

1 **PIMA COUNTY BAR ASSOCIATION**  
2 177 North Church Avenue  
3 Tucson, Arizona 85701  
4 520-623-8258  
5 James W. Rappaport, SBN 031699  
6 *Rules Committee Chair*

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9  
10 In the matter of:

Supreme Court No. R-20-0034

11 **PETITION TO RESTYLE AND AMEND**  
12 **SUPREME COURT RULE 31; ADOPT**  
13 **NEW RULE 33.1; AND AMEND RULES**  
14 **32, 41, 42 (VARIOUS ERS FROM 1.0 TO**  
15 **5.7), 46-51, 54-58, 60, AND 75-76**

**PROPOSED COMMENT OF THE**  
**PIMA COUNTY BAR ASSOCIATION**

16 Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association respectfully  
17 submits the following comment on Petition R-20-0034 filed by the Administrative Office  
18 of the Courts (“Petitioner”). There can be little doubt of the widening chasm between the  
19 general public and the legal profession, and the Petitioner is right to call attention to it.  
20 However, the solutions it proposes are replete with unintended consequences that will work  
21 genuine harm to the legal profession and the public alike. The Petition should be rejected.

22 ///

23 ///

24 ///

25 ///

26 ///

1       **I.       Introduction**

2           It is well beyond dispute that not enough people have access to quality legal help.  
3 This is not a new problem nor is it restricted to any single practice area. One need only  
4 observe morning calendar in any municipal court or an order of protection hearing to see  
5 how dire the need is. The Petitioner’s diagnosis is spot on, but its prescription leaves much  
6 to be desired. In sum, the Petitioner contends that more people will have access to quality  
7 representation if we allow non-lawyers to own and operate law firms and empower non-  
8 lawyers to practice and represent clients in court. Not only do both propositions pose  
9 troubling ethical implications, but also—and perhaps more fundamentally—there is no  
10 reason to think that either of them would remedy the underlying problem.

11       **II.       Allowing non-lawyers to profit from law practices has nothing to do with**  
12       **increasing public access to the courts. Rather, it is plainly a means for**  
13       **passive investors to transform law firms into investment vehicles.**

14           The Petitioner’s first argument is less than persuasive. It characterizes E.R. 5.4 as  
15 little more than “economic protectionism” whose “transparent motivation” is to protect  
16 lawyers’ own incomes. *Petition* at 9. Just as Judge Swann said in his comment in  
17 opposition, our resistance is hardly “a kneejerk defense of a guild.” *Comment in opposition*  
18 at 64. The Petitioner is quick to level the charge that lawyers are simply engaging in  
19 unproductive rent-seeking, yet it mounts no serious attempt to explain how eliminating  
20 E.R. 5.4 would help serve the public. Rather, the Petitioner simply asserts that

21           The Task Force concluded that eliminating the rule would encourage innovation in  
22 the delivery of legal services. Innovation, in turn, may help bridge the access-to-  
23 justice gap as lawyers, technology companies and others would be less constrained  
by an artificial restriction.

24 *Petition* at 3. This is certainly an impressive array of C-suite shibboleths, but it is not an  
25 argument in any meaningful sense of the word. For example, how would allowing a venture  
26 capital firm in San Francisco to buy up every solo practice in Safford “encourage

1 innovation”? What would that “innovation” look like—and most importantly, who would  
2 stand to benefit from it? Basic questions like these are left unanswered in the Petition,  
3 which compels the conclusion that the “transparent motivation” behind the rule change—  
4 to use the Petitioner’s words—is to enrich passive investors, not improve the practice of  
5 law or help clients.

6 Judge Swann noted what is perhaps the most insidious of the many unintended  
7 consequences of eliminating E.R. 5.4: inevitable conflicts of interest between the lawyer’s  
8 duties to the client as well as to his investor-partners. As was drilled into the memory of  
9 every corporations student, a corporation isn’t an eleemosynary institution—it is a  
10 business; returns for shareholders are prime above all else, or at the very least *primi inter*  
11  *pares*. *Dodge v. Ford Motor Company*, 170 N.W. 668, 684 (Mich. 1919). A lawyer, on the  
12 other hand, has a fiduciary duty to her client that is, definitionally, supreme over her  
13 financial needs. Judges routinely insist that lawyers continue their representation even  
14 when a client can no longer pay. What is even more striking is how many attorneys would  
15 sooner eat the cost of litigation than turn a client out on their own. It is difficult to conceive  
16 of how that arrangement could exist when the attorney has interlocking fiduciary duties—  
17 one to his investor-partners to maximize profit and the other to his client to put their needs  
18 before his own.

19 The Petitioner does not acknowledge this conflict much less attempt to resolve it.  
20 Instead, it inverts the burden of proof and argues that E.R. 5.4 should be abolished “because  
21 no modern compelling reason for maintaining the rule exists.” *Petition* at 9. Respectfully,  
22 the Petitioner has this backward: it isn’t on practitioners to justify the existence of E.R. 5.4  
23 or any other ethical rule, it is on the Petitioner to justify why it should be eliminated in the  
24 first place. The Petitioner proffers no such justification but instead casually asserts that that  
25 eliminating E.R. 5.4 would foster “innovation” and “may help” increase access to justice  
26 because lawyers and others would be “less constrained by an artificial restriction.” *Petition*

1 at 3. These claims are made without even a cursory explanation or justification. *Quod gratis*  
2 *asseritur, gratis negatur*: what can be asserted without evidence can also be dismissed  
3 without evidence.

4 **III. “BAD LEGAL ADVICE IS NEVER A BARGAIN”: EMPOWERING**  
5 **NON-LAWYERS TO PRACTICE LAW WOULD HAVE SERIOUS**  
6 **NEGATIVE CONSEQUENCES FOR THE LEGAL PROFESSION.**

7 The Petitioner next contends that more people could have access to justice and the  
8 courts if we increase the supply of lawyers—or, as the Petitioner proposes, create a new  
9 class of practitioners who are empowered to practice law but who don’t have to go to law  
10 school or pass the bar exam. Admittedly, this has some surface-level appeal. After all, most  
11 would accept as an axiom that increasing the supply of a good—in this case, lawyers—  
12 decreases the cost of that good. To again borrow a turn of phrase from Judge Swann, we  
13 should not be seduced by this argument.

14 The “goods” in question are not alike. Lawyers are not widgets, and legal  
15 craftsmanship isn’t fungible. The Petitioner refers approvingly to nurse practitioners  
16 facilitating the “delivery of medical services” as ballast for its argument to create a new  
17 sub-class of legal professionals. *Petition* at 4. True enough, nurse practitioners and  
18 physician’s assistants, for example, do valuable work in our healthcare system. But they  
19 are not analogous to the proposed limited license legal practitioner (“LLLP”). For starters,  
20 the Petitioner provides no specifics about what LLLP education, training, and licensure  
21 would look like. This alone is a reason to reject the proposal. Likewise, non-physician  
22 medical professionals have serious limitations on what they can do, as anyone who has  
23 been to an urgent care can attest to. While they can diagnose and treat a limited universe  
24 of common ailments, it isn’t long before physician intervention is required: as soon as a  
25 patient presents with something outside the urgent care’s clinical algorithm, she is funneled  
26 to the nearest emergency department. There is no reason to suppose that LLLPs would

1 function differently. Indeed, exactly the opposite is true: there is every reason to think that,  
2 in a profession as detail-obsessed and formalistic as the law, LLLPs could and would make  
3 mistakes to the serious detriment of clients—mistakes that would then need to be undone  
4 by experienced lawyers at greater expense than had they consulted a lawyer to begin with.

5 Furthermore, the Petition grossly understates the complexity of legal practice and  
6 seems to labor under the misapprehension that family law, for example, is an appropriate  
7 practice area for a non-lawyer to dabble in. It is difficult to imagine a practice area less  
8 suited to non-lawyers. First, family court isn't federal practice—it is highly idiosyncratic,  
9 and the practice can differ radically between counties and even judges. Second, and most  
10 critically, family law often impacts clients in the deepest and most intimate aspects of their  
11 lives—whether a mother gets to see her children again, or on what terms a marriage of 30  
12 years is supposed to end, for example. It is difficult to overstate the stakes of these cases  
13 for those involved or the emotional demands it puts on practitioners. Family law is serious  
14 business, and it ought not to be treated cavalierly alongside administrative hearings and  
15 small claims proceedings. It is a worthy goal to want to give help to those most in need,  
16 but unless that help is buttressed by the training and experience of a licensed attorney, it  
17 will likely do more harm than good.

#### 18 **IV. CONCLUSION**

19 There is a well-respected trial lawyer here in Tucson whom I used to go to for  
20 advice. Framed in his office was a print from Honoré Daumier's *Les Gens de Justice*, a  
21 series of nineteenth-century French caricatures lampooning every part of the legal  
22 profession, each more acid than the last. It only recently occurred to me why so many  
23 lawyers delight in legal satire, regardless of the time and place. We love these characters  
24 and their antics precisely because they aren't us. We are not Lionel Hutz or Saul Goodman,  
25 neither are we Daumier's shameless Démosthène. They are fictions, and they remind us—  
26 however ham-handedly—that as stultifying or Byzantine as our work can sometimes be, it

1 is special; it is different. And there is honor yet left in it. We are in the business of helping  
2 people solve problems of every kind, and we hold sacrosanct our duty to clients wholly  
3 irrespective of money. Spend five minutes with any public defender and you will see just  
4 how preciously that duty is safeguarded when no money is involved at all.

5 That too few people have the resources to enlist our help is its own injustice, to be  
6 sure, but it is absolutely not a reason to let passive investors profit from it. The unintended  
7 result would be as other commenters have forewarned—a legal profession that is as venal  
8 in practice as it is in the public’s imagination; a legal practice unmoored from its ethical  
9 foundations and instead tethered to an ever-ballooning bottom line. It is even less of a  
10 reason to lower the bar altogether and risk hurting vulnerable litigants even more by  
11 unleashing well-meaning but ill-equipped LLLPs to handle their cases. The Pima County  
12 Bar Association adds its voice to the almost unison chorus of practitioners who have  
13 commented thus far: this Petition should be emphatically rejected.

14  
15 RESPECTFULLY SUBMITTED this 27th day of March 2020.

16 **PIMA COUNTY BAR ASSOCIATION**

17  
18  
19 By s/James W. Rappaport  
20 James W. Rappaport  
21 *Rules Committee Chair*

22  
23 By s/Anne Elsberry  
24 Anne Elsberry  
25 *President*