

TO: The Supreme Court of Arizona

FROM: Gary L. Stuart

DATE: March 9, 2020

RE: In the Matter of Supreme Court No. R-20- 0034. PETITION TO AMEND Rules 31, 32, 41, 42 (ERs 1.0-5.7), 46-51, 54-58, 60, 75 and 76, ARIZ. R. SUP. CT., and ADOPT NEW RULE 33.1, ARIZ. R. SUP. CT. As moved by Dave Byers, Administrative Director, Administrative Office of Courts, Member, Task Force on the Delivery of Legal Services.

### Comment In Support of Petition Before the Court

I write on my own behalf and on behalf of the Board of Trustees of the Arizona Lawyers Foundation.<sup>1</sup> We support the Petition referenced above. We believe the premise and promise of the Petition is entirely consistent with our mission: “The Arizona Lawyers Foundation advances and preserves our independent judiciary and the Rule of Law in Arizona by building a financial and support bridge between our foundation and other nonprofit organizations dedicated to the same cause. The Foundation shall have members who want to make a difference in Arizona’s understanding and acceptance of the Rule of Law. We will provide pro bono legal support, professional services, and financial support to other non-profit organizations through member support and public donations to our foundation.”<sup>2</sup>

The Petition before the Court challenges the status quo of the Arizona legal profession by closing the civil justice gap. To meet this challenge lawyers should ask six important questions. (1) Are we representatives of fee-paying clients *and* officers of the court? (2) Are we public citizens with *special* responsibility for the quality of justice? (3) If so, do we seek improvement of the law *and* access to the legal system? (4) Are we *mindful* of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor cannot afford adequate legal assistance? (5) Do we *devote* professional time and resources and *use* our civic influence to ensure equal access to our system of justice? (6) Are we *aware* of the economic and social barriers that explain why so many people cannot afford or secure adequate legal counsel? These are not rhetorical questions—they are imperatives stated in the Preamble to Arizona Supreme Court Rule 42 (1)–(6).

The Petition invokes and invites fundamental change. If we are to remain true to our oaths of office, we must focus on the future, not the past. It is a new invitation and a fresh opportunity to serve justice as lawyers by being mindful of our special public citizen role. Fundamental change can come only by true innovation—something well beyond rearranging corner offices or protecting small firm profitability. Lawyers are the gatekeepers to the justice system. Our skills are essential to the litigation society. Our profession is advancing at the speed of light rail into 21<sup>st</sup> century business and culture. Protectionism erodes access to justice and resistance to change weakens the Rule of Law. We should no longer demand that our courts and our bar associations insulate us. Our profession does not broadly

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<sup>1</sup> <https://azlf.org/>

<sup>2</sup> <https://azlf.org/about/mission-vision/>

serve justice primarily because we have, for more than a century, practiced law in concrete silos inside virtual moats to bar competitors.

We enjoy our protected status to the disadvantage of those who need our services but cannot afford the price of admission to our waiting rooms. Even if they could afford our triage fees, they cannot hope to pay for our advocacy, except by shared success in contingent fee cases. The plain fact of American legal services is that most indigent people don't have contingent fee cases; they are poor, not injured.

To abide our oaths of office we must engage with other like-minded professionals if we are to access the justice denied to so many in Arizona. What many Arizona lawyers need to profitably practice law *and* serve justice over the next decade is fundamental evolution. If we are to serve justice, and remain a profitable and reputable profession we must evolve. For starters we need tech access and support; benchmarking services; data analytics to improve processes and outcomes; preventive law; and the ability to serve modest means clients. We need new structures to serve fee-paying clients at the same time we serve access to civil and criminal justice. We should look more like multidisciplinary companies and consulting firms. We should welcome the opportunity to seek capital from non-lawyers by shared ownership and shared fees inside 21<sup>st</sup> century legal structures.

We should engage in disaggregation. We should react in counterintuitive ways. We should collaborate with other lawyers and law firms, not just mimic or compete with them. We should develop solutions that go much deeper than just litigating or transacting for paying clients who can afford our retainers and hourly rates. There is no such thing as a small retainer or a modest hourly rate. We should help indigents and people of modest means solve problems that non-lawyers can solve. We can do it by creating ABSs and using LLLPs. We should share ownership and fees with non-lawyers precisely because it will result in better access to justice. A \$500-dollar dispute in a JP court should not require representation by a traditionally licensed lawyer; it should be handled by a LLLP. A divorce case could easily be handled through an ABS at rates much lower than any traditional lawyer would charge. Eviction cases, traffic court cases, and fence-line disputes can and should be resolved by well-trained paralegals, with LLLP certification and licensure under the management of a traditional lawyer, or even a traditional law firm. All of this provides access to justice differently from, and likely better than, the existing model of pay my fee or do it yourself. We can evolve. Darwin was right.

To do this we need a different, more vibrant and more flexible business model. We will move forward by evaluating different business models based not just on hourly or contingent billing. Pro bono publico has to be a part of the core business model for small and medium law firms of the future, if we are to continue our gatekeeper function. We should employ not just lawyers, paralegals, and back-office personnel; we should engage new models for delivery of legal services to advance justice, not just to advance our retirement plans. We should jettison ER 5.4 and strengthen ER 6.1.

The Petition before the Court is predicated on deregulation of the law firm ownership rules in the United States. Big Law has long supported deregulation because it offers new ways to secure capital and is consistent with their global practice environment. But solo practitioners and small law firms can also stand up and advance better legal practice that rewards public service opportunities. The premise

underlying the need to delete ER 5.4 is that law firms will become law companies. Law companies will invent, advance, and deliver legal services through ABSs, LLLPs, shared revenues, costs, and markets. Instead of moving from law school to law practice, future law graduates will invest in research and development while still in law school. Bar associations will help traditional lawyers create new delivery systems that are solutions providers, not just legal practitioners. And all of it will serve a much greater cause—access to justice—not just access to corner offices in tall buildings. Most importantly, we can do all this and still maintain our professional independence by appropriate and consistent rule changes.

We should upgrade ER 6.1 as we dismantle ER 5.4. Thanks to the late Chief Justice Frank Gordon, we have the regulatory tools already in place—he was a focused advocate for voluntary pro bono publico. We have always had a duty to seek ways to provide meaningful, innovative and accessible solutions to justice. The reciprocal is equally demanding—we have far too many people barred from justice because they cannot afford lawyers. We have far too many lawyers who have little time or interest in pro bono publico. We can do better if we create tools and solutions to both problems. In Arizona, we need to do more to provide people, not necessarily full-throated and duly licensed lawyers, to engage in this fight. We need people with knowledge of and access to the legal system that are not burdened by the almighty billable hour. The Arizona Foundation for Legal Services and Education is in place partly to support ER 6.1.

The Arizona Lawyers Foundation, in its infancy, is dedicated to a similar mission. Comment [2] to ER 6.1 makes the connection between the Petition before the Court and today's reality: "The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means as well as for the relatively well-to-do."

This Petition will make ER 6.1 more imperative by changing the financial and management construct underlying the legal needs of "persons of modest and limited means *as well as* the relatively well-to-do."

There is no reason non-lawyers cannot effectively serve the underprivileged and those who need, but cannot afford, today's lawyers. Modifying the ownership structure in law firms will result in better access to justice. There are no credible arguments to the contrary. As an added bonus, the Petition will diffuse the ongoing array of unqualified, unregulated providers already starting to engage the legal services market.

Understandably, the Petition raises more questions than answers because we must, going forward, carefully examine the consequences and anticipate the unintended consequences of monumental change. There has been monumental change over the 150 years in how law firms are created and financed. We've gone from mostly solo practice, to general partnerships, and on to LLCs, PLLCs and global conglomerates with foreign firms who already share ownership and sell shares to willing investors. And of course, we live under the shadow of Big Law. Except for the District of Columbia, we do it by barring nonlawyer ownership. We create our business structures to ensure ownership vests only in lawyers and fees from clients are not shared with non-lawyers. But it should not stay stilted and protectionist.

Of course more study and a broader assessment will flesh out important details and concerns. Narrowing the gap in access will explain *how* we will move forward to sharing fees with non-lawyers and passive non-lawyer shared ownership of law firms. When that time comes, it will be important to remember exactly what is NOT permitted under ER 5.4 today. It prohibits an “an integrated practice in which the lawyer shares fees with a nonlawyer or enters into a partnership or an analogous relationship with a nonlawyer to deliver legal services to clients.” As the Petition urges, we should devise an integrated practice that does the opposite—shared fees and ownership with non-lawyers.

Earlier efforts to change today’s reality were couched in term of multidisciplinary law practice. Some of us became aware in the 1990s that consulting firms were soliciting clients and offering services vaguely resembling what traditional law firms in Arizona were offering. Modest revisions to ER 5.4 were made in 2002. For example Model Rule 5.4(a)(4) provided “[A] lawyer may share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter.” Arizona followed suit, as is our custom with ABA Model Rules. We also changed subsection (d)(1) and (2). “[A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . a non-lawyer owns any interest therein except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; [or] a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation.”

In 1997, the ABA established the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) to study and evaluate the Model Rules of Professional Conduct. Philip S. Anderson, president of the ABA, appointed the Commission on Multidisciplinary Practice (MDP Commission) “to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.” That was a good start. The Petition advances that start.

We are mindful that the Petition is predicated on the significant work done by Justice Timmer’s Task Force. Their conclusion bears repetition here:

The task force undertook the Supreme Court’s assigned tasks with great enthusiasm and worked as diligently as possible within the limited time allotted to make significant recommendations to “move the ball forward” in closing the civil justice gap. Some in the bar and in the public may have grave concerns about some recommendations. Skepticism is healthy and welcomed in debating the merits of our recommendations. When all is said and done, we are hopeful that our system of justice in Arizona is remolded to accommodate the needs of all Arizonans needing legal

assistance without sacrificing the high ethical and performance standards necessary to protect the public.<sup>3</sup>

We applaud the work done by the Task Force and its monumental effort to “move the ball forward.” We believe that the Task Force’s hope will become the Arizona legal profession’s reality—“a remolded justice system to accommodate the needs of all Arizonans needing legal assistance without sacrificing the high ethical and performance standards to protect the public.”<sup>4</sup>

Respectfully yours,



ARIZONA LAWYERS  
FOUNDATION

GARY L. STUART, PRESIDENT & CEO

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[https://iaals.du.edu/sites/default/files/documents/publications/az\\_lstf\\_final\\_report\\_and\\_recommendations\\_100419.pdf](https://iaals.du.edu/sites/default/files/documents/publications/az_lstf_final_report_and_recommendations_100419.pdf)

<sup>4</sup> Ibid at 56.