

Hon. Ann A. Scott Timmer, Chair
Attorney Regulation Advisory Committee
1501 W. Washington St.
Phoenix, AZ 85007

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:	)	
	)	Supreme Court No. R-__-__
PETITION TO AMEND RULES	)	
38 and 39 and ABROGATE RULE	)	
40, RULES OF THE	)	
ARIZONA SUPREME COURT	)	
	)	Petition to Amend Rules 38 and
	)	39 and Abrogate Rule 40, Rules
	)	of the Arizona Supreme Court
_____	)	

Pursuant to Rule 28, Rules of the Arizona Supreme Court, Justice Ann A. Scott Timmer, Chair of the Attorney Regulation Advisory Committee, respectfully petitions this Court to adopt amendments to Rules 38 and 39 and abrogate Rule 40, Rules of the Arizona Supreme Court.

I. Background and Purpose of the Proposed Rule Amendments

Rules 38, 39, and 40 provide exceptions to the usual admission process for lawyers. Rule 38 provides a lengthy list of exceptions to the standard examinations and admission process. Rule 39 sets out the procedures for admission pro hac vice. Rule 40 permits the temporary practice of law for non-member lawyers following a major disaster. This petition proposes to reorganize these various exceptions in a

more user-friendly way. Over the years, the list of exceptions in Rule 38 has expanded. With the addition of admission on motion and admission by transfer of uniform bar examination scores, and the narrowing of the definition of the unauthorized practice of law in ER 5.5, some of the exceptions to the usual admissions process are no longer needed or should be modified to reflect these changes. In addition, the petition updates the certification process for some of the exceptions to make the process more streamlined and the requirements consistent.

The petition proposes dividing the exceptions into two rules. Rule 38 comprises the more permanent exceptions: in-house counsel; foreign legal consultants; full-time and clinical law professors; and approved legal services organizations and certification of *pro bono* counsel. Rule 39 contains the more temporary admissions: *pro hac vice*; practice pending admission; law student practice; and military spouse certification.

The petition also removes certain rules. Rule 40, permitting the temporary practice of law for non-member lawyers following a major disaster, has been abrogated as it is no longer necessary after the 2016 amendments to ER 5.5 that allowed non-members to provide legal services on a temporary basis. In addition, Rule 38(e), permitting non-Arizona attorneys employed by indigent defense offices in small counties to practice, is no longer necessary considering the newer paths to admission: admission on motion and admission upon transfer of uniform bar

examination score.

The petition also attempted to use a uniform format for all the exceptions to facilitate easy reference to the requirements.

II. Proposed Amendments

1. Rule 38 Certifications and Limited Admissions to Practice Law

(a) In-house counsel

The contents of current Rule 38(a) have been reorganized under the more uniform format. The following are the more substantive changes:

- Removed language in current Rule 38(a)(1) stating that the employer must engage in business “other than the practice of law or provision of legal services.” This amendment was based on the suggestion that this exception should not prohibit lawyers from practicing as an in-house counsel for a law firm or other legal office. This change would allow out-of-state lawyers to register as in-house counsel and work for a law practice as an in-house counsel with all rights and restrictions provided in the rules.
- The proposed rule creates a new Foreign Lawyer Eligibility paragraph to separate non-member-U.S.-attorney applicants from non-member-foreign-attorney applicants. Rule 38(a)(2). The intent was to clarify eligibility for the different types of non-members.
- Removed language in current Rule 38(a)(4) that has become obsolete with

time, which stated “An attorney who is employed by an eligible organization as in-house counsel on the effective date of this rule shall apply for a Registration Certificate within one hundred and eighty (180) days of that effective date.” The proposed revised draft requires all lawyers to apply for a registration certificate within ninety (90) days of commencement of employment. Rule 38(a)(3).

- Added a “Subsequent Admission” section. If an attorney registered under this rule is subsequently admitted to the practice of law in Arizona, that attorney’s in-house counsel registration shall be superseded by the Arizona license to practice law. Rule 38(a)(10).

(b) Foreign Legal Consultant.

The contents of current Rule 38(b) have been reorganized under the more uniform format. The following are the more substantive changes:

- Currently, Rule 38(b) requires that the applicant have been admitted to practice in a foreign jurisdiction “for a period of not less than five of the seven years” immediately preceding the application. The petition amends this time period to conform to the ABA Model Rule for licensing foreign legal consultants to “not less than five years.” Rule 38(b)(1)(A).
- Current Rule 38(b) requires an applicant to have engaged in the practice of law for five of the seven years immediately preceding the application. The

petition amends this time period to conform to the time period applied to applicants for admission on motion: “three of the five years immediately preceding” the application. Rule 38(b)(1)(B).

- The petition deletes the phrase “or political subdivision of a foreign country” in current Rule 38(b)(2)(A) to conform to the ABA Model Rule.
- The petition deletes the age requirement (21) in current Rule 38(b)(2)(E) to conform to the ABA Model Rule.
- The petition adds the requirement that the foreign legal consultant receive a registration number and pay an annual renewal fee. Rule 38(b)(8).

(c) Law Professor Certification.

The petition combines current Rule 38(c), Full-Time Law School Faculty Members, and Rule 38(d), relating to Clinical Law Professors, and generally treats them the same for this exception to the admission requirements. The contents of both rules have been organized under the uniform format. The following are more substantive changes:

- The petition requires the law professor to pay annual fees and comply with CLE requirements. Rule 38(c)(2) and (7).
- Clinical law professors will undergo a more formal application process through the Committee on Character and Fitness. Rule 38(c)(2). In light of the need for clinical law professors to be authorized to practice in the

law school clinics, the rule permits them to practice pending the review of the application by the Committee, provided the clinical law professor has submitted an application deemed complete by the Committee, is supervised by an Arizona attorney, and provides notice on all written communication of the temporary status and supervising attorney. Rule 38(c)(3)(B).

- Current Rule 38(c)(5) sets out limitations on the number of hours a full-time faculty member can practice and requires the dean of the law school to “annually advise the executive director of the state bar” that the faculty members are in compliance with university rules regarding practice. The petition amends the rule to remove any limitations on the hours of practice, believing that this restriction could be addressed by each law school. The petition also removes any reporting requirement.

(d) Approved Legal Service Organizations and Certification of *Pro Bono* Counsel.

This proposed rule combines the requirements of current Rules 38(e), attorneys volunteering with an approved legal services organization, and 38(f), attorneys working with an approved legal services organization. The proposed rule also incorporates some of the language previously used in those subsections, as well as some language utilized in current Rule 204.6, Colorado Rules of Civil Procedure.

The following are more substantive changes to the application process for an approved legal service organization:

- The petition to apply for approved legal service organization (LSO) status is filed with the Clerk of the Court.¹ A copy of the petition is also provided to the State Bar. The current rule required Chief Bar Counsel to file a comment on the petition. The draft rule provides that Chief Bar Counsel may within 10 days file a comment with the Clerk. Rule 38(d)(1)(B).
- The LSO is required in its petition to identify those lawyers it directly employs to provide legal services and those lawyers not currently authorized to practice in Arizona who provide volunteer pro bono services under its auspices and supervision. Rule 38(d)(1)(A)(vi).
- The LSO is required to file an annual notice with the Clerk, updating its list of employed and volunteer lawyers, and certifying that it has offered appropriate training and continuing legal education to its volunteer *pro bono* lawyers. Rule 38(d)(1)(C).
- In the event of non-compliance, either the Supreme Court or the State Bar may require the LSO to show cause as to whether its approved status, and the

¹ ARC recommends those legal service organizations already approved by the Court not be required to file another application, but instead be required to submit the annual statement as described in Rule 38(d)(1)(C).

certification of volunteer *pro bono* counsel working under its auspices and supervision, should be revoked. Rule 38(d)(1)(E).

The following are the substantive provisions regarding the qualifications for Certification as *Pro Bono* Counsel:

- “*Pro Bono* Services” are defined. Rule 38(d)(2).
- The categories of lawyers not currently authorized to practice in Arizona who may qualify for *pro bono* certification status are identified. Rule 38(d)(2)(A)(i)-(iv).
- The application to become certified as *pro bono* counsel is submitted by the LSO that is providing supervision and offering training and continuing legal education. Rule 38(d)(2)(B).
- The proposed rule exempts retired and inactive volunteer *pro bono* counsel from paying SBA annual bar dues if they comply with the provisions of proposed subsection (H), including providing an avowal they have provided a minimum of ten (10) hours of *pro bono* legal services.
- A lawyer certified under this rule is assigned a certification number, and it must be provided in any pleading signed by that lawyer. For appearances made in court without a written pleading, the lawyer must advise the court of the lawyer’s certification number. Rule 38(d)(2)(I).

- Retired and inactive lawyers who volunteer as *pro bono* counsel need not comply with the CLE requirements found in Rule 45; instead, the obligation to offer appropriate continuing legal education to volunteer retired and inactive *pro bono* counsel is expressly placed on the approved legal service organization.
- Arizona lawyers who have active license status and those lawyers who are directly employed with legal service organizations must still comply with the Rule 45 CLE requirements. Rule 38(d)(2)(H)(iv).
- Circumstances under which the volunteer *pro bono* certification will be automatically terminated are identified. Rule 38(d)(2)(F).

2. Rule 39 Temporary Authorizations to Practice Law

(a) Pro Hac Vice.

The contents of the rule have been reorganized under the more uniform format.

The following are the more substantive changes:

- The draft adds language to include foreign lawyer eligibility to apply for pro hac vice (PHV) admission. The draft rule allows for a member of a bar of another state or non-U.S. jurisdiction to apply for PHV admission.
- The draft removes the following provision in current Rule 39(a):
 “Except for non-members authorized pursuant to Rule 38(a)(10) or otherwise eligible, no person is eligible to appear as counsel pursuant to this rule if that

person (a) is a resident of the State of Arizona, or (b) is regularly employed in the State of Arizona, or (c) is regularly engaged in substantial business, professional, or other activities in the State of Arizona.” The draft now allows lawyers residing in Arizona, practicing under the authority of another rule, like ER 5.5, to apply for PHV admission. It also is congruent with Rule 38(b) which allows foreign legal consultants to reside in Arizona and apply to appear PHV.

- The draft removed language in current Rule 39(d) enumerating what needs to be in the verified application. Because the application must be approved by the Court, there did not seem to be a need to describe the entire contents of the application in the Rule.

(b) Practice Pending Admission

The contents of current Rule 38(h) have been reorganized under the more uniform format. The only substantive change was to expand the authorization to practice to those applicants seeking admission by transfer of uniform bar examination score and by examination.

(c) Law Student Practice

As noted above, the petition combined the Clinical Law Professor certification with the Full-Time Law Faculty certification, leaving this subsection to deal exclusively with law student practice. The contents of current Rule 38(d) relating to

law student practice were organized under the uniform format. The only substantive change was the requirement that the Clerk issue a notice of certification and send a copy of the certification to the student, the law school, the supervising attorney, and the State Bar. Rule 39(c)(3)(G).

(d) Military Spouse Certification

The contents of current Rule 38(i) were reorganized under the uniform format. No substantive changes were made.

3. Rule 40. Provision of Legal Services Following Determination of Major Disaster

The contents of this rule will be abrogated. The rule can be reserved.

4. Current Rule 38(e): Attorneys Employed by Indigent Defense Offices.

This exception was added in 2009 to allow a non-member attorney employed by an indigent defense office in a smaller county to practice law. Since 2009, only one attorney has sought authorization to practice under this exception with the Mohave County Public Defender. The attorney was later admitted on motion in Arizona. Because it was utilized by only one attorney in the 10 years it has existed, and with the advent of admission on motion and admission upon transfer of uniform bar examination score, this exception no longer appears to be necessary. Consequently, the petition does not include this exception.

III. Pre-submission Comments

ARC circulated the draft petition and appendices to the various stakeholders

that would be affected by the proposed changes: in-house counsel, approved legal service organizations, and the law schools. Based on their comments and suggestions, ARC made a number of amendments to the draft petition.

For the reasons set forth above, ARC requests that this Court amend Rule 38 and 39 and abrogate Rule 40 as set forth in the Appendix.

RESPECTFULLY SUBMITTED this 10th day of January, 2019.

By: /s/
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