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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matters of,	)	Supreme Court No. R-20-0034
	)	
PETITION TO RESTYLE AND AMEND	)	INITIAL COMMENT
SUPREME COURT RULE 31; ADOPT	)	SUPPORTING THE
NEW RULE 33.1; AND AMEND RULES	)	CREATION AND
32, 41, 42 (VARIOUS ERS FROM 1.0 TO	)	REGULATION OF LIMITED
5.7), 46-51, 54-58, 60, AND 75-76; AND	)	LICENSE LEGAL
PROPOSED ACJA 7-210 LIMITED	)	PRACTITIONERS
LICENSE LEGAL PRACTITIONER	)	

16 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, please
17 accept this comment in support of the creation and regulation of Limited License
18 Legal Practitioners (LLPs).

19 In addition to being an expert on legal ethics, I have had the privilege and
20 pleasure of teaching J.D. students, master of legal studies students, and
21 undergraduate law students. Some of these students may choose to become
22 LLPs, and in doing so, they will meet a need and practice competently within
23 their limited scope. I thus write to support the adoption of LLPs in Arizona,¹
24 subject only to certain minimal suggestions in Part II below.

26 ¹ This comment takes no position on the proposed ABS-related
27 amendments.
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1 In Washington (with Limited License Legal Technicians or LLLTs) and so
2 far in Utah (with Licensed Paralegal Practitioners or LPPs), this new tier of legal
3 professional, akin to a nurse practitioner in the medical field, has modestly
4 improved access to legal services for low-to-moderate-income consumers.
5 Although the improvements to date have been modest, they are improvements
6 nevertheless. Utah's program is currently small but meets a previously unmet
7 price point.² Washington's program, while larger but still modest, is likewise
8 commendable.³ We should welcome and improve this modest innovation for
9

10 ² See, e.g., Annie Knox, How a New Program Connects Utahns to Lower-
11 Cost Legal Advice, Deseret News, Feb. 17, 2020,
12 [https://www.deseret.com/utah/2020/2/17/21069591/utah-paralegal-practitioner-program-](https://www.deseret.com/utah/2020/2/17/21069591/utah-paralegal-practitioner-program-lawyer-advice-cheaper-himonas-supreme-court-state-bar-divorce)
13 [lawyer-advice-cheaper-himonas-supreme-court-state-bar-divorce](https://www.deseret.com/utah/2020/2/17/21069591/utah-paralegal-practitioner-program-lawyer-advice-cheaper-himonas-supreme-court-state-bar-divorce) (noting that the
14 program currently has only four licensed paralegal practitioners and that one charges \$75
15 per hour); see also generally Gary Stuart, on Behalf of the Arizona Lawyers Foundation
16 Board of Trustees ("A \$500-dollar dispute in a JP court should not require representation
by a traditionally licensed lawyer; it should be handled by a LLLP."),
[https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&mod](https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=7657)
[uleid=23621&attachmentid=7657](https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=7657).

17 ³ See, e.g., Thomas M. Clarke & Rebecca L. Sandefur, *Preliminary*
18 *Evaluation of the Washington State Limited License Legal Technician Program* (2017),
19 [http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf)
20 [_of_the_washington_state_limited_license_legal_technician_program_032117.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf)
21 ("The evaluation shows that the program has been appropriately designed to provide
22 legal services to those who cannot afford a lawyer but still wish or need assistance. The
23 training program prepares LLLTs to perform their role competently while keeping
24 within the legal scope of that role. Customers have found their legal assistance to be
25 valuable and well worth the cost. The legitimacy of the role appears to be widely
26 accepted in spite of its short track record."). Arizona's LLLPs would likely be more
27 successful and sustainable than Washington's LLLTs, because as currently proposed
Arizona's LLLPs have significantly broader scope-of-practice options. See generally
Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal*
Technicians Increasing Access to Justice, 42 SEATTLE U.L. REV. 1 (2018) (concluding
that Washington's LLLTs offer increased access to legal services only to individuals of
moderate, but not low, income and arguing among other things that LLLTs should be
permitted to offer a broader array of legal services).

1 Arizonans. Moreover, LLLPs will likely be supportive of lawyers, by working
2 with and in law firms (consistent with Washington’s experience).⁴

3 I. PRELIMINARY THOUGHTS ON THE OPPOSING COMMENTS

4 I have appreciated the opportunity to review the thoughtful and passionate
5 comments on this forum. The overwhelming sentiment from those comments is
6 that the proposed ABS changes are unwarranted (or even dangerous). Although
7 some comments do object to LLLPs, both the frequency and tenor of those
8 objections are faint (relative to the ABS objections). Of the comments directed at
9 LLLPs, they generally contain certain recurring themes, discussed below.

10 One theme predicts in essence that the LLLPs would practice law “without
11 repercussion.” The proposed regulatory provisions have now been posted (only
12 after many of the opposing comments had been posted), and those provisions do
13 not permit LLLPs to practice “without repercussion.” In actuality, the regulatory
14 rules and the scope of permissible practice are more restrictive than those
15 governing lawyers.

16 Another theme in the comments is a heavy reliance on Judge Swann’s
17 Opposition Statement.⁵ Judge Swann is of course deeply knowledgeable and
18 respected, but his opposition statement spent relatively little time discussing
19 LLLPs (as opposed to the ABS-related proposals). The statement, in brief,
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21 ⁴ See, e.g., Steve Crossland & Paula Littlewood, *Pro: An Idea Whose Time*
22 *Has Come: LLLTs Provide Qualified Legal Services at an Affordable Price*, Law Prac.,
23 July/August 2016, at 44, 45 (“[M]any lawyers have started to realize that LLLTs are not
24 business competition but rather create business opportunities by attracting clients who
might not otherwise have set foot in a lawyer’s office. When a lawyer and LLLT work in
a firm together, a mutually beneficial referral relationship is created.”).

25 ⁵ The Task Force’s full report and Judge Swann’s Opposition Statement (at
26 page 57) is available here:
27 [https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED1
0042019.pdf?ver=2019-10-07-084849-750](https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750).

1 suggests that LLLPs would need lawyer supervision to navigate unerringly the
2 law's complexity and that the LLP proposal was "not fully baked."⁶ But certain
3 tasks can be done successfully now without lawyer supervision, and in those
4 specific but yet to be identified areas of intractable complexity, the rules could
5 require lawyer supervision or could narrow the authorized scope of practice to
6 preclude or limit the ability of LLLPs to practice in that area.

7 The opposition statement's second proposition, however, was correct—the
8 LLP concept was indeed "not fully baked" at the time. With the addition of
9 proposed ACJA § 7-210, however, the concept now provides the requisite details
10 and accountability. As just one example, some of the commentators feared that
11 disbarred lawyers would become LLLPs, but the proposed ACJA section
12 specifically prohibits this and more generally requires LLLPs to be of "good
13 moral character." ACJA § 7-210(E)(3)(b)(3)-(4). Furthermore, once an LLP
14 applicant is vetted, the ACJA imposes ethical rules, disciplinary enforcement,⁷ and
15 insurance disclosure on LLLPs.

16 The provisions also require clear disclosures to consumers that LLLPs are
17 not lawyers and may advise only within their authorized scope:

18 A limited license legal practitioner shall inform the consumer in
19 writing that a limited license legal practitioner is not a lawyer and
20 cannot provide any kind of advice, opinion or recommendation to a

21 ⁶ *Id.* at 64. The opposition statement also asserts that "there [is no] public
22 thirst for practitioners who never attended law school and charge a 'mere' \$100 per
23 hour." *Id.* at 62. This assertion, however, appears to run counter to the Task Force's
survey, indicating that Arizonans (N=400) would generally welcome an LLP option for
certain legal services. The survey results are posted here:

24 [https://www.azcourts.gov/Portals/215/Documents/Opinion%20Poll%20Results.pdf?ver=](https://www.azcourts.gov/Portals/215/Documents/Opinion%20Poll%20Results.pdf?ver=2020-03-06-113334-443)
25 [2020-03-06-113334-443](https://www.azcourts.gov/Portals/215/Documents/Opinion%20Poll%20Results.pdf?ver=2020-03-06-113334-443).

26 ⁷ As another example of tighter regulation, discipline of proposed LLLPs
27 would require only a preponderance of the evidence, whereas the higher standard of
clear and convincing evidence is required to discipline lawyers.

1 consumer about possible legal rights, remedies, defenses, options, or
2 strategies beyond what the practitioner is specifically licensed to
3 provide authorized services for. A limited license legal practitioner
4 shall not use the designations “lawyer,” “attorney at law,” “counselor
at law,” “law office,” “JD,” “Esq.,” or other equivalent words⁸

5 Finally, another general theme in the opposing comments is a suspicion,
6 based seemingly on speculation and a few stories involving apparently
7 incompetent or unethical legal document preparers and paralegals, that LLLPs
8 will commit malpractice. Some LLLPs undoubtedly will commit malpractice, but
9 some lawyers and law firms undoubtedly commit malpractice as well—yet no
10 comments of course have proposed to ban lawyers. Likewise that some LLLPs
11 will make mistakes does not justify categorically excluding LLLPs, but it does
12 mean that LLLPs should be regulated (as the accompanying ACJA provisions
13 provide) and that avenues for client compensation should be as fulsome as
14 possible.

15 Perhaps the key concern in this set of opposing comments is that LLLPs
16 will commit malpractice at a higher rate than lawyers. In addition to the limiting
17 factor that LLLPs would operate within a significantly narrower scope than
18 lawyers, no evidence exists indicating that LLLPs will commit malpractice at a
19 higher rate than lawyers in those areas in which both lawyers and LLLPs may
20 operate in the future. Furthermore, the available evidence from analogues in
21 Arizona (i.e., certified legal document preparers) and in other states (i.e., LLLTs
22 and LPPs) does not prove or even clearly suggest a higher rate of malpractice.

23 In sum, although this initial comment does not give full treatment to all of
24 the opposing comments, their general themes do not justify banning LLLPs. Of
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26 ⁸ Proposed ACJA § 7-210(J)(5)(D).
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course, improvements can be made to the LLLP program, a few of which are suggested below.

II. INITIAL SUGGESTIONS FOR FURTHER IMPROVEMENT

While fully supportive of the concept, I do believe that additional adjustments (as with any new endeavor) will improve the LLLP program. I offer some thoughts below toward that end:

- Insurance: The regulations should go beyond insurance disclosure; LLPs in the private sector should also be required to obtain insurance.⁹ *See* Ariz. Sup. Ct. R. 32(c)(12) (requiring disclosure of insurance coverage but not requiring actual coverage).
- Ethics: Although the Arizona Rules of Professional Conduct will serve as a suitable default for the ethical rules governing LLPs, the differing background and scope will present occasions to tighten certain ethical rules while potentially loosening others. I would be happy to assist that rule-by-rule review.
- Privilege: The Court should consider whether to add or modify an evidentiary rule or to recommend amending the state privilege statutes (A.R.S. §§ 12-2234, 13-4062) to recognize an LLP-client privilege. As with the LLP duty of confidentiality in the forthcoming ethical rules, the Court will need to decide what if any exceptions should permit or require disclosure (e.g., to prevent death, substantial bodily injury, child and elder abuse, corporate fraud, and so on).
- Client Protection Fund: LLPs should be required to contribute annually to the Client Protection Fund of the State Bar of Arizona, and the trust should be authorized to reimburse otherwise eligible claims arising out of an LLP's (not just a "lawyer's") misconduct.

⁹ See, e.g., Steve Crossland & Paula Littlewood, *Pro: An Idea Whose Time Has Come: LLLTs Provide Qualified Legal Services at an Affordable Price*, Law Prac., July/August 2016, at 44, 45 (“Another aspect of the program that serves the public interest is that LLLTs are required to carry malpractice insurance. . . . LLLTs in Washington are held to a higher standard than lawyers in that respect.”).

- Naming: A final but very minor suggestion is whether we can gain consensus on a shorter title for these new professionals; four words should not be used if one or two will suffice. One possibility would be “paralegal practitioners” (inspired by Utah’s Licensed Paralegal Practitioners).¹⁰ Alternatively, although the term “nonlawyer” is less than ideal, the Court could refer to the new class as “nonlawyer practitioners” or “NPs” for short.

The items identified above should serve as examples for further discussion and refinement; undoubtedly others exist.

CONCLUSION

In sum, the creation of additional legal professionals—carefully regulated LLLPs—will provide Arizonans of low-to-moderate means with increased access to, and choice of, legal services. To be sure, LLLPs will not completely or even mostly solve the access-to-justice gap; many other steps of course will remain necessary to bridge the gap (to name just two: increased funding of legal aid and increased access to online dispute resolution).

RESPECTFULLY SUBMITTED this 30th day of March, 2020.

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¹⁰ If the ACJA permits only those with a license to use the title “paralegal practitioner,” the word “licensed” or “license” becomes unnecessary.

* Institutional designation is for identification purposes.

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 30th day of March, 2020.

By: Keith Swisher