PIMA COUNTY BAR ASSOCIATION
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IN THE SUPREME COURT

STATE OF ARIZONA

In the matter of: **PETITION TO RESTYLE AND AMEND SUPREME COURT RULE 31; ADOPT NEW RULE 33.1; AND AMEND RULES 32, 41, 42 (VARIOUS ERS FROM 1.0 TO 5.7), 46-51, 54-58, 60, AND 75-76**	Supreme Court No. R-20-0034 **COMMENT OF THE PIMA COUNTY BAR ASSOCIATION IN OPPOSITION TO THE PROPOSED RULE CHANGES**

Unfortunately, the Amended Petition is old wine in a new bottle: it rehashes exactly the same claims in the original Petition without even attempting to explain how the proposed changes will operate in practice, much less how they will work to the benefit of the bar or public. It repeats the word "innovation" almost half a dozen times, but not once does the Petitioner give a concrete example of what it means. And as for the Petitioner's response to the dozens of thoughtful comments from the bench and bar alike, those which it does not reduce to strawmen it ignores entirely. The Amended Petition treads no new ground, and it should be rejected.

I. Introduction

In response to the many comments in opposition to non-lawyer ownership of law practices, the Task Force raises three counterarguments. First, it contends that the ethical conflicts that may come with non-lawyer ownership of law practices already exist. Second, it argues that there is nothing inherently wrong with the profit motive that non-lawyer owners may have. And third, it claims that the existing Ethical Rules will continue to ensure that clients are protected. None of these withstand scrutiny. And in response to the concerns about allowing paraprofessionals to practice law, the Petitioner insists that they would have "stiff" licensure requirements and relatively "circumscribed authority to practice." *Amended Petition* at 27. This argument also fails. It is apparent that the Petitioner and most lawyers have radically different understandings of what those words mean.

What is also striking is how quick the Petitioner is to level the charge of protectionism, as though the overwhelming opposition from the bar stems from nothing more than rank financial self-interest. This is a curious indictment considering that the entire purpose of the proposed rule changes is to allow passive investors to buy law practices. Yet according to the Petitioner, it is the bar that is overly concerned with money. Go figure.

At bottom, the Amended Petition does not even try to disentangle the Gordian Knot of legal ethics that the proposed rule changes entail. Rather, the Petitioner continues to assert that we should simply accept at face value its insistence that the proposed changes will be a force for good and that we should ignore our ethical qualms for the sake of "innovation." The members of the Pima County Bar Association are not prepared to do so, and neither should any lawyer in Arizona.

II. The Amended Petition has wholly failed to account for the additional ethical conflicts entailed by abolishing Rule 5.4.

Allowing private investors to own and manage law practices would produce ethical conflicts between a lawyer's duty to her clients and her incentive (indeed imperative) to generate money. This is practically a truism, and the Petitioner does not appear to disagree. Rather, the Task Force sidesteps the issue completely and argues that lawyers in private practice already must balance their own financial interests with the interests of their clients. *Amended Petition* at 14. As such, abolishing Ethical Rule 5.4 "therefore[] does not suddenly interject the need for 'balancing' conflicting interests into lawyers' lives." *Amended Petition* at 15. Put more simply, the Task Force's position isn't that this proposed rule change is free from ethical conflicts; it is that we can ignore them inasmuch as lawyers already seem to be managing those types of conflicts just fine. This argument is not so much wrong as it is no argument at all.

True enough, private practice attorneys have to carefully balance the incentive to make money against their duty to put their clients' interests first. As the Amended Petition rightly notes, this problem is especially acute in the context of insurance defense where third parties (insurance carriers) pay the cost of defense. This is even a potential problem in traditional firms where equity partners direct the work of salaried associates. But this is a non sequitur: abolishing Ethical Rule 5.4 has nothing at all to do with these existing conflicts; it presents a new set of conflicts that will only compound those that already exist.

As discussed in the Pima County Bar Association's original comment in opposition, a corporation's primary reason for existing is to make money for its shareholders. This is doubly true for private equity firms—their very raison d'être is to buy and restructure companies in such a way as to extract as much money from them as possible, either by stripping those companies of their assets and loading them with debt, or by paring their expenses down to the bones to look more attractive (read: cheaper) to other investors. The

Petitioner's response is the truism that a profit motive is not necessarily at odds with an ethical, competent legal practice. This is true enough, but it is a strawman argument: no commenter suggested that a profit motive was inherently at odds with the ethical, competent practice of law. The issue is that when a law practice is transformed into an investment vehicle, it presupposes incentives and duties that are in deep conflict with one another. The Petitioner does not meaningfully engage with this argument.

III. As a practical matter, there is no reason to believe that allowing private equity firms to own and operate law practices will benefit clients.

The Amended Petition speaks in rosy terms about how the proposed rule changes will advance the practice of law and benefit clients. It cites some of the recent changes we have all experienced in the legal community—depositions via Zoom, oral arguments over a conference call, for example—in support of its claim that "[t]hese innovative ways to conduct court business would not have been possible without an infusion of new technology." *Amended Petition* at 8. As the Petitioner concludes, "[t]he ability to partner with other professionals to create innovative ways to deliver legal services in addition to the ability to attract capital may well help firms survive and thrive in what will likely become a new normal." *Id*. at 8. This argument is vulnerable on a number of grounds, not least of which is that there has been no "infusion of new technology": video conferencing has been around for nearly two decades, and the telephone has been used for government business since at least the Hayes administration. Even if the factual premises were true, the conclusion would still not follow from them: what does investor ownership of law firms have to do with Zoom conferencing and telephonic hearings? How is it that private equity firms will facilitate greater access to the courts by lawyers and clients? Considering that the bench and bar already solved a host of shutdown-related problems without needing the

intervention of corporate titans, it seems that private equity is a solution desperately in search of a problem.

Nowhere in the commentary does anyone answer the question begged by the Amended Petition: How does allowing private equity to dominate the legal field help clients? This is not a "gotcha" question nor should it come as a surprise. The Petitioner is proposing seismic changes to our profession, *Amended Petition* at 9, and we should not be left wondering about the most basic question most of us have. It is not enough to make vague statements about "innovation" or arguments like the one above that wither under the gentlest scrutiny; the onus is on the Petitioner to cite to something specific, something concrete that investor ownership can do for clients and to provide meaningful justification. The Amended Petition does not come close to sustaining this burden. Far from it, the available evidence suggests that the goals of private equity are antithetical to the needs of lawyers and their clients.

Consider the changes wrought by passive investment in medicine and nursing home care, which is to say precisely the kinds of changes the Task Force is pushing. The coronavirus pandemic laid bare a number of systemic problems in our country, among them the failure of private nursing homes to provide even minimal care to their patients. A New York Times investigation revealed what most of us who have had to find nursing care for our elderly relatives already suspected: for-profit nursing homes lag behind their non-profit counterparts and are cited for violations at a higher rate.[1] An NBC News investigation revealed much the same thing and noted that

> [t]he impact private equity has had on employees and customers of the companies it has taken over, however, isn't always beneficial. To finance the purchases, private

[1] Goldstein, Matthew, Jessica Silver-Greenberg, and Robert Gebelhoff. "*Push for Profits Left Nursing Homes Struggling to Provide Care*." *The New York Times*, May 7, 2020. https://www.nytimes.com/2020/05/07/business/coronavirus-nursing-homes.html

> equity owners typically load the companies they buy with debt. Then they slash the companies' costs to increase earnings and appeal to potential buyers down the road.[2]

And what does this look like in concrete terms? The horror show that is our healthcare system. The indignities that have been visited upon almost all of us when we or a loved one needs medical care, whether it is having our credit card swiped as we writhe in pain in an emergency department waiting room or the infuriating, Kafkaesque maze of automated options that await us when we call with a question about our hospital bill (if we even get an intelligible bill to begin with). In the worst cases, it means being denied care altogether because you just aren't profitable, as happened to a 17-year-old boy in California in the middle of a global pandemic. Soon after being turned away at an urgent care for lack of insurance, he died.[3] As for the Petitioner's argument that the existing ethical rules will adequately protect clients, healthcare provides the perfect counterpoint: at what point will the ancient and venerable canons of medical ethics protect those patients with the misfortune of not being able to afford quality health insurance? Clearly, Hippocrates's admonitions only apply in-network.

This is the evidence in front of our very eyes and the experiences that many if not most of us can personally attest to. And the rejoinder from the Task Force? Their *ipse dixit* that an infusion of capital into the legal field will spur innovation and that any skepticism can be chalked up to parochialism.[4] Then the tepid defense that the existing ethical rules

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[2] Morgenson, Gretchen, Emmanuelle Saliba. *"Private equity firms now control many hospitals, ERs and nursing homes. Is it good for health care?" NBC News*, May 13, 2020. https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161

[3] Capron, Maddie. *"Teen first counted as coronavirus death was turned away at urgent care, CA mayor says." The Sacramento Bee*, March 27, 2020. https://www.sacbee.com/news/coronavirus/article241580601.html

[4] The Amended Petition cites liberally to three law review articles in support of its position, one by Crispin Passmore, another by Stephen Gillers, and a third by Thomas Andrews. *See Amended Petition* at 13-21. Mr. Passmore runs his own consulting firm in the United Kingdom that advises start-ups, venture capitalists, and private equity firms that buy up law practices. Mr. Gillers has not practiced law in four decades. Mr. Andrews practiced law for approximately five years in the early 1980s and wrote the cited article in 1989. That the Petitioner cited to these sources uncritically and without any context illustrates how unseriously the Task Force has considered the arguments against their position.

will protect client interests. The members of the Task Force have to do better than that, and it is up to us to demand it from them.

IV. The Task Force has still not proposed satisfactory licensure requirements for paraprofessionals.

The Petitioner responds to the criticism that its proposed Limited Licensed Legal Practitioners ("LLLPs") lack robust standards for education, training, and experience by asserting that they in fact will be subject to "stiff requirements." *Amended Petition* at 27. As with other key terms, the Task Force has a somewhat loose understanding of "stiff": at minimum, a four-year bachelor's degree from an accredited school and "additional studies in paralegal studies or certificate programs, plus additional training and experiential learning." *Id*. As for the licensing examination, it would test "legal terminology, client communication, data gathering, document preparation, the ethical code for LLLPs, and professional and administrative responsibilities pertaining to the provision of legal services." *Id*. at 28. To be sure, this is better than no explanation at all, but all the same it is still wanting.

As the Amended Petition explains, LLLPs will be empowered to represent clients in misdemeanor proceedings not involving a penalty of incarceration, in civil actions in small claims or Justice Court, and in family law proceedings. *Amended Petition* at 28. They will be permitted to advise clients as to their rights, remedies, defenses, options, and trial strategy. *Id*. They will also be permitted to appear and represent clients in arbitration and settlement conferences. *Id*. This is an astonishingly broad grant of authority that should give pause to any reasonable practitioner.

Consider an LLLP with an online bachelor's degree in music composition and "additional studies in paralegal studies or certificate programs, plus additional training and experiential learning." What those studies or additional training consist of is anyone's guess, but can the Task Force honestly suggest that our hypothetical LLLP would be

prepared to advise or represent a domestic violence victim in court? Or perhaps to explain to that victim the myriad collateral consequences that attend their spouse's misdemeanor conviction? Would he be prepared to explain to a victim of contracting without a license how to recover five figures in restitution in a collateral action? What about the many and Byzantine distinctions between remedies in equity and those at law? How about the preclusive effect of a criminal plea in a subsequent administrative action? These are not speculative matters; they are the daily bread for countless attorneys who have had the benefit of a minimum of three years of law school, two summers working in the profession, and successfully passing the bar exam, and yet who still make mistakes. Although the Task Force's recommendations are a plausible start, the licensure requirements for LLLPs are still too nebulous to ensure competent representation for those who need it. It is no limitation to restrict LLLPs to seemingly small matters like misdemeanors and arbitrations. These areas of practice are nuanced and complex in ways that even licensed practitioners can fail to appreciate. More basically, these matters are hardly small for those involved—ask any crime victim or suspected misdemeanant. They are of immense importance such that it would be inappropriate to hand them off to a non-lawyer with the training described in the Amended Petition.

V. Conclusion

There is no question that we lawyers like to take ourselves seriously and are the justified butt of many jokes and criticisms. But if the bar takes itself seriously, it is because its work *is* serious. The way in which it impacts society and the lives of the people in it *is* serious. The changes proposed both to the profession and to the society that depends on it are serious enough that we should not lightly accept them, least of all when those changes come from people who would reduce our arguments to strawmen and caricature us as smallminded luddites who fear change. If the last two months of virtual hearings and

meetings have shown us anything, it is that our bar is already resilient, it is already innovative, and far from fearing change, we embrace it wholeheartedly.

Although the Task Force continues to persist in its view of us as selfish and myopic guildsmen, just the opposite is true. It is not the bar that is obsessed with money and protecting its own interests, it is those who are pushing these changes. To be tarred in this way by those who work tirelessly to elevate and protect venture capital and private equity is more than ironic, it is insulting, and it is plainly driven by people for whom access to justice is a corporate slogan. The Amended Petition should be rejected in the strongest of terms, and the push to graft healthcare's business model onto the legal profession should be fought tooth and nail.

RESPECTFULLY SUBMITTED this 26th day of May 2020.

PIMA COUNTY BAR ASSOCIATION

By *s/James W. Rappaport*
James W. Rappaport
Rules Committee Chair

By *s/Reagen Kulseth*
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