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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of Amending Rule 38(d)(3) of the Rules of the Supreme Court of Arizona Pertaining to the Activities of Law Students Acting in a Volunteer Capacity	Supreme Court No.: R-06-0023 **COMMENT**

This comment is filed pursuant to Rule 28(D) of the Rules of the Arizona Supreme Court.

I support in part and object in part to the *Petition to Amend Rule 38(d)(3) of the Rules of the Supreme Court of Arizona Pertaining to the Activities of Law Students Acting in a Volunteer Capacity*, dated October 30, 2006.

I support the appearance of law students as practicing attorneys where permitted under existing Rule 38(d). I wish to stress that Rule 38(d) has requirements that the proposed amendment simply lacks, and that compliance with these requirements is of critical importance when permitting non-lawyers to appear before the court. The requirements include certification by the Dean of the law school that the law student is a participant in one of the school's clinical law programs; certification by the Dean that the student is of good moral character and has completed at least three semesters of law school. This certification is essential when permitting non-lawyers to appear in court. The proposal seeks avoid these essential requirements and replace them with the ill-defined concepts of "friend of the court" and "cooperation of the law school."

Existing Rule 38(d)
Rule 38(d) provides "one means of providing **assistance to practicing attorneys in providing such (legal) services**, and to **encourage law schools to provide clinical instruction in trial work** of varying kinds." *Rule 38(d)(1).*

The Rule 38(d) program is an endorsement by this state's Supreme Court of the nation's accredited law schools and the quality of legal training provided to students by clinical

law professors. It is this that permits the Rule 38(d) exception to the strict requirements for admission to the practice of law.

The rule creates a close working relationship between lawyer, the law schools, and the law student. The dean of the law school and the clinical law professor are required to monitor closely and supervise the law student to ensure the quality and ethics of representation. In addition the law student must certify that they are familiar with the Arizona Rules of Professional Conduct, the Rules of the Supreme Court of Arizona, and statutes of the State of Arizona relating to the conduct of attorneys.

Rule 38(d) permits law students to appear on behalf of an individual subject to the following requirements:

1. Written consent of the person represented
2. Duly enrolled in a JD program at an accredited law school
3. Be supervised by a member of the state bar
4. Be **certified** by the deans of the law school showing compliance with Rule 38(d)(3)(F), 38(d)(5)(B), and (C), and 38(d)(7)

    38(d)(3)(F) Requiring all 38(d) activities to be part of the law school's educational and clinical law practice program, and that a written copy of such program be filed with the executive director of the state bar.

    38(d)(5)(B) Requiring that participating law students complete at least three semesters before participating in program

    38(d)(5)(C) Requiring dean of law school to certify that student is of good moral character.

    38(d)(7) Requiring supervision by lawyer or professor whose service as supervising lawyer is approved by the dean of the law school

5. Law student must certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct and the rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of attorneys.
6. Such certification may be withdrawn (with or without cause) by the dean at any time.

The Proposed Amendment
The proposed amendment to the rule adds the following new section:

> **Rule 38 (d) 3 G**
> Any eligible law student participating in a volunteer legal services program managed by an approved legal services organization, and in cooperation with the James E. Rogers College of Law at the University of Arizona, the Sandra Day O'Connor College of Law at the Arizona State University or any other American Bar Association accredited law school in the state of Arizona, may, at the invitation and request of the court, appear as a friend of the court to assist the proceeding, in any civil matter involving an otherwise unrepresented individual in an uncontested proceeding. Such eligible student must be directly supervised in person by an attorney associated with such volunteer legal services program, and must receive written consent from the unrepresented person. Such written consent will be obtained by the volunteer legal services program and shall be brought to the attention of the court.

The proposed amendment seeks to permit law students to appear in court under the following conditions:

1. The law student is appearing as a "friend of the court"
2. The law student is a participant in an approved volunteer legal services program
3. There is a cooperating accredited law school of which the student is an attendee
4. The court invites and requests the appearance
5. The matter is an uncontested civil matter involving an otherwise unrepresented individual
6. The unrepresented individual consents to the appearance, and written documentation of such consent is filed with the court in which the appearance is made.
7. The student is directly supervised in person by an attorney associated with such volunteer legal services program.

Sections 1, 3, ad 4 are of particular concern to me.

The proposal appears to do away with the certification requirement on the grounds that an appearance as a *friend of the court* does not constitute the practice of law. In addition to the absence of certification, the petitioners substitute vague concepts such as "friend of the court" and "cooperation of the law school."

The law student is appearing as a "friend of the court"
No authority is provided by the petitioners that would permit a law student to appear as a "friend of the court." The phrase is not one in wide use in this State's jurisprudence outside of the appellate process. Trial courts have expressed consternation where an

attorney has sought to appear as a "friend of the court", see *Huck v. Haralambie***,** 122 Ariz. 66, 593 P.2d 289 (App. 1978).

The petitioner's own description of the law students' role in federal bankruptcy cases is offered as a description of the student's role when appearing in this state's courts:

1. Meet with the self-represented litigant before the hearing to ensure they understand the paperwork and process
2. Review the file
3. Appear at the hearing as friends of the court alongside the self-represented litigant
4. The law student and volunteer attorney give a synopsis of the self-represented litigant's case
5. The law student and volunteer attorney provide a **recommendation** as to whether they believe reaffirmation is the best alternative.

I would argue that the above 5 duties come perilously close – if not in substance then in appearance - to the practice of law as defined in Rule 31 of the Rules of the Supreme Court. The very fact of their appearance alongside an unrepresented individual, the assistance by a licensed attorney, and the provision of recommendations to the court undoubtedly creates the impression that the student's role is to provide some type of legal service to the unrepresented individual. Rule 31(2)(A)(2) includes "preparing or expressing legal opinions" among its definitions of the practice of law.

There is a cooperating accredited law school of which the student is an attendee
Cooperation in this context is not defined. Cooperation seems to be a substitute for the more formal certification required by Rule 38(b). Such cooperation may be minimal because, according to the petitioners "no school credit is given for participation." See *Petition,* at 2. As a result the law schools' involvement may, understandably, be minimal.

The court invites and requests the appearance
Though certain non-lawyers may appear in court to make recommendations, those are typically appointed by court. These persons include Court Appointed Special Advocates, Title 14 Court Appointed Investigators, and Guardians ad Litem. In each of these cases, it is the court that appoints such individuals. Where appropriate the court may consider written or oral recommendations made by these appointees.

The proposed program does not seek to have law students appointed by the court but rather seeks to have appear with the court's "invitation and request." "Invitation and Request" is not defined in the petition. It appears to be something less than an appointment by the court but yet permits the law student to make recommendations regarding the case. At very least it places the parties and the court in a position of uncertainty with regard to the law student's role in court.

Conclusion

The fact that a law student's participation is "one hundred percent voluntary" is irrelevant to whether the proposed volunteer program should be subject to the same certification requirements as clinical law programs. The petitioners distinguish and exempt their program from clinical law programs because theirs is "primarily designed to foster the pro-bono ethic" so that "volunteerism will be part of the new attorney mindset." While such objectives are no doubt laudable, it is difficult to see how the "pro-bono ethic" can be fostered by encouraging a law student to merely appear as a friend of the court, and not appear on behalf of the disadvantaged whom the petitioners' seek to aid.

Dated this day February 15, 2007.

Signed,

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Richard Beck