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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 38(h)(1)(A), RULES OF THE ARIZONA SUPREME COURT	Supreme Court No. R-12-_____ **Petition to Amend Rule 38(h)(1)(A), Rules of the Arizona Supreme Court**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petition this Court to adopt an amendment to Rule 38(h)(1)(A), Rules of the Arizona Supreme Court, governing admission on motion to the state bar, as proposed in the attached Appendix A.

I. OVERVIEW AND SUMMARY OF PROPOSED CHANGES

Rule 38(h) allows applicants who meet specific requirements to be admitted on motion to the practice of law in Arizona. Among other requirements, applicants must "have been admitted *by bar examination* to practice law in another jurisdiction allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule." Ariz. R. Supreme Court 38(h)(1) (emphasis added). The

current rule does not consider *active practice* in a reciprocal jurisdiction. Therefore, attorneys who have actively practiced in a reciprocal jurisdiction, but passed the bar examination in a non-reciprocal jurisdiction, are ineligible for admission on motion. Petitioners propose to amend Rule 38(h)(1)(A) such that an applicant who has actively practiced law in a reciprocal jurisdiction would also qualify for admission on motion.

II. THE CURRENT RULE

The current rule provides that to be eligible for admission on motion, among other requirements, an applicant shall "have been admitted *by bar examination* to practice law in another jurisdiction allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule." Ariz. R. Supreme Court 38(h)(1) (emphasis added).

As a result of this language, highly-qualified lawyers with many years of active, unblemished, full-time practice in a reciprocal jurisdiction are not eligible for admission on motion in Arizona simply because of the place of their bar examination. Identically or less qualified individuals, who passed a bar examination in a reciprocal jurisdiction, are eligible for admission on motion regardless of whether they have actively practiced in a reciprocal jurisdiction.

III. THE PROPOSED RULE

The proposed rule would eliminate the arbitrary place of bar examination distinction while retaining the substance and intent of the reciprocity requirement. *See* App. A for a marked version of the proposed Rule 38(h) identifying the requested change. Under the proposed change, candidates would be treated equally based on their active practice of law in a reciprocal jurisdiction, not based solely on where they happened to pass the bar examination years ago—before Arizona recognized admission on motion for reciprocal jurisdictions.

The proposed rule would *not* eliminate the requirement of reciprocity in general and would *not* eliminate the current practice of basing reciprocity on the place of bar examination. By requiring the *active* practice of law in a reciprocal jurisdiction, the amendment eliminates any potential loophole that would allow individuals licensed in a non-reciprocal jurisdiction to be admitted on motion to a reciprocal jurisdiction and then immediately apply for admission on motion in Arizona. The "active practice of law" is already defined in the current Rule 38(h)(2), and the proposed rule relies on that same definition.

This Court has recognized the merit of admission on motion. This amendment would make admission on motion available to seasoned lawyers with training, experience, and an unblemished record of practice in reciprocal jurisdictions.

IV. RATIONALE

The current rule irrationally discriminates against attorneys actively practicing in reciprocal jurisdictions, violates their constitutional rights, contravenes the intent of the rules of this Court, and is out of step with national trends on bar examinations and admission-on-motion requirements.

A. The Current Rule Irrationally Discriminates Against Certain Attorneys, Violating Their Constitutional Rights.

Rule 38(h), facially and as applied to attorneys actively practicing in reciprocal jurisdictions who took the bar examination in non-reciprocal jurisdictions, violates their rights to due process and equal protection of law. The Arizona Supreme Court has held that "the practice of law rises above that of a mere privilege. For those who have the necessary qualifications, it is a right. . . . It cannot be treated as a matter of grace or favor." *In re Application of Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205, 206-07 (1964). Applicants, such as those actively practicing in reciprocal jurisdictions, "may not be excluded by state action from a business, profession or occupation in a manner or for reasons which contravene the due process clause of the Fourteenth Amendment . . . ." *Id.* at 91, 397 P.2d at 207. Their "right to compete freely on an equal basis for the material goods of existence . . . is protected by the due process and equal protection clauses. . . ." *Id.*

To the extent crafted to discourage interstate commerce and travel of licensees—from California or elsewhere—the application of the Arizona rule

irrationally discriminates against certain attorneys actively practicing in reciprocal jurisdictions, creates an illusory anticompetitive distinction that favors other applicants with similar or less qualifying practice experience, and violates the Commerce Clause of the U.S. Constitution. *See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007) (laws that do not treat every private business, whether in-state or out-of-state, exactly the same generally run afoul of the Commerce Clause); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (barriers to movement of interstate trade offend the Commerce Clause); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (holding that discriminatory burdens on interstate commerce "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause").

If reasonable, non-discriminatory alternatives are available and adequate to conserve local interests, then discriminatory regulation is prohibited, even in areas the governing body has an unquestioned power to regulate. *Dean Milk Co.*, 340 U.S. at 354. As shown by the admission rules of a majority of other jurisdictions,[1] there are reasonable, nondiscriminatory alternatives that would better comport with the constitutional rights of attorneys practicing in reciprocal jurisdictions and with the rules of this Court.

[1] *See* discussion *infra* Part IV.C. and note 2.

To be clear, petitioners are not challenging the reciprocity requirement itself. *E.g.*, *Hawkins v. Moss*, 503 F. 2d 1171, 1175 (4th Cir. 1974) (holding that the reciprocity requirement was constitutional because it was clear that each state has the right to establish its own rules for admission to practice law subject only to due process and equal protection clauses of the Fourteenth Amendment). Instead, it is the application of the reciprocity requirement on the sole basis of an individual's place of bar examination—rather than consideration of active practice in a reciprocal jurisdiction—that irrationally discriminates.

To secure for Arizona attorneys the reciprocal rights and advantages obtained under the rule is manifestly a legitimate interest of the state. *Id*. at 1777. But, the current rule violates equal protection because it results in discrimination against certain attorneys actively practicing in reciprocal jurisdictions and the strict bar-examination-reciprocity requirement is not rationally related to the state's legitimate interest. *Id*. (citing *McGowan v. Maryland* 366 U.S. 420, 425-26 (1961); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Sams v. Ohio Valley General Hospital Association* 413 F.2d 826 (4th Cir. 1969); *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549, 554-55 (Ed. Va. 1973)) ("[A] statute or rule promulgated under state authority will be found to violate equal protection only when it results in discrimination against a certain class and the classification is not rationally related to any legitimate state policy or interest.").

B. The Current Rule Contravenes the Intent of the Rules of this Court and the Rule Change Petition Leading to Adoption of Rule 38(h).

The present construction and application of Rule 38(h) contravenes the intent of the rule change petition that led to its adoption, and the Rules of the Arizona Supreme Court, both of which emphasize the importance of a record of practice over strict jurisdictional requirements. *See* R-06-0017, Pet'n in Supp. of Revision of the Rules for Admission to the Bar of Arizona, at 3 (citing interstate commerce as inherent to the practice of law today and stating: "The *best test* for a practitioner is a review of the applicant's practice through that *attorney's record* in the home state.") (emphasis added); *see also* Rule 34(c)(2)(D) (exempting applicants who have been actively engaged in the practice of law for five of the last seven years from requirement that they hold a juris doctor from an *accredited* law school).

As further stated in the rule change petition leading to the adoption of Rule 38(h): "While a bar examination tests an applicant on general legal theories, an applicant's record with the home state's disciplinary authority establishes competence through practice experience." *See* R-06-0017, Pet'n in Supp. of Revision of the Rules for Admission to the Bar of Arizona, at 6. The Petition did not include a recommendation for the strict bar-examination-reciprocity requirement.

The strict bar-examination-reciprocity requirement makes little sense because this Court has accepted the principle that attorneys from reciprocal jurisdictions who move to this state and prove their good standing and experience through the admission process are competent to practice in Arizona. This principle should not be limited based on the place of bar examination. Attorneys who happened to pass the bar examination in a non-reciprocal jurisdiction, but who have actively practiced in a reciprocal jurisdiction are harmed without any fault by such an unreasonable and arbitrary distinction.

C. Adherence to a Strict Bar-Examination-Reciprocity Requirement Is Irrational and Inconsistent with Other States and National Authorities.

The American Bar Association's Model Rule on Admission by Motion does not contain a requirement that applicants "have been admitted by *bar examination* to practice law in another jurisdiction allowing for admission of a licensed Arizona lawyer on a basis equivalent to this rule." *Compare* Ariz. R. Supreme Court 38(h)(1) *with* ABA Model Rule on Admission by Motion, attached as App. B. The vast majority of states that permit admission on motion do not have a bar-examination-reciprocity requirement.[2]

[2] Currently, thirty-nine states and the District of Columbia permit admission on motion. *See* American Bar Association, *Comparison of ABA Model Rule on Admission by Motion with State Versions*, (Mar. 11, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf. Of those, twenty-six states have some type of reciprocity requirement. *Id*. However, only five—Alaska, Georgia, Idaho, Oregon, and Utah—base reciprocity on the place of bar examination. *See* Alaska Bar Rules 2, § 2(a)(1)-(2);

Moreover, the literature supporting the trend toward a national, uniform bar examination strongly suggests that strict bar-examination-reciprocity requirements are obsolete. *See* R-11-0030, Pet'n to Amend Rules 34, 35, 37 and 38, Rules of the Supreme Court (proposing Arizona adopt the Uniform Bar Examination as prepared by National Conference of Bar Examiners for the July 2012 test administration); Hon. Rebecca White Berch, *The Case for the Uniform Bar Exam*, The Bar Examiner, Feb. 2009, at 9-11, *available at* http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2009/780109_UBEEssays_01.pdf (addressing reasons a jurisdiction may consider adopting a uniform bar examination); Martha Neil, *ABA Group Backs Uniform Bar Exam*, Sept. 15, 2010, *available at* http://www.abajournal.com/news/article/aba_group_backs_uniform_bar_exam/ (noting the ABA's Council of the Section of Legal Education and Admission to the Bar and the Conference of Chief Justices adopted resolutions supporting a uniform bar examination). The cumulative weight of the majority rule and the clear trend toward substantive, experience-based admission renders the requirement that an applicant take the examination within a certain subset of states arbitrary and irrational. The relevant and constitutionally permissible consideration is whether attorneys actively and capably practiced law for the required period of time in a reciprocal jurisdiction.

Ga. R. Governing Admission to Practice Law, Pt. C, § 2(b); Idaho Bar Comm'n R. 206(a)(2); Or. RFA 15.05(1); Utah R. Governing Bar Admission 14-705(a)(1).

V. CONCLUSION

The adoption of the proposed rule would eliminate the irrational discrimination against attorneys actively practicing in reciprocal jurisdictions. The proposed rule is a reasonable, non-discriminatory alternative that preserves the state's legitimate interest of securing for Arizona attorneys reciprocal rights and advantages in other jurisdictions. The proposed amendment also aligns the rule with the intent of the rules of this Court by focusing on a candidate's record of practice. Further, it harmonizes Arizona's rule, the ABA's model rule, and the rules of the majority of states permitting admission on motion. For these reasons, petitioners urge this Court to adopt the proposed rule as submitted.

RESPECTFULLY SUBMITTED this 6th day of January, 2012.

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