

1 Lisa M. Panahi, Bar No. 023421  
2 Acting General Counsel  
3 State Bar of Arizona  
4 4201 N. 24th Street, Suite 100  
5 Phoenix, AZ 85016-6288  
6 (602) 340-7236

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-17-

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

**PETITION**

13 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona (“State Bar”)  
14 petitions the Court to amend Rule 38, Ariz. R. Sup. Ct. The proposed amendments  
15 are necessary to correct minor errors in the current version of the Rule, and to clarify  
16 ambiguities in the Rule pertaining to in-house counsel registration with the State  
17 Bar.

18 **DISCUSSION**

19 **1. Rule 38(e)**

20 The State Bar has observed minor errors in the current draft of Rule 38(e) and  
21 takes this opportunity to bring these oversights to the Court’s attention for  
22 correction. The errors are noted in Rule 38(e)(1) and Rule 38(e)(3)(A). The proposed  
23 corrections to these errors are reflected in the attached Appendix and consist of  
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1 simply adding the word “States” following “United” in Rule 38(e)(1), and changing  
2 “Rule 38(h)” to “Rule 38(a)” in Rule 38(e)(3)(A) for correct citation.

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4 **2. Rule 38(h)**

5 The State Bar also seeks to amend Rule 38(h), Practice Pending Admission  
6 on Motion, to clarify the annual assessment amount owed to the Client Protection  
7 Fund (the “Fund”) by an applicant who intends to practice pending admission. In  
8 January 2016, this Court adopted practice pending admission conditioned on the  
9 terms set forth in Rule 38(h). One of these terms requires an applicant to “[pay] the  
10 annual assessment to the Client Protection Fund.” Rule 38(h)(1)(H). Following the  
11 adoption of this Rule, applicants seeking to pay the Fund assessment have inquired  
12 to the State Bar about the amount assessed to applicants under Rule 38(h).  
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15 Rule 32(c)(8) clearly sets forth the amount owed by State Bar active and  
16 inactive members who are not exempt, and mandates these members pay the annual  
17 assessment to the Fund as set by the Court. However, neither Rule 32(c) nor Rule  
18 38(h) is instructive on the amount that applicants intending to practice pending  
19 admission must pay to the Fund.  
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21 Because of this ambiguity, the State Bar seeks to amend Rule 38(h) by adding  
22 the language set forth in the Appendix to clarify that applicants intending to practice  
23 under this Rule must pay to the Fund an assessment in the amount owed by active  
24 and inactive members for the applicable year.  
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1           **3. Rule 38(a) and Rule 38 Comment**

2           The State Bar has also received several inquiries regarding the interpretation  
3 of Arizona’s in-house counsel registration rule, Rule 38(a), and the Comment to Rule  
4 38. These inquiries have resulted in the State Bar taking notice of obscure provisions  
5 in this Rule and the Comment. This Petition seeks to clarify the obscurities by  
6 delineating the application of this Rule and clarifying the language in the Comment.  
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8           The State Bar respectfully requests that Rule 38(a) include the word “single”  
9 in reference to the employment upon which the in-house counsel registration is  
10 premised. After reading Rule 38(a) in totality, one may infer that an Arizona  
11 registered in-house counsel may only be employed by one entity, which can include  
12 its parent subsidiaries and/or affiliates; however, because the black letter of the Rule  
13 does not explicitly limit the number of employers, there is an element of ambiguity.  
14 The State Bar seeks to clarify that in-house counsel registration is intended to apply  
15 to lawyers who otherwise meet the requirements and are employed by one  
16 employing entity. Therefore, we respectfully petition the Court to amend Rule 38(a)  
17 to include the word “single,” as reflected in the Appendix.  
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21           The State Bar also petitions to replace the current Comment to Rule 38 with  
22 the proposed Comment in the Appendix. Rule 38’s only Comment provides further  
23 guidance on the application of the in-house counsel rule. A portion of the Comment  
24 reads:  
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1 The rule's registration requirement is only intended to apply to those  
2 lawyers who are employed in that capacity by an entity conducting  
3 activities within the State, *and whose principal office is located within*  
4 *the physical boundaries of the State.* It is not intended to apply to those  
5 employed in such a capacity whose physical presence in the State is  
6 temporary or sporadic. (Emphasis added.)

7 This particular provision has been construed to mean two different things: 1. that the  
8 pronoun “whose” refers to the lawyer, who must have a principal office located  
9 within the physical boundaries of the State; or 2. that the pronoun “whose” refers to  
10 the entity, who must have a principal office located within the physical boundaries  
11 of the State. It is not clear if “whose” applies to the antecedent lawyer or antecedent  
12 entity. The State Bar has taken the position that this clause applies to the lawyer’s  
13 principal office, and not that of the entity, but this interpretation is not readily  
14 discernible. The State Bar believes that the guidance set forth in this Comment  
15 should be unambiguous and not subject to multiple interpretations.  
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17 The Comment, in its current form and as interpreted by the State Bar, means  
18 that in order to qualify for in-house counsel registration, the applicant must have a  
19 principal office in Arizona. The Comment is clear that the Rule is not intended to  
20 apply to lawyers who appear on a temporary or sporadic basis. Due to the  
21 proliferation of virtual offices and cross-state residences, the State Bar believes that  
22 the Comment can be simplified by clarifying that the Rule applies to lawyers who  
23 will have a systematic and continuous presence in Arizona on behalf of their  
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1 employer. This simplified approach to a lawyer's presence comports with the ABA  
2 Model Rule for Registration of In-House Counsel, which reads:

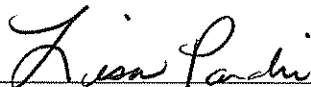
3  
4 A lawyer who is admitted to the practice of law in another United States  
5 jurisdiction or is a foreign lawyer, who is employed as a lawyer by an  
6 organization, the business of which is lawful and consists of activities  
7 other than the practice of law or the provision of legal services, and who  
8 has a systematic and continuous presence in this jurisdiction.

9 The State Bar believes that the proposed amended Comment will provide  
10 better clarity to the interpretation of the in-house counsel rule and bring the language  
11 up to date with the modern-day practice of law.

12 **CONCLUSION**

13 The State Bar of Arizona respectfully requests amendment of Rule 38, Ariz.  
14 R. Sup. Ct., as stated herein.

15  
16 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2017.

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19   
20 Lisa M. Panahi  
21 Acting General Counsel

22 Electronic copy filed with the  
23 Clerk of the Arizona Supreme Court  
24 this 5<sup>th</sup> day of January, 2017.

25 by: 