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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JERRY O'NEIL, individually and as President of Montanans for Multiple Use, on behalf of himself, and the Members of MONTANANS FOR MULTIPLE USE, and CHERYL LITTLE DOG, **Plaintiff,** **vs.** **TYLER P. GILMAN, Clerk of the U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, in his official capacity, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, in its administrative capacity,** **Defendants.**	**CV 16-84-GF-BMM-JTJ** **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

Plaintiffs filed a Complaint in the above-captioned proceeding on July 8, 2016. (Dkt. 1) The named Plaintiffs in the caption are "Jerry O'Neil, individually and as President of Montanans for Multiple Use, on behalf of himself, and the Members of MONTANANS FOR MULTIPLE USE, and CHERYL LITTLE DOG." Plaintiffs allege that Jerry O'Neil is an advocate and counselor who has been licensed to practice before the Blackfeet Tribal Court since 1984. (Dkt. 1, p. 1,¶ 1).

The Complaint alleges that on May 7, 2015, O'Neil applied for permission to represent his clients with their legal issues before the U.S. District Court for the District of Montana. (Dkt. 1, p. 1,¶ 1; p. 2,¶ 5). The Complaint asserts that the Clerk of Court denied O'Neil's application because O'Neil did not meet the standards for admission set forth in Local Rule 83.1(b). (Dkt. 1, p. 1,¶ 2; p. 2,¶5).

Plaintiffs also allege that O'Neil is the president of Montanans for Multiple Use [MFMU], a public benefit corporation and that MFMU needs the ability to petition before the federal court system to exert the First and Fourteenth Amendment rights of its members to petition for redress of grievances. (Dkt. 1, p. 2,¶ 3).

Plaintiffs further allege that Plaintiff Cheryl Little Dog is an enrolled member of the Blackfeet Indian Nation who has been charged with harboring a

fugitive and giving false statements to a federal agent. Allegedly Little Dog, though innocent, pleaded guilty to the charges through the advice of "ineffective counsel or her previous counselor" and is in the process of withdrawing her plea. After an extensive search the "only and best council she has been able to find is O'Neil." (Dkt. 1, p. 2, ¶ 4). It should be noted the U.S. District Court docket reflects that Little Dog retained her prior counsel, Roberta Cross Guns, in *United States v. Little Dog*, 16-CR-00009-BMM-1. The docket shows that retained counsel Cross Guns no longer represents Little Dog, and that Federal Defender Anthony Gallagher now represents the defendant. (*See* Docket, 16-CR-00009-BMM-1).

Plaintiffs request that the Court declare L.R. 83.1(b) unconstitutional as applied to Plaintiffs, and to others similarly situated, and to give injunctive relief directing the Clerk of Court to process O'Neil's application to practice before the United States Court for the District of Montana. (Dkt. 1, p. 3,¶ 7). Plaintiffs allege as a basis for jurisdiction 28 U.S.C. §§ 1331, 2201 and 2202. The remainder of Plaintiffs' Complaint is in essence a brief. (Dkt. 1, pp. 4-25). It should be noted that the Complaint appears to be missing pages (*see* Dkt. 1, p. 25, which appears to end mid-argument) and contains no signature page.

A. Admission Requirements Under the District of Montana Local Rules.

The Plaintiffs in this proceeding request that the Court declare L.R. 83.1(b)

unconstitutional as applied to Plaintiffs and other similarly situated parties, and to issue injunctive relief directing the Clerk of Court to process Plaintiff O'Neil's application to practice before the U.S. District Court for the District of Montana. Plaintiffs' request for relief should be denied and this case dismissed for failure to state a claim upon which relief may be granted.

1. L.R. 83.1 Requirements.

Local Rule 83.1 in pertinent part provides as follows:

83.1 Attorney Admission and Appearance.

(a) General Rules.

(1) An attorney who appears in this court is subject to its disciplinary jurisdiction. See Appendix B.

(2) Only an attorney authorized to appear under this rule may appear on behalf of a party.

(3) An attorney authorized to appear in this court must promptly notify the court of any change in the attorney's status in another jurisdiction that would make the attorney ineligible for membership or ineligible to appear under subsections (c) or (d) of this rule.

(b) Membership in the Bar.

(1) Only attorneys of good moral character who are members in good standing of the State Bar of Montana may be admitted as members of the bar of this court. Member attorneys on active status may appear in any case.

(2) *Procedure for Admission*. Each applicant for admission must present to the clerk of court:

(A) a petition for admission signed by the applicant and setting forth:

(i) the applicant's residence and date of admission to the State Bar of Montana; and

(ii) certification by a member of the bar of this court that the applicant is of good moral character and a member in good standing of the State Bar of Montana;

(B) the current admission fee shown on the court's website; and

(C) the signed oath card.

(3) *Continued Good Standing*. When the clerk receives notice that a member of the Bar is not in good standing, the clerk will notify the attorney that he or she may not appear in any case. On the clerk's receipt of notice from the State Bar of the attorney's return to good standing, the attorney is reinstated to practice in this court.

. . . .

See L.R. 83.1. Although there were modifications to L.R. 83.1 after O'Neil submitted an application for admission, the changes do not occur in the above language. In addition, both the version in effect in June of 2015 and currently, were adopted by Standing Order No. DLC-25 and DLC-16, issued following recommendations of the Local Rules Committee for the District of Montana and a 30-day period of public comment, and with the concurrence of all Article III judges of the Court as set forth in the Standing Orders. (*See* Standing Orders at

mtd.uscourts.gov).

2. Requirements for Admission to the Montana Bar.

The Rules for Admission to the Bar of Montana (hereafter Rules for Admission) are set forth on the web page for the State Bar of Montana, http://www.montanabar.org. Admission to the Bar of Montana is governed by the Montana Supreme Court Commission on Character and Fitness and the Montana Supreme Court Board of Bar Examiners. (*See* Rules for Admission, Section I.A.).

Persons eligible to apply for admission to the State Bar of Montana include a student applicant, who may apply at the time of taking the Montana Uniform Bar Examination, and must have a Juris Doctor from a law school accredited by the ABA at the time of graduation. An attorney applicant with a Juris Doctor from a law school accredited by the ABA at the time of graduation, and who is admitted to practice law in another state, district, or territory of the United States may also apply. (Rules of Admission, I.C.).

An applicant to the State Bar of Montana must pass the Multistate Professional Responsibility Exam. (Rules of Admission, I.E.). An applicant must also complete the Montana Law Seminar. (Rules of Admission, I.F.).

A determination regarding character and fitness is required by the Commission on Character and Fitness. (Rules of Admission, II.B.).

In addition, unless admitted after examination in another State or territory,

the Montana Uniform Bar Examination, which includes the Multistate Essay Exam, the Multistate Performance Test, and the Multistate Bar Examination, are all required. (Rules of Admission, III.B.).

The Montana Bar also provides for admission on motion, which requires that the applicant have graduated from a law school formally accredited by the ABA, must have been admitted by bar examination to practice law and engaged in the active practice of law for 5 of 7 years prior to the motion, and many other requirements. (Rules of Admission, V.A.).

Plaintiff O'Neil has not alleged that he has graduated from any law school much less an accredited law school. He has not alleged he is a member of the Montana Bar, or that he has sought *pro hac vice* admission to the Federal District Court or the Montana Bar.

Plaintiffs have also not alleged that they have approached the Montana District Court Rules Committee, or made comment on the proposed Local Rules, with a proposal to expand the Local Rules to extend admission to any particular tribal bar or application of such an extension to any particular type of cases. *See generally, Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (describing jurisprudential exhaustion); *Nat'ls Ass'n for Advancement of Multijurisdiction Practice v. Berch*, 973 F.Supp.2d 1082, 1109 (D. Ariz. 2013) (dismissing right to petition challenge to court rule). Plaintiffs have not alleged

any detail, and have made no record with the Local Rules Committee, as to the requirements of the Blackfeet Tribal Bar, and whether those requirements are commensurate with the requirements of L.R. 83.1(b), which incorporates the comprehensive knowledge and ethical protections instituted in the requirements for the admission to the Montana Bar.

B. Local Rule 83.1 Is Constitutional, and Authorized by Statute and the Federal Rules of Civil Procedure.

1. Local Rule 83.1 complies with statutes and rules.

"We begin our analysis by recognizing that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. *See* 28 U.S.C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83. This authority includes the regulation of admissions to its own bar." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). The Ninth Circuit in *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), addressed the authority of the Federal district courts as follows:

> While the states shape the general requirements for admission into the legal profession, federal courts too possess an interest in maintaining standards of admission. *Frazier v. Heebe*, 482 U.S. 641 … (1987). Authority over the bar harkens back to the days of English common law and is now codified in federal statutes. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively are permitted to manage and conduct causes therein." 28 U.S.C.§ 1654. *See generally* Friedman, *The History of American Law* 276-77 (1963). Admission into a state bar does not, at least in theory, carry with it an automatic entitlement for admission into the federal district courts of that state. *Raiford v. Pounds*, 640 F.2d 944, 946 (9th Cir. 1981). Nor, in theory, does admission into one federal bar

> guarantee the right to appear before other federal courts. Federal courts may set reasonable standards for admission, independent of the requirements established by coequal courts. *Greer's Refuse ServicSe, Inc. v. Browning-Ferris Industries*, 782 F.2d 918, 923 (11th Cir. 1986), *cert. denied sub nom Wilkes v. District Court*, 488 U.S. 967 … (1988).

Zambrano, 885 F.2d at 1482-83.

Here, the U.S. District Court for the District of Montana has set reasonable standards for admission. It has utilized the extensive quality and ethical protections required for admission to the Montana bar, as a prerequisite to admission to its District Court bar. Even if the *quasi* sovereign Blackfeet Tribal Court was considered a coequal court, the U.S. District Court is not required to adopt the same standards for admission as the Blackfeet Tribal Court. Plaintiffs' assertions of tribal sovereignty in the Complaint (Dkt. 1, pp. 8-12) do not support a mandate that the U.S. District Court must admit and allow whoever is admitted to practice in tribal court, to practice in U.S. District Court.

Moreover, L.R. 83.1(b), does not contain a residency requirement. The Supreme Court in *Frazier* addressed a local rule adopted by the U.S. District Court for the Eastern District of Louisiana, which required not only that the attorney be a member of the bar of the State of Louisiana, but also required the attorney to reside or maintain a law office in Louisiana. Frazier was an attorney who resided in Mississippi, and was a member of the Mississippi and Louisiana State bars. He applied to the U.S. District Court for the Eastern District of Louisiana and was

denied admission because he did not reside in Louisiana or maintain a law office in that state. The Supreme Court found that the residency requirement of the local rule was "unnecessary and irrational." *Frazier,* 482 U.S. at 646, 649. It found that there was no reason to believe that nonresident attorneys who have passed the Louisiana bar exam are less competent than resident attorneys who had passed the Louisiana bar exam. *Id.* at 647. The Supreme Court held that, pursuant to its supervisory authority the district court was not empowered to adopt local rules to require lawyers seeking admission to its bar, who are members of the Louisiana bar, to live in, or maintain an office in, Louisiana where that court sits. *Id.* at 645. Because the Supreme Court made this finding, it did not reach the constitutional issues raised by the plaintiff. *Id*. at 645.

L.R. 83.1 at issue here does not contain a residency requirement to live in Montana or require that a law office be maintained in Montana. Nor do the admission requirements to practice law in the Montana Bar require residency or maintenance of a law office in Montana. Therefore, the District Court rule at issue complies with the statutes and rules and should be upheld.

The Ninth Circuit addressed a local rule substantially similar to L.R. 83.1(b), in *Giannini v. Real*, 911 F.2d 354, 356 (9th Cir. 1990). Giannini, an attorney who passed the New Jersey and Pennsylvania bar exams, failed the California bar exam twice, and was therefore not admitted to the State Bar of California. He

challenged the Local Rules for the U.S. District Courts for the Central District and Eastern District of California, which both stated: "Admission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California." *Id*. at 356 n.1. Giannini asserted that the local rules violated his constitutional right to equal protection implicit in the Fifth Amendment to the U.S. Constitution, in that they "discriminate" in favor of attorneys who are admitted to the State Bar of California. *Id*. at 359.

The Court in *Giannini* rejected plaintiff's arguments, and found that "[h]ere the challenged rules do not involve the impairment of a fundamental right because there is no fundamental right to practice law. Further, lawyers are not a suspect class. Therefore, a rational level of scrutiny is used." *Giannini*, 911 F.2d at 359 (citing *Lupert v. Cal. St. Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985)). The Ninth Circuit then found that the following considerations for the local rule requiring admission to the California bar, amply satisfied the requirement of a rational basis classification:

(1) the defendant district courts, having no relevant procedures of their own, rely on the California bar examination for determination of fitness to practice law;

(2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction;

(3) membership in the California bar provides the district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation;

(4) allegations of professional misconduct can be brought to the attention of the State Bar;

(5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; and

(6) attorneys who are members of the California and district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests.

Id. at 360. The Court found that there was no violation of the equal protection clause. *Id.* It also found that no residency requirement existed, therefore the local rules did not run afoul of the decision in *Frazier*. *Giannini*, 911 F.2d at 361. These same reasons support upholding L.R. 83.1. *See also Matter of Roberts*, 682 F.2d 105, 108 (3rd Cir. 1982) ("Because there is no federal procedure in the district court for determining an applicant's fitness to practice law before it, the court may properly rely on prior admission to the bar of the supreme court of the state in which the district court sits."); *O'Neal v. Thompson*, 559 F.2d 485, 486 (9th Cir. 1977).

Likewise, in this case, Plaintiff O'Neil is not a member of a suspect class. He does not allege the Local Rule was created to discriminate based on race, national origin, gender or other such classes. All persons seeking admission, whether they be from other countries, other states, residents of Montana, or

residents and members of a tribe, are to be members of the Montana Bar in good standing to be admitted to the bar for the U.S. District Court for the District of Montana. The comprehensive testing, ABA accredited Juris Doctor degree, and investigation conducted by the Commission on Character and Fitness, and state bar disciplinary system, provide the necessary assurance that attorneys practicing before the U.S. District Court for the District of Montana have the requisite knowledge and ethical background to be officers of the Court, and represent persons or entities before the Court.

The Ninth Circuit in *Giannini* also rejected Plaintiff's claim that retesting of out-of-state attorneys with the California bar exam violated the Full Faith and Credit Clause of the U.S. Const. Art. IV, § 1. *Giannini*, 911 F.2d at 360. This argument is in essence the same as Plaintiffs' comity argument set forth in Dkt. 1, pp. 16-17. In *Giannini* the Court found no merit to the full faith and credit argument because there was no act, record or judicial proceeding, in New Jersey or Pennsylvania, that stated plaintiff was entitled to practice law in California. *Giannini*, 911 F.2d at at 360. Likewise in this case, even if *quasi* sovereign Indian tribes were to be treated the same as states, Plaintiffs have not alleged that the Blackfeet Tribal Business Council has authorized persons whom it has allowed to practice before the Tribal Courts, to practice in courts outside of the reservation. The Blackfeet Tribe is free to adopt admission requirements to the Tribal bar.

However, it does not have authority over the admission requirements of the U.S. District Court.

C. No First, Sixth or Fourteenth Amendment Violations.

Plaintiff O'Neil has asserted that MFMU needs the services of O'Neil as a financially reasonable method to file and intervene in lawsuits. He asserts that MFMU was created to be involved in Forest planning and opposes the Forest Service spending public funds to remove road access. O'Neil claims the requirement that the corporation have independent counsel is a violation of the First Amendment.

First, there is nothing in L.R. 83.1 that prevents MFMU or any other plaintiff from exercising their right to express themselves. L.R. 83.1 is content neutral. It does not restrict MFMU from taking any position it may deem appropriate in commenting upon or protesting Forest Service travel plans and does not restrict the positions that MFMU may take in any court proceeding contesting such Forest Plans. Requiring a corporation to be represented by counsel that complies with the rules of the U.S. District Court does not prevent free expression. In addition, the Equal Access to Justice Act provides for coverage of attorney fees in the circumstances set forth under 28 U.S.C. § 2412(b).

Plaintiffs' reliance on *NAACP v. Button*, 371 U.S. 415 (1963) is misplaced. (Dkt. 1, p. 20). In *NAACP v. Button*, the issue related to the Virginia legislature

forbidding solicitation of legal business by a "runner" or "capper." The state supreme court found that the NAACP's activities in offering and providing representation by staff attorneys violated the Virginia law. The NAACP asserted that the Virginia statute interfered with its members and lawyers' freedom to associate for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed rights. *Id*. at 428. The Supreme Court held that the activities of the NAACP, its affiliates and legal staff, are modes of expression and association protected by the First and Fourteenth Amendments. *Id*. It did not, however, address or hold that attorneys for the NAACP did not need to be admitted to the state bar to practice in state court. It did not hold that a federal district court could not utilize membership in the state's bar as a reasonable method to assure broad-based knowledge and ethical requirements, to determine admission for practice in federal district court. Finally, it did not find that a requirement to have a corporation represented by an attorney, was a violation of the First Amendment.

The ability of a non-attorney to represent a corporation or third parties is not just a matter of local rules, but is specifically constrained by 28 U.S.C.§ 1654. Section 1654 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes

therein.

28 U.S.C. § 1654.

Under section 1654 it is clear that a corporation may appear in federal court only through licensed counsel. *United States v. High Country Broadcasting Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201-202 (1993). "Hence, a corporation must appear in court through an attorney; it cannot be represented by laypersons." *Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales*, 474 F. Supp.2d 1133, 1141 (N.D. Cal. 2007) (citing *In re America West Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994) ("Corporations and other unincorporated associations must appear in court through an attorney.")); *Church of the New Testament v. United States*, 783 F.2d 771, 773 (9th Cir. 1986) (citing *In re Highley*, 459 F.2d 554, 555 (9th Cir. 1972)). L.R. 83.1, has defined the counsel who may appear before this Court, and O'Neil does not meet that definition.

Likewise, under section 1654, while a layperson may represent himself in federal district court, he may not act as an attorney for other litigants. *Lutz v. Lavelle*, 809 F. Supp. 323, 325 (M.D. Penn. 1991). A plaintiff has no statutory or constitutional right to be represented in federal district court by a non-lawyer. *See Phillips v. Tobin*, 548 F.2d 408, 411 n. 3 (2d Cir. 1976). Moreover, a defendant's Sixth Amendment right to counsel is not violated by a federal district court's

refusal to permit a non-lawyer, to act as counsel. *United States v. Kelley*, 539 F.2d 1199, 1203 (9th Cir. 1976). The Sixth Amendment guarantee of counsel means representation by an attorney admitted to practice law. *U.S. v. Hoffman*, 733 F.2d 596, 599 (9th Cir. 1984). *See also U.S. v. Wright*, 568 F.2d 142, 142-43 (9th Cir. 1978). O'Neil does not meet the requirements to practice law in this Court.

Plaintiffs' reliance on *United States v. Bryant*, 136 S. Ct. 1954 (2016), does not support their claim to allow O'Neil to represent Little Dog. *Bryant* affirms that the Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Id*. at 1958, 1962. The Sixth Amendment does not, however, apply to tribal court proceedings. *Id*. Thus, it is clear that the Sixth Amendment requires counsel in federal district court, and the federal district court has authority and discretion to determine the requirements for admission to practice before it. O'Neil does not meet the requirements.

CONCLUSION

Plaintiffs' Complaint should be dismissed. L.R. 83.1 is authorized under the statutes, is a rational method to determine qualifications for practice in this U.S. District Court, and does not violate the Constitution.

DATED this 17th day of October, 2016.

MICHAEL W. COTTER
United States Attorney

/s/ Victoria L. Francis
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,905 words, excluding the caption and certificates of service and compliance.

DATED this 17th day of October, 2016.

/s/ Victoria L. Francis
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2016, a copy of the foregoing document was served on the following person by the following means.

1	CM/ECF
	Hand Delivery
2,3	U.S. Mail
	Overnight Delivery Service
	Fax
2	E-Mail

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