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7 IN THE SUPREME COURT

8 STATE OF ARIZONA

9 PETITION TO AMEND RULE 38 OF
10 THE ARIZONA RULES OF THE
11 SUPREME COURT

Supreme Court No. R-_____

**PETITION TO AMEND RULE 38,
ARIZONA RULES OF SUPREME
COURT**

12 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the William E.
13 Morris Institute for Justice on its own behalf and on behalf of Community Legal
14 Services, Southern Arizona Legal Aid and DNA-People's Legal Services submits this
15 Petition to Amend Rule 38 of the Arizona Rules of Supreme Court to clarify the rule to
16 simplify the requirements for registered in-house counsel to provide volunteer legal
17 services through an approved legal services program.

18 In support of this petition, the petitioners state the following:

19 **Statement of Interest**

20 The William E. Morris Institute for Justice is a non-profit program established to
21 advocate and litigate on behalf of the interests of low-income Arizonans. We work
22 closely with the federally funded legal services programs and community groups.
23 Community Legal Services, Southern Arizona Legal Aid and DNA-People's Legal
24 Services are the three federally funded legal services programs in Arizona that provide
25 civil legal services to low-income Arizonans throughout the state. They engage with
26 private attorneys, including in-house counsel, to be volunteer lawyers.

27 The petitioners, who are the front line providers of legal services to low-income
28 persons, know firsthand the huge unmet legal needs in this state. The purpose of the rule

1 change is to address some confusion concerning the requirements for in-house counsel to
2 volunteer on an unpaid basis with approved legal services organizations and to provide a
3 solution to that confusion so that registered in-house counsel can more easily provide pro
4 bono civil legal services to those in desperate need of their legal assistance.

5 **I. Background to Proposed Rule Changes**

6 In the summer of 2011, the State Bar of Arizona established the Access to Justice
7 Task Force to look at ways to increase access to justice for Arizonans. This broad-based
8 task force came up with several recommendations. One of the recommendations was to
9 increase the number of attorneys available to provide pro bono services to low-income
10 Arizonans. One part of the recommendation was to permit retired Arizona lawyers and
11 registered in-house counsel to provide pro bono services and to require these attorneys to
12 provide pro bono services through an approved legal services organization. The
13 recommendation was presented to the State Bar.

14 **A. Rule 38 State Bar Petition Filed in 2012**

15 In May 2012, the State Bar submitted Petition No. R-12-0028 to Amend Rule 38
16 to the Court. The amendment to Rule 38 had two components. First, the amendment
17 clarified and simplified the rules allowing retired Arizona attorneys and registered in-
18 house counsel to provide pro bono services. Second, it required that these attorneys
19 provide pro bono service through an approved legal services program that would provide
20 the attorneys with the necessary resources, supervision and insurance coverage. The
21 rationale for these changes was simple: to increase the number of attorneys available and
22 willing to take on pro bono assistance to serve Arizonans who need legal assistance.

23 The Court approved the petition on an emergency basis on January 1, 2013, with
24 the comment period to end May 21, 2013. The changes to Rule 38 made on the
25 emergency basis were the following:

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1 **Rule 38. Special Exceptions to Standard Examination and**
2 **Admission Process**

3 ***

4 **(e) Authorization to Practice Law for Attorneys**
5 **Volunteering with Approved Legal Services**
6 **Organizations.**

7 1. *Purpose.* ~~Individuals admitted to the practice of~~
8 ~~law in Arizona~~ Attorneys have a responsibility to
9 provide competent legal services for all persons,
10 including those unable to pay for such services. As
11 one means of meeting these legal needs, attorneys who
12 otherwise are not allowed to practice law in Arizona
may volunteer to provide civil legal assistance to
individuals who are unable to pay for such services
under limited circumstances.

13 A. An attorney who is or was admitted to
14 practice law for at least five (5) years in the
15 courts of any state, district, or territory of the
16 United States (other than Arizona) who
17 volunteers to provide civil legal assistance to
18 individuals who are unable to pay for such
19 services is allowed to do so, under limited
20 circumstances, under this rule. An attorney
21 may be admitted to practice for the limited
22 purpose of providing such assistance as an
23 unpaid volunteer in association with an
24 approved legal services organization so long as
25 that organization employs at least one Arizona
26 attorney not admitted pursuant to any provision
27 of this rule.

28 B. An attorney who is registered as in-house
counsel pursuant to Rule 38(h) may provide
assistance as an unpaid volunteer in association
with an approved legal services organization so
long as that organization employs at least one
Arizona attorney not admitted pursuant to any
provision of this rule. An attorney who
qualifies under this provision need not comply

1 with the certification requirement of paragraph
2 (e)(3) of this rule.

3 2. *Definitions.*

4 ***

5 B. A ‘Rule 38(e) attorney’ is any person who is
6 or was admitted to practice in the courts of any
7 state, district, or territory of the United States of
8 America (~~other than Arizona~~), and who is not
9 registered as in-house counsel pursuant to Rule
10 38(h), and ...

11 ***

12 In short, these emergency changes allowed registered in-house attorneys to rely on
13 their required registration as evidence and approval of their ability to provide legal
14 services to needy people in association with an approved legal services organization. The
15 in-house counsel were not required to meet any other registration requirements in order to
16 volunteer.

17 Subsequently, only the Association of Corporate Counsel (“Association”) submitted
18 comments to the petition. The Association supported the petition but
19 suggested additional changes to remove the restriction that pro bono services must be
20 performed through an approved legal services organization and instead allow in-house
21 counsel to provide pro bono services directly. The State Bar opposed the Association’s
22 proposal but suggested that the matter be referred to the Bar’s In House Counsel
23 Committee and other stakeholders for further consideration and study.

24 **B. Supreme Court Amendments to State Bar Petition**

25 Subsequently, on September 12, 2013, the Court proposed amendments to Petition
26 No. 12-0028 and re-opened the comment period until October 23, 2013. The Court’s
27 proposed amendments to the petition were the following:

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1 **Rule 38. Special Exceptions to Standard Examination and**
2 **Admission Process**

3 ***

4 **(e) Authorization to Practice Law for Attorneys**
5 **Volunteering with Approved Legal Services**
6 **Organizations**

7 1. *Purpose.* Attorneys have a responsibility to
8 provide competent legal services for all persons,
9 including those unable to pay for such services. As
10 one means of meeting these legal needs, this rule
11 allows certain attorneys who otherwise are not allowed
12 to practice law in Arizona ~~may to~~ volunteer to provide
13 civil legal assistance to individuals who are unable to
14 pay for such services ~~under limited circumstances.~~

15 A. An attorney who is or was admitted to
16 practice law for at least five (5) years in the
17 courts of any state, district, or territory of the
18 United (sic) may be admitted to practice for the
19 limited purpose of providing assistance as an
20 unpaid volunteer in association with an
21 approved legal services organization so long as
22 that organization employs at least one Arizona
23 attorney not admitted pursuant to any
24 provisions of this rule.

25 ~~B. An attorney who is registered as in-house~~
26 ~~counsel pursuant to Rule 38(h) may provide~~
27 ~~assistance as an unpaid volunteer in association~~
28 ~~with an approved legal services organization so~~
~~long as that organization employs at least one~~
~~Arizona attorney not admitted pursuant to any~~
~~provision of this rule. An attorney who~~
~~qualifies under this provision need not comply~~
~~with the certification requirement of paragraph~~
~~(e)(3) of this rule.~~

29 2. *Definitions.*

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B. A ‘Rule 38(e) attorney’ is any person who is or was admitted to practice in the courts of any state, district, or territory of the United States of America, ~~is not registered as in-house counsel pursuant to Rule 38(h), and~~

3. *Certification.* An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

A. a certificate from the highest court or agency in the state, territory, or district in which the applicant is presently licensed to practice law documenting that the applicant has fulfilled the requirements of active bar members for at least five years preceding the date of the application, and that the applicant has not been disciplined for professional misconduct by the bar or highest court of the state, territory, or district during the last ~~15~~ 5 years; provided that an attorney who is registered as in-house counsel pursuant to Rule 38(h) shall fulfill this requirement by providing a copy of his or her current Arizona Certification of Registration of In-House Counsel;

C. a sworn statement by the applicant that he or she

iii. has not been disciplined by the bar or courts of any jurisdiction during the last ~~fifteen~~ five years, and

The State Bar filed comments in opposition to the revisions to the petition. The

1 Association of Corporate Counsel also filed comments requesting that at a minimum, the
2 emergency measures be made permanent. On November 14, 2013, the Court approved
3 the amended petition on a permanent basis as of that date.

4 **C. The Final Amended Rule Appears to Retreat from the Intent of the**
5 **Petition to Facilitate the Volunteer Efforts of In-House Counsel**

6 The initial petition approved on an emergency basis recognized that registered in-
7 house counsel already are allowed and authorized to practice law in this jurisdiction, and
8 extended their ability to provide pro bono assistance to an underserved population under
9 the authority of an approved legal services organization based on their prior registration.
10 The emergency language essentially opened the door for registered in-house counsel to
11 use their legal skills for the greater good.

12 The rule as amended on a permanent basis, with all due respect, appeared to take a
13 step backward and closed that door. The rule appears to treat registered in-house counsel
14 – already allowed to practice law in this jurisdiction -- the same as, for example, an out-
15 of-state lawyer who retires to Arizona and who otherwise has no ability to practice law in
16 this jurisdiction. Unlike the retired non-Arizona lawyer, a registered in-house counsel
17 already has filed an application and is on record with the State Bar of Arizona. A
18 registered in-house counsel receives a bar number, appears on the State Bar’s website as
19 a registered in-house counsel, and is entitled to appear in cases for his or her employer.
20 Despite these differences, the rule as amended on a permanent basis, treated the in-house
21 counsel like attorneys who are not authorized to practice in Arizona and required that in
22 order to provide pro bono services they had to meet the additional certification
23 requirements in Rule 38(e)(3)(C) and submit the paperwork to the State Bar to wait for
24 approval. In several respects the additional requirements appear duplicative of some of
25 the requirements in Rule 38(a)(3) and in other ways impose additional criteria on the in-
26 house attorney that are not required for their initial registration. The certification process
27 also has delays that inhibit the volunteer efforts of the in-house attorneys. These changes
28 have led to confusion and the need for clarification.

1 **II. Proposed Rule Changes**

2 To address the confusion and clarify the requirements for in-house lawyers to
3 perform volunteer work, petitioners propose returning to the clear intent of the
4 emergency rule change and exempting registered in-house counsel from the additional
5 filing requirements in Rule 38(e). Registered in-house counsel are conceptually different
6 from other lawyers covered by Rule 38(e). Unlike the retired out-of-state lawyer,
7 registered in-house counsel already file a “verified application;” certify that the applicant
8 “has read and is familiar with the Arizona Rules of Professional Conduct;” pay an
9 application fee; and take the required course on Arizona law. Rule 38(a)(3). If registered,
10 they then are allowed to practice law in this state for their employers and may apply to
11 appear pro hac vice for their employers. Rule 39(a)(10). And, as noted above, they
12 receive a State Bar number and appear on the State Bar’s website. The petition proposes
13 that Rule 38(a) be revised to affirmatively state that in-house counsel may volunteer with
14 approved legal services programs without meeting any additional filing requirements and
15 that Rule 38(e) be revised to make it clear that in-house attorneys are not required to
16 comply with Rule 38 (e) certification requirements.¹

17 The proposed rule changes are the following:

18 **Rule 38. Special Exceptions to Standard Examinations**
19 **and Ad-mission Process**

20 (a) In-house Counsel

21 ***

- 22 9. Except as provided in this rule, the holder of a valid
23 and current Registration Certificate shall be entitled to
24 the benefits and responsibilities of active members of
25 the State Bar of Arizona, and shall be subject to the
jurisdiction of the courts and agencies of the State of

26 _____
27 ¹ In 2016, there were additional changes to Rule 38(a)(10), the in-house counsel
28 rule, that specifically exempted in-house counsel from the pro hac vice requirements for
pro bono work performed under Rule 38 (e). This petition follows that example.

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Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar. A Registration Certificate shall not authorize the registrant to provide legal services to any person or entity except when providing legal services to the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or when providing ~~legal services under Rule 38(e)~~ legal assistance as an unpaid volunteer in association with an approved legal services organization as defined in Rule 38(e)(2)(C).

10. In providing legal services to the lawyer's employer, a lawyer who has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* in Arizona to provide the services authorized in the preceding paragraph by complying with the requirements of Rule 39 of these rules. A lawyer who has been issued a Registration Certificate under this rule may provide legal assistance as an unpaid volunteer in association with an approved legal services organization as defined in Rule 38(e)(2)(C) ~~services under Rule 38(e)~~ without securing admission *pro hac vice*.

Rule 38(e) Authorization to Practice Law for Attorneys Volunteering with Approved Legal Services Organizations.

2. Definitions.

B. A "Rule 38(e) attorney" is any person who is or was admitted to practice in the courts of any state, district, or territory of the United States of America and

- iv. neither asks for nor receives compensation of any kind for the legal services to be rendered hereunder; ~~and~~
- v. is certified under paragraph (e)(3) of this rule; and
- vi. is not registered as in-house counsel pursuant to Rule 38(a).

3. Certification. An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

- A. a certificate from the highest court or agency in the state, territory, or district in which the applicant is presently licensed to practice law documenting that the applicant has fulfilled the requirements of active bar members for at least five years preceding the date of the application, and that the applicant has not been disciplined for professional misconduct by the bar or highest court of the state, territory, or district during the last 5 years; ~~provided that an attorney who is registered as in-house counsel pursuant to Rule 38(h) shall fulfill this requirement by providing a copy of his or her current Arizona Certification of Registration of In House Counsel;~~

III. Why This Rule Change Matters

Arizona was hit particularly hard by the economic recession several years ago, and continues to have a high percentage of low-income persons. In October 2016, 975,447 persons received food stamps and 1,608,851 persons received medical care through the Arizona Health Care Cost Containment System (“AHCCCS”). “State of Arizona Department of Economic Security Family Assistance Administration Statistical Bulletin October 2016.” https://des.az.gov/sites/default/file/dl/dbme_statistical_bulletin_10_2016.

1 pdf. (pages 3 and 4, respectively). The latter percentage represents over 20% of our
2 population.

3 The Census Bureau estimates that as of July 2015, approximately 17.4% of
4 Arizonans or almost 1.2 million Arizonans fell below the federal poverty level.
5 <http://census.gov/quickfacts/table/PST045215/04>. The federal poverty level for one
6 person in 2016 is \$11,880 and for a family of three is \$21,160.
7 <http://aspe.hhs.gov/poverty/16fedreg.shtml>. Persons who meet or slightly exceed these
8 amounts are not able to hire lawyers. Although low-income, these persons often have
9 significant and life altering legal claims. Their legal issues include such important
10 benefits as the right to healthcare, food stamps or Supplemental Security Income; the
11 right to unemployment insurance benefits; compensation for consumer scams; the right to
12 obtain decent and stable housing under subsidized housing programs; the right to remain
13 in private rental housing under fair eviction court practices; mortgage and home
14 ownership claims: the need for child custody and support; the need to obtain
15 guardianships and protection from abuse by those close to them.

16 Legal services programs and their volunteer lawyers' programs provide the
17 primary and often the only source of legal representation available to low-income
18 Arizonans. On any given day, over 600 persons contact the three legal services
19 programs seeking legal assistance! With limited staff and resources, the three legal
20 services programs cannot on their own assist all the persons who have legal needs. The
21 result is that the legal services programs rely on the private bar to volunteer so that more
22 persons can have the benefit of legal assistance. This assistance may be in conducting
23 clinics to help persons fill out required court papers to representation at administrative
24 hearings and in court.

25 When persons with limited incomes cannot afford to hire an attorney and they
26 cannot obtain assistance from the legal services program or a volunteer/pro bono
27 attorney, they must fend for themselves in administrative and judicial processes that are
28 unfamiliar and difficult to navigate. Registered in-house counsel have many years of

1 legal experience that can be put to good use meeting the huge unmet legal needs of our
2 citizens. This petition accomplishes this worthy goal.

3 **Conclusion**

4 The need for pro bono legal services for those traditionally underrepresented is so
5 great that any perceived or actual hindrance to in-house counsel who want to volunteer
6 through an approved legal services organization should be removed. Therefore, for all
7 the above reasons, the William E. Morris Institute for Justice on its own behalf and on
8 behalf of Community Legal Services, Southern Arizona Legal Aid and DNA-People's
9 Legal Services requests that this Court approve this Petition and amend Rule 38 as
10 requested above.

11 Respectfully submitted this 16th day of December 2016.

12 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

13
14 By /s/ Ellen Sue Katz

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18 Original electronically filed with the
19 Clerk of the Supreme Court of Arizona
20 this 16th day of December 2016

21 Copy of the foregoing emailed this 16th day
22 of December 2016, to:

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