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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

COMMENT TO "Petition to Amend)
Ethical Rules 1.5, 4.2, 4.3 and)
6.5, Rule 42 of the Arizona)
Rules of the Supreme Court, and)
Rules 5.1 and 11 of the Arizona)
Rules of Civil Procedure")

Supreme Court #R-12-0027

**Comment to
the State Bar's
Pending Petition**

This "Comment to Pending Petition,.. " [hereinafter "Comment"] supports in large part the pending Petition R-12-0027 filed by General Counsel Furlong of the State Bar of Arizona. Some modification and addition are proposed herein, for the purpose of adding greater application and thereby providing a vehicle for greater access to justice. This Comment proceeds as follows:

1. Adjustment re engagement letter exemption;
 - 1.1 Broadening the rule to all attorneys
 - 1.2 Reaching a wider audience of litigants
2. Embracing "ghost" writing;
3. Historical perspective regarding limited scope court representation in Arizona in support of the limited court appearance portion of R-12-0027; and
 - 3.1 The 1999 petition
 - 3.2 Limited appearances thereafter
4. Conclusion
 - Recommendation One
 - Recommendation Two
 - Recommendation Three

1 1. *Adjustment re engagement letter exemption.* The Ethical
2 Rules governing attorneys in Arizona currently require a writing
3 regarding the basis or rate of fee and expenses unless exempted.
4 The State Bar petition suggests exemption to such writings:

5 *"The requirements of this subsection shall not apply to*
6 *.. (2) lawyers who provide pro bono short-term limited*
7 *legal services to a client pursuant to ER 6.5."*

7 Petition, Appendix A, "ER 1.5. Fees".

8 This Comment suggests replacing the proposed subsection (2)
9 with the following more inclusive language, thereby serving the
10 goal of "access to justice" more widely:

11 *"(2) lawyers who provide pro bono legal services to a*
12 *client and (3) lawyers who provide short-term limited*
13 *legal services."*

14 The proposed wording in the Bar's Petition actually limits the
15 State Bar's narrative explanation, and the Access to Justice Task
16 Force's work, possibly inadvertently. The wording as it reads in
17 R-12-0027 would not exempt all attorneys from needing to provide
18 engagement letters when acting on a *pro bono* basis and also would
19 not exempt attorneys who may meet with a client only for a discrete
20 or limited task. The above substituted subsection (2) Comment
21 exemption includes both.

22 1.1. *Broadening the rule to all attorneys.* Many public
23 members inquire with attorneys as to limited representation,
24 whether with payment for only a few hours or whether without a fee.
25 Sometimes attorneys are reluctant because they perceive that
26 drafting a limited scope engagement letter for a possible one or
27 two hour task is disproportionate, as well as that the new
28 paperwork creates an extra file retention task.

1 1.2. *Reaching a wider audience of litigants.* To the
2 extent that attorneys do not offer limited representation (whether
3 limited of time, reduced fee, or *pro bono*) due to these perceived
4 ministerial distractions, it is unfortunate. Justice is better
5 served when counsel is available to that population needing
6 discrete tasks. Further, many attorneys provide not only the
7 presumptive fifty hours of annual *pro bono* services, but far in
8 excess. However, those attorneys will be denied the benefit of R-
9 12-0027's exemption as proposed in the Petition because they
10 perform those tasks privately with clients, rather than through a
11 program sponsored by a nonprofit or court.

12 2. ***Embracing "Ghost Writing".*** Document preparers are
13 permitted to ghost write; not so for attorneys. **This Comment**
14 **supports PASSAGE of the proposed amendment to Ariz.R.Civ.Proc.,**
15 **Rule 11, as set forth in the State Bar's petition but also urges**
16 **the same addition at this time to the Arizona Rules of Family Law**
17 **Procedure.**

18 The State Bar's proposal to permit attorneys to ghost-write is
19 bold in that it may be the first such request to the Court. It is
20 a sound request, however. Respectfully, an historical overview
21 suggests that as a general statement, it was considered the
22 unauthorized practice of law for non-attorneys to draft legal
23 documents for a fee, and a UPL offense was once a crime. [For an
24 overview, see "The Unauthorized Practice of Law: Arizona Timeline, Arizona
25 Attorney (June 2001 bottom border)].

26 Amid much discussion about consumer protection, certification
27

1 became available for document preparers in 2003. A regulatory
2 scheme developed permitting certified document preparers to draft
3 documentation, including court pleadings without appearing
4 otherwise in the court case. Hopefully, there is not the same
5 consumer protection concern for attorneys admitted to practice.
6 However, many attorneys are reluctant to draft pleadings on par
7 with doc preps due to lack of specific authority. The reasons are
8 ample.

9 The State Bar's petition explaining the issue framed it well.
10 Attorneys admitted to practice law in Arizona ought to be in a
11 position confidently to draft documentation for limited scope
12 clients without ethical violation. This Comment concurs in the
13 State Bar's explanation surrounding the desirability of ghost
14 writing and endorses the Bar's recommendation to so permit. There
15 is no apparent reason, however, that the rule would not apply
16 equally to the probate, juvenile, family, and criminal departments
17 of the Superior Court or to Justice and Municipal Courts. Given
18 that limited appearances are specifically permitted in three areas
19 of law (discussed *infra* @3), it makes sense that this same
20 provision apply to all three areas.

21 3. *Historical perspective regarding limited scope court*
22 *representation in Arizona.*

23 This Comment supports the State Bar's request to permit
24 limited appearances in court actions.

25 There are currently three substantive areas of law wherein
26 limited appearances are permitted in State court proceedings:
27

1 ↔ Arizona Rules of Probate Procedure, Rule 10.2;

2 ↔ Arizona Rules of Family Law Procedure, Rule 9.B.; implemented
3 by use of Rule 97's Form 1; and

4 ↔ Arizona Rules of Civil Procedure, Rule 5.2; implemented by use
5 of Form 8.

6 **A bit of historical perspective regarding limited appearances**
7 **may be useful, hereby urging PASSAGE of Ariz.R.Civ.Proc., Rule**
8 **5.1.(c), the Limited Appearance portion of the State Bar's**
9 **petition.**

10 3.1. 1999 Petition. R-99-0016 was the undersigned's
11 petition seeking greater recognition of unbundled services,
12 including limited court appearances. In response thereto, the
13 State Bar filed a Comment, constituting its request to continue
14 consideration of R-99-0016.

15 The December 1999 Comment indicated that

16 "*The Board supports the principle of 'unbundled legal*
17 *services' as one method of providing access to justice*
18 *for the citizens of Arizona.*" Comment to Proposed Rule
19 Change, Berry, John T., State Bar Asst.Ex.Dir.-Legal, 13
20 December 1999.

21 The Bar's request for continuance of consideration of R-99-
22 0016 included its desire to have first permitted the Bar's wider
23 recommendations to be developed, in response to the then-occurring
24 Ethics 2000 ABA project and also, that once the State Bar's
25 recommendations would be submitted,

26 "*all of the foregoing issues regarding limited*
27 *appearances and limited representations should be*
28 *deliberated.*"

Subsequently, the State Bar did submit its proposed re-write of the

1 then-ethics' rules (R-02-0045). R-02-0045 in fact later was
2 passed, resulting in our Ethical Rules substantially as we know
3 them today. The then-new ERs supported attorneys offering limited
4 scope services, but court rules were not implemented to address on
5 any parallel path the court appearance component. Rather, that
6 discussion continues today introducing the concept of limited
7 appearances in court actions topic-by-topic, addressing one area of
8 substantive law at a time.

9 3.2. Limited Appearances Thereafter. On January 1, 2006
10 the Arizona Rules of Family Law Procedure took effect, being the
11 first of the substantive areas to permit limited appearances in
12 court actions (applying to title 25 family cases) (R-07-0010).

13 Some years later, (by mere happenstance, occurring
14 concurrently) the next two areas of law were subjects of court rule
15 change permitting limited appearances. The Arizona Rules of
16 Probate Procedure were promulgated, taking effect January 1, 2009.
17 The probate rules permitting limited appearances took effect at the
18 same time as the vulnerable adult limited appearance rule.

19 As to the latter, the State Bar's Sole Practitioners' / Small
20 Firms' section of the State Bar¹ provided its November 2006 initial
21 draft of the initiative to the State Bar Board of Governors. The
22 State Bar submitted the finalized rule change petition, following
23 a lengthy course of volunteer committee members' input. That
24 committee and BOG effort resulted in today's limited appearance
25

26 ¹ for disclosure purpose, as a "signature project" while undersigned was
27 the Chair of the SPSF section

1 rule for title 46 vulnerable adult exploitation cases, effective
2 January 1, 2009 (R-07-0024).

3 4. *Conclusion.* Representation for clients with limited need
4 and/or limited resources remains piece-meal in the court context.
5 "Ghost writing" remains a grey ethical and rule area which many
6 attorneys simply avoid.

7 Many a potential client wishes to be represented at particular
8 times or phases; perhaps unable to afford continued representation
9 in some cases, sometimes recognizing the need for precision
10 drafting, and sometimes believing that a pleading or an upcoming
11 proceeding rises to a critical level deserving of drafting or
12 representation when not otherwise either affordable or desirable.

13 In today's difficult economic climate, many attorneys still
14 commit to serve that wider population on a less-than-traditional
15 limited scale. True access to justice will be enhanced if we might
16 be permitted both to ghost-write and also to appear in court
17 actions for that underserved or unserved population of litigants
18 desiring this assistance.

19 The time is upon us as a Bench and a Bar to welcome passage of
20 R-12-0027.²

21 The time is upon us, too, to consider removing the similarly
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23 ² Perhaps it is time, too, to develop similar limited court appearance
24 rules in the criminal and juvenile departments of the Superior Court, as well in
25 municipal and justice court appearances. (Special consideration for these last
26 bastions would require that any rule address automatic withdrawal from a limited
27 appearance at the time of trial setting, to preserve defendants' constitutional
rights to counsel and to assure that any waiver at trial settings when counsel
withdraws are knowing, voluntary, and intelligent in criminal and certain
juvenile matters.)

1 existing obstacle to limited scope court representation within
2 other branches of state court proceedings.

3 The Comment to Petition R-12-0027 applauds our State Bar and
4 the various committee members who have taken the initiative to
5 develop and file the Bar's proposed rule changes.

6
7 **RECOMMENDATION I**

8 This Comment recommends that R-12-0027 pass promptly but
9 with the limited modification here, substituting this language
10 in lieu of R-12-0027's E.R.1.5 (2) (discussed *supra*):

11 *"The requirements of this subsection shall not apply*
12 *to ..*

13 *(2) lawyers who provide pro bono legal services to a*
14 *client and (3) lawyers who provide short-term*
limited legal services.:

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17 **RECOMMENDATION II**

18 This Comment recommends that the Court add the Petition's
19 same Rule 11 proposed language to the identical Arizona Rules
20 of Family Law Procedure, *i.e.*, Rule 31.A.³

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22
23 ³ The change is not needed in courts whose rules specifically incorporate
24 or follow the Arizona Rules of Civil Procedure, including as does Probate Rule
25 3.A. Likewise, the current Petition covers the limited appearance in matters of
26 vulnerable adult exploitation, as it is within the Rules of Civil Procedure.
27 Rule changes may be appropriate where this point remains unaddressed. For
instance, in the rules governing each of the fields of practice of Protective
Proceedings, Juvenile, and Criminal; as well as Justice and Municipal Court
practices. Please see footnote 2 regarding constitutional concerns in the
juvenile and criminal contexts.

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3 **RECOMMENDATION III**

4 This Comment supports passage of all other provisions as
5 set forth in #R-12-0027.
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8 **RESPECTFULLY SUBMITTED** this 7th day of November 2012.

9 The Law Office of Debbie Weecks

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11 BY:


12 Attorney Debbie Weecks

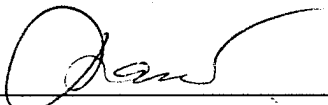
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