

Hon. David. B. Gass
Maricopa County Superior Court
Juvenile Court—Southeast Facility
1810 S. Lewis Street, Suite 1093
Mesa, Arizona 85210-6234

Petitioner

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION FOR
AMENDMENTS TO ARIZONA
SUPREME COURT RULE 31

Supreme Court No. R-18-0004

Reply in Support of Petition to
Amend Rule 31 of the Rules of the
Supreme Court of Arizona

Pursuant to Rule 28(D)(2), Rules of the Arizona Supreme Court, the undersigned respectfully replies in support of Petition R-18-0004. The Petition asks this Court to adopt the amendments to Rule 31 of its rules, as proposed in the Petition's attached Appendix A.

In the finest tradition of the Court's court rules forum, five comments were filed and posted regarding the Petition—all of them carefully thought-through and artful. Commenters included an esteemed and diverse collection of stakeholders: The Arizona Chamber of

Commerce & Industry, the Court’s Attorney Regulation Advisory Committee, the Managing Attorney of the Arizona office of the Institute for Justice, the Arizona Attorney General, and the State Bar of Arizona.

Most Commenters Urge Wholesale Adoption of the Petition’s Changes

Three of the commenters—the Arizona Attorney General, the Arizona Chamber of Commerce & Industry, and the Managing Attorney for the Arizona office of the Institute for Justice urged adoption of the Petition’s proposed rule language wholesale and included no suggestions for revisions to the proposed language.

These commenters do so for a variety of well-founded reasons. *See, e.g.*, Comment of Arizona Chamber of Commerce & Industry, filed March 2, 2018 (“ . . . Rule 31 has not fully evolved to acknowledge the self-representation capabilities of Arizona’s corporate entities. The minor changes presented by [the Petition] are a step toward modernization that improve[s] access for small business and corporate litigants.”); Comment of Arizona Attorney General, filed May 21, 2018 (noting the proposed amendments would “authoriz[e] corporate entities to responsibly self-represent, streamlin[e] the exemptions under the Rule, and increas[e] access to justice for small businesses who experience the dual threats of

unreasonable settlement demands and frivolous lawsuits.”); *see also* Comment of Managing Attorney for Arizona office of Institute for Justice, filed May 21, 2018 (citing multiple authorities and noting that “[g]iven these studies, there is little reason to believe that R-18-0004 will leave those affected by it—small businesses who want or need to self-represent—in worse circumstances. Rather, given what is happening to small businesses in Arizona Courts because of Rule 31’s unauthorized practice of law restrictions, there is every reason to believe they will be better off.”).

Two Commenters Express Concerns, but Present No Solid Reason for Rejection of the Petition’s Proposals

Of the two commenters who do not support the Petition’s proposed language wholesale, neither proposed revised rule language for this Court’s consideration. Both instead largely object to the Petition’s proposed Rule 31(d)(9), the centerpiece of the Petition’s proposals.

It is this Court’s Attorney Regulation Advisory Committee (“ARAC”), however, that “supports [both] the purpose and intent behind Petition R-18-0004.” *See* ARAC Comment, filed May 21, 2018. The ARAC’s support extends to both the Petition’s “public policy objective of improving access to justice by allowing certain business entities to be

represented in court by non-lawyer principals of those entities,” and the Petition’s aim of “enhancing the clarity of Rule 31 through a re-organization thereof.” *Id.* Of note, the ARAC “fully supports the aspects of the Petition that would re-organize Rule 31 in order to clarify the rule.” ARAC Comment, at 3.

The ARAC’s objections to the Petition’s proposed Rule 31(d)(9)—which would meaningfully yet thoughtfully expand when certain corporate entities may represent themselves in Arizona—are threefold. First, the ARAC considers the language overbroad, and Petitioner respectfully disagrees. As the Arizona Attorney General comment points out on its page 5, the Petition’s proposed language “outlines the exact criteria to qualify for exemption” under Rule 31(d)(9)—in the language of the exemption itself. *See* Comment of Arizona Attorney General, at 5. Given the following and other language in Rule 31(d)(9), the exemption is certainly not unlimited, and Petitioner sees no reason to discriminate amongst qualifying entities strictly based on size:

the entity must specifically authorize such person to represent it in the particular matter; such representation must not be the person’s primary duty to the entity, but secondary or incidental to other duties relating to the management or operation of the entity; and the person must

not receive separate or additional compensation (other than reimbursement for costs) for such representation.

Secondly, the ARAC expresses its concern that—based on its information and belief—Arizona would be a first or early adopter of a modestly expanded provision like proposed Rule 31(d)(9). Petitioner submits that the State should not shrink from innovation on this front, as Arizona often tends to—with great success—adopt modest rule changes that both streamline the litigation process and improve access to justice. *See, e.g.*, Order on R-17-0007, filed on August 31, 2017 (adopting new Arizona Rule of Civil Procedure 5.4, thought to be among the first of its kind in the nation, to streamline and standardize the procedures for sealing and unsealing court documents); Order on R-17-0010, filed on August 31, 2017, at 96–98 (adopting new Arizona Rule of Civil Procedure 45.2, known to be unique in the nation, to improve access to justice for those, including nonparties, served with burdensome pre-litigation preservation demands).

Thirdly, the ARAC objects that the “Petition does not clearly prevent a disbarred or suspended lawyer, whether from Arizona or another jurisdiction, from appearing on behalf of an entity.” ARAC Comment, at 2. Yet, the Petition did not change the way this Court’s

current Rule 31 handles such situations. Current Rule 31(c), Ariz. R. Supreme Ct., puts a blanket restriction on disbarred, suspended, disability inactive status, and former members of the State Bar of Arizona practicing law or representing in any way that they may do so. Current Rule 31(d), Ariz. R. Supreme Ct.—in a portion left unchanged by the Petition—then lists all of its exemptions as “subject to the limitations of section (c) unless otherwise stated.”

The State Bar of Arizona presents a considered comment that supports efforts to streamline and update Rule 31, but portends that proposed Rule 31(d)(9) would ‘result in representation of business entities by unqualified persons, injuring these entities and the judicial process.’ State Bar Comment, filed May 21, 2018, at 3. In lieu of this Court adopting any of the proposed changes, the State Bar suggests that the Court instead convene an ad hoc task force to review and potentially proposed a revised Rule 31. The difficulty with the State Bar’s dual prediction and proposal is that if the Petition is not adopted, any ad hoc task force will lack data as to how such a change would impact business entity representation—for good or for ill.

While the aim of the State Bar to protect the public is laudable, the public—in the form of small businesses—should not be ‘protected from’ access to justice in instances in which it may need it most. An ad hoc task force convened by this Court would have a much more thorough analysis to conduct if such a body is convened *after* the Petition’s proposed changes are adopted, even on an experimental basis if needed. The State Bar duly cites thoughtful authorities and examples in support of its prediction, but none of them directly address the situations that would arise under a newly and modestly expanded Rule 31(d)(9), as proposed by the Petition. Indeed, they could not, as it has not been adopted yet. The State Bar, like the ARAC, also glosses over the continued application of the important Rule 31(c), Ariz. R. Supreme Ct., restrictions to Rule 31(d)(9) if adopted. Petitioner respectfully submits that the better course is to adopt the Petition’s proposals in full and convene a study group to collect and address data on how Rule 31(d)(9) functions after adoption.

The Court Should Adopt the Petition’s Proposals in Full

All commenters acknowledged in some way that Rule 31(d)’s current myriad exceptions, yet countless strictures, place courts and parties in a bind, stifling access to justice and corporate autonomy. Small

business litigants, in particular, would benefit from the updated rule as proposed, and, respectfully, those commenters who urged caution provided no solid reason for further delay in acting to amend the rule. Given that, Petitioner continues to urge adoption of the streamlined Rule 31(d) proposed for this Court's consideration in Appendix A to the Petition.

RESPECTFULLY SUBMITTED this 27th day of June, 2018.

HON. DAVID B. GASS

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