

Hulm, Petra

From: Tabor, Adam Nolan <atabor@orrick.com>
Sent: Thursday, December 29, 2016 12:24 PM
To: (SUP) Clerk of Court Office
Cc: Miller, Penny
Subject: Comment Letter re Notice of Comment - Supreme Court No. 20160436
Attachments: 12.29.2016 - Comment Letter re Emergency Petition - Misc Attorneys an Firms across country.pdf

Good morning, Ms. Miller,


Thank you for your assistance from last Thursday and the good, helpful conversation we had.

Please find attached a comment letter of a coalition of attorneys from various parts of the country, not officially affiliated with one another but having a common interest in providing (hopefully helpful) comments to the Court on the emergency petition to temporarily relax the temporary admission rules. The letter supports the relaxation, but focuses mainly on ideas and suggestions for balancing the issues at hand with granting the relief the emergency petition requests.

After your office files this comment letter, could I please receive a file-stamped version back by email?

Sincerely,

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December 29, 2016

Hon. Gerald W. VandeWalle
Chief Justice, Supreme Court
Judicial Wing, First Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Dear Chief Justice VandeWalle:

As a coalition of law firms and attorneys from across the United States, we urge the Court to grant the December 14, 2016 petition titled “In the Matter of a Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota.” We hope that the Court finds the following comments valuable as it considers that petition.

As an initial matter, we have reviewed the comments submitted by the State Bar Association of North Dakota (“SBAND”), submitted December 22, 2016, and we understand some of its concerns. For example, we consider it entirely reasonable, should the Court grant the pending petition, to require any out-of-state attorney to attest to their good conduct in the state or states where they are licensed to practice law. We also consider it entirely reasonable that out-of-state attorneys should be subject to North Dakota’s attorney discipline rules. These two items, which SBAND has already flagged for the Court’s consideration, go to the core of protecting the public, including the Dakota Access Pipeline (“DAPL”) protestor-arrestees’ own rights – after all, it would run counter to the petition’s aims of securing competent counsel if these safeguards were not in place.

However, in light of the extraordinary circumstances and strain on public defense resources associated with DAPL-related arrests and charges (disproportionately small resources relative to the extra funding that law enforcement received to make the arrests and file charges in the first instance), the requirement that out-of-state attorneys associate with in-state attorneys seems an equally disproportionate burden on the rights of the DAPL arrestees’ right to counsel. The petition’s further reasoning on this point should be well taken, and we need not repeat it here. Rather, consistent with SBAND’s recommendation that any relaxation of this requirement “be done in light of the interests of the protection of those being represented,” we recommend the following requirements for out-of-state attorneys, in lieu of associating with in-state attorneys:

1. Require all out-of-state attorneys to swear or affirm that they have read and understand the North Dakota Rules of (1) Professional Conduct; (2) Administrative Rules; (3) Criminal Procedure; (4) Evidence; (5) Local Rules; (6) Rules of Court; (7) Appellate Procedure; and any general or standing orders of any judge or court before which the out-of-state attorney will appear.
2. To mitigate financial barriers to representation but maintain the protective goals of North Dakota’s *pro hac vice* appearance rules, waive the required *pro hac vice* fee and replace it with a one-time, refundable \$500 surety bond. The bond should be allowed to be payable

from the out-of-state attorney directly or any surety authorized under N.D. Cent. Code Ch. 6-05. Such bond should be refundable only if the out-of-state attorney represents any DAPL arrestee absent meritorious grievances resulting in attorney discipline arising out of the representation.

3. For out-of-state attorneys who would represent any DAPL arrestee on a *pro bono* basis, eliminate altogether the *pro hac vice* fee or suggested bond alternative from item 2 above, provided that such an attorney submits evidence of satisfactory risk management procedures and liability insurance to cover any misconduct on the part of an out-of-state attorney's representation of a DAPL arrestee.
4. Unless justice otherwise requires, such as a criminal defendant's need for continuity of counsel through any appeal, the Court could impose a sunset limit on any temporary relaxation of the *pro hac vice* requirements. Specifically, any out-of-state attorney's ability to practice in North Dakota under a temporary relaxation of the rules could be limited to 18 months from the time representation commences.¹

Finally, we understand that SBAND expresses no opinion as to whether arrests resulting from DAPL protests are an emergency affecting the justice system resulting from a "major disaster" under Admission to Practice R. 3.2. We do not understand, however, why SBAND expressed no opinion on this point.

The North Dakota Supreme Court has promulgated a comprehensive set of rules for all aspects of practice before and administration of the State's judiciary. To read those rules in isolation from one another, particularly parsing them down to the level of two-word phrases, renders the judiciary's administration of justice an unjust, siloed endeavor. In other words, particularly where the Admission to Practice Rules contemplate a judicial emergency, it is entirely sensible to read those rules in context with, as relevant here, the North Dakota Rules of Criminal Procedure. Specifically, the latter provides that "[t]hese rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." N.D.R.Crim.P. 2.

Here, given the extraordinary circumstances that the North Dakota justice system faces, this Court ought not to read the Admission to Practice Rules, particularly the *pro hac vice* provisions, in a crabbed fashion. Considering this unique situation a "major disaster," at least temporarily and for the state's justice system as well as the criminal defendants currently without counsel, is indeed an understatement. However, as the institution charged and empowered with safeguarding individual rights, this Court can mitigate the effects of this major disaster through a measured relaxation of its admission to practice rules.

¹ In the natural disaster context (as opposed to "major disaster," as Admission to Practice R. 3.2 distinguishes) a similar approach is not without precedent. The Supreme Court of Louisiana issued an emergency temporary rule for certain civil legal service relief in the wake of Hurricanes Katrina and Rita. *See* https://www.lasc.org/katrina_orders/Order-ProBono.pdf (last accessed December 29, 2016).

We appreciate your consideration of our comments.

Sincerely,

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