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IN THE SUPREME COURT

STATE OF ARIZONA

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In the Matter of : **R-09-0038**
 :
PETITION TO AMEND RULE 38(D) : **SANDRA DAY O'CONNOR**
OF THE RULES OF THE SUPREME : **COLLEGE OF LAW**
COURT OF ARIZONA : **ARIZONA STATE UNIVERSITY**
 : **COMMENT ON PETITION**
----- : **TO AMEND**

The Sandra Day O'Connor College of Law at Arizona State University hereby comments regarding the petition to amend Rule 38(d), Arizona Rules of Supreme Court, which address the special exceptions to the standard examination and admission process for law students.

Respectfully submitted this 14th day of September 2010.

Sandra Day O'Connor College of Law
Arizona State University



By: _____
Paul Schiff Berman
Dean and Foundation Professor of Law



Catherine O'Grady
Associate Dean for Clinical Affairs and
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This comment from the Sandra Day O'Connor College of Law at Arizona State University responds to Phoenix School of Law's petition to amend Arizona Supreme Court Rule 38 (d). Rule 38 generally sets forth special exceptions to the standard admission process for lawyers practicing in Arizona. Rule 38 (d) provides for limited certified practice for clinical law professors and students when such practice is connected to a clinical law program approved by the dean and faculty of a law school in Arizona. One of the stated purposes of Rule 38 (d) is "to encourage law schools to provide clinical instruction in trial work of varying kinds"

The proposed amendment eliminates the connection of student certification under Rule 38 to the educational programs of an Arizona law school. The amendment removes the requirement that student participation under Rule 38(d) "be part of the law school's educational and clinical law practice program approved by the dean and faculty of a law school either provisionally or fully approved and accredited by the American Bar Association." Thus, under the proposed amendment, a dean could certify a student to practice law under Rule 38 (d) even if the student is not taking a class at the law school, receiving faculty guidance, or earning academic credit.

While we appreciate Phoenix School of Law's effort to clarify a confusing rule, we respectfully object to the elimination of the language that connects student practice certification to a law school's clinical program for three primary reasons. First, we are concerned that both clients and the legal profession will be negatively impacted. Second, we are concerned that

student learning will suffer. Finally, we are concerned that the robust legal clinical programs we have invested in at Arizona State University will be diminished.

With regard to clients and the legal profession, the Arizona Supreme Court has the power and responsibility to regulate the practice of law in Arizona. This power includes evaluating charges of misconduct brought against attorneys, and setting parameters for admission to the Arizona State Bar and for the authorized practice of law. Thus, it is within the Court's power to set limitations on certified student practice to ensure sufficient faculty-guided supervision and institutional control over students representing clients and practicing law.

Student practice is necessarily an area where oversight is necessary because students have not yet finished law school or passed a Bar exam, and at the time of engaging in student practice they may have had little or no practice experience. Because such students, when they are admitted under Rule 38, are nevertheless representing actual clients in actual cases, it is of paramount importance that the Supreme Court, the practicing bar, and the clients themselves be assured that those students are being intensively trained and supervised by faculty members who are fully devoted to such supervision. The proposed amendment, however, completely unmoors the student practice rule from this sort of training and supervision. And while it is certainly possible that some practicing attorneys who take on student externs are sufficiently skilled as teachers and have sufficient time to fully supervise the students in question, the proposed amendment effectively removes the safeguards and institutional control currently in place

through the connection to a law school. We believe these safeguards are absolutely crucial to making sure clients are represented adequately when students are engaged in the representation.

With regard to student learning, again it is true that some practicing attorneys and judges happen to be gifted teachers as well as skilled lawyers. But that happenstance simply cannot substitute for the systematized rigorous training that clinical courses taught by trained professors provides. Unlike practicing attorneys and judges, law school clinical faculty members are trained in learning theory, clinical pedagogy, and supervisory techniques that enhance student learning through real work experiences. Removing the connection to law school distances professional teachers from the students' experiences and diminishes the importance of learning from real work opportunities. Removing the requirement that students be trained through an established law school clinic creates a hit-or-miss training program that effectively undermines the purpose of clinical education and indeed the pedagogical purpose of Rule 38 itself.

Finally, the Sandra Day O'Connor College of Law at Arizona State University has invested in a well established, highly regarded, fully staffed clinical program, and Rule 38 is an important part of the program. Students understand that it is a privilege to take a clinic and receive Rule 38 certification so they can work with our clinical faculty on real client matters. Clinics are among the most expensive programs for law schools to operate because experienced faculty work on cases with small numbers of students. But clinics are extremely valuable to law students and to the community of clients they serve, and the Sandra Day O'Connor College of Law now has 11 clinical programs, perhaps the most per capita of any law school in the country.

We make this massive financial commitment because we believe in the extraordinary value of this form of training. And we maintain this commitment even as we also offer some 80 externship offerings per semester because we recognize that externships, while extremely valuable in their own right, are very different and less intensively training-focused than clinics, and an externship is therefore not a substitute for a clinic. The proposed amendment would effectively allow an externship to replace a clinic, and would elide the crucial differences between the two, with what we believe would be disastrous results. If Rule 38 is broadly available to any current or former law student without regard to whether they are taking a clinic, our well-established clinical programs may well suffer from decreased student enrollment and diminished respect. This result would impoverish the quality of both student practice and student training.

One purpose of the petition to amend may be to allow students to continue their Rule 38 certification into a summer or beyond graduation from law school, if, for example, they want to continue to work on a clinic case after their clinical semester ends. Yet, the proposal moves broadly past that objective to completely disconnect the law school's clinical programs and learning goals from the student's real-world experiences. We would not object to a compromise amendment to Rule 38(d) that would allow for a targeted extension of Rule 38 certification to a student who wishes to extend the clinical experience after the semester ends. A targeted extension of Rule 38 certification, at the discretion of the dean, sensibly allows students who have received clinical education or are working in a Rule 38 externship with a qualified supervisor to continue a project to a logical end, which often occurs after the semester's

termination point. The connection to the law school's clinical or externship program would be a starting requirement, with targeted extension of certification permitted only as a follow up to that semester. In conjunction with this amendment, we would further propose broadening Rule 38 for students connected to a school's clinical program by requiring two semesters of law school instead of three. This careful expansion of the certification will allow second year students in the fall semester to participate in a Rule 38 supervised clinic. Thus, we propose amending Rule 38 (d) (5) (B) to read: have successfully completed legal studies amounting to at least two semesters, or the equivalent if the school is on some basis other than a semester basis.

We further object to the following items in the Phoenix School of Law's petition:

(1) the requirement that students seeking Rule 38 certification first take "academic courses in civil procedure, criminal law, evidence, and professional responsibility." Identifying pre-requisites to Rule 38 clinics should be up to the law school's faculty and administrators. At ASU, for example, we offer a number of clinics (transactional and administrative clinics, for example) where students would have no occasion to use the rules of evidence and should not have to take evidence before receiving certification.

(2) the requirement that a "dean, associate dean, or assistant dean" sign the Rule 38 certification. We propose using the "dean's designee" language in all relevant instances in the rule, which would allow the dean to designate a college's Executive Director of Clinical Programs to sign the certifications.