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## Comment in Support of Proposal 2018-006 Immigration status of bar applicants (Rule 15-103(B)(7))

Verónica C. Gonzales-Zamora  
*University of New Mexico - School of Law*

New Mexico Hispanic Bar Association, Board of Directors

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New Mexico Hispanic  
Bar Association  
c/o State Bar of New Mexico  
P.O. Box 92860  
Albuquerque, NM 87199

[nmhispanicbar@gmail.com](mailto:nmhispanicbar@gmail.com)

<https://www.facebook.com/NewMexicoHispanicBar/>

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Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, NM 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)

To Whom It May Concern:

We are the Board of Directors for the New Mexico Hispanic Bar Association (NMHBA), an organization of approximately 300 attorneys and students throughout New Mexico. Our vision is to promote a legacy of equality and empowerment for Hispanics in education, the community, and the legal profession throughout the state of New Mexico.

We write in strong support of Proposal 2018-006, proposing to amend Rule 15-103(B)(7) NMRA governing admission to the State Bar of New Mexico without regard to lawful presence.

#### **I. Increased admissions, particularly from underrepresented groups such as undocumented individuals, can improve access to justice.**

Access to justice is of paramount concern and a deep-rooted value of the legal profession and of New Mexico Courts. For example, the New Mexico Supreme Court established The NM Commission on Access to Justice, an "independent, statewide body dedicated to expanding and improving civil legal assistance in New Mexico." *See Supreme Court Order No. 04-8300 Establishing the NM Commission on Access to Justice* (2004)<sup>1</sup>. There is no question that access to justice by immigrants is limited. *See ACLU's Written Statement Submitted to the Civil Society Consultation for the Universal Periodic Review of the United States of America Regarding Access to Justice in the U.S. Immigration System* (2014) ("Approximately 84% of immigration detainees are unrepresented in immigration court." (citation omitted)).<sup>2</sup> One reason for this may be the lack of diversity in the legal profession, generally. *See Presidential Initiative Comm'n on Diversity, ABA Diversity in the Legal Profession: The Next Steps 9-24* (2010) (reporting that the legal profession remains less diverse than most other professions and that, in 2000, the legal

<sup>1</sup> Available at <https://accesstojustice.nmcourts.gov/uploads/files/2004SupCtOrder.pdf>

<sup>2</sup> Available at <https://www.aclu.org/files/assets/140325%20UPR%20Access%20to%20Justice%20Final.pdf>

profession was still about 90% Caucasian without much progress since).<sup>3</sup> Increasing the number of lawyers who are immigrants by approving proposed revisions to Rule 15-103(B)(7) can lead to increased access to justice by immigrants.

The NMHBA's long-standing mission is to increase diversity in legal education and the legal profession. When the legal profession mirrors the makeup of our community at-large, justice is more accessible. This is why, in part, the NMHBA programs and financial support awards (such as book and bar scholarships, law student mentorship, and summer law camp) do not take into account an applicant's immigration status.

The Supreme Court, as the gatekeeper of the State Bar, is also inherently the gatekeeper of the diversity of the State Bar. Because undocumented individuals are presently underrepresented in the State Bar due to barriers to admission, undocumented individuals seeking counsel also experience an additional, though somewhat preventable, barrier to accessing justice.

State bar associations, like NMHBA, and state courts, are not in the business of enforcing U.S. immigration laws. We recognize that applicants who are not lawfully present will still have to contend with federal immigration work restrictions and they will still be subject to removal whether or not they are granted a license to practice law. Nevertheless, at minimum, allowing admission will support the legal community's obligation to develop and support lawyers inclined to serve populations that have traditionally been underserved, including immigrants.

## **II. Consideration of undocumented, but otherwise qualified, individuals for admission to the State Bar should be based on individual circumstances rather than fundamental misconceptions.**

First, we take issue with the fundamental misconception that a "path to citizenship" is available to any person or is practically achievable by any person. A path to citizenship is simply not available for millions of people, such as those individuals eligible for Deferred Action for Childhood Arrival (DACA). *See Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* from Janet Napolitano, Sec'y of the Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., *et al.* (2012).<sup>4</sup> In some cases, a path to citizenship may simply not be practical where, for example, an unmarried, adult child of a legal permanent resident from Mexico has an average wait time of 17 years. *See Plyler Students at Work: The Case for Granting Law Licenses to Undocumented Immigrants*, 21 Wash. & Lee J. Civil Rts. & Soc Just 567, 571- 72 (2015).<sup>5</sup>

Second, we also reject the faulty assumptions that undocumented individuals are inherently morally deficient and cannot, for example, handle client finances, be an "officer of the court" or comply with an oath to uphold the state laws and Constitution. This stereotype cuts against the "facially neutral" origin of bar admission criteria. *See*

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<sup>3</sup> Available at <http://mldc.whs.mil/download/documents/Readings/Next%20Steps%20Final-Virtual%20Accessible%20042010.pdf>

<sup>4</sup> Available at [http://www.dhs.gov/xlibrary/assets/s\\_1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf](http://www.dhs.gov/xlibrary/assets/s_1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf)

<sup>5</sup> Available at <https://scholarlycommons.law.wlu.edu/crsj/vol21/iss2/11/>

*Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 Akron L. Rev. 255, 255-56 (2007) (discussing the early 19th century origins of the good moral character standard for bar admission as a “facially neutral” means of excluding undesirable individuals from practicing law).<sup>6</sup> There is no connection between lawful presence and one’s ability to comply with a duty of candor to a court. See, e.g., Raffaelli v. Committee Of Bar Examiner, 7 Cal. 3d 288, 294 -301 (Cal. 1972) (ruling that citizenship requirement for state bar admission violated equal protection and rejecting argument that a lawyer, as an “officer of the court”, must be a citizen because there was “no demonstrable nexus between that status and a requirement that every lawyer be a United States citizen”).

The assumption also disregards important individual circumstances that are relevant to a determination of moral fitness. For instance, one might argue that choosing not to self-deport in order to comply with the law means an undocumented immigrant is unable to satisfy the good moral character requirement. See In re Haukebo, 352 N.W.2d 752, 754 (Minn. 1984) (citing Application of Gimbel, 533 P.2d 810 (Or. 1975)). However, “[r]eformation from past immoral acts can be shown by a subsequent history of good behavior.” Id. See also ABA Sec. Legal Educ. and Admissions to Bar & Nat’l Conf. of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements*, at III.15. (2017) (unlawful conduct is considered with additional factors such as the applicant’s age at the time of the conduct; recency of the conduct; evidence of rehabilitation; the applicant’s positive social contributions since the conduct; etc.).<sup>7</sup>

Individual circumstances are important because a person can still be fit and capable of practicing law, notwithstanding unlawful presence in the United States. See, generally, Schware v. Board of Bar Exam. of N.M., 353 U.S. 232 (1957) (overturning denial of bar application on the basis of use of aliases, member of communist party, and criminal conduct because a “any qualification [such as good moral character or proficiency in its law, before it admits an applicant to the bar], must have a rational connection with the applicant’s fitness or capacity to practice law.”); In re Park, 484 P.2d 690 (Alaska 1971) (invalidating citizenship requirement for admission to the Alaska State Bar, because it was unrelated to an attorney’s fitness and competency to practice law and rejecting concerns over loyalty and constitutional allegiance, disapproving of the argument that only natural-born citizens could demonstrate “an appreciation of the spirit of American institutions,” required to practice law.). In any event, because admission to the State Bar will subject undocumented individuals to the jurisdiction of the New Mexico courts and the Disciplinary Board, if necessary, admission will *enhance* protection of the public.

Third, we do not agree with the proposition that undocumented individuals will consume resources that ought to be preserved for citizens, such as financial aid. The opposite is true – financial aid is not available. See 8 U.S.C. Section 1621(a) – (d) (2012) (prohibiting state from providing public benefits to “illegal aliens and nonimmigrants”). Rather, evidence suggests that immigrants “underutilize public services, while contributing their labor to the local economy and tax money to the state.” Plyer v. Doe, 457 U.S. 202, 228- 230 (1982) (holding that the Texas statute could not deny immigrant

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<sup>6</sup> Available at <https://www.uakron.edu/dotAsset/727978.pdf>

<sup>7</sup> Available at

[https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/ComprehensiveGuidetoBarAdmissions/2017\\_comp\\_guide\\_web.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf)

children free public education). “[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.” *Id.* at 221. See also *In re Griffiths*, 413 U.S. 717, 722 (1973) (because noncitizens “pay taxes, support the economy... and contribute in myriad other ways to our society,” it is proper for states to “bear a heavy burden” when depriving these individuals of opportunities for employment when considering admission to the bar).

Legal skills and values are also tools that can lead to economically productive lives for undocumented individuals who will be subject to a character examination and the jurisdiction of the Disciplinary Board, like all other applicants. On the other hand, a blanket exclusion from admission based on citizenship, which disregards individual circumstances and immigration policies, is unfair and deprives New Mexico of the contributions of skilled professionals.

### **III. Equal access to the legal profession, and consequently equal access to justice, hinges on admission to the State Bar without regard to status.**

Access to the legal profession is not meaningful if a person is permitted to go through every arduous step, except the final and most important step of gaining admission to the bar and an ability to practice law. See *ABA 2017-2018 Standards and Rules of Procedure for Approval of Law Schools*, Standard 206(a) at 12 (law schools “shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and *entry into the profession* by members of underrepresented groups, particularly racial and ethnic minorities.” (emphasis added))<sup>8</sup> ; See *In re Griffiths*, 413 U.S. 717 (1973) (state bar examiners must admit undocumented individuals to sit for the bar exam). Meaningful access requires entry into the legal profession via admission to the State Bar.

The issue of admission to the State Bar with or without consideration of lawful presence is not simply an access to professional practice issue, but is also a broader issue entangled in a complex, nationwide debate about immigration reform. Subjecting law applicants, law students, and bar exam takers to the constant vacillation of federal politics, rather than fundamental legal values like equal access, undermines the state and federal commitment to equal protections for all. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973) (holding that conditioning eligibility to sit for bar exam on U.S. citizenship violated equal protection of laws); *Raffaelli v. Committee of Bar Examiner*, 7 Cal. 3d 288, 294 - 301 (Cal. 1972) (ruling that a citizenship requirement for state bar admission violated equal protection clause of the Fourteenth Amendment).

In the words of the New Mexico Supreme Court, “equal justice under law is not merely a caption on the façade of the Supreme Court building; it is fundamental that justice should be available....” *Supreme Court Order No. 04-8300 Establishing the NM Commission on Access to Justice* (2004). For the above reasons, we highly encourage approval of the proposed revisions to Rule 15-103(B)(7) NMRA.

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<sup>8</sup> Available at [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017\\_2018\\_aba\\_standards\\_rules\\_approval\\_law\\_schools\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf)

Sincerely,

The Board of Directors for the New Mexico Hispanic Bar Association, and the following individuals in support:

*Verónica Gonzales-Zamora, Esq.*

*Matthew Zamora, Esq.*

*Damian Lara, Esq.*

*Amber Macias-Mayo, Esq.*

*Larissa Lozano, Esq.*

*Miguel Archuleta, Esq.*

*Mary Torres, Esq.*

*Jazmine Ruiz, Esq.*

*Jessica Terrazas, Esq.*

*Mabel Arellanes, Esq.*

*Robert Sanchez, Esq.*

*Ashlee Wright, Esq.*

*Darren Cordova, Esq.*

*Dynette Cordova, Esq.*

*Devon Moody, Esq.*

*Denise Chanez, Esq.*

*Zachary Quintero (J.D. Candidate)*

*Robert Desiderio, Esq.*

*Quiana Salazar-King, Esq.*

*Jorge Alvarado, Esq.*

*Jody Neal-Post, Esq.*