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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 38(a), ARIZ. R.S.Ct.,	Supreme Court No. R- _____ **Petition to Amend Rule 38(a)**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the United States Attorney for the District of Arizona, on behalf of the United States of America, hereby petitions the Court to amend Supreme Court Rule 38(a) for the reasons that follow.

I. SUMMARY OF PROPOSED CHANGES AND GROUNDS THEREFOR

A. As currently written, Rule 38(a) obligates all out-of-state (nonresident) attorneys, *inter alia*, to complete an application to appear *pro hac vice,* to pay "a non-refundable application fee equal to 85% of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed," and to associate with a local attorney who is a member in good standing of the State Bar of Arizona, before they may appear before an Arizona State court, board or administrative agency. *See* S. Ct. R. 38(a)(2), & (3)(A). No exception is recognized for attorneys appearing on behalf of the United States Government. Rule 38(a) thus affects all nonresident Department of Justice

attorneys who are sent by the United States Attorney General to attend to the interests of the United States in Arizona State courts, boards, and administrative agencies.

This rule imposes a substantial burden on the United States and its attorneys, and we believe that its imposition against the Federal Government's representatives is unauthorized. We therefore propose a rule amendment that would expressly exempt attorneys appearing in Arizona solely for the purpose of representing the interests of the United States from the requirement of applying for admission *pro hac vice*, paying any application fee, and associating with local counsel.

B. The U.S. Attorney General has the authority by federal statute to assign any officer of the Justice Department to appear on behalf of the United States in any legal proceeding in the United States, so long as that attorney is duly licensed and authorized to practice as an attorney under the laws of at least one state, territory, or the District of Columbia. *See* 28 U.S.C. §§ 515-519, 530C(c)(1), 547. By conditioning the participation of Federal Government Attorneys in Arizona legal proceedings upon securing *pro hac vice* admission to practice, Rule 38(a) conflicts with the Attorney General's federal statutory authority to send attorneys to any court in the United States – state or federal – to protect the interests of the United States. *See* 28 U.S.C. § 517 (the Attorney General may send "any officer of the Department of Justice . . . to any State . . . to attend to the interests of the United States in a suit pending in a court of . . . any State, or to attend to any other interest of the United States.").

Attorneys sent by the Attorney General to represent the interests of the United States are themselves vested with nationwide authority – by clear statutory authorization, they may conduct "any kind of legal proceeding" in which the United States is concerned, regardless of whether they reside in the state in which the proceeding is brought. 28 U.S.C. §§ 515(a), 547.

Under the Supremacy Clause of the United States Constitution, the activities of federal officers and agents carrying out their duties on behalf of the United States are free

from direct state regulation, except where Congress has expressly provided otherwise. *See*, *e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180-181 (1988); *Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-104 (1940).

This principle has long been an established part of our law. Thus, in *Cunningham v. Neagle*, 135 U.S. 1, 62-63 (1890), the Supreme Court made clear that a California sheriff could not interfere with a U.S. Marshal carrying out his duties to protect the safety of federal officials. The Court explained the constitutional underpinnings of its ruling: "The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." *Id.* at 62.

Moreover, the Supreme Court has in various circumstances held that the states cannot regulate the activities of the Federal Government without clear Congressional authorization. For instance, in *Sperry v. Florida*, 373 U.S. 379 (1963), the Court ruled that Florida could not enjoin an individual from preparing and prosecuting patent applications within the state on the ground that the individual was engaging in the unauthorized practice of law under state law. The Court reasoned that, "since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders *except to the limited extent necessary for the accomplishment of federal objectives*." *Id.* at 402 (emphasis added).

The Supreme Court has also made clear that the United States is exempt from state-imposed administrative fees when performing a governmental function. *See Mayo v. United States*, 319 U.S. 441, 447 (1943). In *Mayo*, a Florida state law required that all bags of commercial fertilizer sold or distributed in the state bear a stamp indicating that an inspection fee had been paid. The U.S. Department of Agriculture, as part of a national soil

conservation program, distributed to consumers in Florida bags of fertilizer that had been purchased outside the state, but did not bear the state-required inspection fee stamps. Florida objected. The Supreme Court found that the United States was acting in its governmental capacity by promoting soil conservation through distribution of fertilizer and that Congress had not authorized state taxation of federal instrumentalities; the Court therefore held that requiring the United States to pay the state inspection fees was prohibited by the Supremacy Clause.

In so holding, the Supreme Court distinguished *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466 (1939), in which an employee of a federal agency sought exemption from the New York state income tax on the theory that a tax upon his salary imposed an unconstitutional burden upon the Federal Government. The Court in *Graves* held that the economic burden of a state income tax was not a burden on the United States, and that the employee was not "clothed with the implied constitutional tax immunity of the government." *Id.* at 486. By contrast, the Court in *Mayo* held that the proposed state inspection fees would be charged directly to the United States, and effectively constituted "money exactions the payment of which, if . . . enforceable, would be required before executing a function of government," and hence were "prohibited by the Supremacy Clause." *Mayo*, 319 U.S. at 447.

C. Although *pro hac vice* application fees are imposed upon individual attorneys, it is the policy of the Department of Justice to reimburse such fees to its attorneys who are required to pay fees in order to appear in state courts on behalf of the United States. The rationale for this policy is that, unlike regular admission to the bar of a court, a *pro hac vice* admission for a government attorney representing the interests of the United States in a particular case does not accrue to the personal benefit of the individual attorney, but benefits only the United States by enabling the attorney designated by the Attorney General to represent it in the matter at hand.

Under the Supreme Court's *Mayo* analysis, then, the fee requirement of Rule 38(a), although ostensibly imposed upon an attorney representing the interests of the United States, is in reality a charge against the United States. It is therefore a "money exaction[] the payment of which . . . would be required before executing a function of government," and accordingly is prohibited by the Supremacy Clause.[1] *See Mayo*, 319 U.S. at 447.

D. As noted earlier, Rule 38(a) also requires that a *pro hac vice* applicant associate with "local counsel" – whose name must appear on all documents filed in the case, and who "may be required to personally appear and participate in pretrial conferences, hearings, trials, or other proceedings conducted before the court, board or administrative agency when the court, board or administrative agency deems such appearance and participation appropriate." Rule 38(a)(2).

Such requirements – which place considerable time obligations on the associated local counsel, as well as a duty to remain knowledgeable about the legal issues and details of a case – can impose a significant burden on already stretched Federal Government resources. They require the Attorney General to double-staff cases that are, for valid administrative reasons, being handled outside the office of the United States Attorney for Arizona. For example, because of their subject matter calling for specialized expertise, certain cases are assigned for handling to attorneys at Department of Justice headquarters in Washington, D.C.; in other cases, proper resource allocation might demand such an assignment. And, in some situations, the U.S. Attorney's Office might be recused from a matter. In that circumstance, the U.S. Attorney's Office cannot act as local counsel for the government lawyers brought in from elsewhere to handle the matter.

The requirement that the Federal Government have associated local counsel is also inconsistent with the principles of Supremacy Clause law described above. This requirement

[1] Our Supremacy Clause arguments apply with equal force to other federal agency attorneys appearing on behalf of the Federal Government before state boards and administrative agencies.

improperly imposes costs and burdens directly on the United States as its attorneys appear in Arizona solely to represent the interests of the United States.

E. There is no clear and unambiguous authorization from Congress giving states the power to interfere with the U.S. Attorney General's authority to send officers of the Department of Justice to attend to the interests of the United States in state courts. And, as we have pointed out, absent such Congressional authorization, the imposition of a *pro hac vice* appearance fee on Federal Government Attorneys appearing on behalf of the United States violates the Supremacy Clause.

We note that, pursuant to 28 U.S.C. § 530B, Congress has provided that Federal Government Attorneys are "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The text, legislative history, and implementing regulations for Section 530B make clear, however, that it was intended only to subject Federal Government Attorneys to a state bar's ethical standards, and not to undermine the Attorney General's ability to assign federal attorneys in providing representation to the United States.

First, the statute's title, "Ethical standards for attorneys for the Government," indicates its narrow focus. *See Stern v. United States District Court*, 214 F.3d 4, 19-20 (1st Cir. 2000); *United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir. 1999). Second, the legislative history shows that the statute was intended to "insure[] that . . . Department of Justice . . . lawyers [are subject to] the same rules of ethics that govern the professional conduct of all other attorneys." 144 Cong. Rec. E301-01 (daily ed. March 5, 1998) (extension of remarks of Rep. McDade). Finally, the statute's implementing regulations provide that 28 U.S.C. § 530B "requires Department attorneys to comply with state . . . rules of professional responsibility . . . but should not be construed in any way . . . to interfere with the Attorney General's authority to send Department attorneys into any court in the United States." 28 C.F.R. § 77.1(b); *see also id.* at § 77.2(h)(3) ("The phrase *state laws and*

rules . . . governing attorneys . . . does not include . . . [a] statute, rule, or regulation requiring licensure or membership in a particular state bar"). Thus, although the rule change we propose would exempt attorneys from Arizona's *pro hac vice* admission requirements when protecting the interests of the United States, such attorneys would remain subject to state professional responsibility rules to the same extent as private counsel.

F. Adoption of the proposed change to Rule 38(a) to exempt Federal Government Attorneys from Arizona's *pro hac vice* admission requirements would be consistent with the practice in other jurisdictions we have surveyed.[2] Indeed, in recognition of the unique mission of Federal Government Attorneys, the District of Columbia expressly exempts such attorneys from its bar-membership requirement. *See* D.C. Ct. App. R. 49(c)(1). Further, Wyoming exempts from its *pro hac vice* admission rule any Federal Government Attorney appearing in state court on behalf of the United States. *See* Wyo. Bar Rule 11(c)(7). Other states grant an exemption to Federal Government Attorneys from the requirement of paying a fee to appear *pro hac vice*. For example, New Mexico waives its $250 *pro hac vice* admission fee for any attorney who "is employed by a governmental authority and will be appearing on behalf of a governmental authority in the proceeding for which the attorney is registering . . . ." NMRA Rule 24-106.C. Similarly, Oregon also waives its $250 *pro hac vice* fee for any attorney "employed by a government body [who] will be representing that government body in an official capacity" in the state court proceeding. OR UTCR 3.70(8). In addition, the Department of Justice has found that Colorado, Oklahoma, Utah, Alaska, and Hawaii will grant waivers of the *pro hac vice* application fee to attorneys sent by the Attorney General to represent the interests of the United States in their courts.

[2] We note also that, after inquiry by the U.S. Attorney General, the Director of the Administrative Office of the United States Courts wrote to the clerks of the federal courts in 1988, advising them that Federal Government Attorneys should not be charged admission fees to appear to represent the interests of the United States.

G. In light of the foregoing, Federal Government Attorneys should be exempted from the financial requirements of Rule 38(a), as the well as the requirement that local counsel be associated. As set forth in Part II below, the proposed change would add a new subparagraph (12) to subpart (a) of the rule, explicitly providing that attorneys appearing in Arizona courts and before Arizona state boards to represent the interests of the United States are not subject to the *pro hac vice* admission requirements. The proposed amendment will obviate the need for Federal Government Attorneys to apply on a case-by-case basis for waiver of the *pro hac vice* admission requirements, and thus relieve the burden of the Arizona Supreme Court and the state bar to consider and act on such individualized requests.

DATED this day of February, 2006.

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II. TEXT OF PROPOSED RULE CHANGE

Rule 38. Special Exceptions to Standard Examination and Admission Process

(a) Admission Pro Hac Vice.

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12. **Exception for Attorneys Representing the United States of America**. The procedures set forth in subpart (a)(1)-(9) of this Rule shall not apply to attorneys appearing solely on behalf of the United States, its officers, employees, or agencies, in Arizona courts and before Arizona State boards, and administrative agencies, in connection with their official duties.