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5 On Behalf of the Committee on Examinations

6
7 In the Matter of

8 PETITION TO ABROGATE AND
REPLACE ARIZONA SUPREME
9 COURT RULE 35 AND AMEND
RULES 34 AND 37

Supreme Court No. R-25-_____

PETITION

10
11 **I. INTRODUCTION**

12 Undersigned is filing this petition as Vice Chair, and on behalf of,
13 the Arizona Supreme Court's Committee on Examinations (CoE).¹

14 Arizona has administered the Uniform Bar Examination (UBE),
15 created by the National Conference of Bar Examiner (NCBE), since 2012. As
16 a result, the current Rule 35 of the Arizona Rules of Supreme Court on
17 Examination Requirements uses the term "uniform bar examination"
18 throughout (23 times, to be exact).

19 On December 5, 2023, the Arizona Supreme Court announced
20 that it will adopt and administer the NCBE's NextGen bar exam beginning
21 in July of 2027. NextGen is the product of Arizona's own forward-thinking

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¹ Proposed Rule 35 and amended Rules 34 and 37 were written with the
assistance of CoE members.

1 Retired Chief Justice Rebecca White Berch, who established NCBE’s Testing
2 Task Force when she served as Chair of the NCBE Board of Trustees in 2018.
3 The task force was charged with a three-year, future-oriented study of the
4 bar to identify minimum competencies and to assess exam formats, timing,
5 and delivery to best determine how to test the knowledge, skills, and abilities
6 required for the evolving practice of law. The task force considered the input
7 and guidance of numerous stakeholders including courts, bar examiners,
8 jurisdiction administrators, law schools, bar associations, and legal
9 employers. The result is the NextGen bar exam, which tests a wider variety
10 of knowledge through additional testing methods, and in less time, than the
11 UBE, which will no longer be offered in any jurisdiction after February of
12 2028.² The CoE recognized that the impending transition from the UBE to
13 NextGen bar exam will make Rule 35’s many references to the UBE obsolete,
14 and that triggered this effort to amend Rule 35.

15 This petition seeks to abrogate and replace Arizona Supreme
16 Court Rule 35, and to amend Arizona Supreme Court Rules 34 and 37 as
17 needed to account for those changes by striking provisions of those rules
18 incorporated into Proposed Rule 35 or adding portions of current Rule 35
19 that need to be maintained but do not fit within the scope and organization
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21 ² The Committee on Examinations is well underway in preparing for
22 the administration of the NextGen bar exam, having already administered
the first prototype exam in October 2024.

1 of Proposed Rule 35. Other than as referenced in Section II.B.4., *infra*, no
2 similar petition has been filed within the previous five years.

3 Appendix A to this petition contains a clean version of the
4 proposed text of the new rules, and Appendix B contains a redline of the
5 proposed changes to Rules 34 and 37.

6 **II. PROPOSED AMENDMENTS**

7 **A. Restyling and Reorganization of Proposed Rule 35**

8 This revision seeks to abrogate and replace Rule 35 due to the
9 extensive nature of the restyling and reorganization of the rule, despite that
10 Proposed Rule 35 seeks to maintain essentially the same provisions in the
11 current Rule 34. Proposed Rule 35 seeks to consolidate all bar exam rules,
12 regulations, requirements, and procedures in one rule, whereas current bar
13 exam provisions are also scattered throughout Rule 34 and to a lesser extent
14 Rule 37. With respect to styling, we wrote the proposed amended rule with
15 an eye toward clarity, conciseness, and plain language, and we further
16 sought to shift the language of the rule from static to dynamic. For example,
17 current Rule 35(b)(1) provides specific details about the content, format, and
18 relative weights of each section of the UBE. Proposed Rule 35(a)(1) and 35(b)
19 are written in a way to apply to *any* bar exam accepted by the Court for
20 admission to the practice of law in Arizona. Not only does this prevent the
21 need to rewrite the rule if the NCBE modifies the bar exam in the future, or
22 if Arizona were to transition to a different bar exam model entirely, but it also

1 easily allows the Court to promulgate changes over time by administrative
2 order (AO) rather than employing the rule change process. One
3 consideration in transitioning to dynamic wording was the expectation that
4 there will be overlap between when the NextGen starts being administered
5 in other jurisdictions in July 2026 and when the UBE is discontinued by July
6 2028.

7 The rules currently provide for the transfer of UBE scores from
8 other jurisdictions for up to five years, so an applicant who takes the UBE in
9 another jurisdiction in February 2028 could transfer that score into 2033; thus,
10 there is conceivably an overlap of 7 years (2026-2033) in which Arizona could
11 accept both UBE and NextGen scores. The prospect of drafting a rule to
12 specifically capture both exams was impractical, so the rule was written more
13 broadly to accommodate that transition period. The Court can easily issue
14 AOs to set expectations for future attorneys.

15 Another example of dynamic rule writing relates to the timing of
16 the bar exam. Currently, Rule 35(a) states that the UBE is “administered two
17 times each year, once in February and once in July.” In 2020, the Court
18 considered whether to cancel the July exam due to COVID-19, and although
19 the CoE proceeded to safely administer the exam, we also administered a
20 third exam remotely in October for those who were not comfortable
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1 attending in person during the height of a pandemic.³ Proposed Rule 35(e)
2 more broadly states that the CoE will administer the exam “periodically” and
3 will publish the dates and places of the exam in advance. This allows the
4 flexibility to accommodate the circumstances we saw in 2020, or for example,
5 if the NCBE decides to administer the NextGen exam in January and June.

6 Proposed Rule 35 was further drafted in a chronological order of
7 sorts, starting with definitions, source and content of the bar exam, the
8 application process, requirements, and fees, and the scheduling, grading, and
9 retaking of the bar exam. The proposed rule then transitions to exam
10 accommodations; exam code of conduct, the CoE’s enforceability of that code
11 of conduct, and related, hearing procedures, and concludes with the petition
12 for review process for an aggrieved applicant.

13 Finally, the restyling of the rule clarifies the CoE’s operational
14 procedures, such as the CoE’s ability to determine whether to grant an
15 accommodation for an extended period of time to spare a permanently
16 disabled applicant from having to reapply for accommodations when
17 retaking the exam, or the CoE’s deference to an Attorney Admissions
18 designee to approve non-disability medical accommodation requests such as

21 ³ Some jurisdictions canceled the July 2020 exam and only offered the
22 remote exam in September or October. Others canceled the July exam and
allowed limited practice privileges until the next regular exam
administration in lieu of offering a remote exam.

1 durable medical devices or electronic diabetic supplies. *See* Proposed Rule
2 35(h)(1)(E) and 35(h)(2)(A).

3 **B. Substantive Additions to Proposed Rule 35**

4 **1. Definitions**

5 Proposed Rule 35 includes a handful of definitions, including
6 “Bar Exam” which is intended to broadly captured either UBE, NextGen, or
7 any other iteration of the bar exam accepted by the Court for admission;
8 “Permission to Write” is defined because the phrase is used somewhat
9 colloquially in the rule; and “Attempt” is defined for purposes of when a
10 petition for permission to write is required, clarifying that a pre-
11 administration withdrawal (whether voluntary or not) and exam no-shows
12 do not count.⁴ The definition of attempt further clarifies that the CoE counts
13 all iterations of the bar exam, in any jurisdiction, for purposes of permission
14 to write consideration, whereas the NCBE only counts an applicant’s UBE
15 attempts in any given jurisdiction. In other words, under the NCBE’s
16 definition, an applicant could take the UBE multiple times in each of the 40
17 other UBE jurisdictions and would not have to request permission to write
18 before taking their first exam in Arizona. We think this is impractical, and
19 that is why the CoE’s Proposed Rule 35(a)(3) departs from the NCBE’s
20 definition on this issue.

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22 ⁴ Capitalization of defined words is used throughout the rule for clarity,
but not within this petition.

1 **2. Provisions Migrated from Rules 34 and 37**

2 Proposed Rule 35 incorporates provisions currently housed in
3 Rules 34 and 37 that more fittingly fall within the new scope and organization
4 of the proposed rule. The incorporated provisions are currently contained in
5 Rules 34(d)(3) (exam fees); 34(e) (exam certification, deadlines, late fees,
6 retakes); 34(k) (exam application deficiencies and supporting
7 documentation); and 37(c) (detailed exam information to be provided to
8 applicant’s law school for research and educational improvement). Each of
9 these provisions was restyled to match the voice of the rest of Proposed Rule
10 35.

11 **3. Exam Conduct, Enforcement, and Hearing Procedures**

12 Recently, in investigating instances of alleged cheating, the CoE
13 came to realize that there is no rule that admonishes applicants to refrain
14 from cheating. Instead, the CoE makes the admonishment both in its code of
15 conduct form and during test day oral instructions. Although “don’t cheat”
16 seems like it would be an obvious precursor to the bar exam, it would be
17 helpful to have a Supreme Court Rule to point to as the basis for discipline
18 for such conduct. Proposed Rule 35(i)(1) remedies that omission by
19 capturing the most significant aspects of exam conduct affecting integrity,
20 security, and validity, as well as other aspects of an applicant’s conduct that
21 may implicate their character and fitness to practice law in Arizona.
22 Proposed Rule 35(i)(2) then describes the CoE’s authority to investigate

1 allegations of misconduct and clarifies which actions the CoE may take by
2 majority vote and which actions may be taken only after due process is given
3 to the applicant.

4 Importantly, Proposed Rule 35(i)(4) further describes the due
5 process procedures. This section [Proposed Rule 35(i)(4)] was largely
6 modeled after Rule 36(f) (character & fitness hearing procedures), though the
7 language was modified slightly to match the voice of the rest of Proposed
8 Rule 35, and a different burden of proof was delineated. The model rule,
9 Rule 36(f)(1)(F), appropriately provides that the burden of proof is on an
10 applicant to prove by clear and convincing evidence that they are fit to
11 practice law. Currently, Rule 35 does not identify who has the burden of
12 proof or what the standard is. The CoE believes that, when an applicant is
13 accused of serious exam misconduct, it is the CoE that should carry the
14 burden of proving its allegation(s) by clear and convincing evidence.
15 Proposed Rule 35(i)(4) sets forth that burden of proof.

16 **4. Permission to Write**

17 Proposed Rule 35(g) regarding permission to write procedures
18 has been substantively modified. Previously, Rule 35 required an applicant
19 to request permission to sit for the exam after three failed attempts. For a
20 variety of reasons, including in part that applicants were routinely being
21 granted four to six exam retakes upon request, the rule was modified on
22 August 27, 2020, effective January 1, 2021, to allow applicants to fail the exam

1 six times before they needed to request permission to write. *See* R-20-0020,
2 Order Amending Rules 34-37, Arizona Rules of the Supreme Court. In
3 practice, though, that means the bar to take a seventh or even eighth attempt
4 is fairly low, as those petitions for permission to write become the applicant's
5 baseline information about the applicant's extenuating circumstances and/or
6 how they are changing their study habits. It is not until the ninth or tenth
7 attempt that we start seeing applicants reusing the same justifications for
8 double-digit attempts. This is excessive.

9 In light of this, and after careful consideration and extensive
10 discussion on this issue, the CoE believes that four failed attempts before an
11 applicant is required to request permission to write is a happy medium
12 between the prior 3-attempt rule and the current 6-attempt rule. A 4-attempt
13 rule strikes a reasonable balance between being able to give an applicant
14 another try if needed while also meeting the intent of the rule for the CoE to
15 serve as stewards of protecting the integrity and competence of the
16 profession. Four attempts constitutes a minimum of two full years of
17 studying and taking bar exams. If an applicant dedicates 2+ years of their
18 life to this endeavor, still fails to pass, and still wishes to pursue efforts to
19 pass the bar exam, the CoE thinks it would be appropriate for the applicant
20 to begin asking for permission at that point. Moreover, for applicants who
21 come close to passing the bar exam, the Court's recent establishment of the
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1 Arizona Lawyer Apprenticeship Program serves as an alternative option to
2 retaking the exam.

3 Proposed Rule 35(g)(3) further describes the information that an
4 applicant must submit to demonstrate good cause and likelihood of passing
5 to warrant permission to write. These parameters were delineated due to the
6 numerous petition to write applications that have cursorily stated that an
7 applicant is studying more, or trying a different bar prep course. While these
8 actions may warrant permission to write, the CoE believes that additional
9 detail would be helpful, and the proposed rule is intended to elicit that
10 information.

11 **C. Amendment of Proposed Rules 34 and 37**

12 As described in section B.2., *supra*, certain provisions of Rules 34
13 and 37 were migrated into Rule 35. Those portions are now stricken from
14 proposed amended Rules 34 and 37. Additionally, Rule 37(b)(1) providing
15 for refund of bar exam fees under certain circumstances, is being struck as
16 inconsistent with Proposed Rule 35(d) which provides that bar exam fees are
17 nonrefundable after the initial filing deadline even if the applicant is
18 involuntarily withdrawn due to deficiencies or the applicant is denied
19 permission to write. That is because, even in those circumstances in which
20 the applicant is involuntarily precluded from testing, their application has
21 required the time and resources of the CoE and Attorney Admissions.

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1 Conversely, there are provisions contained in the current Rule 35
2 that do not fit the scope or sequence of Proposed Rule 35. Those portions,
3 specifically current Rules 35(b)(6) through (9), relate to the overall admissions
4 process, and are not specific to the bar exam. They are therefore better
5 situated in Rule 34. For example, revised Rules 34(b)(1)(G)(i) - (iii) were
6 previously memorialized in Rules 35(b)(6) through (9) and relate to the
7 Multistate Professional Responsibility Examination – a topic more
8 appropriate for revised Rule 34.

9 **D. Note about Rules 34’s References to the UBE**


10 Finally, a brief note about Rule 34’s numerous references to the
11 UBE: For purposes of this petition, we have only rewritten Rule 35, and the
12 surrounding rules have been modified only as necessary to prevent
13 duplication or inconsistency. Rule 34 should be revisited by the time
14 NextGen is first administered in Arizona in July 2027.

15 **III. CONCLUSION**

16 The CoE respectfully requests the Court abrogate the current
17 version of Arizona Supreme Court Rule 35 and adopt the proposed new Rule
18 35 as well as amendments to Rules 34 and 37 as set forth in Appendix A,
19 subject to any modifications to those rules that the CoE may propose in its
20 reply in support of this petition.

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DATED this 10th day of January, 2025.

By 
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