

Draft Report - Vote	Justice Timmer, Chair	
BREAK		
Call to the public	Justice Timmer, Chair	
Chair comments and adjournment	Justice Timmer, Chair	

**MINUTES OF
COMMITTEE ON THE REVIEW OF SUPREME COURT RULES GOVERNING
PROFESSIONAL CONDUCT AND THE PRACTICE OF LAW**

Thursday, November 20, 2014

State Bar of Arizona

4201 North 24th Street

Phoenix, AZ 85016

Web Site: <http://www.azcourts.gov/reviewscrulesgpc/Home.aspx>

Members Present:

The Honorable Ann A. Scott Timmer, Chair

James J. Belanger

Whitney Cunningham

Kimberly A. Demarchi

Jodi Knobel Feuerhelm

Mary Jo Foster

Nancy A. Greenlee

Geoffrey M. T. Sturr

The Honorable Samuel Thumma

Maret Vessella

Members Present via Telephone:

Jennifer Burns

Members Absent:

Leticia Marquez

Staff Present:

Patricia A. Sallen

Quorum:

Yes

Others Present:

Patricia Seguin

Lisa M. Panahi

Regina Nassen

1. Call to Order & Introductions – Justice Timmer

Justice Timmer called the meeting to order at 9:35 a.m. and welcomed members.

Amelia Cramer introduced Regina Nassen.

2. Review and approval of minutes of meeting held September 17, 2014

Motion to approve the minute of the meeting of September 17, 2014 by Geoff Sturr, seconded by Kim Demarchi. Motion carried.

3. Reports from Workgroups:

a. Workgroup Examining the Rules of Professional Conduct

- Kim Demarchi updated the Committee and presented an overview of the issues her workgroup has been considering.
- Ms. Demarchi walked the committee through the work group's proposals on pages 4 through 6 of the meeting materials. She presented Recommendation One (explaining the use of comments for the committee's report).
 - The Committee approved Recommendation One as proposed.
- After discussing Recommendation Two (training lawyers regarding technology), the committee decided to also recommend that technology be added to the mandatory Professionalism Course and to recommend that the State Bar Committee on the Rules of Professional Conduct review relevant technology issues and issue opinions to help lawyers navigate this area.
 - The Committee approved Recommendation Two as described above.
- Jodi Feuerhelm presented the workgroup's proposed revisions to ER 1.10 (imputation of conflicts; pages 7 through 13 of the meeting materials).
 - A majority of the Committee approved the proposed revisions with minor changes.
- Ms. Demarchi described pending issues before her workgroup. This workgroup was scheduled to have its final meeting following the Committee meeting.

b. Workgroup Examining the Practice of Law

- Geoff Sturr updated the Committee and presented the issues his workgroup has been considering, as outlined in the status report on pages 14 through 66 of the meeting materials.
- Among other recommendations, he reported that the workgroup will not recommend that Arizona eliminate its reciprocity requirement.

- With minor changes, the Committee approved this workgroup's proposals, including adding a provision for practice pending admission, lowering the active practice requirement for admission on motion, revising Rule 31 to clarify that mediation is not the practice of law and revising ER 5.5 to limit it to the practice of Arizona law.
- The work group will have a final set of recommendations regarding Rule 38 for the Committee's final meeting.
- The work group was scheduled to have its final meeting on December 10.

Justice Timmer will prepare a draft report and recommendations and ask for individual input. Please do not "reply to all" so that the Open Meeting Law is not violated.

Next meeting is scheduled for Thursday, December 18, 2014

4. Call to the Public/Adjournment – Justice Timmer

Justice Timmer made a call to the public. No members of the public were present.

Following the call to the public, Justice Timmer adjourned the meeting at approximately 11:41 a.m.

Rule 34. Application for Admission

(a) Methods of admission to the practice of law in Arizona. Persons desiring to be admitted to the practice of law in the State of Arizona may apply for admission by one of three methods: (1) admission by Arizona uniform bar examination, (2) admission on motion, or (3) admission by transfer of uniform bar examination score from another jurisdiction.

(b) Applicant Requirements and Qualifications.

1. No applicant will be recommended for admission to the practice of law in Arizona by the Committee on Character and Fitness unless the Committee is satisfied that:

A. the applicant is over the age of twenty-one years;

B. the applicant is of good moral character;

C. the applicant is mentally, emotionally and physically able to engage in the practice of law, and possesses the required knowledge of the law to do so;

D. the applicant is a graduate with a juris doctor from a law school provisionally or fully approved by the American Bar Association at the time of graduation or the applicant is a graduate with a juris doctor and has been actively engaged in the practice of law in some other state or states for at least ~~five~~three of the last ~~seven~~five years prior to filing an application for admission to practice in Arizona; and

E. if ever admitted to practice in any jurisdiction, foreign or domestic, the applicant is presently in good standing, or the applicant resigned in good standing or is capable of achieving good standing status in that jurisdiction.

F. the Arizona uniform bar examination applicant has successfully completed the course on Arizona law described in paragraph (j) of this rule.

2. An applicant may be allowed to sit for the Arizona uniform bar examination prior to the award of a juris doctor degree if the applicant:

A. is a currently enrolled student in good standing at a law school fully or provisionally approved

by the American Bar Association;

B. is expected to graduate with a juris doctor degree within one hundred twenty (120) days of the first day of early exam administration;

C. has satisfied all requirements for graduation with a juris doctor except for not more than eight (8) semester hours or its equivalent in quarter hours at the time of early exam administration;

D. will not be enrolled in more than two (2) semester hours or its equivalent in quarter hours during the month of early bar examination testing and the immediately preceding month;

E. has been determined by their school to be academically prepared for early testing;

F. provides by the deadline to the Committee on Character and Fitness, on a form provided by the Committee, an affidavit attested to by the applicant and the law school that they meet the above criteria. The law school's decision whether to certify that the student meets the criteria is final and shall not be subject to review by the Committee or the Court.

No applicant shall be recommended to practice law until graduation or satisfaction of all requirements for graduation, and completion of all requirements for admission to the practice of law under these rules. If an applicant under this subsection has not graduated with a juris doctor within one hundred twenty (120) days of the first day of early exam administration, all parts of the Arizona uniform bar examination, including the score, are void and the applicant's examination scores shall not be disclose for any purpose. Scores may not be released until such time as satisfactory proof of award of juris doctor, as determined by the Court, is provided to the Committee. An early examination which is voided shall count as a examination attempt under Rule 35(c)(1).

At the completion of the juris doctor requirements and within sixty (60) days after graduation, the applicant must cause his or her law school, dean, or registrar to submit to the Committee on Character and Fitness proof of graduation, showing his or her juris doctor was conferred within one hundred twenty (120) days of the first day of early exam administration. Failure to complete the course of study within one hundred twenty (120) days of the examination and provide evidence of graduation within an additional sixty (60) days shall render the applicant's score void.

3. The Committee on Character and Fitness shall endeavor to complete its inquiries, some or all of which may be delegated to the National Conference of Bar Examiners, to be in position to

recommend for or against a successful Arizona uniform bar examinee's admission to the practice of law no later than the time the results of the Arizona uniform bar examination are available for examination applicants. This time limitation is aspirational only, and may be extended for further inquiry and formulation of a recommendation when the circumstances of a case so require.

(c) Application and Character Report Materials. Any person desiring to be admitted to the practice of law in the State of Arizona must submit to the Committee on Character and Fitness an application in the form supplied by the Committee. The application for admission must be accompanied by required supporting documents and application fee.

1. The Arizona uniform bar examination applicant shall also complete and submit a character report accompanied by a character investigation fee as established by the Court. For an Arizona uniform bar examination applicants only, the character report and related fee may be submitted separately from the application for admission.

2. An applicants for admission on motion or admission by transfer of uniform bar examination score shall submit character investigation materials together with the application.

(d) Documents Required in Support of Application. The following must accompany every application:

1. subject to the exception made in paragraph (b)(1)(D) of this rule, the applicant's law school diploma, or other evidence satisfactory to the Committee on Character and Fitness showing the applicant is a graduate with a juris doctor degree from a law school provisionally or fully approved by the American Bar Association at the time of graduation;

2. if the applicant has been previously admitted to practice law in any jurisdiction, foreign or domestic, the certificate of the appropriate court agency(ies) or the mandatory bar association, which ever has custody of the roll of attorneys in such jurisdiction, indicating the date of admission and that the applicant is presently in good standing, or that the applicant resigned in good standing or is capable of achieving good standing status in that jurisdiction;

3. for applicants taking the Arizona uniform bar examination, an examination fee as established by the Court;

4. an application fee as established by the Court;

5. a full face photograph of the applicant's head, neck and shoulders, without a hat, and not larger than two and one-half (2.5) inches by two and one half (2.5) inches nor smaller than two (2) inches by two (2) inches taken within six months prior to filing with the Committee on Character and Fitness; and

6. a complete set of the applicant's fingerprints. The Committee on Character and Fitness is authorized to receive criminal history information regarding any applicant for admission from any law enforcement agency in conjunction with the admissions process.

(e) Arizona Uniform Bar Examination Application Filing Schedule; Fees

1. On the basis of an application for admission by Arizona uniform bar examination properly and timely filed, with all required supporting documents and fees, the applicant will be certified to sit for the Arizona uniform bar examination.

2. The application for admission and all of the documents required to be submitted by the Arizona uniform bar examination applicant must be timely submitted, with required fees, in accordance with the schedule and filing fees established by the Court. In the event an application, documents or fees are submitted after the initial filing deadline, late fees as established by the Court shall be assessed. No application, documents or fees will be accepted after the close of filing deadline, as established by the Court.

Any applicant failing to pass a written Arizona uniform bar examination who wishes to take the next subsequent examination must submit an application for examination, required supporting documentation, and application and examination fees as established by the Court, no later than twenty days after the date of the letter notifying the applicant of the applicant's failure to pass the written examination. If the application is submitted after twenty days, a late application fee shall be paid in accordance with the schedule and filing fees established by the Court. No application for subsequent Arizona uniform bar examination will be accepted after the filing deadline as established by the Court.

3. When an application to take the Arizona uniform bar examination is properly filed with required supporting documents, the applicant shall be promptly notified that the application is in order and that the applicant is certified to sit for the Arizona uniform bar examination, specifying the time and place of such examination.

(f) Admission on Motion.

1. An applicant who meets the requirements of (A) through (H) of this paragraph (f)(1) may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

A. either (i) have been admitted by bar examination to practice law in another jurisdiction allowing for admission of Arizona lawyers on a basis equivalent to this rule, or (ii) have been admitted by bar examination to practice law in another jurisdiction that does not allow for admission of Arizona lawyers on a basis equivalent to this rule ~~one or more states, territories, or the District of Columbia,~~ and ~~thereafter werethereafter~~ have been admitted to and engaged in the active practice of law in another jurisdiction allowing admission of Arizona lawyers on a basis equivalent to this rule for five-three of the five-seven years immediately preceding the date upon which the application is filed;

B. hold a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time of graduation;

C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for five-three of the seven-five years immediately preceding the date upon which the application is filed;

D. submit evidence of a passing score on the Multistate Professional Responsibility Examination as it is established in this jurisdiction;

E. establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

F. establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;

G. establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and

H. submit evidence of successful completion of the course on Arizona law described in paragraph (j) of this rule.

2. For the purposes of this rule, the “active practice of law” shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that permits such activity by a lawyer not admitted to practice; however, in no event shall any activities that were performed in advance of bar admission in some state, territory or the District of Columbia be accepted toward the durational requirement:

A. representation of one or more clients in the practice of law;

B. service as a lawyer with a local, state, or federal agency, including military service;

C. teaching law full-time at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

D. service as a judge in a federal, state, territorial, or local court of record;

E. service as a judicial law clerk;

F. service as corporate counsel; or

G. service as corporate counsel in Arizona before January 1, 2009 or while registered pursuant to Rule 38(h). Active practice performed within Arizona pursuant to Rule 38(h) may be applied to meet active practice requirements found in Rule 34(f)(1)(A)(ii) provided all other requirements of Rule 34(f) are met.

3. For purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located. The “active practice of law” is further defined to require that at all times in the durational period the applicant has held a law license in “active” status. ÷

~~A. held a law license in “active” status;~~

~~B. spent one thousand (1,000) hours or more per year engaged in the practice of law, for each of~~

~~the required five years in the durational period; and~~

~~C. derived at least fifty percent (50%) of non-investment income from the practice of law.~~

4. An applicant who has failed a bar examination administered in this jurisdiction or who has passed the uniform bar examination in another jurisdiction but failed to achieve the Arizona scaled score within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

5. The Court shall approve jurisdictions considered “reciprocal” to Arizona, and the Committee shall publish and make available a list of reciprocal jurisdictions.

[no changes (g) – (n)]

Rule 38

Overall structural note: Pro hac vice moved to Rule 39; In-house counsel relocated to (a) from (h) and amended; practice pending admission added as (h)

(a) Admission Pro Hac Vice. In-house Counsel

~~1. *Eligibility.* An attorney who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or eligible to practice before the highest court in any state, territory or insular possession of the United States (hereinafter called a nonresident attorney) and who is of good moral character and is familiar with the ethics, professionalism and practices of the legal profession in the State of Arizona, may appear as counsel pro hac vice in a particular case before any state or local court, board or administrative agency in the State of Arizona upon compliance with this rule. However, 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.~~

~~2. *Association of Local Counsel.* No nonresident attorney may appear pro hac vice before any court, board or administrative agency of this state unless the nonresident attorney has associated in that cause an attorney who is a member in good standing of the State Bar of Arizona (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel 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. Local counsel associating with a nonresident attorney in a particular cause shall accept joint responsibility with the nonresident attorney to the client, to opposing parties and counsel, and to court, board, or administrative agency in that particular cause.~~

~~3. *Procedure for Applying.* Appearance pro hac vice in a cause is subject to the discretion and approval of the court, board, or administrative agency where such cause is pending. A nonresident attorney desiring to appear pro hac vice under this rule shall comply with the procedures set forth herein for each matter where pro hac vice status is requested. For good cause shown, a court, board, or administrative agency may permit a nonresident attorney to appear pro hac vice on a temporary basis prior to the completion by the nonresident attorney of the application procedures set forth herein. At the time such temporary admission is granted, the court, board, or administrative agency shall specify a time period for the nonresident attorney to complete the application procedures, and any temporary pro hac vice admission shall be revoked in the event of subsequent failure by the nonresident attorney to so complete the application procedures.~~

~~A. *Verified Application to State Bar of Arizona.* In order to appear as counsel in any matter pending before a court, board, or administrative agency in the State of Arizona, a nonresident attorney shall file with the State Bar of Arizona an original and one copy of~~

~~a verified application together with a certificate from the state bar or from the clerk of the highest admitting court of each state, territory or insular possession of the United States in which the nonresident attorney has been admitted to practice law certifying the nonresident attorney's date of admission to such jurisdiction and the current status of the nonresident attorney's membership or eligibility to practice therein and a non-refundable application fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed; provided that not more than one application fee may be required per nonresident attorney for consolidated or related matters regardless of how many applications are made in the consolidated or related proceedings by the nonresident attorney; and further provided that the requirement of an application fee shall be waived i) for Judge Advocate General's Corps' military attorneys practicing before the Military Trial Court of the State of Arizona or the Arizona Court of Military Appeals and ii) to permit pro bono representation of an indigent client or clients. An attorney seeking a fee waiver to provide pro bono representation of an indigent client or clients shall include in the application a verification that all clients represented in the action are indigent and that no attorney fee shall be paid by the client. "Indigent" is defined as those individuals whose gross income is at or below 125% of the federal poverty guidelines, as calculated in conformity with the eligibility requirements for Legal Services Corporation grantees, currently codified at 45. C.F.R. Section 1611.~~

~~Fifteen percent of the non-refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund to be distributed by the Arizona Foundation for Legal Services and Education entirely to approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

~~*B. Notice of Receipt by State Bar of Complete Application.* Upon receipt of the verified application and fee from the nonresident attorney as described above, the State Bar of Arizona shall issue to local counsel a Notice of Receipt of Complete Application which states: (1) whether the nonresident attorney has previously made any application or motion pursuant to this rule within the preceding three years; (2) the date of any such application or motion; and (3) whether the application or motion was granted or denied by the court or administrative agency. The State Bar of Arizona Notice shall include as exhibits: (1) the original verified application and (2) the original certificate(s) of good standing. Copies of verified applications, certificates of good standing and orders granting, denying or revoking applications to appear pro hac vice shall be retained by the State Bar of Arizona for three (3) years.~~

~~*C. Motion to Associate Counsel Pro Hac Vice.* Local counsel shall file a motion to associate counsel pro hac vice with the court, board, or administrative agency where the cause is pending, together with proof of service on all parties in accordance with Arizona Rules of Civil Procedure. The motion to associate counsel pro hac vice shall include as exhibits: (1) the original verified application; (2) the original certificates of good standing; and (3) the State Bar of Arizona Notice. The motion to associate counsel pro hac vice shall also be accompanied by a proposed order granting or denying the motion. A copy of each order granting or denying the motion as entered by the court, board, or administrative agency shall be mailed by local counsel to the State Bar of Arizona.~~

~~D. *Entry of Order.* The order granting or denying the motion to associate counsel pro hac vice shall be entered by the court, board, or administrative agency no later than 20 days (exclusive of weekends and holidays) after the filing of such motion. A nonresident attorney shall make no appearance in a cause until the court, board, or administrative agency where the cause is pending enters the order granting the motion to associate counsel pro hac vice. The order granting pro hac vice status shall be valid for a period of one year from the date of entry, and shall be renewed for subsequent one year periods upon compliance with renewal procedures as specified herein.~~

~~4. *Verified Application.* The verified application required by this rule shall be on a form approved by the Board of Governors of the State Bar of Arizona and available at the clerk of the court, board, or administrative agency where such cause is pending and shall state:~~

~~A. the title of the case or cause, court, board, or agency and docket number in which the nonresident attorney will be seeking to appear pro hac vice, and whether this case or cause is a related or consolidated matter for which the nonresident attorney has previously applied to appear pro hac vice;~~

~~B. the nonresident attorney's residence and office address;~~

~~C. the court(s) to which the nonresident attorney has been admitted to practice and the date(s) of such admission;~~

~~D. that the nonresident attorney is a member in good standing of such court(s);~~

~~E. that the nonresident attorney is not currently disbarred or suspended in any court;~~

~~F. whether the nonresident attorney is currently subject to any pending disciplinary proceeding by any court, agency or organization authorized to discipline attorneys at law, and if so pending, the application shall specify the jurisdiction, the nature of the matter under investigation and the name and address of the disciplinary authority investigating the matter;~~

~~G. whether the nonresident attorney has ever been disciplined by any court, agency, or organization authorized to discipline attorneys at law;~~

~~H. the court, board, or administrative agency, title of cause and docket number in which the nonresident attorney has filed an application to appear as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted;~~

~~I. the name, address and telephone number of local counsel;~~

~~J. the name of each party in the cause and the name and address of counsel of record who is appearing for each party;~~

~~K. that the nonresident attorney certifies that he or she shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Arizona, as provided in Rule 46(b), Rules of the Supreme Court;~~

~~L. that the nonresident will review and comply with appropriate rules of procedure as required in the underlying cause; and~~

~~M. that the nonresident attorney understands and shall comply with the standards of professional conduct required of members of the State Bar of Arizona.~~

~~5. *Discretion.* The granting or denial of a motion to associate counsel pro hac vice pursuant to this rule by the court, board, or administrative agency is discretionary. The court, board, or administrative agency may revoke the authority of a nonresident attorney to make continued appearances pursuant to this rule. Absent special circumstances, repeated appearances by any person pursuant to this rule may be the cause for denial of the motion to associate counsel pro hac vice. Such special circumstances may include, but are not limited to, the following:~~

~~A. a showing that the cause involves a complex area of law in which the nonresident attorney possesses a special expertise, or~~

~~B. a lack of local counsel with expertise in the area of law involved in the cause.~~

~~6. *Transfer.* The nonresident attorney shall be deemed admitted in the event venue in such action is transferred to another county or court or is appealed; provided, however, that the court having jurisdiction over such transferred or appealed cause may revoke the authority of the nonresident attorney to appear pro hac vice.~~

~~7. *Continuing Duties to Advise of Changes in Status.* A nonresident attorney admitted pro hac vice shall have the continuing obligation during the period of such admission to promptly advise the State Bar of Arizona of a disposition made of pending charges or the institution of any new disciplinary proceedings or investigations. The State Bar of Arizona shall then advise any court, board, or administrative agency where the nonresident attorney has been admitted pro hac vice of any such information. A nonresident attorney shall promptly advise the State Bar of Arizona if permission to appear pro hac vice pursuant to this rule is revoked by any court, board, or administrative agency.~~

~~8. *Renewal of Application.* On or before each anniversary date of the filing of the verified application with the State Bar of Arizona, local counsel must certify to the State Bar of Arizona whether (a) the nonresident attorney continues to act as counsel in the cause; or (b) such cause has been adjudicated to a final conclusion or is otherwise concluded. Any nonresident attorney who continues to act as counsel in the cause shall remit to the State Bar of Arizona on or before each anniversary date a fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such renewal is sought, unless the nonresident attorney is waived under paragraph (a)(3)(A) of this rule as a Judge Advocate General's Corps' military attorney or as an attorney providing pro bono representation of an indigent client.~~

~~Fifteen percent of the non-refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund administered by the Arizona Foundation for Legal Services and Education, to be distributed to and used exclusively for approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

~~9. *Failure to Renew.* Any nonresident attorney who continues to appear pro hac vice in a cause and fails to pay the renewal fees set forth in paragraph (a)(8) of this rule shall be suspended from appearance in any cause upon the expiration of a period of thirty days from the anniversary date. The executive director of the State Bar of Arizona shall notify the nonresident attorney and local counsel of the suspension and shall file a certified copy of the notice with the court, board or administrative agency where the cause is filed. The nonresident attorney may be reinstated upon the payment of fees set forth in paragraph (a)(8) of this rule and a \$50 late penalty. Upon payment of all accrued~~

~~fees and late penalty, the executive director shall reinstate the nonresident attorney and shall certify such reinstatement to the court, board, or administrative agency where the cause is filed.~~

~~10. *Annual Reporting.* The State Bar of Arizona shall prepare an annual report which shall list: (a) all applications filed pursuant to this rule during the preceding twelve months; (b) the names of all applicants; and (c) whether the application was granted or denied. The report shall be available for inspection at the offices of the State Bar of Arizona, and shall be provided to the Supreme Court.~~

~~11. *Disciplinary Jurisdiction of the State Bar of Arizona.* As provided in Rule 46(b), Rules of the Supreme Court, a nonresident attorney admitted pro hac vice pursuant to these rules shall be subject to the jurisdiction of the courts and agencies of the State of 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 of Arizona.~~

1. As used in this rule, “in-house counsel” shall refer to an attorney who is employed as a full-time employee within the State of Arizona as in-house counsel or a related position for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services.

2. A lawyer who is not a member of the State Bar of Arizona, but who holds a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and is currently a member in good standing of the bar of another state or the District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who is employed within the State of Arizona as in-house counsel, as hereinabove defined, may apply for an Arizona Certificate of Registration of In-House Counsel (“Registration Certificate”). A lawyer employed as in-house counsel who is admitted to practice in a jurisdiction outside of the United States, in accordance with the standards and requirements generally applicable to the practice of law in that jurisdiction, may also apply for a Registration Certificate.

3. An applicant for a Registration Certificate shall:

A. file with the clerk of the Arizona Supreme Court ~~State Bar of Arizona its form of a~~ verified application for an Arizona Certificate of Registration of In-House Counsel;

B. attach to the verified application ~~furnish to the State Bar of Arizona~~ a certificate from the state bar or from the clerk of the highest admitting court of each state, territory, or insular possession of the United States, or foreign jurisdiction, in which the applicant has been admitted to practice law certifying the current status of the applicant's membership or eligibility to practice therein;

C. certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct;

D. pay an application fee in an amount established by the Supreme Court equal to seventy-five percent (75%) 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
E. submit evidence that the applicant has successfully completed the course on Arizona law described in Rule 34(j).

4. 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. From and after the effective date of this rule, any attorney who commences employment by an eligible organization as in-house counsel shall apply for a Registration Certificate within ninety (90) days of the date of commencement of employment.

5. On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this rule, who continues to be employed as in-house counsel within the State of Arizona, shall renew the Registration Certificate, ~~in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose~~, and pay a renewal fee set by the Supreme Court. in an amount equal to seventy five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.

6. Upon a determination ~~by the State Bar of Arizona~~ that the applicant has complied with the requirements of subpart (3) of this rule, the clerk State Bar shall issue to the applicant a Registration Certificate. ~~The State Bar shall promptly notify any applicant if it determines that an application fails to comply with the requirements of subpart (3) of this rule, and the applicant shall have thirty (30) days from the date of such notice in which to cure any deficiency. If the applicant fails to cure such deficiency within that thirty (30) day period, the application shall be deemed denied.~~

7. Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within thirty (30) days, any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal or state court or agency before which the applicant has been admitted to practice, or in any state in which the lawyer has rendered legal services while temporarily authorized under any rule or by admission *pro hac vice*.

8. If there is a change in circumstances, and an attorney holding a current Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the ~~State Bar of Arizona~~ clerk of the supreme court of such change in writing within thirty (30) days. An attorney registered pursuant to this rule who has become employed by a different eligible entity, but continues to meet all the requirements of this rule, may apply for the issuance of an amended Registration Certificate to reflect that change.

9. Except as provided in this rule, the holder of a valid and current Registration Certificate shall be entitled to the benefits and responsibilities of active members of the

State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of 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 other than the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or when participating in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these rules. ~~or to engage in activities for which admission pro hac vice is required under Rule 38(a) of these rules.~~

~~A lawyer that has been issued a Registration Certificate under this rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the registrant shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in-house counsel shall file an affidavit demonstrating full compliance with this rule.~~

~~10. Notwithstanding the provisions of subpart (9) of this rule, the holder of a Registration Certificate may participate in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these rules.~~

10. A lawyer ~~who that~~ has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* in Arizona by complying with the requirements of Rule ~~398(a)~~ of these rules.

11. A lawyer ~~that who~~ has been issued a Registration Certificate under this rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the registrant lawyer shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in-house counsel shall file an affidavit demonstrating full compliance with this rule.

11.12. A lawyer's authority to practice as in-house counsel under a Registration Certificate issued pursuant to this rule shall be suspended when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which that lawyer has been admitted to practice.

12.13. A lawyer serving as in-house counsel in Arizona who fails to register pursuant to the provisions of this rule shall be ineligible for admission *pro hac vice* in Arizona, and may be referred by the State Bar of Arizona to the Bar admission and/or disciplinary

regulatory authority in any jurisdiction in which that lawyer has been admitted to practice of law.

~~13. An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.~~

Note: No changes proposed to (b), (c), (d) or (e); text is provided for context

(b) Foreign Legal Consultant.

1. *Definition.* A “foreign legal consultant” is a person who is admitted to practice and is in good standing as an attorney or counselor at law or the equivalent in a foreign country or political subdivision of a foreign country, and has been issued a certificate of registration as a foreign legal consultant.

2. *Requirement for Certificate of Registration.* To be issued a certificate of registration as a foreign legal consultant, an applicant must:

- A. for a period of not less than five of the seven years immediately preceding the date of the application, have been admitted to practice and have been in good standing as an attorney or counselor at law or the equivalent in a foreign country or political subdivision of a foreign country; and have engaged either: (i) in the practice of law in such country or political subdivision; or (ii) in a profession or occupation that requires admission to practice and good standing as an attorney or counselor at law or the equivalent in such country or political subdivision;
- B. possess the good moral character necessary for a member of the state bar;
- C. intend to practice as a registered foreign legal consultant in this state and to maintain an office in the state for such practice;
- D. possess the necessary documentation evidencing compliance with the immigration laws of the United States;
- E. have attained the age of twenty-one;
- F. file with the Committee on Character and Fitness an application in the form supplied by the Committee. The application must be accompanied by required supporting documents and application fee. The applicant shall also complete and submit a character report accompanied by a character investigation fee as established by the Court. The character report and related fee may be submitted separately from the application to practice as a registered foreign legal consultant.

3. *Documents Required in Support of Application.* The following must accompany every application:

- A. an application fee as established by the supreme court;
- B. a complete set of the applicant's fingerprints (the Committee on Character and Fitness is authorized to receive criminal history information regarding any applicant for admission from any law enforcement agency in conjunction with the admissions process);

C. a certificate, with a duly authenticated English translation, if not in English, from the authority having jurisdiction over admission in the foreign country or political subdivision of the foreign country in which the applicant was admitted to practice, which shall be signed by a responsible official or one of the members of the executive body of such authority and which shall be accompanied by the official seal, if any, of such authority and which shall certify (a) the authority's jurisdiction in such matters, and (b) the applicant's admission to practice in such foreign country or political subdivision of such country, the date of such admission, and the applicant's good standing as an attorney or counselor at law or the equivalent thereof;

D. a certificate, with a duly authenticated English translation, if not in English, from the authority having jurisdiction over professional discipline in the foreign country or political subdivision of the foreign country in which the applicant was admitted to practice, which shall be signed by a responsible official or one of the members of the executive board of such authority, and which shall be accompanied by the official seal, if any, of such authority and which shall certify (a) the authority's jurisdiction in such matters, and (b) whether any charge or complaint has ever been filed against the applicant with such authority, and if so, the substance of each such charge or complaint and the adjudication or resolution thereof;

E. a letter of recommendation, with a duly authenticated English translation, if not in English, from one of the members of the executive body of the authority mentioned in paragraph (b)(3)(C) of this rule or from one of the judges of the highest law court or of a court of original jurisdiction in the foreign country or political subdivision of the foreign country;

The Committee on Character and Fitness and its agents may require such information or further documents from a foreign legal consultant applicant as it is authorized to require of any applicant for admission to the state bar and may make such investigations, conduct such hearings, and otherwise process said application as if made pursuant to the provisions of the rules governing application for admission by examination.

4. *Time for Processing Application.* The Committee on Character and Fitness may receive and act upon any such application at any time or in its discretion may require that such applications be received and processed by the Committee at the same time and in the same manner as applications for admission upon examination.

5. *Hardship Waiver.* Upon a showing that strict compliance with the provisions of paragraphs (b)(3)(C) or (D) of this rule would cause the applicant unnecessary hardship, or upon a showing of exceptional professional qualifications to practice as a foreign legal consultant, the Committee may in its discretion waive or vary the application of either or both of those provisions and permit the applicant to furnish other evidence in lieu thereof.

6. *Reciprocity.* In considering whether to issue a certificate of registration as a foreign legal consultant, the Committee may consider whether a member of the state bar would have a reasonable and practical opportunity to establish an office for the giving of legal

advice to clients in the applicant's country of admission if (a) there is pending with the Committee a request from a member of the state bar to take this factor into account, (b) the member is actively seeking or has actively sought to establish such an office in that country, and (c) there is a serious question as to adequacy of the opportunity for a member of the state bar to establish such an office.

7. Scope of practice.

A. A person licensed to practice as a foreign legal consultant under this rule may render legal services in this state subject, however, to the limitations that he or she shall not:

- i. appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state other than upon admission pro hac vice pursuant to Rule 38(a);
- ii. prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States of America;
- iii. prepare any will or trust instrument affecting the disposition on death of any property located in the United States of America and owned by a resident thereof;
- iv. prepare any instrument relating to the administration of a decedent's estate in the United States of America;
- v. prepare any instrument in respect to marital relations, rights or duties of a resident of the United States of America or the custody or care of the children of a resident;
- vi. render professional legal advice on the law of this state or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this rule) to render professional legal advice in this state;
- vii. in any way hold himself or herself out as a member of the state bar.

B. A person registered as a foreign legal consultant under this rule shall at all times use the title "legal consultant", which shall be used in conjunction with the name of the foreign country of his or her admission to practice, and shall not carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:

- i. his or her own name;
- ii. the name of his or her law firm;
- iii. his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country.

8. Rights and Obligations. A foreign legal consultant registered under this rule shall not be a member of the state bar but shall be considered an affiliate of the state bar subject to the same conditions and requirements as apply to a member of the state bar under the Rules of the Supreme Court governing members of the state bar, insofar as conditions and requirements are consistent with the provisions of this rule, and shall:

A. have the right, in the same manner and to the same extent as members of the state bar, to:

- i. employ one or more members of the state bar;

- ii. be employed by one or more members of the state bar or by any partnership or professional corporation that includes members of the state bar or that maintains an office in this state; or
 - iii. be a partner in any partnership or shareholder in any professional corporation that includes members of the state bar or that maintains an office in this state; and
- B. enjoy and be subject to all rights and obligations with respect to attorney-client privilege, work-product privilege, and other professional privileges in the same manner and to the same extent as members of the state bar.

9. *Disciplinary Provisions.* A person registered as a foreign legal consultant under this rule shall be subject to professional discipline in the same manner and to the same extent as members of the state bar.

10. *Course on Professionalism.* Within one year after receiving a certificate of registration, a foreign legal consultant shall complete the state bar course on professionalism, or an equivalent course on the principles of professionalism approved or licensed by the Board of Governors of the State Bar of Arizona for this purpose. The provisions of Rule 34(f)(2) regarding summary suspension and reinstatement shall apply.

(c) Full-Time Law School Faculty Members.

1. *Application; Examination by Committee on Examinations not Required.* Upon recommendation of the dean of a law school in Arizona which is either provisionally or fully approved and accredited by the American Bar Association or, as to such dean, upon recommendation of the president of such university or school, a full-time faculty member of such law school may apply for admission to practice law in the State of Arizona as an active member of the bar without examination by the Committee on Examinations.

2. *Requirements.* An applicant under this rule must be a graduate with a juris doctor degree from a law school provisionally or fully approved by the American Bar Association at the time of such applicant's graduation. Applicants shall be required to submit proof of their admission by examination to the bar of another state or the District of Columbia and shall pay the current applicable application and investigation fees. Each applicant must file an application with the Committee containing information relative to his or her educational and professional background and moral character. An applicant shall submit evidence that he or she has successfully completed the course on Arizona law described in Rule 34(j).

3. *Investigation.* The Committee may require such information from any such applicant as it is authorized to require of any applicant not within the exception made by this rule and may make such investigations, conduct such hearings, and otherwise process said application as if made pursuant to the provisions of the foregoing rules governing application for admission by examination.

4. *Recommendation for Admission by Committee.* If after such investigation as the Committee may deem appropriate it concludes that such applicant possesses the moral qualities and the intellectual attainments required of all other applicants for admission to practice law in the State of Arizona, it shall recommend such applicant for admission to practice and, if said recommendation is accepted by the Court, said applicant shall be admitted to practice and be enrolled as a member of the state bar, and except for the limitations imposed by this subsection, shall have all privileges and rights enjoyed by any member of the State Bar of Arizona admitted pursuant to application and admission by examination. Applicants admitted under this rule shall be subject to all the duties and obligations of members under Rules 41 and 42. The Committee may receive and act upon any such application at any time or in its discretion may require that such applications be received and processed by the Committee at the same time and in the same manner as applications for admission upon examination.

5. *Limitations on Practice.* Faculty members who are admitted to the bar pursuant to this subsection and who subsequently terminate their full-time faculty status shall not retain active bar membership unless they pass the Arizona bar examination. Faculty members who are admitted to the bar under this subsection shall limit their practice hours in accordance with the limits imposed by each university and shall in no event engage in compensated practice as members of the state bar for more than an average of eight hours per week during each calendar year. The dean of each law school shall annually advise the executive director of the state bar that faculty members who have been admitted to the bar under this subsection have complied with the reporting requirements under university rules and the limits imposed by this subsection. For purposes of this rule, activities of clinical law professors in connection with supervision of a clinical law program as described in paragraph (d) of this rule shall not be considered as compensated practice.

(d) Clinical Law Professors and Law Students

1. *Purpose.* This rule is adopted to encourage law schools to provide clinical instruction of varying kinds and to facilitate volunteer opportunities for students in pro bono contexts.

2. *Definitions.*

A. "Accredited law school" means a law school either provisionally or fully approved and accredited by the American Bar Association.

B. "Certified limited practice student" is a law student or a graduate of an accredited law school who holds a currently effective Arizona Supreme Court Certification as a certified limited practice student.

C. "Dean" means the dean of the Accredited Law School where the student is enrolled (or was enrolled on graduation), or the dean's designee, who signed the application for limited practice certification.

D. "Designated attorney" is, exclusively in the case of government agencies, any deputy, assistant or other staff attorney authorized and selected by a supervising

attorney to supervise the certified limited practice student where permitted by these rules.

E. "Period of supervision" means the dates for which the supervising attorney has declared, on the application for certification or recertification, he or she will be responsible for any work performed by the certified limited practice student under his or her supervision.

F. "Personal presence" means the supervising attorney or designated attorney is in the physical presence of the certified limited practice student.

G. "Rules" means Rule 38, Rules of the Supreme Court.

H. "Supervising attorney" is an attorney admitted to Arizona full or limited practice who agrees in writing to supervise the certified limited practice student pursuant to these rules and whose name appears on the application for certification or recertification.

I. "Volunteer legal services program" means a volunteer legal services program managed by an approved legal services organization in cooperation with an accredited law school. Approved legal service organizations are defined in paragraph (e)(2)(C) of this rule.

3. *General Provisions.*

A. *Limited Bar Membership.* To the extent a professor or a student is engaged in practice of law under this rule, the professor or student shall, for the limited purpose of performing professional services as authorized by this rule, be deemed an active member of the state bar (but not required to pay fees). The provisions of this rule shall govern rather than the provisions of other rules relating to admission and discipline.

B. *Nonapplicability of Attorney Discipline Rules to Terms of the Certification.* The procedures otherwise provided by law or court rule governing the discipline of lawyers shall not be applicable to the termination of the certification of a clinical law professor or a limited practice student pursuant to this rule. Termination of certification shall be without prejudice to the privilege of the professor or the student to make application for admission to practice law if the professor or the student is in other respects qualified for such admission.

C. *Effect of Certification on Application for Admission to Bar.* The certification of a clinical law professor or a limited practice student shall in no way be considered as an advantage or a disadvantage to the professor or student in an application for admission to the state bar.

D. *Privileged Communications.* The rules of law and of evidence relating to privileged communications between attorney and client shall govern communications made or received by and among professors, supervising attorneys (and designated attorneys), and certified limited student practice students. All persons participating in any program of instruction or professional activity for which a student is certified under these rules are enjoined not to disclose privileged or confidential communications whether in the implementation of a course of instruction or otherwise.

4. *Clinical Law Professors.*

A. *Activities of Clinical Law Professors.* A clinical law professor not a member of the state bar but certified pursuant to this rule may appear as a lawyer, solely in connection

with supervision of a clinical law program approved by the dean and faculty of a law school in Arizona either provisionally or fully approved and accredited by the American Bar Association, in any court or before any administrative tribunal in this state in any of the matters enumerated in paragraph (d)(5)(C) of this rule on behalf of any person, if the person on whose behalf the appearance is being made has consented in writing to that appearance. Such written consent shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

B. Requirements and Limitations for Clinical Law School Professors. In order to make an appearance as lawyer pursuant to this rule, the clinical law professor must:

- i. be duly employed as a faculty member of a law school in Arizona either provisionally or fully approved and accredited by the American Bar Association for the purpose, *inter alia*, of instructing and supervising a clinical law program approved by the dean and faculty of such law school;
- ii. be admitted by examination to the bar of another state or the District of Columbia;
- iii. neither ask for nor receive any compensation or remuneration of any kind for such services from the person on whose behalf the services are rendered;
- iv. certify in writing that the clinical law professor has read and is familiar with the Arizona Rules of Professional Conduct and the Rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of lawyers; and
- v. submit evidence that the clinical law professor has successfully completed the course on Arizona law described in Rule 34(j).

C. Certification. The certification shall be signed by the dean of the law school on the form proscribed by the clerk of this Court and shall be filed with the clerk and the state bar. The certification shall remain in effect until withdrawn.

D. Duty to Ensure Adequate Supervision and Guidance of Certified Limited Practice Student. It shall be the responsibility of the clinical law professor to ensure that certified limited practice students receive adequate supervision and guidance while participating in the law school's clinical law program. In the case of a certified student who has graduated and participates in the program pending the taking of the bar examination, the clinical law professor shall, on a monthly basis, based on such reporting from the certified limited practice student and the supervising attorney as the law school shall require, confirm that the certified graduate has received and is receiving adequate attorney supervision and guidance.

E. Withdrawal or Termination of Certification.

- i. The dean may withdraw a certification of a clinical law professor at any time by filing a notice to that effect, with or without stating the cause for withdrawal, with the clerk of this Court, who shall forthwith mail copies thereof to the clinical law professor and the State Bar of Arizona.
- ii. The Court may terminate the certification of a clinical law professor at any time without cause and without notice or hearing by filing notice of the termination with the clerk of this Court and with the state bar.

5. Practical Training of Law Students

A. Law Student Eligibility for Limited Practice Certification. To be eligible to become a certified limited practice student, a law student applicant must:

- i. have successfully completed legal studies amounting to at least three semesters, or the equivalent academic hour credits if the school or the student is on some basis other than a semester, at an accredited law school, or have graduated from an accredited law school, subject to the time limitations set forth in these rules;
- ii. neither ask for nor receive any compensation or remuneration of any kind for services rendered by the certified limited practice student from the person on whose behalf the services are rendered, but this shall not prevent a supervising lawyer, legal aid bureau, law school, public defender agency, or the state from paying compensation to the eligible law student, nor shall it prevent any such lawyer or agency from making such charges for its services as it may otherwise properly require;
- iii. certify in writing that the student has read and is familiar with the Arizona Rules of Professional Conduct and the rules of the Supreme Court of Arizona and statutes of the State of Arizona relating to the conduct of attorneys; and
- iv. be certified by the dean of the accredited law school where the student is enrolled (or was enrolled on graduation), or by the dean's designee, as being in good academic standing, of good character, and as having either successfully completed or being currently enrolled in and attending, academic courses in civil procedure, criminal law, evidence, and professional responsibility.

B. Application for Limited Practice Certification.

- i. All applications for student limited practice certification or requests to change or add a supervising attorney or extend the period of certification pursuant to these rules must be submitted on a form provided by the clerk of the Court, to the clerk, with all the information requested on the form, together with any designated appropriate nonrefundable processing fee. The clerk of the Court shall send a copy of all approved student limited practice certifications to the admissions department of the state bar.
- ii. The application for certification shall require the signature of the applicant, the dean, associate dean, or assistant dean of the accredited law school in which the applicant is enrolled, and the signature of the supervising attorney.
- iii. The applicant shall attest that he or she meets all of the requirements of the rules; agrees to and shall immediately notify the clerk of the Court in the event he or she no longer meets the requirements the rules; and, that he or she has read, is familiar with and will abide by the Rules of Professional Conduct of the State of Arizona and these rules.
- iv. The dean, associate dean, or assistant dean of the accredited law school in which the applicant is enrolled shall attest that the applicant meets the requirements of these rules; that he or she shall immediately notify the clerk of the Court in the event that the certified limited practice student no longer meets the requirements of these rules; and that he or she has no knowledge of facts or information that would indicate that the applicant is not qualified by ability, training, or character to participate in the activities permitted by these rules.
- v. The supervising attorney shall specify the period during which he or she will be responsible for and will supervise the applicant and attest that he or she has read, is

familiar with, will abide by, and will assume responsibility under the requirements of these rules;

C. Permitted Activities and Requirements of Limited Practice Certification; Physical Presence of Supervising Attorney.

- i. *Court and Administrative Tribunal Appearances.* A certified limited practice student may appear in any court or before any administrative tribunal in this state on behalf of any person if the person on whose behalf the student is appearing has consented in writing to that appearance and the supervising attorney has also indicated in writing approval of that appearance. In each case, the written consent and approval shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal. In addition, the certified limited practice student shall orally advise the court on the occasion of the student's initial appearance in the case of the certification to appear as a law student pursuant to these rules. A certified limited practice student may appear in the following matters:
 - a. *Civil Matters.* In civil cases in justice, municipal, and magistrate courts, the supervising lawyer (or designated lawyer) is not required to be personally present in court if the person on whose behalf an appearance is being made consents to the supervising lawyer's absence.
 - b. *Criminal Matters on Behalf of the State.* In any criminal matter on behalf of the state or any political subdivision thereof with the written approval of the supervising attorney (or designated attorney), the supervising attorney (or designated attorney) must be present except when such appearance is in justice, municipal, or magistrate courts.
 - c. *Felony Criminal Defense Matters.* In any felony criminal defense matter in justice, municipal, and magistrate courts, and any criminal matter in superior court, the supervising attorney (or designated attorney) must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.
 - d. *Misdemeanor Criminal Defense Matters.* In any misdemeanor criminal defense matter in justice, municipal, and magistrates courts, the supervising attorney (or designated attorney) is not required to be personally present in court, so long as the person on whose behalf an appearance is being made consents to the supervising attorney's absence; however, the supervising attorney shall be present during trial.
 - e. *Appellate Oral Argument.* A certified limited practice student may participate in oral argument in the Arizona Supreme Court and the Arizona Court of Appeals, but only in the presence of the supervising attorney (or designated attorney) and with the specific approval of the court for that case.

Notwithstanding anything hereinabove set forth, the court may at any time and in any proceeding require the supervising attorney (or designated attorney) to be personally present for such period and under such circumstances as the court may direct.

- ii. *Other Client Representation Activities.* Under the general supervision of the supervising attorney (or designated attorney), but outside his or her personal presence, a certified limited practice student may:
 - a. prepare pleadings and other documents to be filed in any matter in which the certified limited practice student is eligible to appear, but such pleadings or documents must be signed by the supervising attorney (or designated attorney);

- b. prepare briefs, abstracts and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising attorney (or designated attorney);
 - c. provide assistance to indigent inmates of correctional institutions or other persons who request such assistance in preparing applications and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute, or rule of this Court (if there is a lawyer of record in the matter, all such assistance must be supervised by the lawyer of record, and all documents submitted to the court on behalf of such a client must be signed by the lawyer of record and the supervising attorney (or designated attorney));
 - d. render legal advice and perform other appropriate legal services, but only after prior consultation with and upon the express consent of the supervising attorney (or designated attorney).
- iii. *Other Non-Representation Activities.* A certified limited practice student may perform any advisory or non-representational activity which could be performed by a person who is not a member of the state bar, subject to the approval by the supervising attorney (or designated attorney). In connection with a volunteer legal services program and at the invitation and request of a court or tribunal, a certified limited practice student may appear as a law student volunteer to assist the proceeding in any civil matter, provided:
- a. the assistance is given to an otherwise unrepresented individual in an uncontested proceeding without entering an appearance as counsel;
 - b. the student's supervising attorney is associated with the particular volunteer legal services program;
 - c. the certified limited practice student has received the written consent and acknowledgment of non-representation by the unrepresented person, which written consent shall be obtained by the volunteer legal services program and brought to the attention of the court.
- D. *Use of the Title "Certified Limited Practice Student."*
- i. In connection with activities performed pursuant to these rules, a certified student may use the title "Certified Limited Practice Student" only and may not use the title in connection with activities not performed pursuant to these rules.
 - ii. When a certified limited practice student's name is printed or signature is included on written materials prepared pursuant to these rules, the written material must also state that the student is a certified limited practice student pursuant to these rules; state the name of the supervising attorney; be signed by the supervising attorney; and otherwise comply with these rules.
 - iii. A certified limited practice student may not and shall not in any way hold himself or herself out as a regularly admitted or active member of the state bar.
 - iv. Nothing in these rules prohibits a certified limited practice student from describing his or her participation in this program on a resume or letter seeking employment as long as the description is not false, deceptive or misleading.
 - v. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that person might lawfully do prior to the adoption of this rule.
- E. *Requirements and Duties of the Supervising Attorney.* The supervising attorney shall:

- i. be an active member of the state bar under these rules, and, before supervising a certified limited practice student shall have practiced law or taught law in an accredited law school as a full-time occupation for at least two years;
- ii. supervise no more than five (5) certified limited practice students concurrently; provided, however, that a supervising attorney who is employed full-time to supervise law students as part of an organized law school or government agency training program may supervise up to, but in no case more than, fifty (50) certified students;
- iii. assume personal professional responsibility for any work performed by the certified limited practice student while under his or her supervision;
- iv. assist and counsel the certified limited practice student in the activities authorized by these rules and review such activities with the certified limited practice student, all to the extent required for the proper practical training of the certified limited practice student and the protection of the client;
- v. read, approve, and personally sign any pleadings, briefs or other similar documents prepared by the certified limited practice student prior to the filing thereof, and read and approve any documents which shall be prepared by the certified limited practice student for execution by any person (exclusively in the case of government agencies, a designated attorney may, in the place of the supervising attorney, perform the obligation set forth in this subparagraph, but the supervising attorney shall still provide general supervision);
- vi. provide the level of supervision to the certified limited practice student required by these rules (exclusively in the case of government agencies, a designated attorney may, in the place of the supervising attorney, perform the obligation set forth in this subparagraph, but the Supervising Attorney shall still provide general supervision); and
- vii. in the case of a certified student who is participating in the clinical program post-graduation pending the taking of the bar examination, report to the clinical law professor and the dean of the law school, as the law school shall require, on a monthly basis regarding the supervising attorney's supervision and guidance of the certified student.
- viii. promptly notify the clerk of the Court in writing if his or her supervision of the certified limited practice student has or will cease prior to the date indicated on a notice of certification.

F. Duration of Certification. Certification of a certified limited practice student shall commence on the date indicated on a notice of certification and shall remain in effect for the period specified on the notice of certification unless sooner terminated pursuant to the earliest of the following occurrences:

- i. *Termination by the Student.* The certified limited practice student may request termination of the certification in writing or notify the clerk of the Court that he or she no longer meets the requirements of this rule, and in such event the clerk shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.
- ii. *Termination by the Supervising Attorney.* The supervising attorney may notify the clerk of the Court in writing that his or her supervision of the certified limited practice student will cease prior to the date specified in the notice of certification. In such event the clerk shall send written notice to the student, the student's supervising attorney, the dean and the state bar, and the dean may issue a modified certification reflecting the substitution of a new supervising attorney, as necessary.

iii. *Termination by the Dean.* A certification of student limited practice may be terminated by the dean any time, without cause and without notice or hearing, by filing notice of the termination with the clerk of the Court. A certification of student limited practice shall be terminated if one or more of the requirements for the certification no longer exists or the certified limited practice student, supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

iv. *Failure to Take or Pass the Bar Examination.* A certification of student limited practice shall be terminated if the certified student fails to take or pass the first general bar examination for which the student is eligible.

v. *Termination by the Arizona Supreme Court.* A certification of student limited practice may be terminated by the Arizona Supreme Court any time, without cause and without notice or hearing, by filing notice of the termination with the clerk of the Court. A certification of student limited practice shall be terminated if one or more of the requirements for the certification no longer exists or the certified limited practice student, supervising attorney or designated attorney fails to comply fully with any provision of these rules or any other pertinent statute, rule or regulation. In the event of termination, the clerk of the Court shall send written notice to the student, the student's supervising attorney, the dean, and the state bar.

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

1. *Purpose.* Attorneys have a responsibility to provide competent legal services for all persons, including those unable to pay for such services. As one means of meeting these legal needs, this rule allows certain attorneys who otherwise are not allowed to practice law in Arizona to volunteer to provide civil legal assistance to individuals who are unable to pay for such services.

An attorney who is or was admitted to practice law for at least five (5) years in the courts of any state, district, or territory of the United States may be admitted to practice for the limited purpose of providing 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.

2. Definitions.

A. The "active practice of law" means that an attorney has been engaged in the practice of law, which includes, but is not limited to, private practice, house counsel, public employment, or academic employment.

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

i. has been engaged in the active practice of law for at least five years before applying to participate in the volunteer lawyer program;

ii. has been a member in good standing of the entity governing the practice of law of any other state, territory, or the District of Columbia and has not been disciplined for

professional misconduct by the bar or courts of any jurisdiction within the past five years;

iii. agrees to abide by the Rules of Professional Conduct and submit to the jurisdiction of the Supreme Court of Arizona for disciplinary purposes;

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.

C. An “approved legal services organization” for the purposes of this rule is a non-profit legal services organization that has as one of its primary purposes the provision of legal assistance to indigents, free of charge, in civil matters. A legal services organization must be approved as such by the Supreme Court of Arizona. The organization shall file a petition with the clerk of the Court explaining:

i. the structure of the organization and whether it accepts funds from its clients;

ii. the major sources of funds used by the organization;

iii. the criteria used to determine potential clients' eligibility for services performed by the organization;

iv. the types of services performed by the organization;

v. the names of all members of the State Bar of Arizona who are employed by the organization or who regularly perform legal work for the organization; and

vi. the existence and extent of malpractice insurance that will cover the Rule 38(e) attorney.

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;

B. A statement signed by an authorized representative of the approved legal services organization that the applicant is an unpaid volunteer associated with the organization; and

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

i. has read and is familiar with the Rules of the Supreme Court and the applicable statutes of the State of Arizona relative to the conduct of lawyers, and will abide by the provisions thereof;

ii. submits to the jurisdiction of the Supreme Court of Arizona for disciplinary purposes, as defined by the Rules of the Supreme Court;

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

v.¹ has successfully completed the course on Arizona law described in Rule 34(j).

The applicant shall send a copy of the application to the State Bar of Arizona, which shall file any objection to such application with the clerk of the Supreme Court within ten (10) days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court of Arizona. The clerk of the Supreme Court shall send a copy of the order authorizing the practice of law to the State Bar of Arizona.

4. *Mandatory Continuing Legal Education.* Rule 38(e) attorneys shall be exempt from the requirements of Rule 45, Mandatory Continuing Legal Education.

5. *Pro Bono Requirement.* As provided in paragraph (e)(2)(B)(iv) of this rule, no attorney who practices law under the authority of this rule may receive compensation from the approved legal services organization with which the attorney is associated, from the attorney's client, or through a contingent fee agreement. This prohibition shall not prevent the attorney from seeking legal fees and costs from the opposing party, so long as all fees obtained are received by the client or donated to a qualified legal services program with the client's consent. In addition, an approved legal service organization or a client may reimburse any attorney practicing under this rule for actual expenses incurred while rendering services hereunder.

6. *Expiration of Authorization.* Authorization to practice law under this section shall expire if the applicant ceases to be associated as an unpaid volunteer with the organization. If the applicant ceases to be associated as an unpaid volunteer with the organization, an authorized representative of the organization shall, within ten (10) days of the date that association ceased, file a notification of the cessation with the clerk of the Supreme Court of Arizona and the State Bar of Arizona, specifying the date the association ceased.

7. *Discipline.* In addition to any appropriate proceedings and discipline which may be imposed by the Court under these rules, the Rule 38(e) attorney shall be subject to the following disciplinary measures:

- A. civil contempt imposed by the presiding judge or hearing officer for failure to abide by a tribunal's orders in any matter in which the Rule 38(e) attorney has participated; and
- B. withdrawal of the certification hereunder, with or without cause, by either the Court or the approved legal assistance organization.

(f) Authorization to Practice Law for Attorneys Working for Approved Legal Services Organization.

An attorney who has been admitted to practice law in any other jurisdiction for at least two years and who is employed part-time or full-time by an approved legal services organization in this State that provides legal assistance to indigents in civil matters, free of charge, may be admitted to practice before all courts of this State, subject to the following:

1. *Approval of Legal Services Organizations.* An “approved legal services organization” for the purposes of this rule is a non-profit legal services organization that has as one of its primary purposes the provision of legal assistance to indigents, free of charge, in civil matters. A legal services organization must be approved as such by the Supreme Court of Arizona. To obtain approval, the organization shall file a petition with the clerk of the Court containing the following:

- A. a statement that it does not accept fees for services rendered from its clients;
- B. an explanation of the structure of the organization;
- C. disclosure of the major sources of funds used by the organization;
- D. the criteria used to determine potential clients' eligibility for legal and nonlegal services performed by the organization;
- E. a description of the types of services performed by the organization;
- F. the names of all members of the State Bar of Arizona who are employed by the organization or who regularly perform legal work for the organization; and
- G. the existence and extent of malpractice insurance that will cover attorneys authorized to practice under this rule.

A copy of the petition for approval shall be sent by the organization to the ~~Chief Bar Counsel of the~~ State Bar of Arizona, ~~who~~ which shall file any comment the state bar desires to file respecting such petition with the clerk of the Court within ten days after the date of receipt of such petition. A legal services organization is not approved until an order confirming such approval is entered by the Court. A copy of the order approving the legal services organization under this rule shall be sent by the clerk of the Court to the ~~Chief Bar Counsel of the~~ State Bar of Arizona.

2. *Application and Authorization.* 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 membership for at least the two 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 for the past five years, or during the time of the applicant's licensure, whichever is greater;
- B. a statement signed by an authorized representative of the approved legal services organization that the applicant is employed by the organization; and
- C. a sworn statement signed by the applicant that he or she:
 - i. has read and is familiar with the Rules of the Supreme Court ~~and any applicable statutes of the State of Arizona relative to the conduct of lawyers,~~ and will abide by the provisions thereof;
 - ii. submits to the jurisdiction of the Court for disciplinary purposes, as defined by the Rules of the Supreme Court;
 - iii. has not been disciplined by the bar or courts of any jurisdiction within the past five years; and
 - iv. has successfully completed the course on Arizona law described in Rule 34(j).

~~The applicant. A copy of the application shall send a copy of the application be sent by the attorney to the Chief Bar Counsel of to~~ the State Bar of Arizona, ~~who which~~ shall file any objection to such application with the clerk of the Supreme Court within ten days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court. ~~The clerk of the Supreme Court shall send a~~ copy of the order authorizing the practice of law ~~shall be sent by the clerk of the Court to the Chief Bar Counsel of the~~ State Bar of Arizona.

3. *Expiration of Authorization.* Authorization to practice law under this section shall ~~remain in effect from the date of the order authorizing the applicant to practice law in the State of Arizona until such time as expire if~~ the applicant ceases no longer to works for an approved legal services organization. If the applicant ceases employment with the approved legal services organization, an authorized representative of the organization shall, within ten (10) days of the date of termination of employment, file a notification of the termination with the clerk of the Court and the ~~Chief Bar Counsel of the~~ State Bar of Arizona, specifying the date of termination of employment. If the applicant leaves the approved legal services organization in order to work for another approved legal services organization, a notification of new employment shall be filed with the clerk of the Court and the State Bar of Arizona.

4. *Limitation of Activities.* An attorney authorized to practice under this rule shall not perform any legal services within the State of Arizona except for clients of the approved legal services organization by which the attorney is employed. The attorney shall not accept any compensation for such services except such salary as may be provided to him or her by the organization. ~~Part-time employment is permitted under this rule.~~ A Rule 38(f) attorney may not provide services for compensation other than compensation from the legal services organization with which the attorney is employed.

5. *Supervision.* An attorney authorized to practice under this section who has been practicing in Arizona for less than two years shall be supervised by an attorney who is an active member of the State Bar of Arizona, who is employed full time by the approved legal services organization for whom the applicant attorney works, and who will act as a supervisory lawyer pursuant to Rule 42 of the Rules of the Supreme Court of Arizona, ER 5.1.

6. *Continuing Legal Education.* An attorney authorized to practice under this paragraph (f) must comply with the Mandatory Continuing Legal Education ~~(MCLE)~~ requirements of Rule 45.

7. *Discipline.* In addition to any appropriate proceedings and discipline that may be imposed by the Supreme Court of Arizona under Rule 31, an attorney practicing under this paragraph (f) shall be subject to the following disciplinary measures:

A. The presiding judge or hearing officer for any matter in which the attorney practicing under this paragraph (f) has participated may hold the attorney in civil contempt for any failure to abide by such tribunal's orders; and

B. The Supreme Court of Arizona or the approved legal services organization may, at any time, with or without cause, withdraw certification hereunder.

(g) Authorization to Practice Law for Attorneys Employed by Indigent Defense Offices.

An attorney who has been admitted to the active practice of law in any other jurisdiction for at least two years, and who is employed full time by a state or county funded indigent defense office located in a county with a population less than 500,000, may be admitted to practice before all courts of this State, for the limited purpose of providing representation to appointed clients of such office, as provided in this paragraph (h).

1. Definitions.

A. The "active practice of law" means that an attorney has been engaged in the practice of law, which includes, but is not limited to, private practice, house counsel, public employment, or academic employment.

B. A "funded indigent defense office," as used in this rule, means a governmental department, organization or other entity formed under the authority of A.R.S. § 11-581 et seq. The office also must employ at least one Arizona attorney not admitted pursuant to any provision of this rule and be located in a county with a population less than 500,000. A funded indigent defense office must be approved as such by the Supreme Court of Arizona.

2. Approval of Funded Indigent Defense Office.

A. To obtain approval of the Supreme Court the office shall file a petition with the clerk of the Court containing the following:

- i. a description of the structure of the organization, including a certification that the organization maintains a supervisory structure and ratio in line with accepted defense standards, the source of which shall be identified;
- ii. a copy of the last annual report prepared pursuant to A.R.S. § 11-584(A)(3), and an affirmation that, during any time in which the office has an attorney employed under this rule, the office will file a copy of the annual report with the Supreme Court at the same time as it files the report with the entities designated in A.R.S. § 11-584(A)(3);
- iii. a certification that the office complies with ethical workload limits, ~~American Bar Association Formal Ethics Opinion 06-441 (2006), American Council of Chief Defenders/National Legal Aid and Defender Association Ethics Opinion 03-01 (April 2003), and Arizona Bar Ethics Opinion 90-10,~~ such certification to include an affirmation that the office has a means of reviewing caseload/workload of assigned attorneys;
- iv. a description of the source of major funds used by the office;
- v. the type of representation the office provides under A.R.S. § 11-584(A);
- vi. the names of all members of the State Bar of Arizona who are employed by the office or who regularly perform legal work for the office; and

vii. a certification that all attorneys employed by the office under this rule receive pay and benefits commensurate with other regularly licensed attorneys in the office.

~~The office shall send a~~ copy of the petition for approval ~~shall be sent by the office to the Chief Bar Counsel of to~~ the State Bar of Arizona, ~~who~~~~which~~ shall file any comment ~~to the state bar desires to file respecting~~ such petition with the clerk of the Court within ten days after the date of receipt of such petition. A funded indigent defense office is not approved until an order confirming such approval is entered by the Court. ~~The clerk shall send a~~ copy of the order approving the funded indigent defense office under this rule ~~shall be sent by the clerk of the Court~~ to the ~~Chief Bar Counsel of the~~ State Bar of Arizona.

3. *Application and Authorization.* 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 membership for at least the two 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 for the past five years, or during the time of the applicant's licensure, whichever is greater;

B. a statement signed by an authorized representative of the approved funded indigent defense office that the applicant is employed by the organization; and

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

i. has read and is familiar with the Rules of the Supreme Court and any applicable statutes of the State of Arizona relative to the conduct of lawyers, and will abide by the provisions thereof;

ii. submits to the jurisdiction of the Court for disciplinary purposes, as defined by the Rules of the Supreme Court;

iii. has not been disciplined by the bar or courts of any jurisdiction within the past five years, or during the time of the applicant's licensure, whichever is greater; and

iv. has successfully completed the course on Arizona law described in Rule 34(j).

The applicant shall send a copy of the application to the State Bar of Arizona, which shall file any objection to such application with the clerk of the Supreme Court within ten (10) days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court of Arizona. The clerk of the Supreme Court shall send a copy of the order authorizing the practice of law to the State Bar of Arizona.

4. *Mandatory Continuing Legal Education.* An attorney authorized to practice under this paragraph (g) must comply with the Mandatory Continuing Legal Education (MCLE) requirements of Rule 45.

5. *Expiration of Authorization.* Authorization to practice law under this section shall remain in effect from the date of the order authorizing the applicant to practice law in the State of Arizona until (A) the applicant no longer works for an approved funded indigent

defense office; (B) the applicant is admitted to the practice of law in Arizona pursuant to Rules of the Supreme Court 33 through 37; or (C) two years from the date of the order authorizing the applicant to practice law under this rule, whichever comes first. If the applicant ceases employment with the funded indigent defense office, an authorized representative of the office shall, within ten (10) days of the date of termination of employment, file a notification of the termination with the clerk of the Court and the ~~Chief Bar Counsel of the~~ State Bar of Arizona, specifying the date of termination of employment. If the applicant leaves the approved funded indigent defense office in order to work for another approved funded indigent defense office, a notification of new employment shall be filed with the clerk of the Court and the State Bar of Arizona. In the event of an applicant transferring from one approved funded indigent defense office to another, the time limits for expiration of licensure under this rule shall run from the date of the original order of admission. No applicant may be admitted more than once pursuant to this rule.

6. *Discipline.* In addition to any appropriate proceedings and discipline that may be imposed by the Court under these rules, the Rule 38(g) attorney shall be subject to the following disciplinary measures:

A. civil contempt imposed by the presiding judge or hearing officer for failure to abide by a tribunal's orders in any matter in which the Rule 38(g) attorney has participated; and

B. withdrawal of the certification hereunder, with or without cause, by either the Supreme Court, or the funded indigent defense office.

7. *Limitation of Activities.* An attorney authorized to practice under this rule shall not perform any legal services within the State of Arizona except for clients of the approved funded indigent defense office by which the attorney is employed. The attorney shall not accept any compensation for such services except such salary as may be provided to him or her by the office. Part-time employment is not permitted under this rule.

8. *Supervision.* An attorney authorized to practice under this section who has been practicing in Arizona for less than two years shall be supervised by an attorney who is an active member of the State Bar of Arizona, who is employed full time by the approved funded indigent defense office for whom the applicant attorney works, and who will act as a supervisory lawyer pursuant to Rule 42 of the Rules of the Supreme Court of Arizona, ER 5.1.

~~(h) In-house Counsel~~

~~1. As used in this rule, "in-house counsel" shall refer to an attorney who is employed within the State of Arizona as in-house counsel or a related position for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services.~~

~~2. A lawyer who is not a member of the State Bar of Arizona, but who holds a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and is currently a member in good standing of the bar of another state or the~~

~~District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who is employed within the State of Arizona as in-house counsel, as hereinabove defined, may apply for an Arizona Certificate of Registration of In-House Counsel ("Registration Certificate"). A lawyer employed as in-house counsel who is admitted to practice in a jurisdiction outside of the United States, in accordance with the standards and requirements generally applicable to the practice of law in that jurisdiction, may also apply for a Registration Certificate.~~

~~3. An applicant for a Registration Certificate shall:~~

~~A. file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel;~~

~~B. furnish to the State Bar of Arizona a certificate from the state bar or from the clerk of the highest admitting court of each state, territory, or insular possession of the United States, or foreign jurisdiction, in which the applicant has been admitted to practice law certifying the current status of the applicant's membership or eligibility to practice therein;~~

~~C. certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct;~~

~~D. pay an application fee in an amount equal to seventy-five percent (75%) 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~~

~~E. submit evidence that the applicant has successfully completed the course on Arizona law described in Rule 34(j).~~

~~4. 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. From and after the effective date of this rule, any attorney who commences employment by an eligible organization as in-house counsel shall apply for a Registration Certificate within ninety (90) days of the date of commencement of employment.~~

~~5. On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this rule, who continues to be employed as in-house counsel within the State of Arizona, shall renew the Registration Certificate, in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose, and pay a renewal fee in an amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.~~

~~6. Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this rule, the State Bar shall issue to the applicant a Registration Certificate. The State Bar shall promptly notify any applicant if it determines that an application fails to comply with the requirements of subpart (3) of this rule, and the applicant shall have thirty (30) days from the date of such notice in which to cure any deficiency. If the applicant fails to cure such deficiency within that thirty (30) day period, the application shall be deemed denied.~~

~~7. Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within thirty (30) days, any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal or state court or agency before which the applicant has been admitted to practice, or in any~~

~~state in which the lawyer has rendered legal services while temporarily authorized under any rule or by admission *pro hac vice*.~~

~~8. If there is a change in circumstances, and an attorney holding a current Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the State Bar of Arizona of such change in writing within thirty (30) days. An attorney registered pursuant to this rule who has become employed by a different eligible entity, but continues to meet all the requirements of this rule, may apply for the issuance of an amended Registration Certificate to reflect that change.~~

~~9. Except as provided in this rule, the holder of a valid and current Registration Certificate shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of 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 other than the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or to engage in activities for which admission *pro hac vice* is required under Rule 38(a) of these rules. A lawyer that has been issued a Registration Certificate under this rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the registrant shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in-house counsel shall file an affidavit demonstrating full compliance with this rule.~~

~~10. Notwithstanding the provisions of subpart (9) of this rule, the holder of a Registration Certificate may participate in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these rules. A lawyer that has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* in Arizona by complying with the requirements of Rule 38(a) of these rules.~~

~~11. A lawyer's authority to practice as in-house counsel under a Registration Certificate issued pursuant to this rule shall be suspended when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which that lawyer has been admitted to practice.~~

~~12. A lawyer serving as in-house counsel in Arizona who fails to register pursuant to the provisions of this rule shall be ineligible for admission *pro hac vice* in Arizona, and may be referred by the State Bar of Arizona to the Bar admission and/or disciplinary regulatory authority in any jurisdiction in which that lawyer has been admitted to practice of law.~~

~~13. An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.~~

(h) Practice Pending Admission by Motion

1. An applicant who meets the requirements of paragraph (f) of Rule 34 and whose application for admission on motion has been filed and deemed complete by the Committee on Character & Fitness may provide legal services in Arizona through an office or other place for the regular practice of law in Arizona for no more than 365 days, provided that the applicant:

A. does not cease to be a member in good standing in every jurisdiction, foreign or domestic, wherever admitted to practice law;

B. does not become subject to lawyer discipline or the subject of a disciplinary matter in any other jurisdiction;

C. has never been denied admission on character and fitness grounds in any jurisdiction;

D. reasonably expects to fulfill all of Arizona's requirements for admission on motion;

E. associates with and is supervised by an attorney who is admitted to practice law in Arizona, and discloses in his or her application for admission on motion the name, address, and membership status of that attorney;

F. provides with his application for admission on motion a signed verification from the Arizona attorney certifying the applicant's association with and supervision by that attorney;

G. includes in all written communications with the public and clients the following language: "Arizona practice temporarily authorized pending admission under Ariz. R. Sup. Ct. 38(h);

H. pays the annual assessment to the Client Protection Fund.

2. Until the applicant's application for admission on motion is granted, the applicant may not appear before a court of record or tribunal in Arizona that requires pro hac vice admission unless the applicant is granted such admission pursuant to Rule 39.

3. The applicant must immediately notify that Committee on Character and Fitness if the applicant becomes subject to a disciplinary or disability investigation, complaint, or sanctions in any other jurisdiction at any time during the 365 days of practice authorized by this rule. The

Committee on Character and Fitness shall take into account such information in determining whether to grant the attorney's application for admission to practice law in Arizona.

4. Any attorney practicing under this rule shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

5. The authority given an applicant to practice law pending admission pursuant to this rule shall terminate immediately if:

A. the applicant withdraws the application for admission by motion, or the application is denied;

B. the applicant fails to remain in compliance with paragraph (h)(1) of this rule;

C. the applicant is disbarred, suspended, or placed on disability inactive status in any other jurisdiction in which the applicant is licensed to practice law; or

D. the applicant fails to comply with the notification requirements of paragraph (h)(3) of this rule.

6. Upon the termination of authority to practice law pursuant to this rule, the applicant shall:

A. immediately cease practicing law in Arizona;

B. notify in writing all clients in pending matters, and opposing counsel and co-counsel in pending litigation, of the termination of the applicant's authority to practice law in Arizona; and

C. take all other necessary steps to protect the interests of the applicant's clients.

(i) Military Spouse Temporary Admission.

1. *Requirements.* An attorney who is not a member of the State Bar of Arizona applicant who meets the requirements of (A) through (N) of this paragraph (i)(1) ("Applicant") may, upon ~~motion~~verified application, be admitted to the temporary practice of law in this jurisdiction. The Applicant shall:

A. have been admitted by bar examination to practice law in another jurisdiction in the United States or territory;

B. hold a juris doctor degree from a law school provisionally or fully approved by the American Bar Association at the time of graduation;

C. submit evidence of achieving the passing score established in this jurisdiction for the Multistate Professional Responsibility Examination;

- D. establish that the Applicant is currently an active member in good standing in at least one jurisdiction where admitted, and establish that the Applicant is a member in good standing in all jurisdictions where admitted;
- E. establish that the Applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;
- F. establish that the Applicant possesses the character and fitness to practice law in this jurisdiction;
- G. submit evidence that the Applicant has successfully completed the course on Arizona law described in Rule 34(j);
- H. submit evidence that the Applicant is a dependent spouse of a service member of the United States Uniformed Services as defined by the Department of Defense;
- I. submit evidence that the service member is on full time, active duty pursuant to military orders in the State of Arizona;
- J. submit evidence that the Applicant is residing in Arizona due to the service member's full time, active duty pursuant to military orders in this state;
- K. submit character investigation information, in a manner established by the Court, including all required supporting documents;
- L. not have failed the Arizona bar examination or failed to achieve the Arizona scaled score on the uniform bar examination administered within any jurisdiction within five years of the date of filing an application under this rule;
- M. not have been previously denied admission to the practice of law in Arizona;
- N. agree to advise all clients, prior to providing representation or services, that the attorney is temporarily admitted under the military spouse exception.
- O. at the time of submitting the verified application, pay an application fee set by the Supreme Court.

2. *Duration and Renewal.*

- A. A temporary admission will be valid for one year from the date of issuance, unless terminated earlier pursuant to paragraph (5).
- B. An attorney admitted under this rule may annually renew a temporary admission upon:
 - i. filing a written request for renewal;
 - ii. paying an \$300 application fee.

3. *Continuing Legal Education.* No later than six months following the attorney's temporary admission, the attorney shall certify to the Supreme Court completion of at least fifteen hours of continuing legal education on Arizona practice, procedure, and ethics. The attorney shall also comply with Rule 45 and on or before September 15 of each year certify completion of at least fifteen (15) hours of such continuing legal education during each year for which a temporary admission is renewed.

4. *Association of Local Counsel.*

- A. No attorney temporarily admitted under this rule may appear before any court, board, or administrative agency of this state unless the attorney has associated in that cause an attorney who is a member in good standing of the State Bar of Arizona (hereinafter

called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel 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. Local counsel associating with an attorney temporarily admitted under this rule in a particular cause shall accept joint responsibility with that attorney to the client, to opposing parties and counsel, and to court, board, or administrative agency in that particular cause.

B. If the attorney temporarily admitted under this rule has not engaged in the active practice of law for at least five years cumulatively, the attorney shall be supervised by local counsel as defined above, who will be responsible to the court, the bar, the Supreme Court, and the client for all services the temporarily admitted attorney provided pursuant to this rule.

5. Termination.

A. A temporary admission shall terminate, and an attorney shall cease the practice of law in Arizona pursuant to that admission, unless otherwise authorized by these rules, 30 days after any of the following events:

- i. the service member's separation or retirement from the United States Uniformed Services;
- ii. the service member's permanent relocation to another jurisdiction, unless the service member's immediately subsequent assignment specifies that the Department of Defense does not authorize dependents to accompany the service member, in which case the temporary attorney may continue to practice law in Arizona as provided in this rule;
- iii. the attorney's permanent relocation outside the state of Arizona for reasons other than the service member's relocation;
- iv. the attorney's ceasing to be a dependent as defined by the Department of Defense or, with respect to the Coast Guard when it is not operating as a service in the Navy, the Department of Homeland Security;
- v. the attorney's failure to meet the annual licensing requirements for an active member of the State Bar of Arizona;
- vi. the attorney's request;
- vii. the attorney's admission to practice law in Arizona under any other admissions rule;
- viii. the attorney's failure to achieve the Arizona scaled score on the uniform bar examination administered within any jurisdiction;
- ix. the attorney's denial of admission to the practice of law in Arizona for violating ethical rules; or
- x. notice by the Supreme Court at any time, provided that the Clerk of the Supreme Court shall mail a copy of the notice of termination to the attorney and associated local counsel.

B. An attorney whose temporary admission is terminated shall provide written notice to the State Bar of Arizona within thirty (30) days of the terminating event.

C. At least sixty (60) days before termination of the temporary admission, or as soon as possible under the circumstances, the attorney shall:

- i. file in each matter pending before any court or tribunal a notice that the attorney will no longer be involved in the case; and
- ii. provide written notice to all clients receiving representation from the attorney that the attorney will no longer represent them.

6. *Benefits and Responsibilities of Temporary Admission.* An attorney temporarily admitted under this rule shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of 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.

~~7. *Record.* The State Bar of Arizona shall maintain a current record of all attorneys temporarily admitted under this provision and shall promptly provide such record upon request.~~

Rule 39. ~~Provision of Legal Services Following Determination of Major Disaster~~Admission Pro Hac Vice

[Rule 39 currently is Katrina rule; no longer need that provision if we limit 5.5 to just practicing Arizona law; replace Rule 39 with pro hac vice from Rule 38(a); language below strikeout is current Rule 38(a) but amended]

~~(a) **Determination of existence of major disaster.** Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:~~

~~(1) the State of Arizona and whether the emergency caused by the major disaster affects the entirety or only part of the State, or~~

~~(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) of this Rule shall extend only to lawyers who principally practice in the geographical area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.~~

~~(b) **Temporary practice in this jurisdiction following major disaster.** Following the determination of an emergency affecting the justice system in the State of Arizona pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in Arizona are in need of *pro bono* service and the assistance of lawyers from outside Arizona is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in Arizona on a temporary basis. Such legal services must be provided on a *pro bono* basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. The provision of such legal services shall be supervised by a lawyer assigned and supervised through an established not for profit bar association, *pro bono* program or legal services organization or through such other organization(s) specifically designated by this Court.~~

~~(c) **Temporary practice in this jurisdiction following major disaster in another jurisdiction.** Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in that affected jurisdiction, or area of such other jurisdiction, where the major disaster occurred.~~

~~(d) **Duration of authority for temporary practice.** The authority to practice law in the State of Arizona granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in the State of Arizona have ended, except that a lawyer then representing clients in Arizona pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation. The lawyer shall not, however, thereafter accept new clients. The authority to practice law in the State of Arizona granted by paragraph (c) of this Rule shall end sixty (60)~~

days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

~~(e) Court appearances.~~ The authority granted by this Rule does not include authority to appear in court or before any other tribunal except:

~~(1) pursuant to the provisions of Rule 38(a) of these Rules for securing admission *pro hac vice* and, if such authority is granted, any fees for securing such admission shall be waived; or~~

~~(2) if this Court, in any determination made under paragraph (a) of this Rule, grants blanket permission to appear in all designated courts and other tribunals in this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included in such determination, any fees for securing admission *pro hac vice* shall be waived.~~

~~(f) Disciplinary authority and registration requirement.~~ Lawyers providing legal services in the State of Arizona pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the Arizona Rules of Professional Conduct, as provided in Rule ER 8.5 of those Rules. Lawyers providing legal services in the State of Arizona under paragraphs (b) or (c) shall, within thirty (30) days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to, and in accordance with, the provisions of this Rule shall not be considered to be engaged in the unauthorized practice of law in the State of Arizona.

~~(g) Notification to clients.~~ Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits or restrictions on that authorization, and that they are not authorized to practice law in the State of Arizona except as permitted by this Rule. They shall not state or imply that they are otherwise authorized to practice law in the State of Arizona.

a. 1-Eligibility. An attorney who is ~~not~~ neither a member of the State Bar of Arizona or registered pursuant to Rule 38(a), Ariz. R. Sup. Ct., ~~;~~ but is currently a member in good standing of the bar of another state ~~or~~ and eligible to practice before the highest court in any state, territory or insular possession of the United States (hereinafter called a nonresident non-member attorney) and who is of good moral character and is familiar with the ethics, professionalism and practices of the legal profession in the State of Arizona, may appear as counsel pro hac vice in a particular case before any state or local court, board or administrative agency in the State of Arizona upon compliance with this rule. However, 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.

b. 2-Association of Local Counsel. No nonresident non-member attorney may appear pro hac vice before any court, board or administrative agency of this state unless the nonresident non-member attorney has associated in that cause an attorney who is a member in good standing of the State Bar of Arizona (hereinafter called local counsel). The name

of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel 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. Local counsel associating with a ~~nonresidentnon-member~~ attorney in a particular cause shall accept joint responsibility with the ~~nonresidentnon-member~~ attorney to the client, to opposing parties and counsel, and to court, board, or administrative agency in that particular cause.

c. 3. *Procedure for Applying.* Appearance pro hac vice in a cause is subject to the discretion and approval of the court, board, or administrative agency where such cause is pending. A ~~nonresidentnon-member~~ attorney desiring to appear pro hac vice under this rule shall comply with the procedures set forth herein for each matter where pro hac vice status is requested. For good cause shown, a court, board, or administrative agency may permit a ~~nonresidentnon-member~~ attorney to appear pro hac vice on a temporary basis prior to the completion by the ~~nonresidentnon-member~~ attorney of the application procedures set forth herein. At the time such temporary admission is granted, the court, board, or administrative agency shall specify a time period for the ~~nonresidentnon-member~~ attorney to complete the application procedures, and any temporary pro hac vice admission shall be revoked in the event of subsequent failure by the ~~nonresidentnon-member~~ attorney to so complete the application procedures.

1. A. *Verified Application to State Bar of Arizona.* In order to appear as counsel in any matter pending before a court, board, or administrative agency in the State of Arizona, a ~~nonresidentnon-member~~ attorney shall:

(a) ~~file~~ File with the State Bar of Arizona an original and one copy of a verified application together with a certificate from the state bar or from the clerk of the highest admitting court of each state, territory or insular possession of the United States in which the ~~nonresidentnon-member~~ attorney has been admitted to practice law certifying the ~~nonresidentnon-member~~ attorney's date of admission to such jurisdiction and the current status of the ~~nonresidentnon-member~~ attorney's membership or eligibility to practice therein; and

(b) Pay a non-refundable application fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed plus an additional assessment set by the Arizona Supreme Court for the Client Protection Fund, with the following exceptions:

i) ; ~~provided that n~~ Not more than one application fee may be required per ~~nonresidentnon-member~~ attorney for consolidated or related

matters regardless of how many applications are made in the consolidated or related proceedings by the ~~nonresidentnon-member~~ attorney.

~~ii) ; and further provided that the requirement of~~The an application fee shall be waived ~~ii)(1)~~ for Judge Advocate General's Corps' military attorneys practicing before the Military Trial Court of the State of Arizona ore the Arizona Court of Military Appeals and ~~ii)(2)~~ to permit pro bono representation of an indigent client or clients. An attorney seeking a fee waiver to provide pro bono representation of an indigent client or clients shall include in the application a verification that all clients represented in the action are indigent and that no attorney fee shall be paid by the client. "Indigent" is defined as those individuals whose gross income is at or below 125% of the federal poverty guidelines, as calculated in conformity with the eligibility requirements for Legal Services Corporation grantees, currently codified at 45 C.F.R. Section 1611.

~~Fifteen percent of the non refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund to be distributed by the Arizona Foundation for Legal Services and Education entirely to approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

~~2. B.~~*Notice of Receipt by State Bar of Complete Application.* Upon receipt of the verified application and fee from the ~~nonresidentnon-member~~ attorney as described above, the State Bar of Arizona shall issue to local counsel a Notice of Receipt of Complete Application ~~that~~*which* states: (1) whether the ~~nonresidentnon-member~~ attorney has previously made any application or motion pursuant to this rule within the preceding three years; (2) the date of any such application or motion; and (3) whether the application or motion was granted or denied by the court or administrative agency. The State Bar of Arizona Notice shall include as exhibits: (1) the original verified application and (2) the original certificate(s) of good standing. ~~The State Bar shall retain c~~Copies of verified applications, certificates of good standing and orders granting, denying or revoking applications to appear pro hac vice ~~shall be retained by the State Bar of Arizona~~ for three (3) years.

~~€3.~~*Motion to Associate Counsel Pro Hac Vice.* Local counsel shall file a motion to associate counsel pro hac vice with the court, board, or administrative agency where the cause is pending, together with proof of service on all parties in accordance with Arizona Rules of Civil Procedure. The motion to associate counsel pro hac vice shall include as exhibits: (1) the original verified application; (2) the original certificates of good standing; and (3) the State Bar of Arizona Notice. The motion to associate counsel pro hac vice shall also be accompanied by a proposed order granting or denying the motion. ~~Local counsel shall mail aA~~ copy of each

order granting or denying the motion as entered by the court, board, or administrative agency ~~shall be mailed by local counsel~~ to the State Bar of Arizona.

~~D4.~~ *Entry of Order.* The order granting or denying the motion to associate counsel pro hac vice shall be entered by the court, board, or administrative agency no later than 20 days (exclusive of weekends and holidays) after the filing of such motion. A ~~nonresidentnon-member~~ attorney shall make no appearance in a cause until the court, board, or administrative agency where the cause is pending enters the order granting the motion to associate counsel pro hac vice. The order granting pro hac vice status shall be valid for a period of one year from the date of entry, and shall be renewed for subsequent one year periods upon compliance with renewal procedures as specified herein.

~~d.~~ *4-Verified Application.* The verified application required by this rule shall be on a form approved by the ~~Board Arizona Supreme Court of Governors of the State Bar of Arizona~~ and available at the clerk of the court, board, or administrative agency where such cause is pending and shall state:

~~1A.~~ the title of the case or cause, court, board, or agency and docket number in which the ~~nonresidentnon-member~~ attorney will be seeking to appear pro hac vice, and whether this case or cause is a related or consolidated matter for which the ~~nonresidentnon-member~~ attorney has previously applied to appear pro hac vice;

~~2. B.~~ the ~~nonresidentnon-member~~ attorney's residence and office address;

~~3. C.~~ the ~~court(s)jurisdictions~~ to which the ~~nonresidentnon-member~~ attorney ~~has beenis~~ admitted to practice and the date(s) of such admission;

~~4. D.~~ ~~that whether~~ the ~~nonresidentnon-member~~ attorney is ~~an active~~ member in good standing of such ~~court(s)jurisdictions~~;

~~5. E.~~ that the ~~nonresidentnon-member~~ attorney is not currently disbarred or suspended in any court;

~~6. F.~~ whether the ~~nonresidentnon-member~~ attorney is currently subject to any pending disciplinary proceeding by any court, agency or organization authorized to discipline attorneys at law, and if so pending, the application shall specify the jurisdiction, the nature of the matter under investigation and the name and address of the disciplinary authority investigating the matter;

~~7. G.~~ whether the ~~nonresidentnon-member~~ attorney has ever been disciplined by

any court, agency, or organization authorized to discipline attorneys at law;

~~8. H.~~ the court, board, or administrative agency, title of cause and docket number in which the ~~nonresidentnon-member~~ attorney has filed an application to appear as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted;

~~9. I.~~ the name, address and telephone number of local counsel;

~~10. J.~~ the name of each party in the cause and the name and address of counsel of record who is appearing for each party;

~~11. that the non-member attorney acknowledges~~ ~~K.~~ that ~~the nonresident attorney certifies that~~ he or she ~~acknowledges that he or she~~ shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Arizona, as provided in Rule 46(b), Rules of the Supreme Court;

~~12. L.~~ that the ~~nonresidentnon-member~~ attorney will review and comply with appropriate rules of procedure as required in the underlying cause; and

~~13. M.~~ that the ~~nonresidentnon-member~~ attorney understands and shall comply with the standards of professional conduct required of members of the State Bar of Arizona.

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~~e. 5.~~ *Discretion.* The granting or denial of a motion to associate counsel pro hac vice pursuant to this rule by the court, board, or administrative agency is discretionary. The court, board, or administrative agency may revoke the authority of a ~~nonresidentnon-member~~ attorney to make continued appearances pursuant to this rule. Absent special circumstances, repeated appearances by any person pursuant to this rule may be the cause for denial of the motion to associate counsel pro hac vice. Such special circumstances may include, but are not limited to, the following:

~~1. A.~~ a showing that the cause involves a complex area of law in which the ~~nonresidentnon-member~~ attorney possesses a special expertise, or

~~2. B.~~ a lack of local counsel with expertise in the area of law involved in the cause.

~~f. 6.~~ *Transfer.* The ~~nonresidentnon-member~~ attorney shall be deemed admitted in the event venue in such action is transferred to another county or court or is appealed; provided, however, that the court having jurisdiction over such transferred or appealed cause may revoke the authority of the ~~nonresidentnon-member~~ attorney to appear pro hac vice.

g. 7. *Continuing Duties to Advise of Changes in Status.* A ~~nonresidentnon-member~~ attorney admitted pro hac vice shall have the continuing obligation during the period of such admission to promptly advise the State Bar of Arizona of a disposition made of pending charges or the institution of any new disciplinary proceedings or investigations. The State Bar of Arizona shall then advise any court, board, or administrative agency where the ~~nonresidentnon-member~~ attorney has been admitted pro hac vice of any such information. A ~~nonresidentnon-member~~ attorney shall promptly advise the State Bar of Arizona if permission to appear pro hac vice pursuant to this rule is revoked by any court, board, or administrative agency.

h. 8. *Renewal of Application.* On or before each anniversary date of the filing of the verified application with the State Bar of Arizona, local counsel must certify to the State Bar of Arizona whether (a) the ~~nonresidentnon-member~~ attorney continues to act as counsel in the cause; or (b) such cause has been adjudicated to a final conclusion or is otherwise concluded. Any ~~nonresidentnon-member~~ attorney who continues to act as counsel in the cause shall remit to the State Bar of Arizona on or before each anniversary date an assessment set by the Arizona Supreme Court for the Client Protection Fund and a fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such renewal is sought, unless the ~~nonresidentnon-member~~ attorney is waived under paragraph ~~(a)(3)(A)-(c)(1)(B)(ii)~~ of this rule as a Judge Advocate General's Corps' military attorney or as an attorney providing pro bono representation of an indigent client.

~~Fifteen percent of the non-refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund administered by the Arizona Foundation for Legal Services and Education, to be distributed to and used exclusively for approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

i. 9. *Failure to Renew.* Any ~~nonresidentnon-member~~ attorney who continues to appear pro hac vice in a cause and fails to pay the renewal fees set forth in paragraph (a)(8) of this rule shall be suspended from appearance in any cause upon the expiration of a period of thirty days from the anniversary date. The executive director of the State Bar of Arizona shall notify the ~~nonresidentnon-member~~ attorney and local counsel of the suspension and shall file a certified copy of the notice with the court, board or administrative agency where the cause is filed. The ~~nonresidentnon-member~~ attorney may be reinstated upon the payment of fees set forth in paragraph (a)(8) of this rule and a \$50 late penalty. Upon payment of all accrued fees and late penalty, the executive director shall reinstate the ~~nonresidentnon-member~~ attorney and shall certify such reinstatement to the court, board, or administrative agency where the cause is filed.

j. 10. *Annual Reporting.* The State Bar of Arizona shall prepare an annual report which shall list: (a) all applications filed pursuant to this rule during the preceding twelve months; (b) the names of all applicants; and (c) whether the application was granted or denied. The report shall be available for inspection at the offices of the State Bar of Arizona, and shall

be provided to the Supreme Court.

k. ~~11.~~ *Disciplinary Jurisdiction of the State Bar of Arizona.* As provided in Rule 46(b), Rules of the Supreme Court, a ~~nonresident~~non-member attorney admitted pro hac vice pursuant to these rules shall be subject to the jurisdiction of the courts and agencies of the State of 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 of Arizona.

l. *Disposition of Fees.* Fifteen percent of the application fees paid pursuant to this rule shall be deposited into a civil legal services fund to be distributed by the Arizona Foundation for Legal Services and Education entirely to approved legal services organizations, as that term is defined in subparagraph (f) and (g) of this rule.

Lawyer Obligations to Safeguard Client Data in the Modern World

Recommendation One (Already Adopted):

The Supreme Court has already approved amendments to ER 1.6 and its comments that make express the lawyer's obligation to maintain the confidentiality of client data and specifically noting the associated technology-related issues. The Supreme Court has also approved amendments to the comments to ER 1.3 that make clear that the lawyer's duty to maintain competence includes maintaining technological competence as necessitated by the lawyer's practice.

The proposed language that has already been adopted was based on the ABA 20/20 recommendations, and the Committee believes it addresses these issues well and thoroughly, raising lawyers' awareness of data security issues without tying the comments too specifically to current, ever-changing technology. That language is set forth below

Rule 1.1 Comment:

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.6, Rule Text:

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

Rule 1.6 Comment:

[22] ~~{20}~~ Paragraph (e) requires a A-lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to,

electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]-[4].

Recommendation Two:

Lawyers increasingly use technological aids in their practice ranging from storage of client information in a digital format to the transmission of data over the internet or through other electronic means. In order to fulfill their obligation to take reasonable measures to safeguard confidential client information, lawyers must keep up-to-date on the security of the technological tools they use in their practice, but these technological options change too rapidly for permissible uses to be prescribed by rule.

To address the need for training of lawyers and law firm staff regarding security of client data, the State Bar, should assist lawyers in obtaining information and training regarding technology that may aid their practice and the security issues associated with that technology. This information and training could be provided as part of the bar's existing voluntary Law Office Management Assistance Program (LOMAP), through Continuing Legal Education and Professionalism courses, and through ethics opinions or guidance given on the ethics hotline. Training for law firm staff regarding technology and the need to maintain reasonable security of client data would be particularly valuable.

December 11, 2014

TO: Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law

FROM: Kim Demarchi and Jodi Knobel Feuerhelm/Workgroup Re: Rules of Professional Conduct

RE: **Proposed Revisions to ER 1.10 (Imputation of Conflicts of Interest: General Rule) and ER 1.0 Comment [8] [UPDATED MEMORANDUM]**

In 2014, the State Bar filed a Petition to Amend ERs 1.10, 1.11, 1.12 and 1.18 and ER 1.0 Comment [8] (hereafter, “State Bar Petition” or “Petition”) (Supreme Court No. R-13-0046). The Supreme Court declined to address the Petition during the 2014 rules cycle, instead referring the issues to this Committee. As discussed below, the Workgroup recommends several revisions to ER 1.10 and the related Comments. It also recommends that Comment [8] to ER 1.0 be amended as proposed in the State Bar Petition, to add a missing reference to ER 1.10 that reflects an apparent drafting oversight when the Comment was originally adopted. The Workgroup does not recommend any revisions to ER’s 1.11, 1.12 or 1.18.

Two red-lines are attached, showing the proposed changes to ER 1.10 and Comment [8] to ER 1.0. *See* Exhibits A and B, respectively.

I. SUMMARY OF PROPOSED CHANGES.

A. Proposed Changes to ER 1.10 and Related Comments.

The Workgroup’s review of ER 1.10 focused on: (a) the changes proposed in the State Bar Petition; (b) changes to the text of ER 1.10 to clarify that information contained solely in documents or electronically stored information maintained by a firm will not be imputed to lawyers in the firm for purposes of ER 1.10(b), so long as the firm adopts screening procedures to restrict access to such information; and (c) related changes to the comments to ER 1.10. The Workgroup also considered whether any revisions should be made to ER’s 1.11, 1.12 and 1.18, which currently have provisions similar to those in ER 1.10, but address screening in the context of government lawyers, adjudicative officers, and prospective clients. The Workgroup’s recommendations are as follows:

1. ER 1.10(b) Recommendations.

ER 1.10(b) addresses imputation of conflicts where a lawyer has terminated his or her association with a firm, and the firm proposes to represent a person with interests that are “materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm.” The general rule is that the firm can undertake that representation *unless* the matter is the same or substantially related to the former representation;

and “any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c).” Under the current rule, lawyers in the firm arguably “*have*” information in firm records, including closed client files and electronic records that may be maintained for a variety of reasons under the firm’s record retention policies. This creates an overbroad application that would preclude representation in many cases, even where no lawyer currently in the firm was involved in the former client’s representation, simply because the firm itself maintains stored electronic or other records.

The changes proposed by the Workgroup are intended to address this ambiguity in the current Rule. The proposed amendment thus provides that such information will *not* be imputed to the remaining lawyers in the firm if the firm adopts screening procedures that are reasonably adequate to prevent access to the information by those lawyers. The specific language proposed is: “If the only such information is contained in documents or electronically stored information maintained by the firm, and the firm adopts screening procedures that are reasonably adequate to prevent access to such documents or electronically stored information by the remaining lawyers, those remaining lawyers will not be considered to have protected information within the meaning of this Rule.”

Comment [5], addressing ER 1.10(b), has been modified to provide guidance on the screening measures that should be considered, particularly with respect to electronically stored information (such as research databases) that may contain information on work performed for former clients of the firm.

2. ER 1.10(d) Recommendations.

The proposed changes to ER 1.10(d) and the related comments are based in part on changes proposed by the State Bar Petition. The Workgroup recommends a number of modifications to the State Bar’s proposal, which primarily are directed at providing greater protections for clients, along with additional guidance on the required notice and screening procedures in the proposed Comments. Thus:

- ER 1.10(d)(1) is deleted (this is the so-called “litigation exception” that does not allow for screening where the laterally moving lawyer had a substantial role in a matter pending before a tribunal). This portion of the proposal is the same as that contained in the State Bar Petition and also conforms to the ABA Model Rule. The Workgroup concluded that there is no reasoned basis for disallowing screening for litigation matters, when it is allowed in all other contexts. Thus, a lawyer involved in a major transaction for a client is allowed to move laterally to a firm that represents the opposing party in a transaction, so long as an adequate screen is put in place. Yet, a litigator with a comparable role in a litigation matter would be precluded from going to the new firm as screening would not be permitted under the current rule. The use of screening measures is now well-established in modern law practice; that the Rules allow screening reflects a recognition that screening is effective and provides adequate protection for clients in most instances. (As discussed below, the Workgroup’s proposed

additions to Comment [9] cautions that screening may not be adequate to protect the client in all circumstances).

- ER 1.10(d)(2) is modified to track the corresponding language in ABA Model Rule 1.10, except that the Workgroup proposes to delete the requirement that the notice shall include “a statement that review may be available before a tribunal” (which appears in the ABA Model Rule). This proposal expands on the State Bar Petition’s proposal, which simply required that the client get written notice “of the particular screening procedures adopted and when they were adopted.” The proposed language is: “(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule. The written notice shall include a description of the screening procedures adopted; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.”
- ER 1.10(d)(3) has been added, to provide that “the screening procedures adopted [must be] reasonably adequate under the circumstances to prevent material information from being disclosed to the firm and its client.” This language is not contained in the State Bar Petition’s proposal or in the ABA Model Rules, and is intended to provide additional protection for clients. As noted, a corresponding addition to Comment [9] makes clear that there may be some circumstances where screening will not be adequate to protect the client’s interest.
- Comment [9] has been added to address the factors that should be considered in implementing an adequate screen, and to emphasize that screening will not always be appropriate. Comment [9] thus provides that in evaluating the adequacy of screening, “relevant circumstances may include the size of the matter in relation to the overall business of the firm” and “the number of lawyers in the firm that are actively involved in the matter that is the subject of the screening measures,” among other considerations. The proposed addition continues: “There may be some circumstances where, taking all factors into account, screening procedures will not be reasonably adequate to guard against inadvertent disclosure of protected information.” The proposed language is taken in part from Comment [7] to ABA Model Rule 1.10, but has been expanded. It has no counterpart in the State Bar Petition.
- Comment [10] has been added to provide guidance to lawyers on the Rule’s requirement that the screened lawyer shall be “apportioned no part of the fee” from the screened matter. It has no counterpart in the State Bar Petition. The proposed language, taken verbatim from Comment [8] of the corresponding ABA Model Rule, reads: “Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but the lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.”
- Comment [11] has been added to expand on the content of the required notice: “The notice required by paragraph (d)(2) generally should include a description of the screened lawyer’s prior representation and be given as soon as practicable after the need for screening becomes

apparent. It also should include a statement by the screened lawyer and the firm that the client’s material confidential information has not been disclosed or used in violation of the Rules.”. The language proposed is taken in part from Comment [9] to ABA Model Rule 1.10. It has no counterpart in the State Bar Petition’s proposal.

- Comment [12] has been added to cross-reference ERs 5.1 and 5.3, which impose certain obligations on lawyers who have managerial authority to ensure that subordinate lawyers and nonlawyer employees comply with the requirements of the Rules. It also provides guidance to lawyers and firms in the event of a breach of screening procedures. The proposed language reads: “The requirements of ERs 5.1 and 5.3 should be considered in implementing screening procedures under this Rule. If the screened lawyer or the firm become aware that the screening procedures have been violated or are ineffective, reasonable steps should be taken to remedy the deficiencies and prevent prejudice to the impacted client.” This reminder is particularly appropriate in the case of screening measures for electronically stored information, which likely will need to be implemented by technical personnel with specialized training. It has no counterpart in the State Bar Petition’s proposal and is not contained in the ABA Model Rules.

B. Other Proposals and Recommendations.

1. ERs 1.11, 1.12 and 1.18 Recommendations (No Changes Proposed).

The State Bar Petition proposed to modify ERs 1.11, 1.12 and 1.18 to add additional notice requirements; the new language was identical to that proposed for ER 1.10’s notice requirements. Thus, in each of these Rules, the Petition proposed expanding the existing notice requirement as follows (with new language in italics): “written notice of the particular screening procedures adopted, and when they were adopted, is promptly given” to the appropriate government agency, tribunal or prospective client.

The Workgroup does not recommend that the proposed amendments to ER 1.10 be incorporated into ERs 1.11, 1.12 or 1.18, for two reasons. *First*, the notice provisions of Arizona’s current ERs 1.11, 1.12 and 1.18 are identical to the corresponding ABA Model Rule provisions. Consistent with the Workgroup’s proposal, the language of the ABA Model Rules governing private lateral moves is more restrictive than the applicable rules governing government lawyers, adjudicative officers and prospective clients. This reflects an underlying policy decision that the Rules should facilitate the transition of government lawyers and adjudicative officers who desire to leave public service for private practice. Similarly, prospective clients are not accorded the same status under the ABA Model Rules as existing clients. *Second*, Arizona’s current ERs governing government lawyers, adjudicative officers and prospective clients have been in effect for some time and appear to have achieved the proper balance of client and lawyer interests. There is no demonstrated need to add more restrictive notice and screening requirements in these areas.

2. ER 1.0, Comment [8] Recommendations.

The State Bar Petition made a corrective change to Comment [8] to ER 1.0 that should be adopted. The proposal adds a reference to ER 1.10 in the Comment addressing screening, as follows: “This definition [of screening] applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.”

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Exhibit A

Arizona Revised Statutes Annotated

Rules of the Supreme Court of Arizona (Refs & Annos)

V. Regulation of the Practice of Law

D. Lawyer Obligations

Rule 42. Arizona Rules of Professional Conduct

Client-Lawyer Relationship

17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.10

ER 1.10. Imputation of Conflicts of Interest: General Rule

Currentness

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter. If the only such information is contained in documents or electronically stored information maintained by the firm, and the firm adopts screening procedures that are reasonably adequate to prevent access to such documents or electronically stored information by the remaining lawyers, those remaining lawyers will not be considered to have protected information within the meaning of this Rule.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in [ER 1.7](#).

(d) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under [ER 1.9](#) unless:

- ~~(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;~~
~~(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the~~

fee therefrom; ~~and~~

(~~3~~2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule. The written notice shall include a description of the screening procedures adopted; a statement of the firm's and of the screened lawyer's compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(3) the screening procedures adopted are reasonably adequate under the circumstances to prevent material information from being disclosed to the firm and its client.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by ER 1.11.

Credits

Amended June 9, 2003, effective Dec. 1, 2003.

Editors' Notes

COMMENT [2003 AMENDMENT]

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See [ER 1.0\(c\)](#). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See [ER 1.0](#). Comments [2]--[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by ERs 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, for example, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm are reasonably likely to be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm. A disqualification arising under [ER 1.8\(I\)](#) from a family or cohabiting relationship is personal and ordinarily is not imputed to other lawyers with whom the lawyers are associated.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See ERs 1.0(k) and 5.3.

[5] ER 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate ER 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by ERs 1.6 and 1.9(c). For purposes of determining whether any current lawyer in the firm has such material information, information maintained by a firm in the form of documents, including electronically stored information, will not be imputed to the remaining lawyers if the firm adopts screening procedures that are reasonably adequate under the circumstances to prevent the remaining lawyers from accessing such information. In determining whether screening procedures are reasonably adequate, factors to be considered include whether technology is available and has been implemented to restrict lawyer access to electronic information maintained by the firm and whether adequate notice is provided to lawyers in the firm regarding the screening procedures. Further guidance is provided in ER 1.0, Comments [8] through [10]. In addition, the firm should consider whether its lawyers have access to internal electronic databases that utilize research memoranda or other work product from past client representations, to ensure that any protected information is removed from such databases or that access is appropriately restricted.

[6] ER 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in ER 1.7. The conditions stated in ER 1.7 require the lawyer to determine that the representation is not prohibited by ER 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see ER 1.7, Comment [21]. For a definition of informed consent, see ER 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by ER 1.11(a), not this Rule. Under ER 1.11(c), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under ER 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[9] Rule 1.10(d) removes the imputation otherwise required by ER 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures and requirements laid out in sections (d)(1) and (2) be followed. For purposes of section (d), in determining the adequacy of screening procedures “under the circumstances,” factors to be considered include whether technology is available and has been implemented to restrict lawyer access to electronically stored information maintained by the firm. Other relevant circumstances may include the size of the matter in relation to the overall business of the firm, the number of lawyers in the firm that are actively involved in the matter that is the subject of the screening measures, or other factors that may make it difficult to implement a screen that is reasonably adequate to ensure that protected information is not disclosed, even inadvertently. Additional guidance is provided in ER 1.0, Comments [8] through [10]. There may be some circumstances where, taking all factors into account, screening procedures will not be reasonably adequate to guard against inadvertent disclosure of protected information. Lawyers should also be aware that even where screening procedures have been adopted that comply with this Rule, tribunals may

consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[10] Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but the lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[11] The notice required by paragraph (d)(2) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules.

[12] The requirements of ERs 5.1 and 5.3 should be considered in implementing screening procedures under this Rule. If the screened lawyer or the firm become aware that the screening procedures have been violated or are ineffective, reasonable steps should be taken to remedy the deficiencies and prevent prejudice to the impacted client.

Notes of Decisions (31)

17A A. R. S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 1.10, AZ ST S CT RULE 42 RPC ER 1.10
Current with amendments received through 7/15/14

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Exhibit B

Arizona Revised Statutes Annotated
Rules of the Supreme Court of Arizona (Refs & Annos)
V. Regulation of the Practice of Law
D. Lawyer Obligations
Rule 42. Arizona Rules of Professional Conduct
Preamble (Refs & Annos)

17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.0

ER 1.0. Terminology

[Currentness](#)

COMMENT [2003]

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs [1.10](#), 1.11, 1.12 or 1.18.

17A A. R. S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 1.0, AZ ST S CT RULE 42 RPC ER 1.0
Current with amendments received through 11/1/14

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Conforming ER 3.4 to ABA Ethics 20/20 – “Electronically Stored Information”

ABA's Ethics 20/20 made a number of changes to the ethics rules to reference "electronic information" or "electronically stored information." That change did not get made in comment 2 to ER 3.4, which still refers to "computerized information," as follows (emphasis added):

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

....

Comments:

....

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including **computerized information**. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

We recommend changing the language to conform to the ABA 20/20 changes, so that it refers to "electronically stored information" instead of "computerized information". We are not intending to make a substantive change; this proposal is just intended to avoid confusion (and disputes) arising from using different terminology in different rules.

Proposal to Amend ER 1.5 Regarding New Forms of Lawyer Teams

Issue for Resolution

The existing Rules of Professional Conduct contemplate that lawyers may affiliate in “firms,” by which the Rules mean long-term arrangements where the same lawyers work together in an ongoing association. (*See, e.g.*, ER 1.10(c) (defining “firm”).) Thus, various rules attach consequences to the affiliation of a lawyer with a firm, such as imputation of conflicts or duties based on the role of the lawyer as a supervisor or subordinate within that firm structure. (*See* ER 1.10, 5.1, 5.2.) Lawyers who are not affiliated with the same firm may cooperate in the representation of a client, but may divide fees only if they assume joint responsibility for the entire representation. (ER 1.5(e)(1).)

Alternative forms of legal teams are becoming increasingly popular in the legal profession. A client may engage a law firm to represent it in a particular matter, but ask the firm to cut costs by using other entities to conduct research, review documents, or assemble electronic documents for production in discovery. A lawyer may wish to affiliate with other lawyers for a particular matter, because those lawyers have skills or experience needed for that matter, without entering into a long-term partnership with the other lawyer across multiple matters.

These alternative forms of lawyer teams can be beneficial for clients, providing greater cost-effectiveness and giving the client access to teams of lawyers and other professionals assembled to meet the needs of their particular matter. But they also carry risks. Without a single entity agreeing to assume responsibility for the entire representation, it is possible that work will not get done, quality will not get checked, or non-lawyers involved in the matter will not understand or comply with ethical requirements such as confidentiality.

The following proposals are intended to facilitate alternative forms of lawyer teams by removing obstacles not necessary to protect clients and by reiterating the necessity of following core ethical principles regardless of the form the lawyer team takes.

Proposals Already Adopted – Ethics 20/20

The ABA Ethics 20/20 proposals already presented to, and adopted by, the Arizona Supreme Court provisions relevant to new forms of lawyer teams. Revisions to the comments to ER 5.3 make clear that the lawyer’s obligation to supervise nonlawyers assisting with a matter extend to both nonlawyer’s employed by the lawyer’s firm and those employed by other entities, such as external personnel engaged to assist with document assembly or review.

Proposal to Amend ER 1.5 Regarding Fee Sharing

Arizona has a unique provision in its ER 1.5(e)(1), which provides that lawyers not affiliated with the same firm may not share fees unless each lawyer agrees to assume joint responsibility for the entire representation. This provision makes assembling teams of lawyers from different firms more difficult, as a lawyer brought in to provide expertise on a

narrow issue forming only part of a larger project may reasonably be unwilling to agree to be jointly responsible for the entire representation. Affiliation of lawyers with needed expertise is otherwise encouraged by the Rules, particularly the Rule regarding competence, which encourages lawyers to get assistance when they do not personally possess the necessary expertise to handle a particular matter. (See ER 1.1 cmt. 2.)

We recommend amending ER 1.5 to remove this obstacle, as follows. This proposed language echoes that of the Model Rule, while including a specific reminder that the division of responsibility and fees must still serve client needs by ensuring that someone is in fact responsible for all elements of the representation:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation
- (2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of the fees and responsibilities between the lawyers and
- (3) the total fee is reasonable.

....

Comments

....

Division of Fee

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers if the division is in proportion to the services performed by each lawyer or all lawyers assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be diligently completed. See ER 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

Insert Regarding Non-Lawyer Ownership of Law Firms

The Committee considered the possibility of recommending changes to the Rules of Professional Conduct that would permit non-lawyer ownership or management of law firms. The restriction on non-lawyer ownership serves to protect clients by ensuring that law firms are controlled by persons who are subject to the ethical obligations of lawyers as reflected in the Rules of Professional Conduct and who can be disciplined for failure to follow those rules. Although the Committee has recommended changes to the Rules of Professional Conduct to facilitate new forms of lawyer teams blending lawyers and other professionals from multiple firms while ensuring that clients remain protected, the Committee did not believe that taking the additional step of permitting non-lawyers to own or manage law firms was necessary. In addition, the Committee understands this issue is the subject of current study by the American Bar Association, and recommends awaiting the development of further information through that effort prior to making any change in Arizona rules regarding non-lawyer ownership.

Proposal to Amend ER 1.6 Regarding the Scope of Confidential Information

Issue for Resolution

Under the model rule version of ER 1.6, which Arizona has adopted, the lawyer's duty of confidentiality extends to all information "relating to the representation." The rule thus arguably prohibits a lawyer from disclosing even publicly available information without obtaining the client's express permission.

Lawyers have reasons to want to disclose information "relating to" a client representation where that disclosure would do no harm to the client and would instead advance the overall interests of clients. For example, potential clients may wish to have information about the lawyer's experience handling similar cases or to review samples of the lawyer's work as part of deciding which lawyer to hire. In other industries, public information about a company's past work is widely and easily available, and clients may not understand why a lawyer wishing to follow Rule 1.6 would be reluctant to similarly disclose her past work. Alternatively, a lawyer may wish to disclose information about the outcome of similar cases in which the lawyer has been involved, as a part of helping the client to understand the lawyer's recommendations about how to proceed in the client's case.

In practice, ER 1.6 appears to be honored more in the breach. Many lawyers react to its breadth by doubting that it could actually mean what it says and act accordingly. The effect is to disadvantage those lawyers who scrupulously follow the rule and to render enforcement difficult.

We therefore recommend narrowing the scope of ER 1.6 to focus on maintaining the confidentiality of the information whose confidentiality is most essential to client interests. The specific proposed language draws on the language of other states' ethics rules, particularly those who use an approach based on the Model Code that preceded the Model Rules. The Code approach protected information that was either (1) confidential or (2) even if not confidential, of such a kind that disclosure would harm the client's interests.

Proposed Rule Change

ER 1.6. Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client

privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

....

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal confidential information relating to the representation. See ER 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in such situations where evidence is sought from the lawyer through compulsion of law. ~~The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.~~ A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues

relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

....

Proposals Regarding Government Law Practice

The Rules of Professional Conduct currently contain comments hinting at “special considerations” that “may” affect the application of the Rules to government lawyers. (*See* Preamble cmt. 19; ER 1.13 cmt. 9.) The following recommendations would augment the existing comments to provide additional guidance to government lawyers on three frequently arising issues: (1) identity of the client in the governmental context, (2) advising government entities acting in a quasi-judicial capacity and the restriction on *ex parte* contact, and (3) communications relating to government investigative and prosecutorial functions under ER 4.2. None of these comments are intended to change what behavior is permissible under the Rules. Instead, they are intended to provide useful guidance to government lawyers on application of existing Rules to their practice.

Proposal 1: Amend the ER 1.13 Comments Regarding Client Identity

ER 1.13

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

....

Comments

....

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example if the action or failure to act involves the head of the bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Government lawyers also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so.

[10] A government lawyer may have an obligation defined by statute, regulation, or case law to render legal advice to various constituents of a government organization, including elected officials, multi-member boards, or agencies, or to other governmental organizations. Some government lawyers may themselves be elected officials who have statutory obligations to take

formal action against government constituents under certain circumstances. Normally, the government lawyer advises each constituent of a government organization not in his individual capacity but as a representative of the organizational client. In that event, there is only one client, and thus no joint representation or conflict of interest. See ER 1.7 cmts. 28-30. The lawyer must make the identity of that client clear to the constituents and determine which constituent has authority to act for the government entity in each instance. The lawyer must also disclose to the constituents any limitations that are imposed on the lawyer's representation or advice as a result of the lawyer's other statutory obligations. See ER 1.2(c) and related comments.

[renumber subsequent comments]

Proposal 2: Amend the ER 3.5 Comments Regarding Advising Government Clients in a Quasi-Judicial Role

ER 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official of a tribunal by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

....

Comments

....

[6] At times, a government entity is required to act in a "quasi-judicial" capacity as part of an administrative process. In that capacity, it may act as the decision-maker in contested proceedings or hear appeals from the determinations of another officer, body or agency of the same government. A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact, provided that reasonable measures are taken to ensure the fairness of the administrative process, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer's advice to the tribunal to procedural matters. In no event can the same lawyer both provide advice to the tribunal and appear before it, even if the advice is limited to procedural advice.

[renumber subsequent comments]

Proposal 3: Amend the Comments to ER 4.2 Regarding Communications Authorized by Law

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. ~~Communications authorized by the law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.~~

[2] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal prosecution about a matter other than the criminal prosecution, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[renumber subsequent comments]

Cover Note: ER 1.7 and Matter-Based Conflicts of Interest

Enclosed are materials prepared by the ethics rules workgroup regarding switching from a client-based to a matter-based conflict of interest rule.

After preparing these materials, the workgroup elected not to propose a change in the Rules of Professional Conduct. While it may be possible to protect clients by screening lawyers in different offices of a very large law firm who are working for and against the same client in unrelated matters without impairing either the quality of the representation or the relationship of loyalty and trust between lawyer and client, in smaller institutions it would be difficult or impossible to do so. We were unable to find a way to draft a revised rule that drew a clear line between circumstances in which this conduct would be permissible without impairing other professional obligations and circumstances in which it would not.

We further note that, under current rules, it is already permissible for a law firm to both represent and be adverse to the same client, provided that all involved clients give informed consent. This option appears to address the perceived need, without jeopardizing the integrity of the representation or the lawyer-client relationship.

We therefore are not recommending any change to the Rules, but provide the attached materials for the full committee's information.

Moreover, this issue remains under active discussion at the national level and in other jurisdictions, including Canada. While we see no reason for Arizona to lead a major change in practice for the reasons discussed above, it would be wise to monitor the development of this issue and further study it in the future once the experiences of other jurisdictions are available for examination.

Introduction:

Our current version of ER 1.7 prohibits concurrent representation of clients if they are adverse to one another unless the requirements of ER 1.7(b) are met, even if the lawyer or law firm represents these clients on unrelated matters, and even if there is little to no risk that a lawyer handling a matter for one adverse client will share confidential information with another lawyer representing the other adverse client on an unrelated matter.

The notion that a lawyer or firm should never represent another client adverse in any conceivable way to a current client may be placing an unnecessary regulatory restriction on lawyers and firms that could be resolved by proper screening and waivers, if necessary.

Below is a proposed revised ER 1.7 narrowing the scope of conflicts of interest to the same or substantially related matters. Included in the revision is a new subsection addressing the obligation of the lawyer to ensure that confidential information will not be shared with other lawyers in the firm who may be representing adverse parties on unrelated matters. Attached are also some of the current comments to ER 1.7, a number of which have been revised to conform to the revisions.

Proposed Revised ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client in the same or a substantially related matter; or

(2) in the course of representing clients with adversity to each other, one or more client's confidences and secrets entrusted to the lawyer cannot be protected by effective screening measures; or

~~(3)~~ there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see ER 1.8. For former client conflicts of interest, see ER 1.9. For conflicts of interest involving prospective clients, see ER 1.18. For definitions of "informed consent" and "confirmed in writing," see ER 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include ~~both of~~ the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2) and (a)(3).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also ER 5.1, Comment [2]. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see ER 1.3, Comment [4] and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See ER 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See ER 1.9. See also Comments [5] and [28].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. In these circumstances, the lawyer may withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See ER 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See ER 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client in the same or a substantially related matter without that client's informed consent. ~~Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.~~ Similarly, a lawyer acts directly adversely to a client if it will be necessary for the lawyer to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose confidences and secrets can be protected by adequate screening measures ~~interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation,~~ does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Although directly adverse conflicts arise most frequently in litigation, they also arise in transactional matters. For example, if a lawyer is asked to represent a seller in negotiations with a buyer represented by the lawyer, ~~not in the same transaction but in another, unrelated matter,~~ the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under ER 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

....

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See ER 1.1 (competence) and ER 1.3 (diligence). In determining whether a multiple-client conflict is consentable, one factor to be considered is whether the representation will be provided by a single lawyer or by different lawyers in the same firm.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under ER 1.0(m)), such representation may be precluded by paragraph (b)(1).

....

Consent to Future Conflict

[21] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because

it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that an unforeseeable conflict may arise, such consent is more likely to be effective, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[22] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(3~~2~~). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[23] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[24] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[25] Conflicts of interest under paragraphs (a)(1), ~~and (a)(2)~~, and (a)(3) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[26] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present, as when one spouse owns significantly more property than the other or has children by a prior marriage. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[27] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[28] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is

not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications in which the clients were collectively represented by the same lawyer in the same matter, and the clients should be so advised.

[30] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See ER 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[31] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See ER 1.2(c).

[32] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of ER 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in ER 1.16.

Organizational Clients

[33] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See ER 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer in the same or a substantially

related matter, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.