APPLICATION FOR LEAVE & DECLARATION OF JOSEPH ROBERT GIANNINI, ESQ. TO FILE LAWSUIT

I, JOSEPH ROBERT GIANNINI, have personal information, and am competent to testify, and submit this Declaration under penalty of perjury, to obtain permission for leave to appear as counsel for the National Association for the Advancement of Multijurisdiction Practice, and to amend the Complaint to add it back as a plaintiff for the reasons that follow.

STANDARD OF REVIEW — INDEPENDENT & DE NOVO

1. Plaintiffs submit this Court has a duty to "conduct an independent examination of the record to ensure that the district court's ruling does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). When the district court upholds a restriction on speech, we conduct an independent de novo examination of the facts. *See Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 n. 2 (9th Cir.1996). Thus, it appears this Honorable Court has an independent de novo duty to conduct an examination of the alleged facts in all of these coordinated First Amendment cases.

INTRODUCTION TO THE MOST DESPISED LAWYER IN CALIFORNIA

2. Defendants have argued that I am not competent as an attorney because I have not passed the California bar exam for experienced attorneys, implying that I have no right to challenge California State and United States District Court bar admission rules that categorically disqualify *general* bar admission privileges to members of the bar from 49 States. Attached is a copy of Multistate Bar Exam score of 151 from 1983 when I was first admitted, which at the time was a top ten percent score in the national distribution.

3. Attached also are copies of medals I have received for meritorious service and heroism in combat as a representative of the United States of America. When

black Americans came back after serving in World War II they were still treated as second class Americans. Members of the bar who serve America in combat are still treated as second class citizens as they are denied reciprocal licensing in the United States District Courts based on state law.

4. This Local Rule policy has been a traumatic stab in the back to me because the state didn't send me to Vietnam. The state didn't pay me anything to go college and law school on the GI Bill. I served with Americans from all 50 states.

5. This Local Rule policy has further traumatized me, much like being exiled from your own country, as I served as an agent for the Department of the Treasury in the United States Federal Building in downtown Philadelphia. For six years I either walked across or ate lunch at the courtyard in Independence Hall, across the street from the Federal Building. I could not help but think while walking across Independence Hall that I was literally waking in the footsteps of Ben Franklin, Hamilton, Madison and representatives of all 13 colonies; that I was looking into the same room they met and formed our country; that I was the beneficiary of their legacy; that I was a red-blooded down to the bone American and proud of it.

4. Also attached is a copy of Vietnam Veterans Memorial for Joe Allen Read. See http://thewall-usa.com/guest.asp?recid=42677

5. My tribute to him states the following:

"I served with Joe Reed and knew him well. We arrived at the 116th Assault Helicopter Company (Stingers)[1] the same day. He taught me how to clean a machine gun on that very first day. It was just him and I. We talked a lot. Joe was born on September 12 and I was born on September 13. We are related

[1] I forgot that in the 116th the radio call sign for the gunships was "Stingers" and "Hornets" was the radio call sign for the ships carrying troops. I crewed the gunships. Joe Read crewed the troop carrying ships. These aircraft likewise had different pilots and armament systems. We generally flew with the same team every day. Our lives were in each other's hands. The same as today.

in some mysterious way. Joe was an extremely hard worker. He used to take other soldier's KP for $35 because he wanted to save the money to get married. I remember him vividly getting mail from his fiancé every day. I was there the day he was killed and remember them coming in and packing his belongings. I had to try not to think about it and bury it to survive, but I have always felt the need to somehow contact his friends and family, and express my condolences."

6. What my tribute doesn't say is something that has haunted me and led me to try to make a difference for other Veterans who like me have been treated as lepers and non-citizens in America. Joe Read and I were like mirror images of each other. Joe Read asked me to trade places with him the day he was killed. I was assigned KP, which was probably the worst job anybody there could have had. I said no because I knew every day could be my last. I didn't want to take any chances. He was hit by a mortar round while untying the main rotor. That would have been me. I know I am lucky and extremely fortunate just to be alive. It was then that I decided that I would try to do something beneficial with my life.

7. For 25 years now, I have been the most despised lawyer in California for speaking my truth, for trying to make a difference.

APPLICATION FOR ADMISSION IN TH IS CASE 11-5046 DWM & AND THE COORDINATED CASES

8. I am a member of the bar of the Northern District of California. I am and have been involved in the National Association for the Advancement of Multijurisdiction Practice as a founding director. This has never been a secret. The NAAMJP is a public service corporation in good standing. It has attorneys as members licensed throughout the United States who have been injured by archaic licensing rules. A typical member's comment is: "I feel I cannot move out of the State of Maryland because *I am held prisoner by the bar admissions rules*." (Emphasis added) It is the freedom from these chains the Plaintiffs in these

coordinated cases seek. It is the type of blessing and freedom our more perfect Union was intended to secure. It is the freedom to engage in interstate travel; the freedom to advocate, associate, and to petition the government for the redress of grievances; it is the privilege and immunity to not be deprived of our liberties and property rights without due process.

9. I am and also have been involved in raising similar claims that are now pending in the Northern District of California. I have never pretended that I was not involved. These pending cases, as this Honorable Court well knows, include *Blye v. California Supreme Court*, 11-5046 DWM, *Garcia v. California Supreme Court*, 12-4504 DWM and *Giannini v. U.S. District Court* 12-4280 DWM (seeking to invalidate the 1999 prefiling injunction based on a change in facts and law over the last 14 years). It is and was my belief and my attorney that under the 1999 prefiling order I did *not* need to get permission to file *Giannini v. U.S. District Court* because the prefiling order by its terms is limited to enjoin my freedom to challenge California State bar admission rules. It is also and was my belief and that of my counsel that under the 1999 prefiling order, I did *not* need to get permission to file the other cases now pending before the Court because I am not a party or the attorney of record. I believe I have followed the letter of the prefiling order, notwithstanding the fact I also believe it is a prior restraint and presumptively unconstitutional. Had the facts and law presented today been available 14 years ago, I believe the prefiling order would have never been entered.

LEAVE TO ALLOW THE NAAMJP AS A PARTY

10. The NAAMJP voluntarily dismissed itself without prejudice as a party *Blye v. California Supreme Court*, 11-5046 DWM, not because we were trying to disrespect or evade the 1999 prefiling order, as this Honorable Court has suggested, but because the Plaintiffs wanted to streamline and narrow the issues. They didn't want the sins visited on the father to be visited on them.

11. "Feelings influence our causal attribution of other's behavior. This is what psychologists call the "fundamental attribution error." They believe that people act as they do because of the type of person they are internally and not because they are reacting to the situation they may happen to be in." Dalton Kehoe, *Effective Communication Skills* p. 103 (Teaching Company 2011).

12. This Court attributed my standing up in the back of the courtroom to an evil motive. I have a 30% hearing deficit from being around loud noises. This Court is familiar with how this happens. I too remember being once told to wear earplugs. In hindsight, the problem was nobody wore them, they were not available, and we wore helmets, and you needed to be able to hear what was said on the airwaves. We were in radio communication with other helicopters in the air and the infantry on the ground. Earplugs got in the way.

13. In light of fundamental attribution error and defense counsel's arguments that the letter of the 1999 prefiling order should be modified and enlarged 14 years later to cover the *spirit* behind this 1999 prefiling prior restraint; that any attorney or corporation the undersigned associates with is contaminated and is also enjoined by this 1999 prior restraint; and in light of *Citizens United*, (holding corporations have fundamental rights and they do not need to get permission from the government to exercise their First Amendment rights); and in light of the law leave to amend should be freely granted; and the State defendants did *not* file a Motion to Dismiss to either the Amended or the Second Amended Complaint; and the Federal defendants did not file a Motion to Dismiss in accordance with the Federal Rules of Civil Procedure, (they simply added in and filed their Motion to Dismiss in the five page supplemental brief this Court provided for them in addressing the State defendants Motion to Dismiss), my client the NAAMJP requests leave to be added back as a Plaintiff in this case.

14. Defendants have *not* been prejudiced one iota by the NAAMJP voluntarily dismissing itself. Their Motion to Dismiss does *not* address the

amended complaints. On the other hand, the NAAMJP's First Amendment rights are presently at issue in light of the Defendants seeking to restrain the NAAMJP's First Amendment rights. There is also no prejudice because Plaintiffs have filed Motions for Summary Judgment, which this Honorable Court has not read or considered.

15. In *US v. Boothe*, (D. Montana 2012)(CR 12-8-M-DWM, MJ 12-1-M-JCL unpublished), a man was convicted of disrupting the performance of official duties by Government employees in the United States District Court in Montana. The litigant was fined, placed on probation for a year, and restrained from "enter[ing] any United States District Court facility in the District of Montana without permission from the United States District Judge who presides over the division in which a particular court facility is located." Mr. Boothe appealed the condition of his sentence that restrained him from entering the District Court without prior permission, arguing it impermissibly infringes on his First Amendment rights. This Honorable Court held that under the First Amendment this sentencing condition was not overly broad because he could enter the courthouse and attend court proceedings with the presiding district judge's permission, and the condition is only in place for one year.

16. In these coordinated First Amendment cases, however, at issue is not the First Amendment and sentencing condition of one year for a litigant convicted of disrupting the Courtroom, but instead the First Amendment and the sentencing condition restraining speech by a member of the bar levied in perpetuity. A 1999 sentencing condition counsel for the defendants asks this Honorable Court to extrapolate onto a dozen named plaintiffs, and a corporation that has hundreds of members. An idea that the sentencing Judge had herself recommended while serving in private practice in association with 36 of California's best and brightest lawyers and judges. *See* Plaintiff's Motion for Summary Judgment (Doc. 63.4).

THE 1999 PREFILING ORDER

17. The Hon. Susan Y. Illston granted the California Supreme Court's Motion to enter a prefiling Order enjoining declarant from filing future suits in the United States District Court for the Northern District of California regarding admission to the California State Bar and the regulation of the practice of law in California without first obtaining leave from the Chief Judge of the court. *See Paciulan v. George*, 38 F.Supp.2d 1128, 1130, 1147 (N.D.Cal. 1999). This case solely challenged the State of California's *pro hac vice* bar admission rule. It did not challenge any federal court bar admission rules.

18. Judge Illston's decision, however, in *Paciulan v. George*, "recogn[ized] that confusion had arisen due to the absence of a separate judgment, the Court issued a separate judgment on the Court's July 22, 1997 order of dismissal. In the November 5 order, the Court made clear to all parties that the judgment was final and appealable." *Id.* at Judge Illston further acknowledged that the Plaintiffs in *McKenzie v. George* did not receive that final judgment until well after the time for appeal had expired. *Ibid.*

19. Judge Illston further in sentencing the undersigned to lifetime prior restraint rejected my lawyer's arguments, to wit:

> It is Russell's opinion that defendants' motions for sanctions are "aimed to censor and retaliate" against Giannini, and that this lawsuit is not frivolous. Russell states that it is his belief that the Ninth Circuit has never adjudicated whether Rule 983 is lawful. Russell states it is his belief that the instant case is "necessary and not frivolous" for three reasons: (1) "changes in the law" since the Court decided *McKenzie v. George*; (2) the plaintiffs in that case "were denied their full and fair opportunity to appeal as a matter of right" because they did not receive the Court's November 5, 1997 order and judgment; and (3) this Court did not address a number of arguments and case law presented by the plaintiffs in *McKenzie v. George* in the plaintiffs' numerous motions to vacate the July 22, 1997 order. *Id.* at 1133

20. The Ninth Circuit affirmed in *Paciulan v. George*, 229 F.3d 1226 (9th Cir. 2000), holding the undersigned's challenge "contending that their suit advances genuine, nonfrivolous arguments and that the sanction amounts to censorship, [holding] because the issue was not raised in Appellants' opening brief and appellees had no opportunity to counter Appellants' argument, the issue has been waived." *Id.* at 1220 In other words, Mr. Lee's representation to this Honorable Court that the undersigned voluntarily waived his right to appeal the prefiling order is misleading.

21. The Ninth Circuit acknowledged, "Appellants' brief does mention the sanction at one point, declaring, "For the trial Court to . . . enter a Rule 11 sanction and gag order in a published Order wherein she treats Appellants' counsel as her whipping boy — is an unconscionable debauchery. However, Appellants argued for reversal of the sanctions only in their reply." *Ibid.* footnote 4.

22. Judge Illston's Order states,

> "Joseph R. Giannini is hereby ENJOINED from filing any further actions, either as an attorney or a party, in the United States District Court for the Northern District of California, regarding admission to and the regulation of the practice of law in the State of California without first obtaining leave of the Chief Judge of this court. If Giannini wishes to file further actions regarding admission to and the regulation of practice of law in California, Giannini must attach a copy of this order to his application for leave to file such actions and supply a declaration supporting the application stating: (1) that the matters asserted in the new action have not previously been raised by him, as an attorney or a party, and disposed of on the merits by any court, state or federal; (2) that the claims are not frivolous or made in bad faith; and (3) that Giannini has conducted a reasonable investigation of the facts and certifies that they are accurate. Failure to comply with any of these

conditions shall be sufficient grounds to deny the application or dismiss the action, and any violation of this injunction may be treated as contempt of court." *Id.* at 1147.

23. In conformity with Judge ILLSTON's Order, I am herein attaching a copy of that Prefiling Order.

24. Before addressing whether this Court should grant leave today, in light of the 1999 prefiling Order, this Court is requested to consider subsequent Ninth Circuit precedent, as well as this Court's decision as noted above in *US v. Boothe*.

25. In *Molski v. Evergreen Dynasty Corp.*, 521 F. 3d 1215 (9th Cir. 2008), nine members of the Ninth Circuit declared "Pre-filing orders infringe the fundamental right to access the courts." *Id.* at 1216 "The First Amendment right to "petition the Government for a redress of grievances" — which includes the filing of lawsuits — is "one of `the most precious of the liberties safeguarded by the Bill of Rights.'" *Ibid.* citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002)

26. In *Molski* nine members of the Ninth Circuit further declared prefiling Orders also implicate Due Process: "There are ample avenues for addressing any concerns raised by this case — avenues that do not involve one judge, acting alone, imposing a pre-filing order that covers an entire district." *Id.* at 1219

27. It cannot be doubted that Chief Judge Kozinski knows what he is talking about despite Mr. Lee's argument that this Court should disregard Judge Kozinski's conclusions and *Molski*. Chief Judge Kozinski states, "The lawyers and judges of the Central District don't have to put up with this kind of tyranny by one judge acting entirely on his own." *Id.* at 1221-22. He squarely avers there was a Due Process violation, no cross-examination, and no record on which to make a finding: "Draconian orders such as this one will not be the handiwork of a single judge, subject only to cursory supervision by the court of appeals, but a shared responsibility of the court's judges." *Ibid.*

28. Judge Kozinski further declares the District Court should adopt a new local rule or general order that should be applied *retroactively* to Molski's case.

29. The undersigned in *Giannini v. U.S. District Court* has plainly and unambiguously presented general First Amendment and Due Process constitutional challenges to life-time sentencing orders echoed by nine members of the Ninth Circuit. Plaintiff is not seeking retroactive relief. Plaintiff is seeking prospective relief.

30. This Honorable Court pondered and raised many questions at the oral argument that Mr. Lee was unable to answer. Mr. Lee was *not* able to advise the Court on how to obtain an appealable Order. The undersigned avers that his Motion for Summary Judgment (Doc. 17) which this Court did not hear argument on, and the Supplemental Brief (Doc. 26) that this Court denied leave to file, directly answered many of those questions. (Doc. 27)

31. More particularly, Mr. Lee's reliance on *Mullis v. US Bankruptcy Court, Dist. of Nevada*, 828 F. 2d 1385 (9th Cir. 1987) to argue Judges are immune from claims for prospective relief is "similar to comparing apples with oranges" (Doc. 26.1 page 2) and misplaced. Plaintiff argued: "Procedurally and substantively, *Mullis* is not applicable to this case, where both the Plaintiff and the Defendants are seeking to modify an injunction because of a change in circumstances over the last twenty three years. It is hornbook law as noted by Justice Cardozo and others that a District Court retains jurisdiction over injunctions that it issues." (Doc. 26.1 page 3). [2]

32. Turning to the question of whether leave should be granted to allow the undersigned to represent the NAAMJP in light of the 1999 prefiling Order. This is

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[2] Plaintiff further believes in light of Fed. R. Civ.Proc 60 the proper procedural vehicle to obtain substantive judicial review is by an independent action, and requests that if an independent action is not the proper procedural vehicle to obtain substantive review, that this independent action be presumed to be the proper substantive vehicle.

a pivotal question because this Honorable Court has not heard argument on the Plaintiffs' Motions for Summary Judgment and the 19 Exhibits Plaintiffs have submitted in support (Doc. 61-65), and it has excused the Defendants from responding to that Motion; and it has to date excused the Defendants from responding to the Second Amended Complaint, that this Honorable Court granted leave to file. (ECF 72) . The defendants have also *not* responded to plaintiff's Complaint in *Garcia v. California Supreme Court.*

33. This Honorable Court has sagaciously suggested that it might be best if all of these claims were heard on the merits. Plaintiffs agree. This Court presciently asked supposed some lawyer in Texas reads about these issues and thinks this might be a good idea? I will be submitting a Declaration from a member of the NAAMJP. She is a Texas lawyer who has read about these issues, agrees with Plaintiffs, and thinks this might be a good idea. She has a medical degree. She has considerable experience with testing protocol. She is a patent lawyer. She was failed on the California bar exam. Her association with the NAAMJP is necessary because she does not want to be a named plaintiff for fear of reprisal.

34. I am unable to submit this Declaration now because of time constraints as I am having knee replacement surgery tomorrow at the VA Health Center.

35. There are tens of thousands of lawyers that will be affected by this Court's decision; 40,000 lawyers have been admitted on motion in the last five years in 39 States and the District of Columbia.

COUNSEL CERTIFIES THE CLAIMS PRESENTED HAVE NOT BEEN DISPOSED OF ON THE MERITS, THEY ARE NOT FRIVOLOUS OR MADE IN BAD FAITH

36. The Second Amended Complaint in *NAAMJP v. California Supreme Court* and the First Amended Complaint in *Garcia v. California Supreme Court* (hereinafter *Complaints*) challenges the Local Rules of the United States District

Court's that categorically exclude members of the bar from 49 States from *general* admission privileges under the Supremacy Clause. This Supremacy Clause claim has not been disposed of on the merits in any published decision. I have conducted a thorough investigation and I have not found any published case challenging Local Rules that categorically exclude members of the bar from 49 States from general admission privileges filed and decided under the Supremacy Clause.

37. This Supremacy Clause claim is also not in filed in bad faith. State licensing requirements which purport to regulate private individuals who appear before a federal instrumentality have been held invalid. *Sperry v. Florida*, 373 U.S. 379, (1963) is the leading case. The Supreme Court held that a "State may not enforce licensing requirements which . . . give `the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions," and found that the state's licensing requirements could not govern practice before the PTO. *Id.* at 385, 388. The Supreme Court concluded that applying state licensing requirements to practitioners appearing before the PTO would have a "disruptive effect," given that one-quarter of the attorney practitioners before the PTO would have been disqualified because they were not licensed in the state in which they were practicing." *Sperry*, 373 U.S. at 401.

38. More particularly, I believe these challenged Local Rules are plainly and unambiguously unconstitutional under the Supremacy Clause because in *Augustine v. Dept. of Veterans Affairs*, 429 F.3d 1334, 1341 (Fed. Cir. 2005), the question of whether federal law may adopt or incorporate state law standards as its own, as do the challenged Local Rules, was expressly raised and rejected. There, the Court held incorporation "is controlled by the will of Congress. In the absence of a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Id.* at 1340. The presumption here again is that federal law does not incorporate state

standards. *Id.* at 1342. The Court further held that the purpose of the Congressional fee-shifting statute can be served only by allowing fees for representatives who are licensed as attorneys in any state or federal jurisdiction, without regard to the state licensing requirements of the state in which services were rendered. *Id.* at 1343. By the same reasoning, District Court Local Rules that incorporate state bar admission rules "impose[s] . . . additional conditions" not contemplated by Congress. *Sperry*, supra, 373 U.S. at 385.

39. The *Complaints* also challenges the Local Rules of the United States District Court's that categorically exclude members of the bar from 49 States from general admission privileges under the First Amendment. These First Amendment claims have not been disposed of on the merits in any published decision. I have conducted a thorough investigation and I have not found any published case challenging Local Rules that categorically exclude members of the bar from 49 States from general admission privileges filed and decided under the First Amendment. There are none that I know about.

40. More particularly, I believe these challenged Local Rules are plainly and unambiguously unconstitutional under the First Amendment because the right to petition in the federal courts is a federal right. The United States Supreme Court has pierced every conceivable immunity, invalidating State Supreme Court rules that limit the First Amendment rights of lawyers and judges. *United Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967)(invalidating Illinois Supreme Court Rules for attorneys under the First Amendment); *Republican Party of Minn. v. White*, 536 US 765 (2002)(holding Minnesota Supreme Courts Rules for state judges violates their First Amendment rights). The United States Supreme Court has held that even corporations have First Amendment rights.

41. The categorical disqualification from admission on motion of experienced attorneys from 49 states is patently overbroad. This overbreadth is

demonstrated by the ABA's recommendation for admission on motion; its adoption in 39 States, 65,000 attorneys admitted on motion in the last ten years; a billion dollars a year outsourced to Indian lawyers; the California Futures Commission, and SB 1782 Leg., Reg. Sess. (Ca. 2000) calling for the California Supreme Court to adopt admission on motion. The United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Court in construing the right to petition held that litigation could only be enjoined when it is a sham. To be a sham, first, it must be objectively baseless in the sense that no reasonable litigant could expect success on the merits; second, the litigant's subjective motive must conceal an attempt to interfere with the business relationship of a competitor …through the use of government process — as opposed to the outcome of that process — as an anti-competitive weapon. *Id.* at 60-61.

42. The *Complaints* also challenges the Local Rules of the United States District Court's that categorically exclude members of the bar from 49 States from general admission privileges under the *Rules Enabling Act* as amended in 1988. These claims have not been disposed of on the merits in any published decision. I believe that these challenged Local Rules are plainly and unambiguously unconstitutional.

43. I filed the case *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990) that was decided on the basis of the old *Rules Enabling Act* that Congress gutted while the case was pending back in the days of snail mail; it was not filed or decided under Supremacy Clause, or the aforementioned First Amendment rights. *Giannini v. Real* was decided in the midst of Congress revising the *Rules Enabling Act*, and the Court applied the "old" *Rules Enabling Act* rather than the changed law that requires a standard of review more stringent than strict scrutiny. People make mistakes. If we think back to what computers looked and worked like in 1990, one can see information technology has significantly changed since 1990. Likewise,

the facts and law cited in *Giannini v. Real* in 1990 were not yet fully matured. Similarly, scores of plaintiffs lost case against the tobacco industry before they were able to prove that smoking caused cancer. Plaintiffs aver they can now prove the California bar exam for experienced attorneys is a cancer on the legal profession.

44. Congress in amending the *Rules Enabling Act* in 1988 concluded that the rulemaking procedures "lacked sufficient openness," there was no meaningful opportunity for judicial review because the judges who make the rules decide whether they are valid, "and of course the barrier to interlocutory appeal built into Federal rule practice .... made effective appellate review of such a rule impossible sometimes, impractical most times, and impolitic always." See David D. Siegel, *Commentary on 1988 Revision*, following text of 28 U.S.C. § 2071 p. 130-32; following text of 28 U.S.C. § 332 p. 94-95 (West U.S.C.A. 2006). Mr. Siegel was the Reporter for Congress.

45. Congress in amending the *Rules Enabling Act* in 1988 adopted 28 U.S.C. § 332(d)(4) "thus place[ing] on each Judicial Council a mandatory continuing duty to periodically review the federal district court "local" rules promulgated on the authority of § 2071 to conform to the requirements of § 2072 instead of merely to rules promulgated by the Supreme Court." *See* Siegel, Commentary on Revision, *supra*. There is no such thing as a Federal District Court "local" Rule becoming sacrosanct merely for passing initial Judicial Council review the first time. *Ibid.*

46. The NAAMJP and some of the plaintiffs filed a comprehensive petition with the Ninth Circuit Judicial Council requesting it to abrogate bar the challenged District Court bar admission Local Rules. *See* Exhibit C. Judge Kozinski's representative called the undersigned and stated "if you want the Judicial Council to take some action you have to sue them" and this petition could present us with a direct "conflict of interest" with the California Supreme Court in any case challenging their bar admission rules.

47. The *Complaints* further alleges facts that demonstrate the results of the California bar exam are not admissible into evidence under the Federal Rules of Evidence or *Daubert*. It is alleged the test for experienced attorneys are rigged to exclude competition; that the exam results are not reliable or valid; that the test has a standard error of measurement greater than 50 %, when the industry standard for similar high stakes test is in the 10% to 15% standard error of measurement range; when the test is applied to someone who has not already been licensed. These *Daubert* claims have not been disposed of on the merits in any published decision. The assertion by defense counsel Mr. Lee that he is sure these claims have been decided on the merits is untrue.

48. The *Complaints* further allege facts and law arguing California Rules of Court 9.44-.46 are unconstitutional. I have conducted a thorough investigation and I have not found any published case challenging Rules 9.44-.46. There are none that I know about.

49. The *Complaints* further allege these rules cannot even pass a rational basis standard of review because the obvious purpose of these rules is to provide monopoly protection. Economic protection is not a legitimate state interest. Defense counsel when directly questioned by this Honorable Court what the purpose of these rules were was unable to provide an answer. The purpose of a Rule 12(b) dismissal is simply to ascertain whether plaintiffs can state a claim. Plaintiffs have stated a claim are designed and administered to provide monopoly protection.

50. Plaintiffs have further alleged and filed Motion for Summary Judgments, complete with expert witness reports and Declarations (Doc. 61-65), that the California bar exam results for experienced attorneys is not a valid and reliable test; that the standard error of measurement is greater than fifty percent; and the results are rigged to exclude qualified counsel. As noted above, these questions that implicate the First Amendment rights and Privileges and Immunities

of tens of thousands of lawyers have never been addressed or decided in any published case that I know of.

51. *Paciulan v. George* challenged the State of California's *pro hac vice* admission rule. *Plaintiffs* in these *Complaints* do not challenge the *pro hac vice* admission rule. They were *not* parties to that case. The facts and legal arguments presented in *Paciulan* are far different from the facts and law presented in these *Complaints*. The scales of justice, if not digitized and globally repositioned in this 21st Century Information Age, have been substantially revised by numerous Supreme Court and Ninth Circuit decisions and findings of fact by the American Bar Association. Time cannot be made to stand still. The love of freedom is genetically hardwired in American citizens.

WHATS REALLY GOING ON HERE IN THE DEFENDANTS' MOTION TO DISMISS?

52. The challenged bar admission rules are constructed on hard-wired and deep-seated prejudice against outsiders. The problem is Americans are compelled to travel interstate more and more because the world has changed and we are all outsiders somewhere. A recent review of the roster of the University of Montana football team shows that out of the 87 players only 32 of them are from Montana. In the upcoming Super Bowl between San Francisco and Baltimore, very few if any of the professionals are from San Francisco and Baltimore; only a small percentage of the players on the 49ers are from California; only a small percentage of the Ravens are from Maryland.

53. Congress is composed of 100 senators and approximately 450 representatives from all walks of life. They meet in Washington D.C. They know each other. They pass laws for the benefit of all Americans. They see the big picture. Congress revised the *Rules Enabling Act* 28 U.S.C. §§ 2071-77 to prohibit the proliferation of Federal District Court local rules that conflict with Federal Legislation and U.S. Supreme Court holdings.

54. 28 U.S.C. § 2071. Rule-making power generally, provides:

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. *Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.* (Emphasis added)

55. 28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe, provides,

(b) *Such [Local] rules shall not abridge, enlarge or modify any substantive right.* (Emphasis added)

56. Under the National Rules (FRAP 46, Supreme Court Rule 5) or laws enacted by Congress [5 U.S.C. § 500(b)]. All sister-state attorneys are statutorily entitled to practice before these United States courts. These National Rules and Act of Congress do not exclude any State's attorneys from federal admission.

57. The District Court Local Rules for bar admission are not consistent with the National Rules of bar admission. One third of the District Courts have Local Rules that are consistent with the National Rules, providing general admission privileges to all attorneys in good standing. They further enlarge the rights of forum state attorneys and abridge the substantive rights of non-forum state attorneys.

58. Defense counsel has invited this Honorable Court to make the undersigned a scapegoat, to trespass its oath of office, and to not follow the *Rules Enabling Act*. Defense counsel has requested that this Honorable Court ignore the facts documented in Plaintiffs' Motion for Summary Judgment that the California bar exam for experienced attorneys is not a valid or reliable test, and that is has a standard error of measurement greater than fifty percent.

59. Defense counsel asks this Court to ignore those representatives of the American Bar Association MJP Commission (2002) and American Bar Association Ethics 20/20 Commission, not unlike the representatives who met at

Independence Hall, are composed of leading citizens from all over the United States. Both of these studies have recommended abolishing bar exams for experienced attorneys.

60. Defense counsel asks this Court to ignore the ABA MacCrate Commission. Robert MacCrate is the distinguished former chairman of the ABA's "Task Force on Law Schools and the Profession" (1992). The well-regarded "MacCrate Report" describes the skills and virtues necessary to be an effective lawyer. Nine of ten skills identified as *fundamental* to the successful practice of law cannot be tested on a pen and paper bar exam.

61. Defense counsel asks this Court to ignore the reality that subjective bar exam only tests legal analysis and reasoning. Dr. Geoff Norman is a nationally recognized testing expert with over 30 years' experience. Dr. Norman is one of the experts writing a chapter in the *Cambridge Handbook of Expertise and Expert Performance*, *supra*. Dr. Norman writes:

> *"Study after study has shown that it is almost impossible to get judges to agree on scores for essay answers."*

See "So What Does Guessing the Right Answer Out of Four Have to Do With Competence Anyway?" *The Bar Examiner*, p. 21 (Nov 2008).

62. Defense counsel has invited this Honorable Court to trespass its oath of office and to disregard the factual allegations in the *Complaints* that must be presumed as true.

63. This Honorable Court is well aware that its sacred duty and role as an Article III Judge is a far cry from the duty and role of defense counsel. As noted above this Court has an independent de novo duty to review the facts and law.

64. In view of the foregoing, I respectfully request leave of Court for permission to allow the NAAMJP to substitute back into this case and to allow the undersigned to appear as counsel.

65. I also respectfully request that this Honorable Court shun defense counsel's requests and that it Order the Defendants to Answer the Complaints and respond to plaintiffs' Motions for Summary Judgment.

Sworn to under penalty of perjury under federal law.

Dated: January 28, 2013

/s/ ***Joseph Robert Giannini***

Joseph Robert Giannini