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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-06-0002
)
) Response to Comments to
) Petition
) to Amend Rule 38(a)
)
_____)

On February 9, 2006, the United States Attorney for the District of Arizona, on behalf of the United States of America, submitted a petition to this Court to amend Supreme Court Rule 38(a) to except “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,” from the *pro*

hac vice procedures set forth in subpart (a)(1)-(9) of the Rule (requiring applying for admission *pro hac vice*, paying an application fee, and associating with local counsel). As of the close of the comment period on May 21, 2007, two comments had been submitted in response to the proposed amendment, both opposing the amendment. The first comment is from Margot J. Champagne, Esq., an attorney with offices in Washington, D.C., and Prescott, Arizona; and the second comment was submitted by the Arizona Association of Superior Court Clerks (AASCC). (It is significant to note that the State Bar of Arizona did not submit a comment opposing the proposed amendment).¹ The United States responds to these comments as follows:

1. Ms. Champagne first argues that the proposed rule change would give “the US Attorney’s offices throughout the United States”² an unfair advantage over the private bar. Champagne Ltr. 1. There is no merit in this contention.

¹ It is also important to point out that no objection has been made to the proposed amendment to the extent that it would waive the requirement that federal government attorneys pay the non-refundable *pro hac vice* application fee. Although this fee is imposed upon individual attorneys, it is the policy of the Department of Justice to reimburse such fees to attorneys who are required to pay the fees in order to represent the United States in state courts. The fee is therefore in reality a charge against the United States.

² We note that the commenter refers to the “U.S. Attorney Offices” as though the United States Attorney’s Office were the petitioner. However, the petitioner is the United States of America, represented by the Department of Justice, of which the office of the United States Attorney is a component.

a. As an initial matter, it appears that Ms. Champagne misconstrues the intent of the proposed rule change. The proposed amendment is intended to exempt non-resident federal government attorneys, appearing before Arizona tribunals for the sole purpose of representing the interests of the United States, from the procedural burdens of the State's *pro hac vice* requirements, such as applying for admission, paying a fee, and associating with local counsel. It is not, as Ms. Champagne suggests, intended to exempt resident attorneys working in local U.S. Attorney's offices from "the standard examination and admission process in Arizona." Champagne Ltr. 1. Under current Rule 38(a)(1)'s substantive requirements, resident Assistant U.S. Attorneys would not be eligible to appear *pro hac vice*, and the proposed amendment is not intended to alter that eligibility requirement.³ As the petition explains (at 2-3), because the current Rule 38(a) conditions the participation of federal government attorneys in Arizona legal proceedings upon applying for admission *pro hac vice*, paying an application fee, and associating with local counsel, it conflicts with the United States Attorney General's authority to assign an attorney of his choosing to represent the interests of the United States in any legal proceeding in the United States, so long as that attorney is licensed to practice law in a least one United States jurisdiction. See 28 U.S.C. §§ 517; 530C(c)(1). Further, Ms. Champagne's assertion that the proposed rule change would allow the federal government "greater flexibility and efficiency in allocation of resources" is correct, and should be considered a good reason for adopting the change. We find it difficult to imagine that there would be a general objection to the federal government, or an agency thereof, operating more efficiently.

³ Nor, as we discuss (*infra* at 4), would the proposed rule change alter the substantive requirement that attorneys appearing before Arizona tribunals be in good standing in at least one other bar.

b. Second, Ms. Champagne contends that it would be “blatantly discriminatory against the private bar” for “this Court to assume that a lawyer who works for an office of the U.S. Attorney is competent and ethical without local counsel vouching for him, while making an opposite assumption about private counsel.” Champagne Ltr. 1. Again, the commenter misconstrues the proposed rule change. As discussed in the petition (at 5), the requirement of association of local counsel, in effect, requires the Attorney General to double-staff cases – *i.e.*, by assigning both an attorney from outside the office of the U.S. Attorney for the District of Arizona, (for instance, an attorney from the Department of Justice headquarters in Washington, D.C.), and an attorney from the U.S. Attorney’s Office for the District of Arizona. Thus the local counsel “vouching” for the federal government attorney in most instances would be a resident attorney in the local U.S. Attorney’s office.⁴

In any event, as noted previously, any attorney assigned by the Attorney General to represent the interests of the United States must be licensed, in good standing, to practice law in at least one United States jurisdiction. Indeed, nearly all of the Assistant U.S. Attorneys in the District of Arizona are members of the Arizona bar. Further, the proposed amendment does not seek to exempt federal government attorneys from complying with the State’s professional responsibility rules to the same extent as the private bar. See Pet. 6-7. Federal law requires Justice Department attorneys to comply with the ethical rules of the states in which they appear. 28 U.S.C. § 530B, 28 C.F.R. §§ 77.1(b), 77.2(h).

2. The AASCC is opposed to the proposed amendment because it is concerned that an exemption from the *pro hac vice* requirements for attorneys representing the interests of

⁴ Another problem for the United States caused by the requirement of association of local counsel is presented where the local U.S. Attorney’s Office may be recused from a matter. In that circumstance, that office could not act as local counsel for the non-resident government lawyers sent by the Attorney General to handle the litigation.

the U.S. will be burdensome on the superior court's case management system. The AASCC states that, under current practice, the resident associated counsel is responsible for transmitting case information to attorneys admitted *pro hac vice*, and that the names and addresses of *pro hac vice* attorneys are not maintained in superior court databases. AASCC Comment 1-2. If the proposed rule change is adopted, the AASCC states that "the burden will fall on court clerks to know when [a federal government attorney] is representing the United States on a case in the Superior Court" and to transmit case information to the federal government attorney. *Id.* at 2.

This concern is, however, overstated, and the AASCC comment likely reflects a misconception about the actual situation. The number of cases in which the federal government appears in Arizona superior courts when not represented by the local U.S. Attorney is very small. Thus, any burden on court clerks to provide case information to a Justice Department attorney outside Arizona will be extremely minimal. In the few cases where this issue arises, the Justice Department will be pleased to work with the particular court clerk involved to ensure that the burden, if any, will be minimized.

Moreover, the current rule requires more than that local counsel serve merely as the conduit of case information. Rather, local counsel "may be required to personally appear and participate in pretrial conferences, hearings, trials, and other proceedings" conducted before a state tribunal. See Rule 38(a)(2). As explained in the petition (at 5), these 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, impose a significant burden on already stretched federal government resources. The requirement of association of local counsel is thus inconsistent with the Supremacy Clause

because it imposes costs and burdens directly on the United States as its attorneys appear in Arizona solely to represent the interests of the United States. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 190-81 (1988) (activities of federal officers and agents carrying out their duties on

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behalf of the United States are free from direct state regulation, except where Congress has expressly provided otherwise).

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Respectfully submitted,

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Original and seven copies
filed and copies mailed on
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