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03/09/2018

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: AF 11-0244

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 11-0244

IN RE RULES FOR ADMISSION TO BAR OF MONTANA

PETITION OF PAUL F. KIRGIS, ON BEHALF OF THE FACULTY OF  
THE BLEWETT SCHOOL OF LAW AT THE UNIVERSITY OF  
MONTANA, FOR AMENDMENT OF RULES FOR ADMISSION  
REGARDING LAW SCHOOL FACULTY

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PETITION

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Comes now Paul F. Kirgis, Dean of the Alexander Blewett III School of Law at the University of Montana, and respectfully petitions this Court for an amendment of the Rules for Admission to the Bar of Montana to facilitate the admission of law faculty.

I. BACKGROUND ON LAW FACULTY BAR ADMISSION

Under the current Rules for Admission to the Bar of Montana, faculty members at Montana's law school, the Blewett School of Law at the University of Montana, must either take the Montana Bar Exam or, if licensed in another state and meeting other requirements, seek admission on motion. Those two mechanisms for admission present significant obstacles, in terms of time and money, respectively. It has been the practice to allow faculty members to seek admission on motion on an *ad hoc* basis, and several faculty members who teach in law school clinics have availed themselves of that option. But that process has never been formalized. Because of these barriers to admission, both real and perceived, about a quarter of the School of Law's faculty members are not admitted to practice in Montana.

We believe that both the law school and the legal community in Montana would benefit from bringing the law school faculty into the Bar. The School of Law's mission includes an obligation to serve as the academic legal center for the State of Montana. Law faculty are frequently called upon to serve on commissions and committees, provide continuing legal education, and engage in other ways with the Bar membership. Faculty members who are members of the Bar are likely to be more engaged in those activities and better attuned to the issues facing Montana's legal community.

Further, faculty members can play an important role in promoting access to justice through pro bono work. This year, the School of Law has adopted a new Pro Bono Policy designed to increase involvement in pro bono work by both students and faculty. By taking on pro bono matters, faculty members not only contribute directly to the provision of legal services to those in need, they also serve as mentors and role models

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for the students who will become leaders in the State's legal community. Faculty who are not licensed in Montana are prevented from performing that function.

Recognizing the value of Bar membership for law school faculty, many states have adopted formal processes for the admission of faculty members. Several states in our region, including Colorado, South Dakota, and Oregon, have taken that approach. Their rules on law professor admissions are attached to this petition for reference. They all follow basically the same process. In a nutshell, they allow full-time faculty members who are members in good standing of another state bar to seek admission on motion based on certain certifications. In all cases, members admitted under these provisions are granted full rights of bar membership, but only for as long as they remain full-time faculty members. In Oregon and South Dakota, the fees are the same as for other attorneys admitted on motion (\$1050 for Oregon and \$450 for South Dakota); in Colorado, the fee for faculty members is reduced (\$500 rather than the \$1800 normally required for admission on motion).

## II. PROPOSED RULE AMENDMENT

This petition respectfully requests that the Montana Supreme Court consider an amendment to the Rules for Admission to the Bar of Montana to facilitate the admission of Montana's law faculty. The Rules already include a mechanism that could be modified to cover law school faculty members, through the admission on motion process. Admission on motion is a relatively straightforward method that law faculty members could use. But the \$2,500 fee renders Admission on motion impractical. Rule I(G)(5)(b) addresses the monetary deterrent for certain attorneys by waiving the fee for those employed by an "Access to Justice Organization," defined as a "Montana non-profit entity whose purpose is to support activities and programs that promote access to the Montana civil justice system." *See* M.R. Civ. P. 23(2).

Rule I(G)(5)(b) could be amended to add Montana's law faculty as a second category of attorneys eligible for the fee waiver. Such an amendment might take the following form:

(b) The Montana attorney application fee must be waived for an applicant for admission on motion who:

- (i) is employed by or has secured employment with an Access to Justice Organization as defined in M. R. Civ. P. 23(i);
- (ii) is employed full-time or has secured full-time employment as a dean or teacher of law at a law school located in Montana and approved by the Council of the Section of Legal Education and Admission to the Bar of the American Bar Association; or
- (iii) is seeking admission to emeritus status.

The applicant must, however, pay the State Bar fees for new admittees and fees and assessments for the Montana Law Seminar registration, the Office of Disciplinary Counsel, Lawyers' Fund, and annual attorney license, as provided in (a). If the admitted applicant ceases to be employed by the qualifying employer, no longer holds full-time status as a dean or teacher of law at the Montana law school, or transfers from emeritus to active status within two years of the fee

waiver, the admitted applicant shall notify the Bar Admissions Administrator and must either pay the waived fees or relinquish admission to the State Bar of Montana. An applicant admitted under Rule I(G)(5)(b)(ii) may not represent clients for personal remuneration; a law faculty member who seeks to represent clients for personal remuneration must first pay the waived fees.

An amendment along those lines would put law faculty in the same position as attorneys who practice for other non-profit legal organizations, including the requirements for character and fitness review and the payment of bar dues and other fees. It would also be consistent with the ad hoc method of admission used by certain faculty members in the past. And the limitation on practice for remuneration would ensure that the amendment does not create any inequities within the Bar.

### III. PRACTICAL CONSIDERATIONS

One concern that has been expressed about this proposal involves the logistics of monitoring law faculty activities to ensure faculty members admitted under this rule comply with its terms. Our faculty policies ensure that faculty members remain fully engaged in the work of the law school and report any outside consulting activities. These policies appear in the ABA Standards for Approval of Law Schools, our Law Faculty Handbook, and the University's Faculty Consulting Policy.

ABA Standard 402 requires us to carry out our program of legal instruction using "full-time faculty." Interpretation 402-2, provides that "[r]egularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under this standard. This presumption may be rebutted if the law school is able to demonstrate that the individual has a full-time commitment to teaching, research, and public service, is available to students, and is able to participate in the governance of the law school to the same extent expected of full-time faculty." Thus, under the ABA Standards, our faculty must devote substantially all their working time to law school activities.

We ensure compliance with that standard through our Faculty Workload Policy, contained in Chapter 16 of our Faculty Handbook. That policy requires faculty to amass a minimum of 20 "workload credits" through teaching and instruction in the School of Law, scholarship, Direct Professional Public Service, Law School Service, and administration. With each workload credit defined to equate to 75 hours, our faculty are obligated to devote substantially all their working time to law school activities. Faculty are obligated to submit detailed workload reports each year demonstrating their compliance with that policy. In practice, all full-time faculty exceed the minimum standard. Only a small number of faculty engage in any paid consulting or private practice, and the hours spent are minimal.

Finally, University policy bolsters the School of Law's workload policy by regulating faculty consulting, defined as "professional activity related to the faculty member's field or discipline, where a fee-for-service or equivalent relationship with a third party exists." Faculty Consulting Policy 101.5 allows faculty members to engage in consulting activity, but only if "the faculty member's primary obligations to the University are met first." We understand that to mean that faculty must meet their workload obligations under our Faculty Handbook. Further, Policy 101.5 requires faculty

members to disclose any consulting prior to engaging in it, so that we can track any consulting and ensure it does not interfere with the faculty member's law school responsibilities.

Given the policies and reporting requirements outlined above, we are confident that ensuring compliance with the limitations in the proposed rule will be a straightforward matter between the School of Law and the Bar.

We are grateful to the Court for its consideration of this request and welcome the opportunity to engage more closely with the bench and bar of Montana.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

(Signature) \_\_\_\_\_

*Paul F. Kirgis  
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# Appendix A

## Colorado Rule on Law Professor Admission

### **Rule 204.5. Law Professor Certification**

**(1) General Statement and Eligibility.** In its discretion, the Supreme Court may certify a law professor who has been admitted to practice law in another jurisdiction in the United States to practice law in Colorado if all of the following conditions are met:

(a) The attorney is a law school graduate who, as determined by the Attorney Regulation Counsel, Office of Admissions, is employed full-time as a dean or teacher of law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association located in Colorado;

(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(c) The attorney is not currently subject to an order of attorney discipline or the subject of a pending formal disciplinary or disability matter in any jurisdiction; and

(d) The attorney possesses the character and fitness required of all applicants for admission to the practice of law in Colorado as set forth in C.R.C.P. 208.

**(2) Filing Requirements.** An applicant under this rule shall submit an application for law professor certification. The applicant shall pay a fee in an amount fixed by the Supreme Court. The fee must be paid when the application is submitted. The application and fee shall be collected by the Office of Attorney Registration. The required application fee shall be made payable to the Clerk of the Supreme Court. The application shall include the following:

(a) A certification of employment by the law school; and

(b) A certificate of good standing from all courts and jurisdictions in which the attorney is admitted to practice.

**(3) Scope of Authority.** Except as provided in this rule, an attorney certified under this rule shall be entitled to all rights and privileges and subject to all duties, obligations, and responsibilities otherwise applicable to licensed Colorado lawyers for the period of authorized practice under this rule. The attorney may not act as counsel for a client until certified under this rule.

**(4) Discipline and Disability Jurisdiction.** An attorney certified under this rule is subject to the Colorado Rules of Professional Conduct; C.R.C.P. 251.1 et seq. (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in C.R.C.P. 251.6, the attorney may also be enjoined from further practice of law in Colorado.

**(5) Termination of Certification.** Certification under this rule shall automatically terminate when:

(a) The attorney no longer holds full-time status as a dean or teacher of law at the Colorado law school;

(b) The attorney is disciplinarily suspended or disbarred or placed on disability inactive status in any jurisdiction, court, or agency before which the attorney is admitted; or

(c) The attorney is suspended in any jurisdiction for failure to pay child support or failure to cooperate in a disciplinary matter.

The attorney admitted pursuant to this rule shall notify the Colorado Supreme Court Office of Attorney Registration of any change of status described in this section (5) within twenty-eight days of such change.

**(6) Required Action After Termination of Certification.** Upon the termination of certification pursuant to section (5) of this rule, the attorney, within twenty-eight days, shall:

(a) Notify in writing all clients in pending matters, and co-counsel and opposing counsel in pending litigation, of the termination of the attorney's authority to practice law pursuant to this rule;

(b) Decline any new representation that would require the attorney to be admitted to practice law in Colorado; and

(c) Take all other necessary steps to protect the interests of the attorney's clients.

(7) **Registration, Fees, and Continuing Legal Education.** An attorney certified under this rule shall be required to pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as the mandatory legal education requirements of C.R.C.P. 260.

(8) **Registration Number.** An attorney certified under this rule shall be assigned a registration number, which shall be used to identify that attorney's registration status in Colorado in accordance with applicable rules of procedure.

(9) **Subsequent Attorney Admission.** If an attorney certified under this rule is subsequently admitted to the practice of law in Colorado, that attorney's law professor certification shall be superseded by the Colorado license to practice law.

# **Appendix B**

## **Oregon Rule on Law Professor Admission**

## **ADMISSION OF LAW TEACHERS**

### **11.05 Admission of Law Teachers**

A person who is a regular, full-time member of the faculty of any law school in this state approved by the Court, who has graduated from a law school approved by the American Bar Association, earning a Juris Doctor Degree, and who has passed a bar examination substantially equivalent to the Oregon Bar Examination and been admitted to practice law in another state, federal territory or commonwealth or the District of Columbia, may be admitted to practice in this state by the following procedure:

- (1) After serving at least one year on the faculty of a law school in this state approved by the Court, such person may apply for a teacher's admission to practice by filing an application as prescribed in Rule 4.15.
- (2) The applicant shall pay the fees prescribed in Rule 4.10.
- (3) The applicant shall be investigated as prescribed in Rule 6.05 to 6.15.
- (4) If a majority of the non-recused members of the Board considers the applicant to be qualified as to the requisite moral character and fitness to practice law, the Board shall recommend the applicant to the Court for admission as a teacher-member.
- (5) If the Court considers the applicant qualified for a teacher's admission, it shall admit the applicant as a teacher-member. A teacher-member shall have all the rights and obligations of the Bar of Oregon except permanent admission.
- (6) In order to remain a teacher-member, such person must continue as a regular, full-time member of the faculty of a law school in this state approved by the Court.

# **Appendix C**

## **South Dakota Rule on Law Professor Admission**

If after admission to practice in this state, the applicant engages in professional misconduct as that term is defined by the rules governing the state bar of South Dakota, the Supreme Court may revoke his or her admission to practice. In addition, the matter may be referred to the disciplinary board of the state bar or other proper authority as is deemed necessary and desirable. The county in which the legal aid bureau or public defender agency is located shall be considered the county of the applicant's residence for the purpose of determining venue in any disciplinary action taken against him or her.

**16-16-7.5. Extent of practice--Compensation.** The admission of the nonresident attorney under §16-16-7.3 will allow the attorney to practice in the courts or administrative agencies of this state solely in the capacity as a member of the legal aid bureau or public defender agency by whom he or she is employed. The nonresident attorney shall not receive compensation from the person on whose behalf he or she renders services, but this shall not prevent the legal aid bureau or public defender agency from paying compensation to the attorney nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

**16-16-7.6.** An attorney licensed to practice law in another jurisdiction within the United States, while actually employed by the Unified Judicial System as its state court administrator, or while actually employed by the University of South Dakota law school as a full-time administrator or as a full-time faculty member, may be admitted to practice in this state upon submission of a sworn, written application to the Supreme Court of South Dakota containing the following:

- (1) The name and post office address of the applicant;
- (2) The jurisdictions in which the applicant is licensed to practice law;
- (3) A statement that the applicant is a member in good standing of the bar of the jurisdictions in which he or she is licensed;
- (4) A statement that the applicant has not been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five years;
- (5) A statement that the applicant has not been denied admission to the courts of any jurisdiction during the preceding five years; and
- (6) A statement that the applicant is familiar with the rules of the State Bar of South Dakota and will at all times abide by and comply with the same.

Such application will be accompanied by the following:

- (1) A certificate of admission to the bar in the jurisdictions in which the applicant is licensed to practice law;
- (2) A certificate from the proper courts therein that the applicant is a member in good standing.

A full-time administrator or faculty member other than the full-time dean shall also submit:

- (1) An affidavit of the dean of the law school that the applicant is a full-time administrator or faculty member of the University of South Dakota law school in good standing and that the dean recommends the applicant for admission to practice.

A full-time administrator includes the dean, librarian, associate or assistant deans, or other administrators holding academic appointment.

A full-time faculty member is one who during the academic year devotes substantially all working time to teaching and legal scholarship, participates in law school governance and service, and has no outside office or business activities, and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as scholar and teacher, are of service to the legal profession and the public generally, and do not interfere with one's responsibility as a faculty member. A full-time faculty member may hold a joint appointment with the University of South Dakota law school and another college or school within the University of South Dakota.

**16-16-7.7. Order of admission and duration.** If the Supreme Court shall find that the applicant is of good moral character and otherwise qualified to practice law, the court may make an order of admission to be effective upon the filing of the oath of attorney in the office of the clerk. Such admission under this section shall remain in effect until the occurrence of the earliest of the following events:

- (1) The announcement by the Board of Bar Examiners of this state that such applicant has passed such examination and the applicant's subsequent admission to practice under §16-16-17, et seq.; or
- (2) The termination of applicant's employment with the University of South Dakota law school or a change in the status of applicant's employment from full-time administrator or full-time faculty member to some other status; provided however, that the membership of such member admitted pursuant to SDCL 16-16-7.6 will not terminate when the member's employment at the University of South Dakota School of Law terminates if the member has served as a full-time administrator or full-time member of that faculty and been admitted to the bar in South Dakota for a minimum of five of the seven years immediately preceding termination of the employment; or
- (3) The termination of applicant's employment with the Unified Judicial System or a change in status of applicant's employment from state court administrator to some other status; or
- (4) The termination by the Supreme Court of the applicant's admission under this section.

It shall be the duty of the individual to inform the Supreme Court immediately of the termination or change in status of applicant's employment.

**16-16-7.8. Submission to disciplinary board jurisdiction - Revocation of admission or referral to board for misconduct – Venue.** Under §16-16-7.6, the filing of an application requesting admission by the state court administrator or by a law school full-time administrator or faculty member shall constitute his or her submission to the jurisdiction of the disciplinary board of the state bar.

If, after admission to practice in this state, the applicant engages in professional misconduct as that term is defined by the rules governing the state bar of South Dakota, the Supreme Court may revoke his or her admission to practice. In addition, the matter may be referred to the disciplinary board of the state bar or other proper authority as is deemed necessary and desirable. Clay County shall be considered the county of the full-time administrator or faculty member's residence for the purpose of determining venue in any disciplinary action taken against him or her. Hughes County shall be considered the county of the state court administrator's residence for the purpose of determining venue in any disciplinary action taken against him or her.

**16-16-8. Application for admission on examination.** Application for admission on examination shall be filed with the Secretary of the Board of Bar Examiners at such time and in such form as the Board shall prescribe. The failure of an applicant to furnish information or answer truthfully interrogatories of the Board pertinent to his application may result in denial of the application.

**16-16-9. Time and place of examination.** The Board of Bar Examiners shall conduct examinations at such times and places as the Board shall by rule determine.

**16-16-10. Subjects covered by examination—Public notice.** The subjects upon which applicants shall be examined shall be such as the Board of Bar Examiners deems necessary to prepare properly for the practice of law in this state, including the subjects of legal ethics and Indian Law. The Board shall make public such subjects, giving full and ample public notice of any change or addition thereto and written notice to the dean of the law school, University of South Dakota.

**16-16-11. Re-examination after three failures prohibited.** An applicant who fails three times to pass the bar examination in any jurisdiction or combination of jurisdictions, may not be permitted to take another examination in South Dakota except by permission of the Supreme Court upon a showing that the reasons for previous failures no longer exist and there is a reasonable likelihood the applicant will pass the examination if allowed to take it.

**16-16-12.1. Admission without examination. Eligibility by practice.** An applicant may be eligible for admission without examination if the applicant:

- a. meets the requirements of SDCL 16-16-2;