

May 26, 2020

The Supreme Court of Arizona  
1501 West Washington Street, Room 402  
Phoenix, AZ 85007

*In re: Rule 28 Petition to Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs From 1.0 to 5.7), 46-51, 54-58, 60, and 75-76, Arizona Supreme Court No. R-20-0034*

***Second Comment Deadline: May 26, 2020***

Dear Supreme Court:

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

Property casualty insurers are among the highest-volume consumers of legal services and have a genuine interest in preserving the integrity of a fair, predictable, legal system. APCIA appreciates the opportunity to submit an additional comment letter, responding to Petition No. R-20-0034, *In re: Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs From 1.0 to 5.7), 46-51, 54-58, 60, and 75-76* (Petition). It is our understanding that the Task Force on the Delivery of Legal Services (Task Force) filed its Response and Amended Petition pursuant to Rule 28(a) of the Arizona Rules of the Supreme Court on April 27, 2020.<sup>2</sup> For the reasons set forth below, we again urge the Arizona Supreme Court to reject the Amended Petition to remove or limit Ethical Rules prohibiting nonlawyer law firm ownership, fee-splitting between lawyers and nonlawyers, and/or nonlawyer investments in law firms or litigation.

While this letter is intended to highlight some of APCIA's concerns, it is not intended to identify or address all potentially harmful unintended consequences of granting the Task Force's Amended Petition. Several Arizona attorneys have provided fulsome commentary in opposition and we direct the Arizona Supreme Court to the comments of Geoffrey M. Trachtenberg, Esq., Thomas Burnett, Esq., Frank Berry, Jr., Esq., David Friedman, Esq., and the combined comment of Nancy Greenlee, Esq. and Ann Ching, Esq.

First, APCIA renews its opposition to the elimination of Ethical Rules (ER) 5.4 and 5.7. ER 5.4 serves a critical purpose to ensure the independence and ethical conduct of lawyers, as its title, the "Professional Independence of a Lawyer", indicates. Comment 1 to ER 5.4 confirms its purpose is to protect the lawyer's "professional

---

<sup>1</sup> Colleen Reppen Shiel, Vice President and Deputy General Counsel for American Property Casualty Insurance Association of America with a mailing address of 8700 W. Bryn Mawr Ave., Ste. 1200S, Chicago, IL 60631-3512. Phone (847) 297-7800. Email: [colleen.shiel@apci.org](mailto:colleen.shiel@apci.org). Illinois Bar No. 6193134.

<sup>2</sup>. <http://www.azcourts.gov/Rules-Forum>.

judgment.”<sup>3</sup> The Task Force acknowledges the importance of these public and professional judgment protections but proposes to redistribute them among existing rules, without subjecting non-lawyer owners or investors to the Ethical Rules. In addition to diluting the existing protections provided by ER 5.4, eliminating the rule will weaken the special fiduciary relationship between attorney and client, insert a new set of conflicts between practicing attorneys and firm ownership, and convert the practice of law into a mere service.<sup>4</sup> The Task Force’s Response adds no new argument and no new proof that eliminating ER 5.4 will not harm the public or the Arizona Bar. Instead, the Task Force relies on the current novel coronavirus (COVID-19) pandemic in support of its petition, claiming it will “severely increase the need for legal services” (Response, p. 8). The fact is, however, that 64,000 lawyers were terminated or furloughed in April 2020, so there are literally thousands of currently licensed attorneys available.<sup>5</sup>

The Task Force mistakenly analogizes the elimination of ER 5.4 to allow ABSs to an insurer’s permitted use of employed staff counsel to represent its insureds. This is a false equivalence. Employed staff counsel are permitted to represent an insurer’s policyholder in Arizona where the insurer has a preexisting contractual obligation to provide the policyholder with a defense, and only where the interests of the insurer and the policyholder are aligned. Petitioner wants to commoditize litigation, creating a market for investors to buy in to litigation after a cause of action accrues, with the hope of realizing big returns on its investment. Existing ethics rules, including ER 5.4, protect against the injection of outside mercenary, and potentially conflicting, interests into the attorney/client relationship. Insurers that use employed staff counsel to defend policyholders have, by the nature of the preexisting relationship, a direct financial interest, fully aligned with the interest of the insured, in the outcome of the case being defended. This is distinct from nonlawyer ownership of law firms by strangers who have no interest in the outcome of a case absent an after-the-fact investment, and this is a distinction with a meaningful difference. Insurers are regulated by the Arizona Department of Insurance, and staff counsel are subject to and protected by Arizona’s Ethical Rules, including ERs 1.8, 5.4 and 5.7. Eliminating ER 5.4 would erode, rather than solidify, the underlying foundational ethical obligations owed by lawyer to client.

The same is true regarding the Petition to allow fee-splitting with nonlawyer owners or investors that have no relationship to, and owe no professional obligation to, a client. The introduction of an outside entity having the ability to influence – if not directly control – decisions related to the client’s interests, without that entity having any preexisting contractual obligation to, or other relationship with the client, would inherently conflict with the lawyer’s ethical obligation to exercise independent professional judgment for the benefit of the client.<sup>6</sup> Although the Task Force no longer opposes a “sandbox” approach, which would allegedly allow Arizona to proceed conservatively and walk back any unworkable changes, even this approach would create significant unintended consequences.

---

<sup>3</sup> ER 5.4 Comment [1] read in part “These limitations are to protect the lawyer’s professional independence of judgment.” See <https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/>.

<sup>4</sup> See, e.g., New York State Bar Ass’n: Report of the Task Force on Nonlawyer Ownership, 76 Alb. L.Rev. 865, 877 (2013) (“nonlawyer control of legal practice presents considerable risks to the legal system and the justice system...and should not be permitted”).

<sup>5</sup> See U.S. Bureau of Labor Statistics May 8, 2020 Employment Situation Summary No. USDL-20-0815, table B-1 available at <https://www.bls.gov/news.release/empsit.nr0.htm>.

<sup>6</sup> See Arizona Bar Ethical Opinion 99-12, noting that a lawyer employed by an architectural firm may violate “ERs 5.4(c) and 1.8(f)(2) if the firm, in its role as the attorney’s employer, in any way directed or regulated the lawyer’s professional judgment in rendering legal services to clients. Even if the firm agreed to comply with these Rules by refraining from influencing the attorney’s representation of clients, the structure of the proposed arrangement would allow the firm to indirectly influence representation of clients by controlling matters such as the attorney’s time and workload.”

Second, the Task Force suggests that an ABS is no different from a law firm, solo practice, in-house practice, or non-profit legal services provider because lawyers are working for fees or wages. That conflation, however, fails to contemplate the fact that a supervising attorney in a law firm is equally subject to censure, suspension, and disbarment for ethical violations of subordinate attorneys. In the ABS model, the owner investors can simply walk away from a failed ABS, subject at worst to a monetary fine. Thus, comparing attorney owners of law firms to non-attorney owner or investors of an ABS is not an apt analogy.

Finally, we note that attorney's ethical obligations follow them as they transition to a new firm, a new practice, or employment, as do the conflicts of interest prohibitions. Non-attorney owners of an ABS are not prohibited from owning an interest in multiple ABSs or other companies that might have a conflict with an ABS client, such as a Third Party Litigation Funder owning an ABS and separately funding the litigation of a client of that ABS. This presents the potential for insurmountable conflicting interests.

Thank you for the opportunity to comment and for your consideration of our perspective. We urge the Arizona Supreme Court to reject the Amended Petition.

Please contact me directly at [colleen.shiel@apci.org](mailto:colleen.shiel@apci.org) with any questions.

Sincerely,

*Colleen Reppen Shiel*

Colleen Reppen Shiel  
Vice President, Deputy General Counsel  
American Property Casualty Insurance Association