicts since $5,000 paid to settle a case could eliminate about 10 percent of a business' annual profit. Regardless of the merits of the underlying claim, however, a business owner knows settlement will cost less than a court fight. While the targeted business saves money in the short term, these quick settlements encourage unscrupulous attorneys to continue shaking down small businesses with more lawsuits.

Statement for the Record of Elizabeth Milito, Esq. before the U.S. Senate Judiciary Committee, November 8, 2017.

Arizona businesses have experienced firsthand the detrimental effects of unscrupulous litigation that are now being recognized on a national level. In 2016, a set of plaintiffs filed an unprecedented wave of over 1,700 lawsuits against businesses in Maricopa County Superior Court, claiming technical violations of the Americans with Disabilities Act (ADA) and the Arizonans with Disabilities Act (AzDA). When plaintiffs served the complaints, the complaint was accompanied by discovery requests and a settlement demand for thousands of dollars. Once it became aware of this issue, the Attorney General's Office moved to consolidate the remaining 1,289 lawsuits. The Office urged the Court to grant the consolidation to prevent plaintiffs from forcing "hundreds more defendants… to (1) expend thousands of dollars in order to settle or fight legally invalid claims, or (2) risk a default judgment." *Advocates for American Disabled Individuals, LLC, et al. v. 1639 40th Street LLC*, CV2016-090506, p. 9. The State's motion detailed the imminent dilemma experienced by the defendant businesses:

> Many defendants have already capitulated under the temporal and monetary pressures of hiring a lawyer and responding to a complaint asking for thousands of dollars and an order that would shut down their business. Plaintiffs have publicly proclaimed that $7,500 is "always the opening negotiation amount" they demand to settle each case, regardless of the allegations, and that as of August 18, Plaintiffs already had settled 209 cases for an average of about $3,900. If accurate, this means Plaintiffs have already collected a staggering total of $815,100 in settlements, almost all of which were reached without a court ever considering the threshold issues the State seeks to raise.

Id. at 9. In addition to the exorbitant settlements collected from hundreds of businesses, the State also noted the looming default judgments businesses faced:

> At present, hundreds of defendants are either at risk of a default judgment or are rapidly approaching default. And Plaintiffs have started to file applications for default, seeking penalties just as severe as the ones in their complaints…[Plaintiff's attorney filed an affidavit] seeking "not less than $5,000" in attorney's fees for himself, even though the only document he filed before the application for entry of default in that case was the mass-produced, copy-and-paste complaint, similar to the one issued here.

Id. at 10. The Court ultimately dismissed all of the remaining complaints with prejudice, but not before the plaintiffs publicly proclaimed that they had collected over $1.2 million. *See* Advocates for Individuals with Disabilities Press Release, October 20, 2016, http://m.marketwired.com/press-release/az-attorney-general-rallies-favor-civil-rights-discrimination-against-individuals-with-2168570.htm.

With the adoption of the Proposed Amendments, small businesses faced with a lawsuit will no longer be forced to spend thousands of dollars either to retain counsel or settle the case. The Proposed Amendments provide an avenue for a specifically authorized person to appear on behalf of the business, answer a

complaint filed, and avoid a default judgment. Businesses can also retain a lawyer to assist in a limited scope representation under ER 1.2(c). Ariz. R. Sup. Ct., Rule 42, ER 1.2. The Proposed Amendments give authority to the specifically authorized person to enter into settlement agreements and negotiate on behalf of a corporate entity without the formal assistance of counsel. Unscrupulous lawyers would be prevented from leveraging the fact that a business would have to spend thousands of dollars just to defend itself.

Businesses can encounter the dilemma presented by the current rules in a variety of contexts. Regardless of the cause of action, a business faced with a meritless lawsuit currently has only two options—settle (usually for thousands of dollars) or retain an attorney (usually for thousands of dollars). Under the new Rule 31(d), businesses will have a third option, empowering them to avoid unreasonable settlement demands and to defend against meritless lawsuits without paying an attorney thousands or tens of thousands of dollars to do so.

Because the Proposed Amendments to Rule 31(d) would allow small businesses to responsibly represent their interests in court and to avoid the harms of frivolous lawsuits and scare-tactic settlement demands, the Office of the Arizona Attorney General strongly supports the adoption of the Proposed Amendments.

Respectfully submitted this 21st day of May, 2018.

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