

We are grateful for the opportunity to offer our perspective on the petition proposing changes to Rule 38 with respect to the limited practice license granted to clinical law professors. The undersigned are Karen Kowalski, Associate Dean for Administration and Chief of Staff at the University of Arizona, James E. Rogers College of Law, Paul Bennett, Director of Clinics at James E. Rogers College of Law, and Jennifer Barnes, Faculty Director of the Clinical Program at Sandra Day O'Connor College of Law. Our comments reflect three overall concerns:

1. The current system has been working well for the past 25 years; and
2. We are unclear whether the proposal requires a full character and fitness review or the relatively abbreviated review such as the review for military spouses.
3. If the proposal requires a full character and fitness review, the proposed changes will likely put an unnecessary burden on the two state law schools that will limit much needed flexibility in maintaining quality clinical legal education programs. While the proposed rules would affect a relatively small number of clinical professors operating under the current rule, the impact of proposed changes could be significant for each of the schools as well as for future hires.

**Purpose of the existing rules:**

The proposed rule eliminates the current practice exemption for clinical law professors and merges it, somewhat awkwardly, with the limited practice license that is generally granted to law professors under Rule 38(c). In so doing, the proposed rule conflates two practice exemptions with very different purposes. The purpose of Rule 38(c) is to allow law professors a courtesy restricted license to practice law on their own. Under Rule 38(c), an approved law professor may represent clients regardless of their legal issue or income. They may charge clients and act as any other member of the bar subject to a current limitation of 8 hour per week limit. Their limited practice license is not tied in any way to their educational mission.

The purpose of current Rule 38(d) is decidedly different. The limited license given to Clinical Law Professors is tied entirely to their educational mission. They are teachers first (and last) of law students practicing law. Their license is limited to their role as supervising attorneys. They may not charge fees to or accept fees from any client. They may not practice as other lawyers. They may operate only within their assigned duties as clinical legal education professors.

Historically, the availability of a limited practice license for clinical law professors allowed both law schools the flexibility to hire law teachers who are licensed in good standing in other states to come to Arizona and immediately assist students in their development as lawyers. Clinical education plays an essential and growing role in helping law students develop into ethical and competent graduates. Both law schools have vibrant and nationally recognized clinical legal education programs. The clinical professors who have come to Arizona to practice under Rule 38(d) have joined us solely to teach and to mentor – not to practice law for their own gain.

**Impact on Necessary Short-term hiring:** Both law schools make use of short-term clinical fellows, visiting clinical professors and short-term hires. We often hire for positions that are grant-funded and, of necessity, cannot promise long-term contracts. Other times, someone leaves, and positions need to be filled on relatively short notice for the next academic term.

We compete nationally to bring the best clinical hires to Arizona. Of course, we fill some of those positions with well-qualified members of the Arizona Bar. Sometimes -- this year being an example -- we are fortunate to fill short-term positions with exceptional people with licenses from other states. This year, both law schools have hired short-term clinical professors to fill positions in our Tribal Justice Clinic, Natural Resources Clinic, Worker's Rights Clinic, Civil Litigation Clinic and our Immigration Clinic.

Under the current proposal, depending on how the rule is interpreted, we might not be able to get professors to come to Arizona for short-term positions if they have to undertake an elaborate character and fitness process, pay application expenses, pay additional bar dues, participate in CLE in two or more states, and supervise under the proposed and awkward pending admission requirements. They may go elsewhere, and we potentially could be in a desperate situation as educators.

We are not uneasy that a character and fitness review will reveal concerns about an applicant's background. After all, each hire is a member in good standing of another state's bar. We also vet our hires. We are apprehensive that the time and energy needed for a full character and fitness review will discourage some highly sought after clinical professors who have opportunities at other law schools.

#### **Pending Admission Requirements:**

The proposed rule creates new restrictions on new clinical hires that may inhibit the capacity of both law schools to attract the best available clinical teachers. Under the current rule, a clinical law professor need only identify him or herself as a "clinical law professor" to clients, the court, and to law students. Under the proposed rule, pending approval of character and fitness – a process that could take months – clinical teachers must now announce that their "*Practice [is] temporarily authorized pending certification under Rule 38(c). Supervision by [name of attorney], a member of the State Bar of Arizona.*"

We do not see the point of a new "supervising the supervisor" requirement. The statement sends a message of lack of qualification to the courts, opposing sides, and, most importantly, to students and clients. Students and clients need to know that their professors are well qualified, if not experts in their respective fields. They should not need to examine why their supervising professor needs to be supervised and it will be odd for the clinical professor to have to explain the reasoning. Asking someone with as much as twenty years' experience in their field to announce that they are being supervised by someone else (possibly a lawyer with much less experience) undermines their credibility with both clients and students with no discernable benefit to either.

Indeed, it is not as if the Bar has had multiple, if any, complaints about the quality of clinical professor supervision over the years. All clinical faculty under current Rule 38(d) have passed Character & Fitness in other states and they all must comply with other state's CLE standards. If the Supreme Court is concerned, perhaps a more simple and expeditious solution would be to keep Rule 38(d) as it is, but add a requirement that Rule 38(d) clinical professors provide a

yearly statement of “good standing” in their other bar(s) with proof of meeting CLE and other ethical requirements.

### **Cost:**

In academia, people are rarely hired with any initial long-term commitment. Short-term clinical hires generally keep their out-of-state licenses. It only makes sense for them. Even long-term hires keep their out-of-state licenses. Tenure or continuing status in the University system takes a number of years – sometimes as many as six or seven. Clinical Professors, most likely, will retain their current out-of-state licenses for years until they receive a long-term commitment from the University.

The added costs of maintaining two or more active licenses with more than one state CLE requirements may further discourage people from accepting short-term positions or even clinical tenure track positions. The law schools generally only pay for bar licenses that are necessary for the law school position which means that additional costs will fall to the clinical professors who are employed for the sole purpose of supervising law students.

### **Grandfathering:**

As of today, the two state law schools have three clinical professors who have been in Arizona for a number of years -- practicing solely under Rule 38(d). Two of them – Paul Bennett at the University of Arizona and Evelyn Cruz of Arizona State University – came to Arizona over a dozen years ago and before Arizona allowed attorneys to waive in on motion. Neither can now waive in on motion, as the rule requires them to have practiced in *another* state for three of the previous five years. They had both practiced in Arizona only – under Rule 38(d). Two others -- Kristine Huskey of Arizona and Gregg Leslie of Arizona State – came to Arizona with exceptional credentials. ASU also just hired a Fellow on a nine-month contract in the Civil Litigation Clinic. He is licensed in Illinois. They were all hired without a long-term commitment and, rationally, chose to practice only under Rule 38(d).

Even though some of the current clinical professors do not have formal Arizona bar membership, they have made significant contributions to the legal communities that they serve. Professor Bennett received the State Bar of Arizona’s Presidents Award in 2006 for co-chairing the State Bar Task Force on Professionalism. Professor Cruz received the 2007 President’s Medal for Social Embeddedness at ASU. Professor Huskey, Director of University of Arizona’s Veteran’s Advocacy Law Clinic for the past six years, received the 2017 Excellence Award, Certificate of Recognition from the U.S. Army (Army Community Service Division), and Army OneSource and the 2016 Community Impact Award by University of Arizona James E. Rogers College of Law.

If the proposed new rules must be implemented, perhaps the proposed rules could be modified to grandfather current Clinical Professors as well as several new hires who are coming on board

this fall before any rule changes would likely take effect. At the very least, perhaps the proposed rule could make explicit that character and fitness review would be similar to the abbreviated review authorized for military spouses.

Respectfully submitted on July 19, 2019 by:

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