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Dave Byers
Administrative Director, Administrative Office of Courts
State Courts Building
1501 West Washington
Phoenix, Arizona 85007

Dear Mr. Byers and Justices of the Arizona Supreme Court:

We write to express strong support for the recommendations put forward by the Arizona task force on the delivery of legal services. Before discussing the recommendations specifically, it is worth reviewing some background on our Center, and why we perceive an urgent need for reform.

Background

Stanford CLP. The Stanford Center on the Legal Profession is devoted to the study of precisely the kinds of questions that the task force has tackled: how should lawyers be regulated in order to preserve the profession's core values while increasing access to justice.

One of us (Deborah Rhode) is the Director of the Center, has taught legal ethics at Stanford Law School for more than 30 years, was the founding president of the International Association of Legal Ethics, is the nation's most frequently cited scholar on legal ethics, and has won multiple awards for her scholarship on regulation of the legal profession and access to justice. The other (Jason Solomon), the Executive Director of the Center, is a lawyer and educator who has written about the goals and practices of the civil justice system. Both of us share strong commitments to protecting lawyers' independence of professional judgment. But there are other crucial values at stake, and the profession's regulatory structure needs to reflect the public as well as the profession's interest.

Rhode has written about the access to justice crisis for over three decades, and has long supported the bar's conventional response: increased funding of civil legal aid, more pro bono efforts by private lawyers at firms and in-house, and related initiatives. But my research, and that of virtually every other respected scholar in the field, suggests that these efforts cannot move the needle on access to justice unless we also reform our regulation of the legal-services market in fundamental ways.

Traditional Business Model is Obstacle to Access. The principal obstacle to increasing access to legal assistance is the cost of the business model in which legal services have conventionally been available to ordinary individual consumers. That model relies largely on one-on-one lawyering, through traditional solo and small firm practices, generally billed on an hourly basis, supplemented by online assistance. The model forgoes the cost-reducing benefits of scale, branding, technology, and the ordinary efficiencies that would come from having lawyers specialize in legal functions, while others (software engineers, financial analysts, business managers, marketing experts, etc.) specialize in all the other functions. Why has the traditional model of legal service delivery not achieved greater efficiencies and lower costs?

The American approach to professional regulation is not the only answer, but it is clearly a major contributing factor. That approach is expressed primarily in the expansive rules on unauthorized practice of law and the restrictions on the corporate practice of law and fee sharing. Under that approach, all (paid) legal help must be provided by holders of an expensive graduate degree—the JD—who pass a state bar exam and hold a valid license from a state bar association. It must be provided by a law firm that is owned, managed and financed exclusively by lawyers. Lawyers who are employees of other entities can offer legal services only to their employer, not the public. Lawyers cannot enter profit- or revenue-sharing contracts with providers of complementary goods and services. These rules make the markets for legal services among the most, if not the most, intrusively regulated in the modern American economy. Even the practice of medicine is far more openly organized, particularly since the advent of health maintenance organizations.

The legal profession can be stronger – and consumers of legal services can be better served – if we make it easier for new business models to emerge other than the familiar “one to one” lawyer to client relationship through greater use of technology, and partnerships with and service from allied professionals.

The U.K. Example. The good news is that we have a very recent and familiar example to look to: England and Wales. Though there are important differences in the underlying regulatory scheme in the U.K., the nation has a similar legal system and until quite recently (2007), had a similar system of self-regulation by lawyers that limited the kinds of business models that could provide legal services.

In recent years, England and Wales took steps much like those currently being recommended by the Task Force, including allowing new business models. It is still very early to assess those reforms, but independent evaluation suggests that “users of legal services are beginning to see benefits” such as improved access, choice and quality in the provision of legal services.¹ And there is “no evidence to suggest that these reforms have detrimentally affected, users of legal services.”²

An important aspect of the U.K.’s reforms is the establishment of an independent regulator to license entities and regulate them based on risk, which we urge Arizona to consider seriously.³

Focus on the Public. As you know, the State Bar has the power to regulate the legal services market in the interest of the public. As the U.S. Supreme Court recently explained, when the state delegates regulatory power to active market participants, as the Arizona Supreme Court does, “ethical standards may blend with private anticompetitive motives in a way difficult for even market participants to discern.”⁴

In what may be a new era for antitrust enforcement of self-regulated professions, bar associations and state supreme courts must ensure that their regulation of lawyers is based on systematic attention to real, not imagined, risks, and that those risks are appropriately balanced against the costs of regulations that raise costs, inhibit innovation, and fail adequately to protect consumers. It should not be at all surprising if the vast majority of comments submitted in response to these proposals are from lawyers expressing concern about possible changes. Their comments should certainly be taken seriously, but the ultimate

¹ Centre for Strategy & Evaluation Services, “Impact Evaluation of SRA’s Regulatory Reform Programme: A Final Report for the Solicitors Regulation Authority,” April 2018.

² Id.

³ The U.K. example is discussed at greater length in Gillian K. Hadfield and Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering, 67 *Hastings Law Journal* 1191 (2016).

⁴ N.C. State Bd. Of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 111 (2015).

decisions must be based on the benefits and risks to consumers. Though research indicates that there are plenty of untapped markets for legal service providers, it is in the public interest to have greater competition among different types of business models to provide higher quality service at lower cost.

The Recommendations

Allied Legal Professionals. Arizona should move forward in developing a licensing system to allow qualified professionals who are not lawyers to offer personalized assistance on routine legal matters, as the recommendation to establish “limited license legal practitioners” envisions. The licensing system could include consumer protections concerning qualifications, disclaimers, ethical standards, malpractice insurance, and discipline. Many administrative agencies already allow nonlawyers to appear, and no evidence suggests that their performance has been inadequate. The same is true in other nations that permit nonlawyers to provide legal advice and assist with routine documents. In one United Kingdom study, nonlawyers generally outperformed lawyers in terms of concrete results and client satisfaction. That and other research suggests that “it is specialization, not professional status, which appears to be the best predictor of quality.”⁵

The medical profession has managed to provide better service at lower cost by creating new, licensed professionals such as physician assistants and nurse practitioners. The legal profession can and should do the same. Note that this is not an open invitation to anyone to provide legal services. Providers would still need training and a license – it’s just a different kind of license than lawyers get -- and a regulator to help monitor quality.

In creating this new class of legal professional, Arizona should be careful not to make the same mistake that Washington has made thus far with its limited license legal technicians. With the bar in Washington controlling the licensing process, the result has been excessively restrictive educational qualifications that work against creating an affordable alternative to attorneys.

You will no doubt hear from others who say: “Everyone deserves full representation from a real lawyer.” But we are long past that being a realistic possibility for individuals who are not wealthy and businesses who are not large. The question is: can we do more to foster a market environment that creates more options for individuals and small businesses between “nothing” and “wildly expensive”? We think we can and should.

New business models. Repealing Rule 5.4 would allow greater investment in legal service providers, as well as more possibilities for fee-sharing, and therefore make it easier for lawyers to partner with others with relevant expertise to build new business models to reach consumers. We strongly support this recommendation as well.

There could be significant benefits from a greater infusion of capital into organizations that provide legal services. Traditionally, law firms have relied on the capital contributions of partners or outside borrowing to finance their work. But with law firm partners increasingly mobile, it becomes more difficult to rely on capital contributions to invest in long-term needs. Moreover, excessive reliance on loans has been one of the precipitating causes of law firm dissolution.

Outside the legal sector, investment has helped companies expand access to financial services, medical care, and more. Often, this is through the use of technology, which is highly capital-intensive. To deliver

⁵ This discussion is drawn from Deborah L Rhode & Scott L Cummings, Access to Justice: Looking Back, Thinking Ahead, 30 Geo. J. Legal Ethics 485, 491 (2017).

affordable routine legal assistance, there is a particular need for outside investment to provide the necessary economies of scale.

There is no evidence of harm to consumers in other jurisdictions who have provided more flexibility in the kinds of structures and business models that can provide legal services. Lay investment in law firms is permitted in some form in Australia, England, Wales, Scotland, Germany, the Netherlands, New Zealand, and parts of Canada. The District of Columbia has permitted lay ownership interests for more than two decades, and the ABA's Ethics 20/20 commission found no record of disciplinary concerns. Other jurisdictions have implemented safeguards such as subjecting alternative business structures to the same ethical rules as those governing legal professionals, as Australia and the U.K. have done. Arizona could institute similar safeguards to mitigate any risk.⁶ In sum, there are many potential benefits and insufficient justification for denying the legal sector the benefit of the full range of investments used by other sectors in the economy.

We have attached a forthcoming white paper from our Center, titled "How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice," which analyzes the evidence on the costs and benefits of this reform in more detail.

Conclusion

We cannot expect that these regulatory changes will lead to immediate or dramatic changes in access to legal services. It will take time for new market participants to enter and existing participants to evolve. But we can be confident that no meaningful progress is possible without such changes. The overwhelming balance of risks here is in going too slow, or changing too little. We urge you to move forward with strong versions of the recommendations.

Sincerely,



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Director, Stanford Center on the Legal Profession
Ernest W. McFarland Professor of Law



Jason Solomon
Executive Director,
Stanford Center on the Legal Profession

⁶ For further discussion of these issues, see Deborah L. Rhode, *The Trouble With Lawyers* 98-102 (2015).