

**ARIZONA SUPREME COURT
CERTIFICATION AND LICENSING DIVISION
WORKING DRAFT AMENDMENT TO ARIZONA CODE OF
JUDICIAL ADMINISTRATION § 7-208**

**IN RE: PROPOSED CHANGES TO)
 SECTION 7-208: LEGAL)
 DOCUMENT PREPARER)**

**Comment Regarding Proposed Changes to Arizona Code
Of Judicial Administration Section 7-208**

The Arizona Association of Independent Paralegals, by and through undersigned counsel, hereby respectfully submits its Comment regarding the proposed changes to Section 7-208 of the Arizona Code of Judicial Administration as set forth in the proposed draft posted on the Arizona Code of Judicial Administration online forum on July 22, 2021 and proposed by the Board of Nonlawyer Legal Service Providers (the “Board”, as defined by ACJA § 7-208(A)).¹

I. THE CURRENT RULE AND PROPOSED AMENDMENTS

A. ACJA § 7-208(F)(1)

i. The Current Rule

The current Arizona Code of Judicial Administration (“ACJA”) § 7-208(F)(1) provides, in part, as follows:

- 1. Authorized Services. A certified legal document preparer is authorized to:*

¹ The source of the proposed amendments is unclear. However, it is likely either the Board or the Certification and Licensing Division of the Administrative Office of the Courts. This Comment will refer to the unidentified source of the proposed amendments as “the Board” for simplicity.

- a. *Prepare or provide legal documents, without the supervision of an attorney, for a person or entity in any legal matter when that person or entity is not represented by an attorney;*
- b. *Provide general legal information, but may not provide any kind of specific advice, opinion, or recommendation to a person or entity about possible legal rights, remedies, defenses, options, or strategies;*
- c. *Provide general factual information pertaining to legal rights, procedures, or options available to a person or entity in a legal matter when that person or entity is not represented by an attorney;*
- d. *Make legal forms and documents available to a person or entity who is not represented by an attorney; and e. File, record, and arrange for service of legal forms and documents for a person or entity in a legal matter when that person or entity is not represented by an attorney. A certified legal document preparer may not sign any document he or she prepares for or provides to a person or entity, but this provision does not prohibit the signing of (i) 20-Day Notices prepared pursuant to A.R.S. § 33-992.01, (ii) notices related to condominium or planned community association liens that are created pursuant to A.R.S. § 33-1256 (condominiums) and § 33-1807 (planned communities); (iii) health care provider liens that are created pursuant to A.R.S. § 33-932, or (iv) mechanic's liens created pursuant to A.R.S. § 33-993.*

ii. The Proposed Amendment

The proposed rule change seeks to restrict the services available to consumers from Certified Legal Document Preparers (“CLDPs”) by modifying ACJA § 7-208(F)(1) as follows:

- 1. *Authorized Services. A certified legal document preparer is authorized to:*
 - a. *Prepare or provide legal documents, without the supervision of an attorney, for a person or entity in any legal matter when that person or entity is not represented by an attorney. A legal document preparer*

shall not draft substantive legal motions, supporting memorandum or appellate briefs, except that a legal document preparer may assist a client with the completion of motions in family court proceedings using the appropriate court approved motions form;

b. [no change]

c. [no change]

d. Conduct legal research necessary to understand general legal principles to assist a client identify and complete a competent legal form or document. A legal document preparer shall not perform legal research for the purpose of providing a legal opinion, advice, or advocating a legal theory.

e. [no change]

f. [no change]

B. ACJA § 7-208(E)(3)(b)(6)(a),(b): Individual Standard Certification

i. The Current Rule

The current ACJA § 7-208(E)(3)(b)(6) provides, in part, as follows:

6. *The applicant shall also possess one of the following combinations of education or experience:*

a. *A high school diploma or a general equivalency diploma evidencing the passing of the general education development test and a minimum of two years of law-related experience in one or a combination of the following situations:*

(i) Under the supervision of a licensed attorney;

(ii) Providing services in preparation of legal documents prior to July 1, 2003;

(iii) Under the supervision of a certified legal document preparer after July 1, 2003;

or

(iv) As a court employee;

b. A four-year bachelor of arts or bachelor of science degree from an accredited college or university and a minimum of one year of law-related experience in one or a combination of the following situations:

(i) Under the supervision of a licensed attorney;

(ii) Providing services in preparation of legal documents prior to July 1, 2003;

(iii) Under the supervision of a certified legal document preparer after July 1, 2003;

or

(iv) As a court employee.

ii. The Proposed Amendment

6. The applicant shall also possess one of the following combinations of education or experience:

a. A high school diploma or a general equivalency diploma evidencing the passing of the general education development test and a minimum of two years of law-related experience in one or a combination of the following situations:

(i) Under the supervision of a licensed attorney; or

~~(ii) Providing services in preparation of legal documents prior to July 1, 2003;~~

~~(iii) (ii) Under the supervision of a certified legal document preparer after July 1, 2003;~~

~~or~~

~~(iv) As a court employee;~~

b. A four-year bachelor of arts or bachelor of science degree from an accredited college or university and a minimum of one year of law-related experience in one or a combination of the following situations:

(i) Under the supervision of a licensed attorney; or

~~(ii) Providing services in preparation of legal documents prior to July 1, 2003;~~

~~(iii) (ii) Under the supervision of a certified legal document preparer after July 1, 2003;~~

~~or~~

~~(iv) As a court employee;~~

C. ACJA § 7-208(L)(3): Responsibilities of Legal Document Preparers.

i. The Current Rule

The current ACJA § 7-208(L)(3) provides as follows:

3. Responsibilities of Legal Document Preparers.

a. It is the responsibility of each legal document preparer to ensure compliance with the continuing education requirements, maintain documentation of completion of continuing education, and to submit the maintained documentation to the legal document preparer program upon the request of the board or division staff.

b. Upon request, each legal document preparer shall provide any additional information required by the board or division staff when reviewing renewal applications and continuing education documentation.

c. Continuing education not recognized for credit upon board review does not in any way relieve the legal document preparer of the responsibility to complete the required hours of continuing education.

ii. The Proposed Amendment

3. Responsibilities of Legal Document Preparers.

a. [no change]

b. Upon receipt of notice of board approval of individual certification and before April 30th of the following odd numbered year, each legal document preparer shall attend and complete a two-hour professionalism training course on the role and responsibilities of the certified legal document preparer as provided by division staff.

~~b.c.~~ [no change]

~~c.d.~~ [no change]

D. Note: 2017 Proposed Amendment to ACJA § 7-208.

Notably, the current proposal is not the first time the Board has attempted to amend Section 7-208 to substantially limit a CLDP's ability to prepare legal documents.

In September 2017, the Board sought to amend ACJA § 7-208(J)(3) as follows:

- e. Other than performing research to determine the legal document preparer is utilizing the appropriate form, the legal document preparer shall not perform legal research concerning particular statutes, case law or other sources of information concerning legal theory or authority on behalf of a specific client. The legal document preparer may perform such research to develop an understanding of general legal principles when the research is not done on behalf of a specific client.*

- f. If a legal document preparer drafts a document that contains substantive legal statements or arguments, the legal document preparer must maintain adequate records to demonstrate that all research, analysis and legal statements and arguments were developed by the client and provided by the client to the legal document preparer for inclusion in documents prepared by the legal document preparer consistent with the requirements of subsection F(1).*

As in 2017, the Board's current proposed changes to ACJA § 7-208(F)(1) fail to meet constitutional muster and will result in a contraction of Arizona citizen's right to access the judicial system. These restrictions will also harm the public by leaving those individuals who cannot otherwise afford the assistance of a licensed attorney to "go it alone" in most civil cases. As explained below, the Board should reject the proposed changes.

II. OBJECTION TO PROPOSED CHANGES TO ACJA § 7-208(F)(1)

This comment makes four primary objections to the proposed amendments to ACJA § 7-208(F)(1). First, the proposed amendments do not promote access to justice. Second, the proponents of the amendments have not shown any justification for the amendments. Third, the conduct proposed to be prohibited is actually contemplated by ACJA § 7-208 and has been practiced by CLDPs for decades without demonstrable harm. Finally, the proposed amendments are unconstitutionally vague and overbroad and likely to lead to troubling interpretations and prosecution of otherwise law-abiding CLDPs. For the reasons stated above and argued in more detail below, the proposed amendments to ACJA § 7-208(F)(1) must be rejected.

The Proposed Amendments Run Contrary to the Purpose For Which ACJA § 7-208 Was Enacted.

ACJA § 7-208(C) states in part “[the] court recognizes . . . that the need to protect the public from possible harm caused by nonlawyers providing legal services must be balanced against the public’s need for access to legal services.” This simple statement effectively summarizes the reasoning behind the formation of the Certified Legal Document Preparer Certification. Specifically, the public (or, “Consumer”) needs access to more affordable legal services, but the Consumer also needs to be protected from the potential harm caused by nonlawyers providing legal services.

As such, any amendment to ACJA § 7-208 must first pass the following test: **Does the proposed amendment maintain the necessary balance between the Consumer’s access to affordable legal services and protection of the public?** As applied to the

proposed amendments to ACJA § 7-208(F)(1), it fails spectacularly. Specifically, the proposed ACJA § 7-208(F)(1)(a),(d) 1) run contrary to the public policy of promoting equal access to justice; 2) do not have sufficient justification for the protection of the Consumer; 3) prohibit conduct originally contemplated by ACJA § 7-208 and its drafters, and 4) are unconstitutionally vague and overbroad.

1. The Public Policy Supports Increased Access to Justice.

For the vast majority of Consumers in Arizona, Lawyers are prohibitively expensive. As a result, these litigants represent themselves *in propria persona*, or in other words, without an attorney to represent them. As stated in Arizona’s Task Force on the Delivery of Legal Services Report (2019), “[in] 2017, the Legal Services Corporation released a report, finding that 86% of civil legal matters reported by low-income Americans in the prior year received no or inadequate legal help.”² “And according to a report issued by the National Center for State Courts, 76% of 900,000 civil cases examined from July 1, 2012 through June 30, 2013 involved at least one self-represented party.”³ Further, a survey of pro-se litigants conducted by the Florida Association of Legal Document Preparers (“FALDP”) found that eighty percent (80%) of respondents who were representing themselves were doing so because they could not afford an attorney.⁴

² Supreme Court, State of Arizona, *Task Force on the Delivery of Legal Services Report and Recommendations* at 6 (Oct. 4, 2019)

³ *Id.* at 7.

⁴ Pro Se Survey re: Legal Access, The Florida Association of Legal Document Preparers, <<https://www.faldp.org/Pro-Se-Survey.html>>

In its 2019 Annual Report, Maricopa County acknowledged the issue of accessibility and, in response, adopted access to justice as its #1 Strategic Focus Area, recognizing that it is “vital” to make the public’s interaction with the Justice System “as *accessible* and simple as possible.”⁵ (emphasis added). It follows that Arizona should be seeking to expand access to civil justice. Unfortunately, by proposing the pending amendments, the Board will effectively hinder the progress made by Arizona in providing affordable access to our legal system and create an increased “justice gap.”

By prohibiting CLDPs from drafting “substantive legal motions, supporting memorandum or appellate briefs” and “[performing] legal research for the purpose of providing a legal opinion, advice, or advocating a legal theory” the Board is making the legal system far less accessible to the public.

If a CLDP is prohibited from assisting a low-income litigant with complicated legal documents such as motions, memorandum and briefs, it is not likely that the litigant will simply hire a lawyer to assist them due to the prohibitive cost. It is far more likely that the litigant will either attempt to work out the unfamiliar legal documents alone, lowering the efficiency of the courts who will have to decipher such documents, or simply ignore their legal issue altogether.⁶ The result of the proposed amendment will be increasing the burden on self-represented litigants to find and draft the correct motions,

⁵ See Maricopa County Judiciary. Maricopa County Superior Court Annual Report, 2019. (Strategic Focus Area #1: “Access to Justice & Delivery of Services. The Judicial Branch of Arizona for Maricopa County is the leading edge for residents’ interactions with their Justice System, which means it’s vital to make that interaction as accessible and simple as possible.”).

⁶ See *Task Force Report* at 7. (“One reason for the current “justice gap” is that the costs of hiring lawyers has increased since the 1970s, and many individual litigants have been forced to forego using professional legal services and either represent themselves or ignore their legal problems.”)

memorandum and briefs alone, or perhaps with the help of internet searches.⁷ As one law professor puts it, self-represented litigants often “don’t know what they don’t know” and their “internet-guided self-help” is equivalent to using the internet to diagnose your symptoms instead of visiting a medical professional.⁸ Preventing self-represented litigants from receiving help from certified, trained and experienced CLDPs does not align with Maricopa County’s findings and alleged commitment to expanding access to the legal system. In fact, it serves to increase the existing “justice gap”.

As discussed in more detail in Section (A)(II) below, the Board has not demonstrated that CLDPs who provide these services to their customers have harmed the public in any meaningful way, especially when compared to the immeasurable benefit provided to low-income Consumers who would otherwise have no assistance at all. Essentially, the proposed amendments to ACJA 7-208(F)(1) address a non-issue while exacerbating the real issue.

It is likely that the Board will argue that the new tier of legal paraprofessional will fill the justice gap left behind should the proposed amendments be put into effect. However, this “solution” fails for a number of reasons. Most notably, that legal paraprofessionals are not permitted to represent a client in Superior Court. Therefore, any

⁷ In FALDP’s survey of pro se litigants, the respondents stated that understanding rules and legal information are the most difficult parts of self-representation, with most turning to internet searches for guidance. <<https://www.faldp.org/Pro-Se-Survey.html>>

⁸ Tom Sharbaugh, “Everyday Low Price” for Legal Services in Arizona?, *Legal Evolution* <<https://www.legalevolution.org/2020/09/everyday-low-price-for-legal-services-in-arizona-198/>>.

Consumer with damages above the maximum allowed for Justice Court, for example, will not receive assistance. This leaves the “justice gap” unsolved.

For the foregoing reasons alone, the proposed amendments to ACJA 7-208(F)(1) should be rejected.

2. No Evidence has been Submitted to Show that the Proposed Amendments are Necessary to Protect the Consumer.

The second half of the balancing test adopted by ACJA § 7-208(C) is that the Arizona Supreme Court affirms that it has an interest in protecting Consumers from non-lawyers engaging in the practice of law. As explained above, this interest is in tension with the overarching policy of providing the Consumer with access to civil justice. However, in the case of ACJA § 7-208(F)(1), there is no justification stated, nor evidence presented that there is harm to be prevented by the significant restrictions included in the proposed amendments. In fact, the available evidence shows the contrary.

For example, in 2001, the Arizona State Bar attempted to pass over-broad and sweeping changes Arizona Unauthorized Practice of Law Statute in an effort to effectively put CLDPs out of business. In support of their proposed changes, the State Bar alleged that it had received 400 complaints alleging consumer harm at the hands of non-lawyers. At the time, the Institute for Justice Arizona Chapter analyzed the State Bar’s claims and made incredible findings. Specifically, of the 378 complaints (not 400 as alleged) received by the State Bar, “only 11 complaints were filed by a consumer against an independent paralegal/document preparer.” Less than three percent (3%) of

the complaints received by the bar alleging consumer harm at the hands of non-lawyers were actually from consumers against document preparers.

Further, CLDPs are permitted to provide legal services to Consumers pursuant to rules and regulations. An important feature of any career requiring a license or certification is that such license or certification may be revoked if a CLDP causes harm to a Consumer. The Board has failed to prove that the risk of harm is prevalent among CLDPs and the Board has a method to sanction individual CLDPs that cause harm to a Consumer.

If the Supreme Court of Arizona wants to inhibit the Consumer's access to civil justice (which the proposed amendments unquestionably do), ACJA § 7-208(C) requires that it only do so to the extent necessary to balance the harm inflicted on Consumers. If the harm cannot be demonstrated, the proposed restrictions must fail. No such harm exists.

3. The Conduct Sought to be Prohibited is Contemplated by the Rules.

a. ACJA § 7-208(F)(1) does not restrict CLDP services to a type of document.

ACJA § 7-208(F)(1), titled "Authorized Services", states that "[a] certified legal document preparer is authorized to: (1) *Prepare or provide legal documents*, without the supervision of an attorney, for an entity or member of the public *in any legal matter* when that entity or person is not represented by an attorney." (emphasis added). Subsection (F)(1) is *inclusive* with its terminology, not *exclusive*. Meaning, it does not designate certain legal documents that CLDPs may prepare under Rule 31 or ACJA § 7-208.

Instead, the grant of authority is § 7-208 defines broadly that CLDPs may *prepare legal documents in any legal matter*.

The proposed amendments to ACJA 7-208(F)(1) seek to arbitrarily and without justification limit the type of document that CLDPs may prepare. By prohibiting CLDPs from drafting these integral legal documents, Arizona is redefining the role of CLDPs in Arizona and running afoul of the language used in the very regulation the amendments seek to change.

b. UPL Opinions Permit CLDPs to do more than just “fill in the blank”.

The State Bar of Arizona has issued a series of Advisory Opinions concerning the limits of CLDPs in preparing legal documents on behalf of customers. The proposed amendments to ACJA § 7-208(F)(1) seek to constrain CLDPs further than the Arizona Bar has found appropriate. Indeed, the Arizona Bar acknowledges that CLDPs are permitted to perform services that would otherwise be considered the practice of law.

Specifically, UPL ADVISORY OPINION 04-02 found that CLDPs may draft late payment notices, demand letters seeking payment of rent or association fees, and eviction notices relating to the property being managed. Legal Document Preparers may also record liens relating to the property being managed.

Interpreting Rule 31, the Arizona State Bar stated that under Rule 31(a)(2)(A)(1), preparing eviction notices or late payment notices constitutes the practice of law. The State Bar then goes on to conclude (correctly) that ACJA § 7-208(F)(1)(a) permits such practice by a CLDP because a CLDP may “(a) *Prepare or provide legal documents*, without the supervision of an attorney, for an entity or a member of the public in *any*

legal matter when that entity or person is not represented by an attorney.” (emphasis added). This permission includes documents that when prepared for another person or entity would otherwise constitute the practice of law.

In addition, the State Bar found under the same reasoning, that a CLDP may prepare and record liens against real property on behalf of a management company. Again, preparing these documents on behalf of another person or entity would otherwise qualify as the practice of law. But, CLDPs are granted the authority to prepare these documents by virtue of their certification pursuant to ACJA § 7-208(F)(1)(a) and (e).

Similarly, UPL ADVISORY OPINION 04-01 found that CLDPs may prepare, serve, and record mechanic’s lien notices for contractors. While the preparation, service and recording of mechanic’s liens is considered the practice of law. Under ACJA § 7-208(F)(1)(a), CLDPs are granted the authority to practice law for documents of this type.

The documents contemplated by UPL 04-01 and 04-02 require, among other things, citation to statutes, and in some instances, case law. Under the proposed amendments to ACJA § 7-208(F)(1), documents which have been authorized by the State Bar of Arizona to be prepared by CLDPs would suddenly become dangerous territory, essentially causing a chilling effect. This standard is both unrealistic and counter to the prevailing public policy adopted by this state and the State Bar of Arizona.

4. The Proposed Amendments are Vague and Overbroad and Violate the Due Process Clause of the United States Constitution.

Due process requires that enacted prohibitions be clearly defined, otherwise they are void for vagueness.⁹ Vague prohibitions of conduct entrap the innocent and expose them to arbitrary enforcement of the same. In *Grayned*, the United State Supreme Court identified the dangers of vague laws as follows:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.¹⁰

The language of the proposed amendment violates these bedrock principles.

i. Substantive Motion and Supporting Memorandum.

The terms “substantive motion” and “supporting memorandum” are vague, overbroad and will leave CLDPs vulnerable to arbitrary enforcement and inconsistent interpretation. The effect of the proposed amendment will result in a chilling effect on the CLDP’s practice. It is far less clear what arguments the CLDP can or cannot make and to what extent they may assist a Consumer in completing a court-provided motion form, for example. CLDPs are left with the choice of assisting a Consumer in navigating

⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁰ *Grayned*, at 108-109.

the legal system and risk prosecution or removing themselves entirely from assisting a Consumer for fear of prosecution by the Arizona Supreme Court.

ii. The Family-Law Exception.

The exception in the proposed amendment allowing for CLDPs to assist Consumers in family-law matters to draft motions using court-approved forms does not ease CLDPs concerns. The forms provided on the Maricopa Court website are extremely basic and CLDPs are not adequately informed of their limits in assisting the Consumers. The vague proposed amendment leaves a CLDP vulnerable to arbitrary decisions on what is considered an acceptable level of assistance.

iii. The Proposed Amendment Prohibiting Legal Research.

The proposed amendment prohibits CLDPs “[performing] legal research for the purpose of providing a legal opinion, advice, or advocating a legal theory.” The term “legal research” alone is extremely vague and overbroad. A CLDP could perform legal research and give legal advice simply by assisting a Consumer in identifying the correct type of document to file, for example. Further, it is uncertain how a CLDP could reconcile this proposed restriction on their ability to perform legal research and their ability to competently provide legal services to Consumers. This proposed amendment should be rejected as overly broad and vague as prohibited by the U.S. Constitution.

III. OBJECTIONS, GENERALLY

1. Proposed Amendment: ACJA § 7-208(E)(3)(b)(6)(a),(b): Individual Standard Certification.

Under the proposed amendment ACJA § 7-208(E)(3)(b)(6)(a),(b), a court employee is no longer considered to be acceptable legal experience to cause an individual to become eligible to be a CLDP. By virtue of their career and workplace, court employees are familiar with and likely have extensive experience in court procedure and court forms. It is uncertain why the Board does not consider such experience to be an asset to CLDPs and Consumers, particularly considering the Board's other proposed amendments appear to reduce the CLDP's role to purely procedural assistance. Further, this requirement only gets an aspiring CLDP past the threshold. They must still prove another form of education, pass the certification exam and comply with continued education requirements.

If the overall strategic focus is to increase access to the legal system then this appears to be an unnecessary restriction. Further, it is unlikely that allowing previous court employment to be considered qualifying experience will harm the Consumer in any way. If the Board has evidence that it has, they have not provided it.

2. Proposed Amendment: ACJA § 7-208(L)(3): Responsibilities of Legal Document Preparers.

Under the proposed amendment AJCA § 7-208(L)(3), CLDPs will be required to attend and complete a two-hour professionalism course. It should be noted that the Arizona Association of Independent Paralegals already provides similar training.

Further, it is interesting that by requiring a two-hour professionalism course, increasing the required continued education hours, and charging comparable certification fees to that of a new attorney, the Board is imposing requirements on CLDPs that are increasingly similar to that of an attorney after passing the Arizona Bar. Yet, at the same time, the Board is proposing amendments that reduce the role of the CLDPs to a mere procedural role. These proposed amendments are contradicting and demonstrate the Board's misunderstanding of the role and value of CLDPs to the Arizona legal system.

IV. CONCLUSION

In sum, the proposed amendments to ACJA § 7-208(F)(1) present a litany of issues. Not only are the amendments contrary to the express purpose of ACJA § 7-208, but they run afoul of the United States Constitution. Unfortunately, the proposed amendments illustrate the Board's fundamental misunderstanding of a CLDP's role in Arizona's legal system. To that end, the Board seeks under the proposed amendments to redefine the role of CLDPs in Arizona and roll back the clock on the strides made for access to civil justice. Should the proposed amendments be upheld, the Arizona Association of Independent Paralegals will not hesitate to challenge their constitutionality. The importance of this issue cannot be understated. For the reasons stated above, we ask that the proposed amendments be rejected.

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