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MEMORANDUM

TO: Attorney Regulation Advisory Committee

FROM: Southern Arizona Legal Aid ("SALA") and the William E. Morris Institute for Justice ("Institute")

DATE: November 5, 2018

RE: Comments to Draft Petition to Amend Rules 38 and 39 and Abrogate Rule 40, Rules of the Arizona Supreme Court

Your committee sent the Institute and SALA a draft copy of the Petition to Amend Rules 38 and 39 and Abrogate Rule 40, Rules of the Arizona Supreme Court, and we appreciate the opportunity to review it and provide comments. We limit our comments to proposed Rule 38(d).

We took additional time to review the proposed rule. While we understand that the committee spent significant time on the proposal, as we reviewed the proposal, we thought it could be clearer and simplified. We recommend more streamlined language and requirements to make compliance with the rule easier for organizations. We also recommend that the three federally funded approved legal services organizations, Community Legal Services, Southern Arizona Legal Aid and DNA People's Legal Services, be grandfathered in as "approved legal services organizations" under the current rule. We further propose that the Court limit the annual certification requirements and develop forms that organizations can easily utilize for certification purposes.

Although we recommend revisions to some provisions of the proposed rule, we do find others, such as the MCLE exemption for volunteer attorneys who are retired or inactive, to be beneficial.

Our concerns and suggested modifications are detailed below.

I. Statement of Interest

SALA and the Institute are "approved legal services organizations," as defined in current Rule 38(e) and (f). SALA has an extensive Volunteer Lawyers Program, and greatly relies on the assistance of attorneys certified to practice law under the current Rule 38(f) to provide effective representation to low-income individuals. Both organizations would be affected by the proposed changes to the rule.

II. The Filing Requirements to be an "Approved Legal Services Organization"

The proposed Rule 38(d) requires legal services organizations to complete initial filings for approval that are slightly different from the requirements under current Rule 38(e) or (f). We are concerned that the new requirements may be unclear and have the potential to be confusing to approved legal services organizations.

A. The Filing Requirements for Approval to be an "Approved Legal Services Organization"

The proposed Rule 38(d)(1) defines an "approved legal services organization" and subsection (A) requires an organization who wants to be approved, to "file a petition with the Clerk of the Arizona Supreme Court, and a copy of the petition with the Chief Bar Counsel of the State Bar of Arizona." The proposed rule's requirements for a petition closely resemble the requirements outlined in current Rule 38(e)(2)(C) and (f)(1) but have some changes. Specifically, proposed Rule 38(d)(1)(A)(vi) requires "the names of all attorneys who are employed by the organization, or who regularly or periodically provide volunteer legal services for clients under the auspices and supervision of the organization," while the current Rule 38(e)(2)(C)(v) and (f)(1)(F) require "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."

These changes are potentially confusing because the proposed rule is silent on whether current approved legal services organizations must refile or amend their prior filings to include this additional information. If the proposed rule does require current approved legal services organizations to refile an application, the process seems unnecessary because those organizations have already submitted information that was scrutinized and approved by the Arizona Supreme Court. Furthermore, the three federally funded approved legal services organizations, Community Legal Services, Southern Arizona Legal Aid and DNA People's Legal Services, are subject to federal oversight, as well as state oversight, and must comply with significant oversight documentation. Therefore, we suggest that the Court exempt the three federally funded legal services organizations from having to file a new application. While we understand this is a distinction the Court may not want to make, we think this is an option worth considering.

We recommend that the proposed rule be amended to clarify who needs to file an initial application for approval under the proposed rule and to allow the three federally funded approved legal services organizations to be grandfathered in as "approved legal services organizations."

B. An Approved Legal Services Organization's Annual Filing for Certification

Besides the initial filing for approval, proposed Rule 38(d)(1)(C) also requires approved legal services organizations to file an annual notice with the Court:

> On or before February 1 of each year, the organization shall file a notice with the Clerk and a copy with the State Bar, providing updated information, including a current list of employed and volunteer lawyers certified under this rule, and certifying that the organizations has provided, and will insure that volunteer *pro bono* lawyers, providing services under its auspices and supervision have completed, regular and appropriate training and continuing legal education.

The current rule has no such requirement placed on approved legal services organizations.

We agree that there needs to be an increase in oversight in the type and level of assistance provided by approved legal services organizations to volunteers and employees certified under the rule. We approve of the proposal to require approved legal services organizations to submit an annual notice to the court, but we propose only the reporting of *changes* to the organization itself, such as funding sources, and additions to the organization's list of attorneys certified under the rule that have not been reported previously. If there have been no changes, organizations should submit a short statement certifying as much. In a more stylistic suggestion, we would break out the information that is required to be included in the annual notice, instead of saying "including . . . ." Rule 38(d)(1)(C).

Further, proposed Rule 38(d)(2)(G) will require organizations to report the loss of an attorney's certification and including this information in the annual notice is duplicative, unless it has not been reported. Therefore, we recommend that the proposed rule be revised to limit the requirement of filing an annual notice with the Clerk to only report changes to the organization itself, or additions to the organization's list of attorneys certified under the rule that have not been reported previously under Rule 38(d)(1)(G).

We also recommend that the Court develop forms that approved legal services organizations can easily utilize for annual certification purposes. This will greatly simplify the process and ease some administrative burdens on approved legal services organizations. The purpose of the rule is to encourage more lawyers to be available to provide representation to low-income Arizonans and increasing the administrative requirements on these programs may have unintended consequences.

Finally, the proposed rule is silent on procedures for counsel certified who practice for more than one approved legal services organizations. Particularly, it is unclear which organization is responsible for the attorney's training and continuing legal education, or if both organizations must certify this information. These matters should be clarified.

III. The Filing Requirements of an Approved Legal Services Organization's List of "*Pro Bono* Counsel"

Proposed Rule 38(d)(2)(B) combines the certification requirements for volunteer attorneys under current Rule 38(e)(3), and attorneys working for approved legal services organizations under current Rule 38(f)(2), which have nearly identical language. The current rule directs the *attorney* seeking authorization to practice law under the rule, either as a volunteer or as an employee, to file an application with the Clerk. In contrast, the proposed rule states that "[t]he approved legal services organization under which a lawyer is to provide *pro bono* legal services shall file an initial application with the Clerk listing those lawyers it seeks to qualify for *pro bono* counsel certification." Proposed Rule 38(d)(2)(B). The proposed rule further details the extensive requirements that must be included in the application for *each* lawyer volunteering with or working for the approved legal services organization:

> (i) A certificate from each of the highest courts or agencies in the state, territory or district in which the applicant is presently licensed to practice law, documenting that the applicant is a member in good standing of all courts and jurisdictions in which he or she has been admitted to practice, and has disciplinary history within the last five years or any pending discipline or disability proceeding. An applicant who is registered as In-House Counsel pursuant to Rule (a) shall fulfill this requirement by providing a copy of his or her current Arizona Certification of Registration of In-House Counsel;
>
> (ii) An avowal by the approved legal services organization that the applicant is employed by or is an unpaid

> volunteer providing *pro bono* legal services under the auspices of the organization;
>
> (iii) An avowal from the applicant certifying he or she qualifies under and agrees to the provisions of 38(d)(2)(A).

Id.

Current approved legal services organizations already have submitted information that was reviewed and approved by the Arizona Supreme Court. Requiring these organizations to provide additional information for attorneys who already have been certified under the rule, could be potentially burdensome. We recommend that current legal services organizations be grandfathered in under the current rule and be exempt from having to file this information for attorneys who have previously been certified. Absent this, we recommend that the three federally funded approved legal services organizations be grandfathered in under the current rule.

Finally, the proposed rule was amended to combine current Rule 38(e) and (f), and we think this combination has the potential to cause confusion since the management of a volunteer attorney may be very different from the management of an attorney hired to work at a legal services organization under subsection (2)(A)(iii). In addition, while it may be reasonable to ask an approved legal services organization to file certification under subsection (2)(B) on behalf of an employee, we think it may not be as reasonable to ask an organization to file certifications on behalf of all their volunteer attorneys. We recommend that some consideration of revisions to the proposed rule be considered to reflect these differences.

IV. Recovery of Attorneys' Fees and Costs

We also are concerned that the rule's section on fees is confusing. Proposed Rule 38(d)(2)(D) states:

> This rule does not preclude an approved legal services organization from receiving court-awarded attorneys' fees for representation provided by certified pro bono counsel, and shall not preclude certified pro bono counsel from receiving reimbursement for otherwise recoverable costs, but not including attorneys' fees, incurred in representing a pro bono client.

As written, the rule suggests that approved legal services organizations are permitted recovery of court-ordered attorneys' fees but are precluded from collecting attorneys' fees from the client. We request the proposed rule be revised to clarify this issue.

V. MCLE Requirements and Registration Fee

Current Rule 38(e)(5) exempts volunteers with approved legal services organizations from the Mandatory Continuing Legal Education ("MCLE") requirements of Rule 45. The proposed rule is silent on this exemption. Does it still apply? If so, it should be stated affirmatively. We note that the proposed rule specifically requires attorneys directly employed with the approved legal services organization to comply with the mandatory CLE requirements, Rule 38 (d)(2)((H)(iv). This issue should be clarified.

The proposed Rule 38(d)(2)(H)(i) has a new provision that a retired or inactive attorney certified under the rule:

> [S]hall not be required to pay an annual registration fee if the attorney has provided ten (10) hours of *pro bono* legal services under this rule within the prior twelve-month period. To be exempt from paying an annual registration fee, the attorney shall complete a dues statement provided by the State Bar of Arizona on or before February 1, identifying the approved legal services organization(s), as described in this rule, for which the attorney has volunteered in the prior twelve-moth period, and avowing that he or she has provided ten (10) hours of *pro bono* services during that period and remains qualified for such waiver for continuing certification as *pro bono* counsel under this rule.

We support this change because it encourages attorneys to volunteer with legal services organizations and to do so for at least ten hours each year. Legal services organizations have very limited resources to meet the legal needs of low-income Arizonans, and those organizations certified under Rule 38 will be able to rely on the work provided by otherwise retired or inactive attorney volunteers.

VI. Conclusion

We thank you for asking the Institute and SALA to provide comments to the draft petition. We hope you find our comments helpful. It may be that some restructuring of the rule would be helpful, but we will leave that to the committee. If you have any questions, please contact Brenda Muñoz Furnish at 602-525-34332 or bmfurnish@qwestoffice.net.