Comments to Proposed Task Force Rule Change Petition

We are lawyers who practice in the area of ethics and professional responsibility. One has represented lawyers in discipline cases for 23 years and was a staff bar counsel for five years prior, and the other was ethics counsel with the State Bar for three years and teaches professional responsibility to law students.

We have concerns about three of the main provisions in the Task Force's rule change petition: the elimination of ER 5.4 and 5.7; the changes to ER 7.2; and the creation of LLPs.

Non-lawyer ownership

If adopted, Arizona will be the first state to allow non-lawyer ownership with no restrictions.[1] The Task Force continues to insist that this dramatic change will promote access to justice, the stated purpose for the creation of the Task Force. Yet, nothing in its report, and no literature, studies, or data support the claim that allowing non-lawyer ownership of law firms will have any impact on increasing the ability of low and middle-income citizens to retain a lawyer. If one considers what a traditional investor is attempting to do when investing, that makes perfect sense: no investor is investing in a business venture in order to provide services to its customers at greatly reduced prices; investors are looking for a suitable return on the investment.

The Task Force report at page 15 concluded . . . "[ER 5.4] no longer serves any purpose, and in fact may impede the legal profession's ability to innovate to fill the access-to-civil-justice gap." There is no authority cited for that proposition and in fact, the Supreme Court of Arizona has had numerous examples before it in State Bar disciplinary cases where it has seen the effects of allowing non-lawyers to make decisions required only of lawyers under ER 5.4. See, e.g., *In re Phillips*, 226 Ariz. 112, 244 P.3d 549 (Ariz. 2010); *In re Struthers*, 179 Ariz. 216, 877 P.2d 789 (1994). Both involved situations where non-lawyers had active roles in the operation of the law firms, with disastrous consequences and harm to the clients. The lawyers who were supposed to be exercising supervision and independent judgment failed to adequately do so with respect to non-lawyer staff. ER 5.4 ensures that client matters are treated the way a fiduciary is required to act; the best interests of the client are paramount. Regardless of whether ER 5.4 was initially enacted for the economic self-interest of lawyers, in Arizona lawyers are following its dictates to ensure that decisions are made for the client's best interest, not to increase the bottom line of a shareholder. What matters is not the historical purpose for the rule's adoption, but its implementation in modern practice.[2]

When determining whether to drastically change the Rules of Professional Conduct by wholesale elimination of ethical rules, the Court must consider that the Rules and comments don't exist in a

[1] At present, D.C. allows non-lawyers who are part of the law firm to have an ownership interest. Utah has recently adopted a "sandbox" rule change to allow non-lawyer ownership for a limited time.

[2] The lawyers who spoke against this rule change petition before the Board of Governors almost to a person spoke about how significant ER 5.4 is to them when dealing client matters. Lawyers are constantly making decisions to the benefit of the client, while knowing that in some circumstances, it disadvantages the lawyer.

vacuum. Other laws come into play that will affect how the Court/State Bar can regulate ABS's. The ethical rules express public policy to the same extent as a statute. Once the ER is eliminated, how does this affect the underlying public policy?

Because the State Bar and the legal profession in Arizona has never operated without ERs 5.4 and 5.7 (or its substantial equivalent under the former DRs, and ECs), we can't adequately address or predict the changes that will be necessary to the Rules of Professional Conduct and to the comments. We also have no idea what unforeseen consequences will arise. There are numerous places in the Task Force's Report where it mentions a lack of time to address or explore issues; yet no request for additional time was made by the Task Force.

Given the expansiveness of the recommended changes, a more cautious approach seems the smarter approach, particularly when the Task Force proposes implementing some "pilot programs" where delivery of legal services will be provided by non-lawyers in certain proscribed situations. There is no mention in the Report of tracking and monitoring those pilot programs to see if they, in fact, increase access to justice. That should be mandatory for these new pilot programs. A more reasonable proposal would be to measure how those pilot programs increase access to justice, and then perhaps attempt further step-by-step changes, monitoring results at each step to insure the actual goal is being met. This seems a much more responsible proposal than to gear up an entirely new regulatory system and framework for the proposed ABS's and the LLPs.[3]

The Task Force Report lacks critical reasoning. It analogizes only the positive sides, but not the realities of the negative effects. It professes that the medical profession has benefited from LLPs and NPs, but ignores the downsides of the corporate practice of medicine; the still high cost of medical treatment in this country; and the lack of doctors in rural areas (despite the influx of capital from corporations).[4] If the corporatization of the medical profession hasn't resulted in more access to doctors, less costly medical treatment, and more doctors in rural areas, why do we believe a different result will ensue for capitalization of the legal profession? The Task Force Report analogizes to insurance companies and "captive counsel" without acknowledging that such counsel operate under litigation guidelines that create ethical dilemmas.[5] The unsupported speculation that consumers would have benefited during the Great Recession of 2008 from lawyers teaming up with mortgage brokers/refinance personnel ignores the distinct possibility that such "teams" might actually have worked in concert to target those under financial duress.

The Henderson report maintains that lawyers need to be able to "collaborate" more with allied professionals from other disciplines. Yet nothing in the current ethical rules prohibits collaboration. The Rules prohibit business ownership, not collaboration. Most lacking from Henderson's report or analysis is any proof that non-lawyer ownership will make legal services

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[3] An analogy can be made to the current covid-19 pandemic, and the re-opening of the economy. Incremental relaxing of the stay-at-home orders is being done while monitoring the extent to which the changes affect the rates of virus infection.

[4] Even more acute shortages for rural countries during this covid-19 crisis.

[5] The reference to insurance companies is also not apt given that if its captive counsel can't engage in certain areas of defense due to the insurance company's guidelines, it is the insurance company that bears that risk by having to pay a higher verdict than otherwise might have been awarded.

less expensive, of same or better quality, and easier for low and middle-income citizens to access. If that is the Task Force's stated goal, and raison d'être, evidence, or even discussion, of how this will accomplish the goal should be mandatory before such sweeping changes are made.

Recently, proponents of the Task Force's recommended elimination of ER 5.4 have allowed that this proposed change isn't really as much about access to justice as it is about "innovation." As Judge Peter Swann in his dissent to the *Report and Recommendations of the Task Force on Delivery of Legal Services* (Oct, 4, 2019) stated, there is nothing in ER 5.4 that restricts innovation. Law firms are currently able to hire or partner with tech companies or individuals to provide innovative legal services. The only caveat is that such individuals can't be owners, however, they can be well compensated through salaries or bonuses. Neither the Task Force nor any other study cited by it in support of the elimination of ER 5.4 has disputed that innovation and compensation can happen under the existing rules.

Defining Nonlawyer Conflicts of Interest

The petition proposes to amend ER 1.10 to address imputed conflicts of both lawyers and nonlawyers. The amended ER 1.10 would state: "While lawyers and nonlawyers are associated in a firm, none of them shall knowingly represent a client on legal or nonlegal matters when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9 . . . ." The rule then exempts certain personal interest conflicts. However, a nonlawyer would never practice law alone, and thus would never be bound by the same duties as lawyers under ERs 1.7 or 1.9. Even if the nonlawyer was "practicing alone" in a nonlegal profession, such as financial planning, the lawyer-client representation aspects of ERs 1.7 or 1.9 would not apply to that nonlawyer. Rather, the nonlawyer would ostensibly be bound by regulations relating to his or her particular profession. Moreover, the proposed amendments to Rule 42 do not address conflicts of interest for passive nonlawyer owner/investors who take no part in client representation on legal or nonlegal matters.

As drafted, the proposed amendments to Rule 42 fail to put lawyers on notice of nonlawyers' prohibited behavior. If the Court votes to adopt the proposed amendments, the Court should require further amendments to the Rules of the Supreme Court to define nonlawyer conflicts of interest. If nonlawyer conflicts are addressed by amendments to the Rules of the Supreme Court other than the ERs, then those rules should be cross-referenced within Rule 42.

Interplay of Eliminating Both ER 5.4 and ER 7.2

The Court is also considering proposals to amend ERs 7.1 to 7.5, the lawyer advertising rules. Petition 20-0030 proposes broad changes that in some respects mirror changes made to the American Bar Association's Model Rules in 2018. In one critical aspect, however, Petition 20-0030 diverges from both Arizona's current rules and the amended Model Rules by eliminating entirely ER 7.2, including the prohibition on paying for referrals. If ER 7.2 is eliminated, lawyers will be permitted to pay any person "anything of value" for referrals, with no cap or *de minimis* requirement.

Thus, if both Petitions 20-0030 and 20-0034, are adopted as written, a lawyer would be allowed to split a legal fee with a nonlawyer outside the firm in exchange for a referral. The possibilities are both predictable and endless: a personal injury lawyer sharing fees with a chiropractor, an estate lawyer splitting a fee with a financial advisor, a family lawyer sending part of a fee as a kickback to a document preparer. Moreover, the proposed amendments do not require disclosure to the client of these types of referral fees, whereas ER 1.5(d)(3)(current version and proposed amended version) requires a lawyer sharing fees with another law firm to disclose the arrangement to the client and obtain signed, written consent. As a result, a lawyer must clear more ethical hurdles to share a fee with another lawyer working on the case, than with a nonlawyer outside the firm whose identity may be unknown to the client.

Elimination of ER 7.2 prohibition against payment of referral fees

Eliminating the prohibition against for-profit referral services means that an online referral service could require lawyers to share their fees with the service as a condition of participation (which is now limited to nonprofit referral services only). The invitation to mischief from the elimination of this prohibition doesn't seem worth the arguable benefits. There has been no compelling showing that this rule change is necessary or beneficial – particularly if ER 5.4 is not eliminated.

Reliance on Anecdotal Evidence

The Response and Amended Petition filed on April 27, 2020, sets forth several arguments that are anecdotal or hypothetical. For example, the response states that lawyers are already obligated by ER 8.3(a) to report misconduct, even if it goes against the reporting lawyer's financial interest, thus demonstrating that lawyers are trusted to act ethically in the face of financial pressures. The response also states that the prohibition on paying referral fees is violated "every day," seemingly without consequence. Either of these arguments could be supported (or refuted) by data from the State Bar of Arizona. If the Court is going to adopt radical changes to the practice of law, the decision should be supported by concrete information the State Bar could provide regarding, for example:

- Public harm resulting from past unauthorized practice of law violations;
- Rates of reporting pursuant to ER 8.3's mandatory reporting rule;
- Numbers of complaints relating to lawyers paying referral fees.

Instead, the response cites primarily law review articles from the past few decades. Although these articles are written by respected ethics lawyers and professors, they are only secondary sources of information and law review articles are not written to be objective.

Reliance on Foreign Law to Support Changes to Arizona Law

The Response and Amended Petition filed on April 27, 2020, cites the legal practices of Canada, Australia, the United Kingdom, and Wales to support the proposed changes to the practice of law in Arizona. Although a review of the practice of law in foreign jurisdictions may be informative, foreign legal practices should not justify changing Arizona ethical rules. Foreign law firms

operate in countries with different laws, norms, and cultures than the United States. One cannot assume that changes to the ownership structure of foreign law firms in foreign countries would provide the same results in the Arizona. The only reliable way to determine the effect of changing the practice of law in Arizona would be to observe those effects in Arizona, in a controlled setting such as a regulatory sandbox.

Licensing LLLPs

The biggest problem with this rule change provision is that there is no evidence to suggest that licensing another set of non-lawyers to provide legal services will result in lower legal costs, or greater access to the justice system. Numerous sole practitioners/small firm lawyers can attest to the enormous problems they have witnessed, caused by certified legal document preparers (CLDPs). These same lawyers report that in many instances, CLDPs ended up charging the public *more* than the lawyer would have charged because each separate task has a charge associated with it, as opposed to lawyers who often bundle the tasks and charge for the bundle, rather than each individual task. And, given that LLLPs will have to obtain some as-yet undefined training (another problem with the rule change petition for LLLPs), and charge enough to make a living, and pay for whatever regulatory framework will exist, it is dubious that the cost of legal services will be less.[6]

While proponents of LLLPs maintain that lawyer won't actually be affected because the segment of the population who would use LLLPs can't afford lawyers, the reality is that a real segment of the general public won't understand the distinction between CLDPs, LLLPs, and "real" lawyers and will choose the option that at first glance seems the least expensive. So, in reality, those people who would attempt to hire a lawyer might actually instead choose an LLLP, only because it *seems* less expensive.

CONCLUSION

We don't deny that it is expensive to hire a lawyer and to be involved in litigation and/or the legal system. We don't deny there is an access to justice issue. We aren't resistant to change. We aren't engaged in protectionism because we're lawyers. But there is a myriad of difficulties with the Task Force's proposed rule change petitions, and scant evidence, if any, to support wholesale overhaul of the Rules of Professional Conduct in the name of increasing access to justice. Changes might be needed to the legal profession, but these are not the changes that we need.

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[6] One way to ensure that the cost charged the public is less is to mandate LLLP's disclose their fee structure/schedule. Similarly, if the state goal of this provision really is to increase access to justice, why are there no requirements that in order to obtain a license, LLLPs must agree to operate in rural areas?