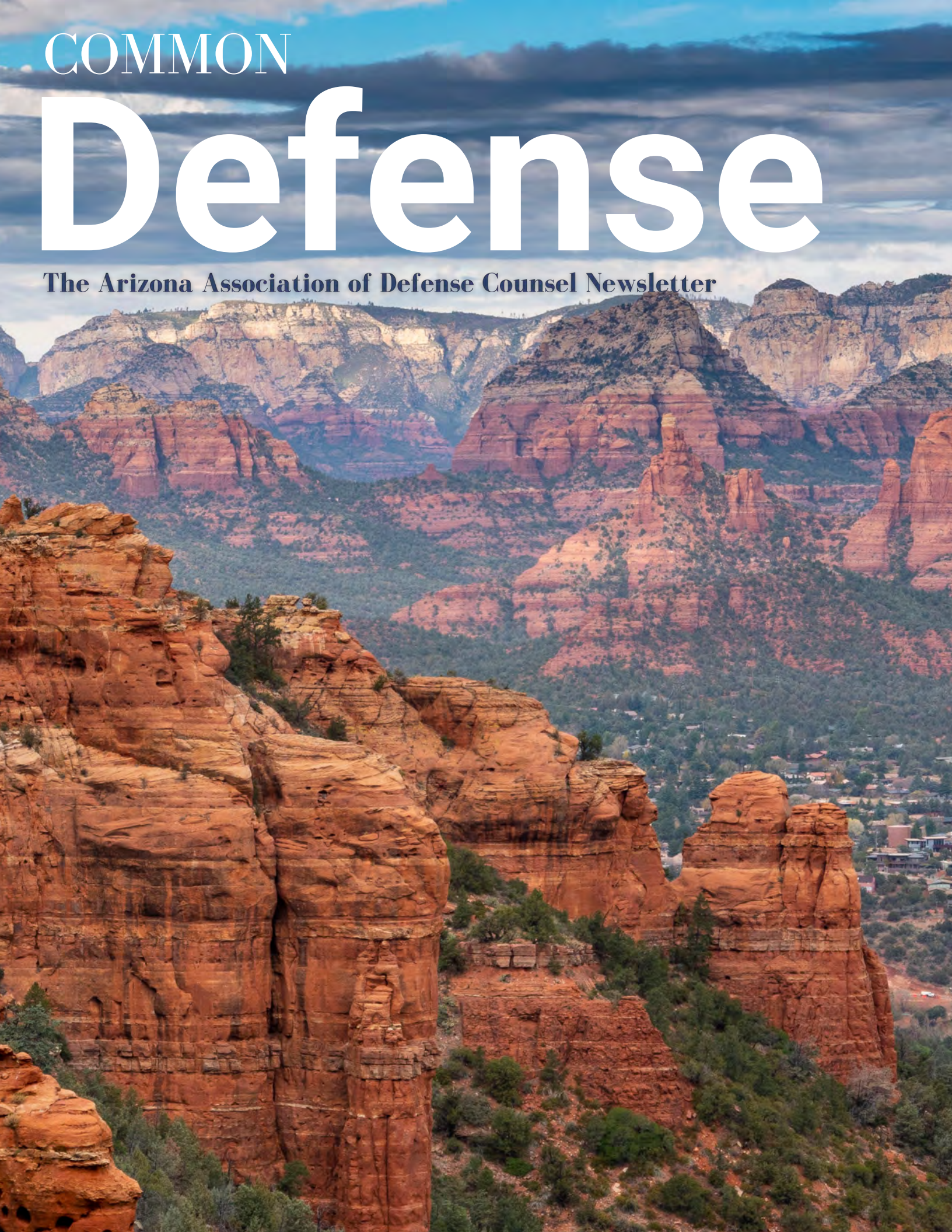

COMMON Defense

The Arizona Association of Defense Counsel Newsletter

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Arizona Association of Defense Counsel
THE CIVIL DEFENSE BAR

SUMMER 2021 NEWSLETTER

AADC Annual Meeting a Virtual Success!

On June 11, the AADC held its first (and hopefully last!) virtual Annual Meeting. Beginning with a Keynote Address from Retired Justice Andrew Gould, attendees were treated to a comprehensive discussion of the Court's most recent decisions regarding duty, including a discussion of the Quiroz opinion authored by Justice Gould. Then, Legal Ethics gurus Linda Shely and Don Bivens presented an engaging update about the 2021 changes to Arizona's ethical rules concerning lawyer/non- lawyer partnerships, legal para-professional services, and changes to the definition of "the practice of law."

The afternoon continued with "Women in the Profession: Men in the Mix," in which Hon. Peter Reyes, Jr., of the Minnesota Court of Appeals, and Katherine Larkin-Wong, co-chairs of the ABA's "Men in the Mix" study, presented the results of their research on men's engagement in gender issues within the legal profession. Interactive break-out sessions allowed for participants to voice their own concerns about, and strategies for, facing gender inequity in the workplace. A highly competitive scavenger hunt then ensued with teams led by sponsors Rimkus Consulting Group and Subrosa Investigations. Subrosa Team "Looky-Loo Lawyers," led by AADC President Chris Begeman, triumphed over the others; for their scavenger prowess, the Looky-Loos each received a $50 gift card.

The afternoon concluded with the ABOTA presentation "Civility Matters!" Judge Christopher Whitten, John Ager, and former AADC President Chris Hanlon led the discussion incorporating both bench & bar perspectives on the importance of creating and fostering a culture of civility in the profession.

The AADC wishes to thank its meeting sponsors, as well as its presenters and participants, for a thoroughly informative and entertaining afternoon.

Examination of Arizona's New Legal Paraprofessionals (LP)

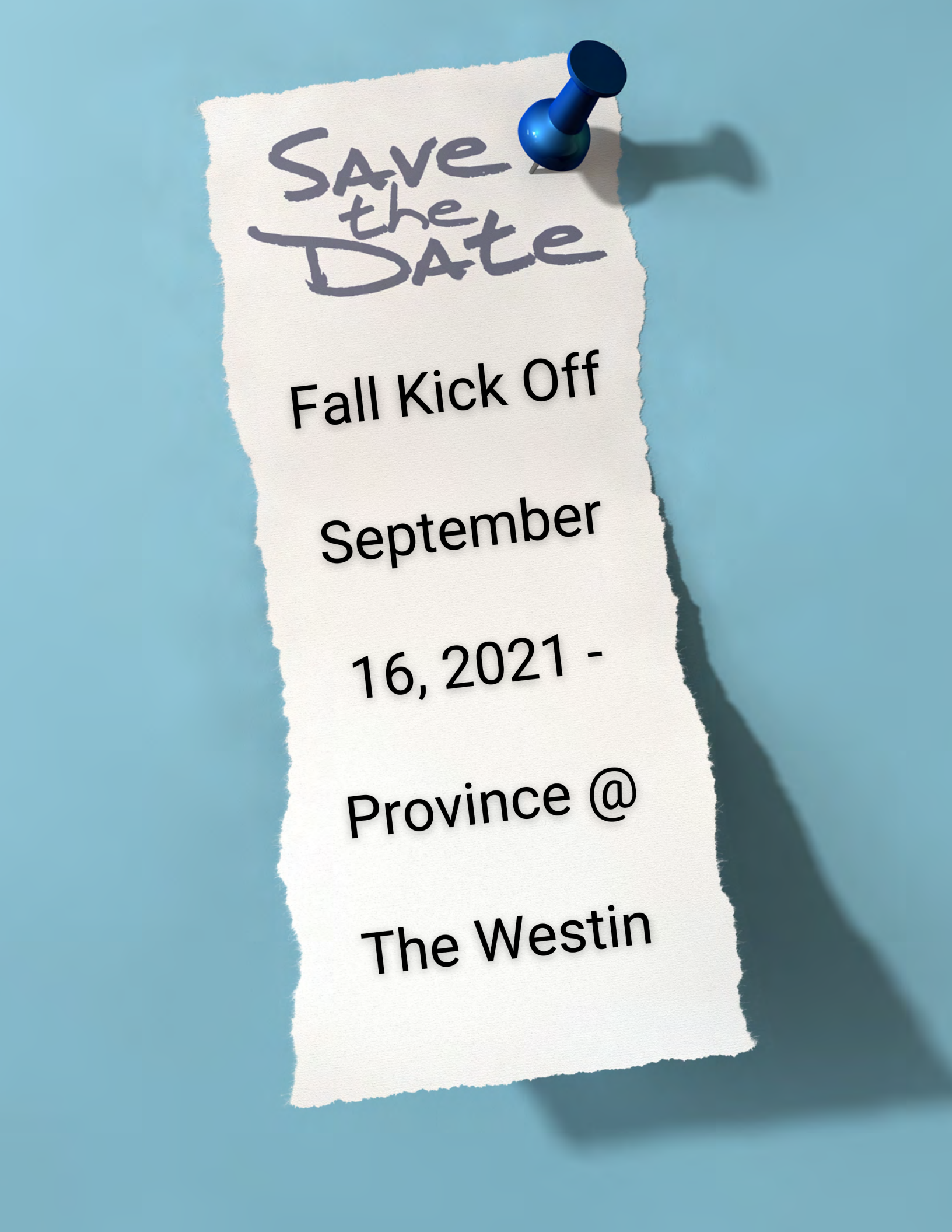
By: Grace J. Lynn, Esq. (Bremer Whyte Brown & O'Meara LLP)

Legal Paraprofessionals ("LP"), affirmed and adopted by the Arizona Supreme Court, was created with the intent to give the general public access to litigation and justice. Historically, after several changed drafts were presented to the Arizona Judicial Council (AJC) on October 22, 2020 and adopted by the Arizona Supreme Court on November 4, 2020, ACJA 7-210 took effect January 1, 2021, thereby creating the new LP tier of legal professionals.

An LP can be considered analogous to a nurse practitioner, the medical field's solution for cost-effective medical treatment, without having to pay doctors their higher fees or longer wait times for visits. While the intent of the creation of LPs is commendable and shows steps taken to combat a serious issue in the market of justice, the question remains as to the efficiency of a program that opens doors to liability, limitations, and increasingly convoluted legal processes. Despite the tests and coursework laid out in Arizona Code of Judicial Administration 7-210 (ACJA 7-210), which was intended to define the expectations, requirements, and scope of the LP program, and the task force enforcing same, there isn't a lot of information or understanding of the nature of these non-lawyer practitioners of law.

There are many distinctions between attorneys and LPs, each presenting a different concern for both occupations. One of the biggest caveats for attorneys is the competing fees between attorneys and LPs. While LPs are capable of competitively setting their own rates similar to attorneys, LPs are expected to charge less than attorneys. Although each locale and area of practice has its own market, attorneys' fees are based largely on the fact that attorneys have gone through grueling licensure, with extensive prerequisites, namely law school. Arguably, attorneys' fees are substantiated and justified by all of the associated costs to achieving licensed attorney status. In contrast, LPs are only required to complete several courses, and the licensing requirement is less stringent, thereby allowing LPs to charge considerably less than attorneys.

Continued on page 15


Save the Date
Fall Kick Off
September
16, 2021 -
Province @
The Westin

What Is a "Like Report" Under Rule 35(d)(2) and Exactly What Must Be Produced?

DAVID L. STOUT, JR., ESQ. AND EVANN WASCHUK, ESQ.

The independent medical examination (IME), governed by Ariz. R. Civ. P. 35, is a staple of personal injury defense. Under the well-known rule, a defendant can compel a medical examination of the plaintiff who is claiming physical or psychological injuries. Most defense attorneys quickly learn that this discovery tool is often critical to defend against a plaintiff's allegations of injuries and damages.

As of late, plaintiff attorneys have argued that Rule 35(d)(2) obligates opposing counsel to produce "the examiner's report, like reports of the same condition, and written or recorded notes from the examination." In other words, plaintiff attorneys are requesting production of the examiner's "like reports" from earlier examinations of other litigants. Such a request begs a number of questions. For instance, who pays for the examiner to perform a review of previous reports? And what exactly constitutes a "like report"? Is an examiner compelled to look for "like reports" of all lower back injuries? Or just lower back injuries involving compression fractures? Finally, if "like reports" are produced, is discovery allowed regarding the previous examinee's medical records and related documents?

The most common interpretation of the rule, at least amongst defense attorneys, is that the defendant must deliver "like reports" of all earlier examinations of the plaintiff. On the other hand, a growing number of plaintiff attorneys have advocated for a much broader interpretation of Rule 35(d)(2), which would include "like reports" of the same condition in individuals other than the examined party. Presumably, plaintiff attorneys could use such reports to establish the IME physician's bias, especially when dealing with physicians who are predominately retained by defense attorneys. If their interpretation of "like reports" under Rule 35(d)(2) is accepted, it would make IMEs cost-prohibitive and unnecessarily expand the scope of litigation.

As a result, discovery disputes regarding the purpose of Rule 35(d)(2) and the interpretation of "like reports" have been on the rise. This article identifies some of those challenges and provides strategies for addressing them.

Case Law from Other Jurisdictions

In Arizona, there is no binding precedent regarding the interpretation of "like reports" under Rule 35(d)(2). However, a small number of federal district courts have interpreted Fed. R. Civ. P 35(a)(1)—the federal counterpart of Arizona's Rule 35(d)(2).

One of the strongest cases that plaintiff attorneys rely on to support their position is Bryant v. Dillon Real Estate Co., where the United States District Court for the District of Colorado held that "like reports of the same condition" extends to previous examinees. In ordering the IME physician to produce "like reports" from previous examinees, the Court in Bryant relied on the fact that it "has found—and the parties cite—no cases interpreting the rule regarding whether it refers to reports of the same condition in individuals other than the examined party." As a result, the IME physician was ordered to disclose the last 20 "like reports" prepared for defense counsel's firm, the last 20 "like reports" prepared for any defendant, and the last 20 "like reports" prepared for anyone.

However, the Bryant holding is flawed. In ordering "like reports" be produced, the Court and counsel overlooked existing authority from other jurisdictions. For example, the United States District Court for the Northern District of Georgia addressed this precise dispute in Howard v. Wal-Mart Stores East, LP, which pre-dated Bryant. Rejecting the plaintiff's request to obtain "like reports" from previous examinees, the Court stated:

> With respect to [the request], the court does not interpret Rule
> 35(a)(1) as requiring the defendant to deliver like reports for all
> earlier examinations of the same conditions from all persons [the
> IME physician] has examined. The court interprets this provision as requiring the defendant to deliver to the plaintiff only like reports of all earlier examinations of the plaintiff regarding the same conditions to which the defendant may have access.

Moreover, the holding in Wellin v. Wellin, a case cited in Bryant, contradicts the argument that IME physicians must produce "like reports" of previous examinees. While not directly on point, the issue in Wellin was whether a preliminary report was required to be disclosed as a Rule 35 report. In holding that a preliminary report must be produced, the Court in Wellin acknowledged that Rule 35 "does not limit disclosure to only final reports . . . and makes no distinction between draft reports and final reports." Accordingly, the holding in Wellin supports the position that Rule 35(d)(2) refers only to reports related to the plaintiff, and endorses a narrow reading of Rule 35, which "balances the privacy interests of the party examined with the interest of the party seeking the examination, the judicial system, and society as a whole[.]"

Other Considerations at Play

If a broad interpretation of Rule 35(d)(2) was adopted, the added expense of retaining an IME physician would be astronomical. Consider the result of one recent case, in which an Arizona court ordered Defendant's IME physician to produce three years of written reports. This particular orthopedic physician stated that he had prepared approximately 600 reports (from both IME and medical records reviews) in the past three years, all of which involved different injuries and circumstances. Even if the scope was limited to the same injury sustained by Plaintiff—for example, a lower back injury—the IME physician would have to sift through 600 reports to identify those that involved a lower back injury. Then, the physician (or defense attorney), would have to carefully redact all of the previous examinees' sensitive information.

Turing to cost, it is common for an IME physician in Arizona to charge over $2,000 for each report, and then charge an additional amount if further review is needed. If the physician was forced to review previous reports to determine whether it was a "like report," and then make the appropriate redactions, the resulting bill would likely be exponentially greater than the examination itself.

It is illogical to conclude that the Arizona Rules of Civil Procedure require physicians with an active clinical practice to perform a report-by-report review, especially in light of the "proportionality" requirement of Rule 26(b)(1), discussed below.

Related Issues Under Rule 26, Ariz. R. Civ. P.

Even when Arizona Courts agree with defense counsel and hold that Rule 35(d)(2) does not extend to "like reports" of other examinees, plaintiff's counsel may argue that these reports are nonetheless discoverable under Rule 26(b) for impeachment and bias. There are several arguments that defense counsel should consider when responding.

- **Rule 26(b)(1)** limits discovery to non-privileged matters that are relevant to any party's claim or defense. Using the previous example of 600 IME reports performed in a three-year period, it is doubtful that those reports concerning prior examinees would have any relevance to the case at hand or the doctor's credibility. Moreover, if previous IME reports are to be produced, then discovery into the previous examinee's medical records should be permitted. Creating numerous "case within a case" scenarios would be terribly inefficient.

- **Rule 26(b)(1)** also limits discovery to being proportional to the needs of the case. Assuming that the request for "like reports" is to explore bias, then the related expense does not justify the burden of forcing physicians to sift through previous reports. Instead, Plaintiff's counsel can explore bias by cross-examining the physician at trial regarding: (1) the percent of their work related to defense IMEs, (2) the frequency with which they have been hired by the particular defense counsel, and (3) the fees that the physician charges for IMEs.

- **Rule 26.1(d)** sets forth the information that parties must disclose regarding the experts that they intend to use at trial. The expert's prior reports concerning other examinees is not on this exhaustive list. In fact, federal courts have held that "conclusions and opinions offered in unrelated litigation do not fall within the scope of Rule 26 discovery and would unnecessarily burden litigation with pre-trial inquiry into facts and issues wholly irrelevant to the case at hand."

Conclusion

Until there is binding precedent regarding the interpretation of "like reports" under Rule 35(d)(2) in Arizona, disputes regarding the same will likely continue. However, by focusing on the limitations set forth in Rule 26, using favorable case law from other jurisdictions (particularly Howard v. Wal-Mart Stores East, LP), and taking a reasoned approach to discovery, defense attorneys can increase the chance of obtaining a favorable result when a dispute over "like reports" arises.

Upcoming CLE Webinars (12pm-1pm):

September 8, 2021: Fire & Explosion Investigation

September 22, 2021: Crashes Off The Pavement - UTVs, ATVs & More

Fall Kick Off

September 16, 2021 - Province @ The Westin

I Will

AN INTERVIEW WITH RETIRED JUDGE COLLEEN MCNALLY

Last year, Retired Judge Colleen McNally authored a personal reflection Facebook post and was encouraged to share it. On June 16, 2020, that reflection was shared at-large through AZ Central. You can read it here:

AADC Diversity and Inclusion Task Force Members J.P. Harrington Bisceglia and Benjamin Branson sat down with Judge McNally to discuss her reflections one year later. What follows is the interview edited for length and clarity.

Last year you authored an op-ed for AZ Central in which you admitted that you did not realize you grew up racist until later in life. What led you to that realization?

The timing of the article reflects my response to what happened in front of our eyes with George Floyd's murder. It wasn't a culmination really, because it had been happening again and again and again. It just broke me. It broke a lot of us. I felt compelled to look inward to see what my role is, where I fit in, and what I should be doing about it. Every time I talk about that article, I cringe because I never wanted to think of myself as racist. And I guess I still have trouble swallowing it. I maybe wrote it in that way to be a little provocative, because what I was really saying was that if you're white and you grew up in this country, you know, we've all benefited from the historic white supremacy. And so, if we've been accepting it, which we have all been accepting it, maybe we're all racist. The op-ed has taken on a lot of life that I never anticipated.

How did that realization affect you personally?

The events are just so heartbreaking and then it's very easy to just feel hopeless and helpless in those circumstances. I definitely have those feelings. But as a judge, I always encouraged people in my court in criminal cases and juvenile cases and family cases to not succumb to that – to realize that we all individually have our voices and we have power.

It may not feel like it, and it may not be a lot of power, but we all can do something. With the op-ed, I was giving myself that advice. I've had privileges in being a judge. For instance, sometimes somebody might want to hear what I have to say, because I have that history. So, not only could I do something – I had an obligation to do something. I could at least use my voice, at least start something, and it has actually taken on a lot more than that. I haven't stopped. You know, Kiilu Davis and I were the co-chairs of this year's Bar Convention just this week. And the reason we were asked to do that was because they wanted to have a social justice theme, and the Bar President thought we could help lead that.

Professionally?

Well, you know, I'm post-career, but I'm not post being involved in my community and in the legal profession. I've also done some consulting with judges, mostly it's on the internet in different jurisdictions on juvenile justice and child welfare. In those areas, there is a high level of disproportionality with who gets pulled into these systems and who gets treated the worst in those systems. So, part of it is it's not that I didn't do anything when I was a judge and had administrative authority – I did work on it, but I didn't do enough. I certainly didn't

solve it. And now I feel sometimes when you're outside the system, you have a different ability to affect that system because you're not bound by trying to keep things running. You are a little freer to call out inequities or suggest changes that maybe wouldn't be the changes that people inside the system would suggest. It's made me continue to evaluate ways that I could make things better.

You discuss efforts you made while on the bench to address disproportionality in the justice system. Why do you think they didn't work? What could we do differently now?

Well, a good example, I think, is in the juvenile justice system, because there have been efforts for decades to deal with that. And some of the success is seen in how the system is treating juveniles overall. So, we really reduced the number of kids that were getting detained and getting locked up. We really changed that structure. The way that worked out was that if you were a black or brown kid in in Arizona, you were a lot less likely to get locked up over the last 20 years because of these efforts. But if you were a black or brown kid, you were still a lot more likely to get locked up than if you were a white kid. That's still not OK. So, it was better for our system, and our community as a whole, and that's impacting the most kids, but it's not the equal justice that we aspire to.

I felt what was happening was that we kept we kept looking at data. Data is really, really important to look at. But you can get into almost a data tornado where you just keep going around and around and around and that's what our committees would talk about, "We just want to figure out one more thing." It leads to inaction. I feel like we didn't get past the data to any kind of core changes. But here's a good example of how you don't get stuck in that. We figured out when kids were picked up by police and brought to detention, there was a decision made, not by a judge, but by the detention intake staff, about who stays and who goes. And then if you stay, you will see a judge within twenty-four hours who decides if you really are going to continue to stay detained. Well, we figured out the black and brown kids were getting detained. And while the intake people were not intentionally being racist, when you have a racist outcome, there's racism there.

That might be because they didn't give the same value to that family structure. If instead of a mom and dad coming down, maybe an uncle is coming down, and they thought, "That's not good enough. We need a parent here." Things that aren't directly attributable to skin color, but actually are attributable to race when you drill down. So, they put together a more objective tool. Then, any time there was a discretionary call, the head of our detention in Maricopa County was the one that looked at every single one. It totally flipped and it wasn't happening anymore. So, there are ways to do this, but that took a lot of work, and it took a real commitment. And unfortunately, I think without really intentional work in it and a commitment, it's going to keep happening. We know what happens without that. It's what's continued to happen for all these decades and centuries, really.

As Arizona addresses jury selection, where do you think the justice system will go from there? Is this the right direction?

I think it is the right direction to evaluate what a jury of your peers means. For example, a fact that wouldn't on its face look to be a racial factor, but I think it leads to these inequities, is just the sheer cost of serving as a juror. Who shows up to begin with? Who can even handle the day that you have to come down or who is just going to ignore it? Some people really can't afford to lose the day [away from work or other obligations], so they don't even show up to begin with. And then who can handle the twelve dollars a day, to make up for lost income? Looking at those kind of factors is really important.

As important as actual justice is the perception of justice. Attorneys are the least. representative profession in the country There's work to be done everywhere, but certainly we can be better than being the worst. When you walk into a courtroom, it should look like the community that it serves. Who the jurors are, who the lawyers are, who the judges are? Representation is important.

What can attorneys do to help – particularly those whose practices focus in the private sector? Can we, too, be instruments of change? How?

I absolutely think there's a role for everybody, and I wouldn't just leave it to attorneys, but I think we have a

special role no matter what our practice area is as attorneys, because as attorneys, we are leaders, and we are change makers. And every practice area there is has helped shape the social construct that we have in some way. So, I feel like it may see pretty obvious, I guess, if you're in the criminal field or maybe the juvenile field. But in other areas, the law doesn't seem as obvious. But I think the more you know, the more you realize that, oh, there's actually a lot of work to be done in every area.

The issues that surround unfairness and inequity in banking are huge. In real estate, it's huge. I think it's important for us to recognize that our education around racial injustice has been extremely poor, no matter where you were educated, whether it was public or private. There's a whole bunch of information that I feel like we were not given, and neither were our parents. I'm not going to blame one generation for this happening, but I feel like I'm learning things all the time. It's our responsibility to figure it out. We need to figure out what was missing and figure out what we didn't talk about, what we didn't learn. The place I grew up, across the street, there's a place called Burnt Ranch Road, and it's not that far from Skull Valley. I had no idea my whole life what those things meant. Well, those were sites of violence against native people and murder. There is a lot for us to learn. So, I feel like it is our responsibility to take it upon ourselves to learn those things and to start listening to our colleagues.

They are still being treated horribly in their day-to-day lives, and I honestly, very naively I think, didn't realize that. And I think it's naive because if you actually pay attention to what's going on in the world, it should be obvious that people are treating others terribly. But, you know, I thought that if you're a lawyer, you're a judge, and you're black, you're kind of removed from that. And I'm listening and I'm learning that it's absolutely not true. They have horrible, heartbreaking experiences that happened last week. That happens today when they go to the store. And I feel like that effort of listening with some humility and recognizing "I don't know what I don't know," is key. We should not demand that people tell their story because there's a lot of pain involved. But when our colleagues share their experiences, listen, and learn. And once you start doing that, the opportunity to do things differently is going to appear. It's going to be obvious that there are things you could do within your profession or even within your life. I'll think and think to see if I can identify an area of the law where there isn't some impact of the social and racial injustice that we've been seeing. But I haven't thought of anything yet. I think there's a place everywhere where it's happening.

Final thoughts?

At the Bar Convention, they encouraged this conversation and for all the attorneys to leave with a statement about "what I will do" to help. And I think that's what I'm going to keep doing. I'm going to keep figuring out what else can I do and what will I do. And I would really encourage people to do the same. Consider what your circle of influence is because we each have our circles of influence and sometimes it's personal within your own family. So that's what I would just ask people to do. Think about what it is that you will do and make that statement. Make that statement and make that commitment.

In the spirit of this conversation, the AADC Task Force Members include their "I Will" statements below.

J.P. Harrington Bisceglia: I will work to address inequities in the practice of law, diversity of the practice, and diversity in the judicial system at large by collaborating with colleagues and listening and learning from their unique experiences.

Benjamin Branson: I will stand in proximity to those fighting for their rights.

Jason Kasting: I will listen to, foster, and support diverse persons and perspectives in all personal and professional interactions.

If you would like to share an "I will" statement to be included in a future newsletter, please email it to jphbisceglia@cdslawfirm.com.

Welcome

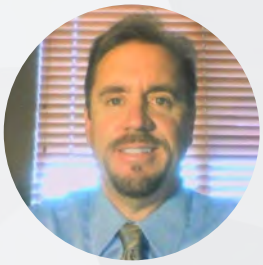
New AADC Members

WILL MACDONALD
H&M Law

BRANDON MILLAM
Doyle, Hernandez & Millam

MEGHAN STEWARTS
Gordon & Rees

DAVID TURNBALL
Liberty Mutual Insurance



DAVID WEBER
Travelers Insurance

The Ethics of Ghostwriting

BY: JENNIFER ELIAS, ESQ. (FAMERS INSURANCE, AZ LEGAL OFFICE)

If you have been practicing law for any length of time, you have probably been asked to "ghostwrite" for a pro se litigant. In many cases, the requests started shortly after you told people you were taking the LSAT. Most defense lawyers have faced a pro se litigant who was clearly being aided by an anonymous lawyer. Whether and under what circumstances ghostwriting – the drafting of pleadings and other forms of assistance to unrepresented parties – is permitted varies from jurisdiction to jurisdiction. The split is most pronounced as between the federal and state courts, with the federal courts mostly ignoring the many state courts and bar associations across the country that allow the practice.

The ABA views ghostwriting as a form of "unbundling" of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter. "Unbundling" refers to the fact that traditional legal representation includes a number of tasks (a bundle), which can be unbundled as part of a limited scope representation, which is allowed by ABA Model Rule 1.2(c). The primary benefit of unbundling is that it makes legal services more accessible to populations that might not otherwise fit the traditional (and expensive) model of full-service legal representation. Low and moderate-income litigants are far more likely to use unbundled representation than wealthier litigants. When viewed as a form of cost-effective representation, ghostwriting is a positive practice, given that pro se litigants lose cases at a considerably higher rate than represented parties and that the inaccessibility of legal counsel because of cost is one of the industry's biggest shortcomings.

Some form of ghostwriting is allowed in almost every state jurisdiction, although many that allow it do so only if the ghostwriter is disclosed, which arguably removes the "ghost" aspect of the limited representation. ***Continued on page 17***

STATUS OF PROCEEDINGS IN AZ COURTS

OUR COURTS ARIZONA

Arizona Supreme Court - All Arizona courts may continue transitioning to in-person proceedings to the extent it can be safely accomplished. Until Phase III, judicial leadership should limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, judicial officers, court employees, and other necessary persons, where necessary to maintain the recommended social distancing within the courthouse, including each courtroom.

Coconino County - Jury trials may resume no earlier than June 15, 2021. The Court will limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, court personnel and other necessary persons. Non-essential parties will not be allowed to enter the courtroom to observe proceedings.

Maricopa County – Oral arguments, evidentiary hearing an all other civil proceedings will presumptively continue to occur through audio and video platforms. Parties should work with their judicial officer to discuss alternatives to traditional jury trials. Voir dire is being completed one of two ways: virtually or in jury assembly room. Judge Gates observed that virtual voir dire has had some benefits, including an increase in potential jurors responding and more candid answers from jurors.

Pima County - Judges may set existing matters, including hearings and trials, as telephonic hearings, sua sponte, with reasonable notice to parties and their attorneys. Judges may also sua sponte continue matters which cannot be conducted telephonically, with reasonable notice to the parties and their attorneys. To inhibit the spread of the virus, non-parties and others whose presence are not necessary to conduct court business should not attend court proceedings or enter the courthouse.

Pinal County - All court participants and visitors must wear face mask to enter courthouse. Judges will conduct telephonic or video hearings when possible.

Yavapai County - No civil jury trials due to the criminal backlog. The attorneys were referred to the YEADR Program through an administrative order.

Yuma County - Jury Trials will not commence sooner than August 17, 2020. Grand Jury continues in session. The Yuma County Superior Court believes it is necessary to temporarily restrict in-person proceedings conducted in court facilities in order to protect the health and safety of the public and of Judicial Branch employees. Many proceedings have been converted to telephonic or rescheduled.

Examination of Arizona's New Legal Para-professionals (LP) continued

The biggest concern for LPs is that they may only provide "limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, and administrative hearings not otherwise allowed by Rule 31(d), and family court…" which requires careful consideration when performing tasks for their clients so as to not overstep in their scope of representation. Attorneys have a much broader scope of capabilities than LPs. This creates an issue for LPs and their clients considering that many lawsuits and cases are capable of evolving. Illustratively, while a criminal matter may begin with no threat of incarceration (which permits the representation of clients by LPs), consolidation with another criminal matter may change the punishment to include incarceration, thereby barring LPs sole representation of their clients.

In accordance with ACJA § 7-210(F)(2)(c), the LP would be forced to withdraw at that point. This process calls into question the efficiency of the LP system that cannot account for the ongoing changes and evolution of cases. Moreover, LP services may be incomplete in addressing concerns over infringement on Arizona lawyers fiduciary duty to clientele, as the Arizona Task Force on the Delivery of Legal Services requested a removal of State Bar Rule 5.4, allowing nonlawyers to have financial stakes in firms, and allow for lawyers and nonlawyers to co-own business engaged in the practice of law. This could allow disbarred attorneys, corporations, and venture capitalists the ability to have equity and investments within a firm without any of the duties to clients that attorneys are subject to.

As with most innovation, there are proverbial growing pains; the new LP system is no different. The removal of State Bar Rule 5.4 creates a vulnerability in the Arizona legal system, despite promises by the task force to continue to uphold the basic goals of Rule 5.4, in accordance with the American Bar Association. The lack of ability to contend with cases that evolve out of the scope of LPs' expertise, compounded with a lack of options should an LP find themselves in a case that extends beyond their education and licensure, could leave clients in a similar position as before the enaction of the LP program: without legal representation. Despite these potential pitfalls to the system, there is potential within the LP system to close the gap to accessing litigation. By being held to similar standards of ethical and professional conduct as attorneys, and with specialized education that is sufficient regarding common civil cases, the new LP program potentially heralds a new age of accessible justice.

For the Defense

Daniel Hamilton v. Yavapai Community College District, et al.

The oldest case in the Arizona District Court, that had been litigated for 9 years, ended in a defense verdict for all defendants after a three-week trial in federal court. The Plaintiff filed a False Claim Act lawsuit alleging that Yavapai College and its flight subcontractors defrauded the Veterans' Administration through its aviation degree programs. Plaintiff claimed damages of over $70 million dollars over a three-year period during which Yavapai College was educating students to become helicopter and airplane pilots. Yavapai College was represented by Georgia Staton and Elizabeth Gilbert of Jones, Skelton & Hochuli, PLC. North-Aire Aviation, LLC was represented by Ed Hendricks, Jr. and Brendan Murphy of Hendricks Murphy PLLC. Guidance Academy LLC, was represented by Jeffrey Walsh, Robert Hill and Matthew Hoxsie of Greenberg Traurig, LLP.

Rajbhandary v. Pacific Indemnity Company et. al.

Jason Kasting and Robert Sullivan of Broening, Oberg, Woods & Wilson, P.C. prevailed on summary judgment and received a $376,071.77 judgment in favor of their insurance carrier client comprised of attorney fees, costs, and Rule 68 sanctions. Plaintiffs alleged insurance bad faith and breach of contract in an action arising out of a residential water leak claim. Plaintiffs also alleged personal injuries resulting from mold exposure. After the judgment was entered, plaintiffs filed multiple motions asking the court to set aside the summary judgment ruling and the judgment itself. All such motions were denied and the judgment was affirmed.

Krause, et al. v. County of Mohave, et al.

Georgia Staton, Ravi Patel, and Justin Ackerman of Jones, Skelton & Hochuli, PLC represented the County and Officers in both the District Court and Court of Appeals cases, where Plaintiff asserted issues of material fact precluded summary judgment. Justin Ackerman presented oral argument before the Ninth Circuit. In affirming the trial court's ruling, the Ninth Circuit expressly rejected Plaintiff's argument, holding the officers did not violate Krause's Fourteenth Amendment rights and affirming the Officers' Qualified Immunity. Additionally, the Ninth Circuit affirmed the dismissal of Plaintiff's state law claims for the same reasons as its rulings on Plaintiff's Section 1983 claims.

The Ethics of Ghostwriting continued

There are four types of allowed ghostwriting – anonymous ghostwriting, requiring disclosure of the assistance if the lawyer gives "substantial assistance" to the unrepresented party, anonymous disclosure of the assistance, and mandatory disclosure of the attorney doing the writing or providing the assistance. Arizona allows ghostwriting and an attorney is not required to disclose their assistance unless it is necessary to avoid assisting the client with a criminal or fraudulent act, and then only if permitted by ER 1.6. Arizona Eth. Op. 05-06.

In contrast to the majority of state jurisdiction, ghostwriting is almost universally condemned in federal courts. The United States Supreme Court has never squarely addressed the issue, although Justice Jackson, joined by Justice Frankfurter, in a dissenting opinion, commented that "[g]host-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense." Kingsland v. Dorsey, 338 U.S. 318, 324 (1949). Among the federal circuit courts, only the Second Circuit has issued a favorable opinion of the practice, holding that ghostwriting is not sanctionable conduct. In re Fengling Liu, 664 F.3d 367, 370-72 (2d Cir. 2011). Relying, in part, on ABA Formal Opinion 07-446 (2007), the Second Circuit stated there was no dishonesty involved in ghostwriting as long as the client did not make an affirmative representation that the pleadings were prepared without an attorney's assistance. The Second Circuit did not, however, address any of the decisions or reasons of the other circuit courts that prohibit ghostwriting. The Ninth Circuit does not have any appellate authority directly on point, but the district courts in that circuit, particularly California and Nevada, have numerous opinions disapproving of the practice and calling it sanctionable.

Regardless of jurisdiction, if you are considering undertaking a representation that involves assistance to an unrepresented litigant, you should, at a minimum, make sure that you identify the disclosure obligations under the ethical rules of that jurisdiction, make clear to the client the limited scope of the representation, understand you are still responsible for the content of any document you draft whether you are appearing in the case or not, and be licensed to practice law in the jurisdiction where the client intends to file the document you are preparing.

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