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ARIZONA SUPREME COURT

In the matter of:	)	
	)	
RESTYLE AND AMEND RULE 31;	)	Supreme Court No. R-20-0034
ADOPT NEW RULE 33.1; AMEND	)	
RULES 32, 41, 42 (VARIOUS ERs FROM	)	COMMENT
1.0 TO 5.7), 46-51, 54-58 AND 75-76	)	
_____	)	

We write on behalf of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, in support of the Petition to Amend Rules 31, 32, 41, (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. (the “Petition”). We urge the Arizona Supreme Court to eliminate Ethical Rule 5.4 and adopt the framework proposed in the Petition for regulating alternative business structures (ABSs). Doing so will facilitate the development of new, innovative business and service offerings, permit outside investment and/or multi-professional business models, and expand Arizona attorneys’ ability to offer legal services to their clients. Such a change could benefit the bottom line for Arizona attorneys and their firms, in

addition to potentially expanding the reach of legal services to accommodate many unmet needs.

A Consequential Rule Unsupported by Evidence

Arizona Ethical Rule 5.4, identical to ABA Model Rule of Professional Conduct 5.4, ostensibly exists to preserve lawyers' independent judgment, but it does very little to offer such protection. Many other rules already protect a lawyer's independence in exercising professional judgment on a client's behalf and free from control of others—a bedrock of any attorney's ethical obligations.¹ Instead, Rule 5.4 principally exists only to constrain business practices.² Most of Rule 5.4's provisions are not directed toward ethical behavior at all, but instead are economic rules that dictate how lawyers are allowed to structure their business with other lawyers and allied professionals.

The rule prohibits lawyers from sharing legal fees with other others, prohibits others from having any financial interest in law firms, and prohibits lawyers from forming partnerships with anyone other than a lawyer if any of the

¹ *See, e.g.*, Petition at 9 (citing such rules as ER 1.7 (prohibiting a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to a third person) and 1.8(f) (directing that third-party payers cannot interfere with a lawyer's independent professional judgment)).

² *See Id.* (ABA Model Rule 5.4 and its predecessor rules were “not rooted in protecting the public but in economic protectionism.”).

partnership's activities consist of the practice of law. These business practices are linked to independent professional judgment by the thinnest of unsupported assumptions. In fact, IAALS has not identified any evidence that these business practices inherently compromise the independent judgment of lawyers, and certainly not in any way that requires their categorical prohibition. And when the rule was originally drafted, there was no evidence that the corporations then supplying lawyers to clients were harming the public. Today, lawyers currently work within corporations, insurance companies, and accounting firms and have been doing so for years. There is no evidence that this arrangement destroys these attorneys' independent judgment. Absent the need for Rule 5.4 to protect the independent judgment of a lawyer—protection amply afforded elsewhere in the rules—the lack of any real evidence behind Rule 5.4 is alarming, given that the rule's economic restrictions have had severe consequences for lawyers and for people in need of legal services.

Rule 5.4's Detrimental Effects on Attorneys

For example, the Rule has condemned law firms to systemic inefficiency. Lawyers are not allowed to bring in business partners with expertise in business, marketing, or technology. Instead, many lawyers spend much (if not most) of their day-to-day time on administrative tasks and work related to marketing and earning

new clients.³ One report suggests that some solo and small firm practitioners earn just 1.6 hours in billable work per day, after factoring in the number of billable hours that never make it to an invoice and the amounts forfeited by unpaid bills.⁴ This restriction puts lawyers in the unenviable position of having to run a business with structural impediments to making services more efficient—a detriment unique to the legal profession.

To make matters worse, lawyers’ ability to innovate or scale the services they provide is hampered by Rule 5.4’s prohibition on taking capital investments from sources outside lawyer partnerships. And because Rule 5.4 restricts lawyers to organizing legal services in sole proprietorships, legal partnerships, or LLCs, money paid for services is received as fees and profits are distributed to partners/owners at the end of the fiscal year, offering little in the way of incentive to forego distributions and invest in technology or other long-term solutions to better serve clients. In fact, while nearly every other industry is taking advantage of new technology, multi-disciplinary collaboration, and the ability to leverage to scale services, lawyers remain woefully behind.

Handicapped by structural inefficiency and unable to leverage modern tools for growth, lawyers are at a severe disadvantage to competitors in an economy

³ LEGAL TRENDS REPORT 14, CLIO (2018), <https://www.clio.com/wp-content/uploads/2018/10/Legal-Trends-Report-2018.pdf>.

⁴ *Id.* at 10-11.

characterized by technologically adept consumers expecting solutions to be readily available and accessible. According to the 2019 Altman Weil Law Firms in Transition study, 63 percent of attorneys indicated their firms were losing business to corporate law departments and 14 percent reported losing business to alternative legal providers.⁵ And unregulated companies such as LegalZoom or Rocket Lawyer have the ability to scale in a way lawyers do not.

Rule 5.4's Detrimental Effects on Consumers

The movement toward regulatory reform of the legal profession, a movement now reaching across multiple states, is driven not only by the need for a more sustainable model of practice for lawyers, but also the recognition that the American legal system faces a crisis in terms of public dissatisfaction and disengagement. The inefficiency of Rule 5.4's economic regulations has significantly contributed to an environment where lawyers must charge fees that most people in the United States simply cannot afford.

The United States ranks 99th out of 126 countries for accessibility to legal services,⁶ and the problem reaches far up the income scale. It is not only the

⁵ LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 4, ALTMAN WEIL, INC. (2019), http://www.altmanweil.com//dir_docs/resource/28BC6AB5-10E9-418D-AED2-B63D1145F989_document.pdf.

⁶ RULE OF LAW INDEX 2019, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>.

poorest who lack access to legal services, it is also the middle class and small businesses. According to the ABA, in some jurisdictions over 80 percent of the civil legal needs of lower- to middle-income individuals are unmet.⁷ People want legal help, and they are not getting the help they need.⁸ When this reality collides with our ideal of “equality under the law” the sustainability of the legal system is threatened.

Whether by choice or by circumstance, the American public is increasingly turning away from the legal system. Americans seek lawyers for help or consider doing so for only 16 percent of the civil justice situations they encounter, and 76 percent of cases in state courts involve at least one self-represented party.⁹ In his

⁷ Victor Li and James Podgers, *Can the access-to-justice gap be closed? These recommendations might make it possible*, ABA JOURNAL (Aug. 6, 2016), http://www.abajournal.com/news/article/aba_commission_future_legal_services_report_access_to_justice.

⁸ In 2016, IAALS conducted its Cases Without Counsel study, focused on the experience of self-representation in family court, the court in which the largest portion of Americans will be involved over the course of their lives. More than 85 percent of the people we talked to in that study wanted legal advice or representation, but they could not get the help they needed because the cost was too high and they were unclear on where to find the right resources. NATALIE ANN KNOWLTON, LOGAN CORNETT, CORINA D. GERETY, & JANET DROBINSKE, CASES WITHOUT COUNSEL, RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 12 (May 2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.

⁹ See Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. B. FOUND. 14 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf, and Civil Justice Initiative,

study on the legal services landscape, Professor William Henderson noted that “As society becomes wealthier through better and cheaper good and services, human-intensive fields such as law, medical care, and higher education become relatively more expensive,” but “[i]n contrast to medical care and higher education, however, a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price.”¹⁰

What do these statistics actually mean? They mean that many people face major challenges to their financial security, living security, and their physical and mental health without any assistance, and, consequently, they often suffer significant adverse impacts on their lives. Evidence shows us that those forced to deal with issues such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases without legal help face disproportionately adverse outcomes.¹¹

The Landscape of Civil Litigation in State Courts, NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE iv (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>, respectively.

¹⁰ William D. Henderson, *Legal Market Landscape Report*, STATE BAR OF CALIFORNIA i (July 2018), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf>.

¹¹ As just one example, renters in Colorado who lacked legal representation were evicted 68 percent of the time from private housing and 43 percent of the time from public housing, while those who were represented by counsel kept their private housing 94 percent of the time and public housing 80 percent of the time. Aubrey Hasvold & Jack Regenbogen, *Facing Eviction Alone: A Study of Evictions, Denver, CO, 2014–2016*, COLORADO COALITION FOR THE HOMELESS 2, 8

Lawyers, through pro bono and legal aid services, have worked to close part of the justice gap. But the need is just too great. An attorney's average hourly rate is approximately \$250, much more than most people can afford or want to pay, whichever the case may be. Providing just one hour of attorney assistance to every household facing a legal problem would require over 200 hours of pro bono work per year by every lawyer in the country.¹² The cost of providing legal help under our current rules is too expensive for lawyers to provide legal assistance at the scale needed to solve the problem. This is because our current rules require lawyers, and lawyers alone, to bear all the risk and all the responsibility of law practice.

Emphasizing the point, ABA President Judy Perry Martinez recently stated, "We need new ideas. We are one-fifth into the 21st century, yet we continue to rely on 20th-century processes, procedures and regulations."¹³ Under today's regulatory system, in most jurisdictions, anyone other than a lawyer providing legal services would be seen as engaging in the unauthorized practice of law and can be subject

(September 11, 2017), http://cclponline.org/wp-content/uploads/2017/10/Facing-Eviction-Alone-9-11-17_revised.pdf.

¹² See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access to Justice, Innovation, and the Quality of Legal Services*, 67 HASTINGS L.J. 1191, 1193 (June 2016).

¹³ Judy Perry Martinez, *We Must Not Squander the Future of Legal Services*, A.B.A. J. (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/we-must-not-squander-the-future-of-legal-services>.

to sanctions—even if those services were actually helping, not harming, consumers. Most jurisdictions prevent lawyers from sharing fees or ownership interest with any other professional. Eliminating Rule 5.4 and allowing outside investment and/or multi-professional business models would foster innovation in a sector deeply in need of innovative thinking and benefit a customer base that is deeply in need of legal services. Thus, access to legal services for consumers and sustainable practices for lawyers appear to be two sides of the same coin. As Professor Henderson writes, “We have entered a period where we are either going to redesign our legal institutions or they will fail.”¹⁴

Evidence Supporting the Elimination of Rule 5.4

There is already strong public support for the rule changes proposed by the Petition. Over 60% of Arizonans surveyed agreed that the current requirement that restricts the ownership of any business that engages in the practice of law exclusively to lawyers should be eliminated.¹⁵ In addition to public support, there is also ample evidence to suggest that these changes could lead to more innovation

¹⁴ William Henderson, *The Decline of the PeopleLaw Sector*, LEGALEVOLUTION.ORG (Nov. 19, 2017), <https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/>.

¹⁵ STATE OF ARIZONA PUBLIC OPINION SURVEY, ARIZONA SUPREME COURT TASK FORCE ON THE DELIVERY OF LEGAL SERVICES 22 (Jan. 20-24, 2020), <https://www.azcourts.gov/Portals/215/Documents/Opinion%20Poll%20Results.pdf?ver=2020-03-06-113334-443>.

in the delivery of legal services, more available services for those who need them, and better quality services in general.

Unlike Rule 5.4, the changes proposed in the Petition are not based solely on assumption. Research from England and Wales on ABSs operating under the Solicitors Regulation Authority (SRA) suggests that overall innovation among legal services providers, including innovation that reduces the cost of delivery legal services, is higher than among traditional providers. ABSs are three times as likely to make use of technology compared to other providers. Specifically, ABSs are twice as likely as other providers to use any of the following ten emerging technologies: interactive websites, live chat or virtual assistants, cloud or similar data storage mechanisms, ID-checking tools, custom-built smart device apps, technology assisted review (TAR), automated document assembly (ADA), robotic process automation (RPA), predictive technology, and smart contracts/distributed ledger technology (DLT).¹⁶

The beneficial impacts of technology on the quality of services is widely recognized, and technology has also been shown to reduce the costs of legal services delivery. Along with ABS entities, larger organizations and newer

¹⁶ TECHNOLOGY AND INNOVATION IN LEGAL SERVICES – MAIN REPORT: AN ANALYSIS OF A SURVEY OF LEGAL SERVICE PROVIDERS, LEGAL SERVICES BOARD 1, 11 (November 2018), <https://www.legalservicesboard.org.uk/wp-content/media/Innovation-survey-2018-report-FINAL-2.pdf>.

providers operating under the SRA were also more likely to innovate in a way that would result in more efficiency (reduced costs/increased profitability).¹⁷

A 2016 review of the Law Society of England and Wales similarly illustrated that ABS firms were active in numerous, diverse areas, including residential conveyancing, personal injury, ADR/other litigation, corporate/commercial, and others.¹⁸ Thus, the evidence shows that by allowing attorneys to partner with other professionals, those attorneys are far more likely to create efficiencies that lead to better client service and a more sustainable practice overall—a change that would be welcome for many attorneys, particularly among the solo and small firm practitioners who make up the bulk of the legal profession.

Increased innovation in England is also leading to more available services for people who need them. Indeed, U.S. Supreme Court Justice Neil Gorsuch addressed this issue recently in his book “A Republic, If You Can Keep It.” Citing data from an experiment analyzing ABSs six years after permitting multidisciplinary firms and non-lawyer investment in England and Wales, Justice Gorsuch writes:

[W]hile these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market

¹⁷ *Id.* at 43.

¹⁸ THE FUTURE OF LEGAL SERVICES, THE LAW SOCIETY OF ENGLAND AND WALES (January 2016), <https://www.lawsociety.org.uk/news/documents/future-of-legal-services-pdf/>.

– suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably too, almost one-third of the ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms – more than 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it’s no surprise that some U.S. Jurisdictions have appointed committees to study reforms just along these lines.¹⁹

Moreover, the Petition’s proposed amendments ensure that a new ABS

model in Arizona will not come at the cost of ethical duties or quality of service.²⁰

And in other countries where ABS entities have existed for years, there is no evidence that they cause any more consumer harm than traditional firms. In fact, in New South Wales, Australia, which has allowed nonlawyer ownership under a management-based regulatory approach since 2001, there has been no increase in complaints against lawyers.²¹ Importantly, in Australian business structures where lawyers and other professionals share fees or ownership, all other professionals

¹⁹NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 259 (Random House 2019).

²⁰ The Petition proposes amendments to ER 5.3(a) that would require that the conduct of all nonlawyers in an ABS, including any nonlawyers who have economic interests in the firm, is consistent with a lawyer’s professional obligations. Petition at 14.

²¹ Memorandum to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients and Client Entities from The ABA Commission of the Future of Legal Services re: For Comment: Issues Paper Regarding Alternative Business Structures, April 8, 2016, https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf.

working with lawyers are held to the same ethical standards as the lawyer. And in England, where the ABS model has existed since 2007, “[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints.”²² To the contrary, the quality of legal services in England has improved, as measured by the 12 percent increase in the number of “first tier” complaints being resolved, and new business models, including ABSs, have better and more responsive consumer complaint processes.²³

IAALS Supports Adoption of the Petition’s Proposals

The profession is facing declining business at a time when there is enormous demand for affordable legal services. This contradiction exists because lawyers are locked into a 19th century model for delivering legal services. Now, more than ever, with disruptions and restrictions in place due to the COVID-19 pandemic, is time for change.

The crisis we face demands action. Our *Unlocking Legal Regulation* project is about taking a bold step towards laying the foundation for a consumer-centered regulatory system that will ensure access to a well-developed, high-quality,

²² LEGAL SERVICES CONSUMER PANEL, 2014 CONSUMER IMPACT REPORT 15 (2014), https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf.

²³ CHANGES IN THE LEGAL SERVICES MARKET 2006/07 -2014/15, LEGAL SERVICES BOARD, <https://www.legalservicesboard.org.uk/wp-content/media/2015-2016-FINAL-Market-Evaluation-Infographic.pdf>.

innovative, and competitive market for legal services. Our vision is a legal system that works for all people by being accessible, fair, reliable, efficient, and accountable: a system that earns trust, because a trusted and trustworthy legal system is essential to our democracy, our economy, and our freedom. That is why we support eliminating Rule 5.4, and we urge the Arizona Supreme Court to adopt the proposals outlined in the Petition.

Sincerely,

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Executive Director

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Manager