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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In the Matter of : PETITION TO AMEND RULES 46-74, ARIZONA RULES OF THE SUPREME COURT	**Supreme Court No. R-_____** Comment on Attorney Discipline Task Force's Petition to Amend Rules 46-74, Rules of the Supreme Court

Pursuant to Rule 28, Ariz.R.Sup.Ct., the undersigned attorneys provide the following comments to the above-referenced Petition.

The original version of the Petition was filed with the Arizona Supreme Court on December 28, 2009, by the Administrative Office of the Court ("AOC"), on behalf of the Attorney Discipline Task Force (the "Task Force"). As of April 1, 2010, the undersigned attorneys, as well as others, provided comments to the original Petition and Appendix A, the Task Force's original rule proposal. Thereafter, the Task Force met and made revisions to its proposal and filed an amended Petition on May 6, 2010 ("the Amended Petition"). The undersigned attorneys now file this amended comment to the Task Force's Amended Petition and Attachment A, its revised rule proposal.

I. Introduction:

We are a group of lawyers with significant experience in, and knowledge of, the lawyer discipline system. Presently, we represent respondents in State Bar discipline matters. Previously, certain of us have served as volunteer or staff Bar counsel, Bar ethics counsel, a member of the Board of Governors, a President of the State Bar of Arizona, and a member (and Chair) of the Disciplinary Commission.

We continue to question some of the proposed amendments in the Amended Petition and remain quite supportive of others. We support the overall direction of the Task Force and the Court's stated goal of maintaining due process for lawyers subject to discipline while reducing the time and cost of processing lawyer discipline cases.

We favor removing the probable cause function from a member of the Board of Governors and establishing a body that functions independently of the State Bar, whose members are appointed by the Supreme Court. We support the proposal enabling both respondent and complainant to provide input directly to the renamed Attorney Regulation Committee ("Committee"), input missing in the current system which relies exclusively upon bar counsel to summarize the positions of respondent and complainant.

We favor the creation of the office of Presiding Disciplinary Judge ("PDJ"). Having one judge oversee and involved in all stages of the disciplinary process will help to ensure that sanctions are proportionate and that all respondents are treated fairly. The importance of the position obviously makes the selection of the PDJ a critical decision.

We favor the change in the duties of bar counsel to "review" instead of "investigate" information coming to the attention of the State Bar. We believe this change will foster a shift in the current philosophy that inhibits bar counsel from exercising appropriate discretion in resolving matters short

of a full-blown screening investigation, because the current rules direct them to "investigate" matters when allegations, if true, would be grounds for discipline.

We favor the use of hearing panels, although we note that coordinating schedules in order to determine availability for hearings is likely to be more complicated with three-member hearing panels. The requirement that every hearing panel include a public member ensures public participation in the trier-of-fact function, something that was part of the system prior to the establishment of the hearing officer system.

We favor proposed Rule 57(a) governing discipline by consent, particularly the elimination of the requirement of two documents (tender of admissions and joint memorandum) that currently comprise consent agreements. The provision allowing such agreements to be submitted to the PDJ is expected to speed up the acceptance and implementation of agreements.

We favor the right of direct appeal to the Supreme Court. The Court has a uniquely important role to play in assuring ethical conduct by members of the Bar and can discharge that function most effectively by reviewing all appeals in cases involving alleged lawyer misconduct.

We are greatly concerned by some of the new changes in the Amended Petition - which came after the first comment period ended but appear not to have been directed at those comments, instead constituting entirely new proposals.

II. Comments on Specific Proposed Changes:

We address our comments in the order of rule number.

A. **Amendment of Pleadings: Rule 47(b)(1)**

The revised changes address the procedure for amending the pleadings to conform to evidence presented at the hearing. The original proposal stated that if an amendment to the complaint was made, respondent **shall** be given reasonable time to answer the amendment, to produce evidence and to respond to the charges. The new proposal states that the hearing panel **may** allow the pleadings to be amended and **shall do so freely** when the presentation of the merits of the action will be served and the objecting party fails to satisfy the hearing panel that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. It states that in such event, the hearing panel **may** grant a continuance to enable the objecting party to meet such evidence.

We are concerned that the proposed Rule 47(b)(1) no longer mandates that respondents be given reasonable time to answer the amendment and defend against evidence introduced at hearing, of which respondents had no prior notice or opportunity to defend. This will likely have the effect of placing the burden on a respondent to show prejudice before additional time is allowed to answer the amendment, to produce evidence, and to respond to the charges. In light of the fact that bar counsel control the screening investigation from the outset, and the "charging" function in formal proceedings, it seems an unfair burden to insist that respondents show why they need more time - during a hearing - to defend against new charges. We suggest that there be a rebuttable presumption that the objecting party will be given additional time to answer the amendment, to produce evidence and to respond to the charges.

B. **Service of Subpoenas: Rule 47(h)(4)B**

The revised changes to Rule 47(c)(2) regarding service of process require personal service of a subpoena on a respondent unless

"impracticable": in such cases the PDJ directs which method of service may be used, including certified mail. While we are in favor of the change requiring personal service, we remain concerned about including an exception for cases where service is "impracticable", because the term is not defined. Further, the proposal allows the State Bar – by filing a motion without notice - to propose service in a manner chosen by bar counsel.

The Task Force revised Rule 47(h) to provide that service of subpoenas shall be as set forth in Rule 47(c)(2). To the extent that Rule 47(c)(2) will now require personal service of subpoenas on respondents , we welcome the change. However, our previous concern with the new order to show cause provision in 47(h)(4)(A) remains the same in those cases where service is "impracticable", and an alternative method of service, which may or may not be effective, is allowed. As stated in our original comments, the new Rule 47(h)(4)(A) authorizes the Bar to request an Order to Show Cause when a respondent does not respond to a subpoena for information. If the respondent fails to respond to a subpoena, the PDJ may summarily suspend the respondent (after an order to show cause).

We still agree that respondents *who have been properly served* and who fail or refuse to respond to subpoenas and lawyers who have abandoned their practices should be subject to this summary suspension contempt sanction. However, the provisions in question in the Amended Petition continue to pose the potential for serious unintended consequences for an attorney who simply has not updated his or her mailing address with the State Bar, or who has appropriately notified the State Bar of an address change, but the State Bar failed to properly, timely change the information in its database. As currently drafted, a respondent who fails to respond to a charge and subpoena, simply because the documents were mailed to an incorrect address, could be unfairly subject to suspension. Generally, service

of process of a subpoena by alternative means such as certified mail seems logical. However, when considered with new Rule 47(h)(4)(A), a respondent could be suspended just because he or she did not *receive* the mailed subpoena.

Proposed Rule 47(h)(4)(A) provides that a respondent may be summarily suspended for not responding to a subpoena:

> A. *Request for Order to Show Cause.* A party may file with the presiding disciplinary judge a verified notice and request for order to show cause alleging that a person under subpoena has failed to comply with the subpoena. The presiding disciplinary judge may enter an order to show cause directing the person alleged to be in contempt to appear before the judge at a specified time and place and then and there show cause why he or she should not be held in contempt. In the case of a respondent alleged to have failed to comply with a subpoena, the order shall indicate that a finding of contempt could result in a sanction of summary suspension of his or her license to practice law.

Undersigned counsel continue to encourage the Court to require that a subpoena for an order to show cause hearing that could result in the summary suspension of a respondent be served personally, in accordance with Ariz.R.Civ.P. 4.1(d). Upon a showing that personal service has been attempted and the respondent cannot be located, then the Bar may request that the PDJ issue an order authorizing service by certified mail.

C. Public Notice of Discipline Imposed: Rule 49(a)(2)(C)

Undersigned counsel agree with and support the Arizona Supreme Court's goals contained in its Administrative Order No. 2009-73: maintaining a fair and impartial discipline system while decreasing the time and cost to process cases. In Appendix "A" to Order No. 2009-73, the Court expressed its intent that the Task Force incorporate best practices from the Colorado attorney discipline system and the systems of other states.

We pointed out in our original comments that the Task Force's proposed Rule 49(a)(2)(C) represents a significant departure from the Colorado system. Because the Task Force has not changed, but rather reinforced, its position on this issue, we continue to assert that the proposed rule will serve as a roadblock to achieving the goals of reducing the number of cases that actually proceed to hearing, and decreasing the time and cost of processing cases.

The Task Force in its Amended Petition includes a provision found in Rule 49(a)(2)(C)(ii) that probation, informal reprimands ("admonitions" in the proposed rules) with probation, restitution and costs shall be posted on the State Bar's website for five years from the effective date of the sanction or until completion, whichever is later. The Task Force's original rule proposal did not include this specific language, though it was included in the "Background and Purpose" section of its original Petition. Now, this provision has been made an explicit part of the Task Force's proposed rules.

Undersigned counsel continue to vigorously object to this proposal and state our unified opposition to the view of the Task Force majority that information relating to probation and admonitions with probation be both public and published on the State Bar website. This is not only contrary to the best practices of the Colorado system but is actually more expansive than the policy adopted by the Board of Governors ("BOG") on the subject in 2005. At that time, when the State Bar proposed posting all discipline on the website (*see* BOG' minutes for June 15, 2005, and July 8, 2005, available on the State Bar's website), the Board rejected the State Bar's request.

The Task Force Minutes for its August 29, 2009 meeting contain information from John Gleason, Chief Bar Counsel for the Colorado Supreme Court. Mr. Gleason's views are important to this process and should be carefully considered. For purposes of proposed Rule 49(a)(2)(C),

paragraph 4 is critically important because Mr. Gleason explains that a significant difference between the current Colorado and Arizona systems is that admonitions and diversions are private and confidential in Colorado. Publicizing and publishing admonitions and/or probation in Arizona will be a significant disincentive and deterrent to resolving minor matters informally and expeditiously.

We continue to firmly assert that making admonitions and probation public and publishing them on the bar's website will have a significant and negative impact on respondents' willingness to resolve a bar charge involving relatively minor misconduct informally and expeditiously when loss of business, reputation, and public humiliation might result from the publicity.

On its face, the recommendation to make diversion private (a decision we strongly support) appears to be a compromise to include one of the "best practices" of the Colorado system while inexplicably rejecting another comparable and important facet of the Colorado system – keeping admonitions private. We urge the Court to draw on the considerable experience of Colorado and reject the proposal that probation and admonitions be public and published on the State Bar's website.

Undersigned counsel submit that making admonitions and probation private, as is the case in Colorado, and as was the case some years ago in Arizona, would accomplish the Court's goal of encouraging earlier resolution of lower level cases. The public should have access to information about lawyers who are guilty of misconduct serious enough to warrant censure ("reprimand" under the proposed rules), suspension or disbarment, and we do not oppose posting such information on the State Bar website. But publicizing admonitions and probation resulting from minor misconduct in the interest of transparency will undoubtedly frustrate the

Court's stated desire to achieve the early, inexpensive, and informal resolution of disciplinary charges. The Task Force discussed the importance of the public being made aware of sanctions imposed against an attorney in order to enable prospective clients to make more informed decisions when choosing an attorney. However, admonitions and probation are private in many states because, *by definition*, they address negligent conduct that has resulted in little or no injury.

In 2007, the American Bar Association's Center for Professional Responsibility issued the results of a survey on Lawyer Discipline Systems across the country. In Chart I of that report, "Lawyer Population and Agency Caseload Volume 2007," which is attached as Exhibit 1 to this Comment, a comparison of Arizona and Colorado numbers is available. The following are relevant points to consider:

- Arizona had 16,038 active lawyers; Colorado had 21,900
- Arizona received 3,914 charges; Colorado received 4,016
- Arizona had 864 cases pending from prior years; Colorado had 33
- Arizona summarily dismissed 1,047 charges; Colorado: 3,471
- Arizona investigated 1,797 charges; Colorado: 372
- Arizona dismissed 545 cases after investigation; Colorado: 189
- Arizona charged 101 lawyers after probable cause; Colorado: 52

These numbers demonstrate that changing the standard of review of incoming charges to encourage bar counsel to exercise discretion in deciding whether to investigate is likely to be a positive step toward reducing the initial number of investigations and increasing the number of summary dismissals. *Nevertheless, simply encouraging bar counsel to dismiss questionable charges earlier is not likely to significantly impact the end result.* Exhibit 1 demonstrates that despite the fact that Colorado has 5,000 more lawyers than Arizona, Arizona charges twice as many lawyers as Colorado after a probable cause determination.

We believe that Arizona attorneys are as ethical as Colorado attorneys. However, Exhibit 1 confirms that the dramatic difference in cases resulting in charges and dismissals is a reflection of the different prosecution policies and philosophy of the two State Bars. Based on our collective experience in the representation of thousands of respondents, we submit that making admonitions and probation private would encourage earlier and informal resolution of a higher percentage of bar charges.

The Court has expressed its desire to have Arizona discipline policies conform to a more uniform model, and specifically, to incorporate the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("the *Standards*") wherever possible. The definition of "admonition" at page 24 of the *Standards* is important:

> **Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.**
>
> **Commentary**
> Admonition is the least serious of the formal disciplinary sanctions, and is the only private sanction. Because imposing an admonition will not inform members of the public about the lawyer's misconduct, admonition should be used only when the lawyer is negligent, when the ethical violation results in little or no injury to a client, the public, the legal system, or the profession, and when there is little or no likelihood of repetition. Relying on these criteria should help protect the public while, at the same time, avoid damage to a lawyer's reputation when future ethical violations seem unlikely. To enhance the preventive nature of lawyer discipline, the court or disciplinary agency should publish a fact description in admonition cases without disclosing the lawyer's name.

The *Standards* also provide that unless probation is imposed as a condition of either a suspension or censure (referred to as "reprimand" in the *Standards* and proposed rules), probation should also be private. Thus, if

probation is imposed as a condition of an admonition under the proposed rules, the probation should be private and not posted on the State Bar website. When imposed as a condition of an admonition, probation is obviously intended to prophylactically address low-level violations of the ethical rules that involve little or no injury and for which one of the State Bar's remedial programs are suited, *i.e.*, additional CLE instruction, or a referral for a LOMAP or MAP evaluation. This is especially true because "probation" is subject to misinterpretation by those unfamiliar with what the term actually means in the context of lawyer discipline - a descriptive word that covers remedial, rehabilitative conditions associated with the specified sanction. By contrast, we submit that many members of the public may think of probation in terms similar to that involved in the criminal justice system. Thus, we posit that the public views probation more seriously than its intended meaning in the lawyer discipline arena. The potential loss of clients and the stigma attributable to publicizing low-level informal discipline might cause a respondent lawyer to contest the proposed sanction, which would serve to frustrate or defeat the goal of the proposed changes.

D. Complainants: Rule 53

The proposed changes to Rule 53 dramatically expand the role complainants will play in the disciplinary process. We have no objection to the informal notice component of the proposal. However, we are concerned by the provision that allows the complainant, in the case of an agreement for discipline by consent, to file a written objection and be heard at a hearing. In our experience, allowing complainants "to be heard" at a hearing to approve an agreement for discipline by consent can dramatically expand the purpose and scope of the hearing. At that stage of the proceeding, the complainant would have already received adequate opportunity to express his or her position.

E. Deadlines During Investigation: Rule 55(b)(1)

The original Task Force proposal required that respondents respond within 20 days notice of a screening investigation. Bar counsel may grant one 20-day extension only; further extensions must be approved by Chief Bar Counsel for "good cause shown." We expressed our reservations about this provision in our original comments. Because the Task Force did not change the proposal, we re-urge our objections here.

We continue to be concerned about the 20-day deadline to respond to allegations. We are aware of problems, in numerous cases, with the State Bar's system for tracking address changes. Lawyers report situations in which, despite notice to the State Bar about an address change, the State Bar continues to send mail to an old address. Lawyers report instances in which corrections occur only after multiple exchanges with the State Bar. We are concerned about a 20-day deadline for responding, without any requirement that the State Bar personally serve notice of a screening investigation on the lawyer. If, in fact, the lawyer has failed to keep the State Bar appraised of his or her address, the discipline system can deal with that issue, as all lawyers are obligated to notify the State Bar about address changes. If, on the other hand, the lawyer has made reasonably diligent efforts to communicate an address change to the State Bar, and deficiencies at the State Bar have resulted in the State Bar not having a current address, burdening the lawyer with discipline proceedings represents an unreasonable outcome.

Substantively, the process set forth in Rule 55(b) presents possible problems. The rule requires that Bar Counsel give written notice of an investigation and "the nature of the allegations." The phrase "nature of the allegations" is vague at best, and nothing in Rule 55(b) explicitly requires Bar Counsel to provide information about the allegations sufficient to permit

an intelligent response from the lawyer. We have all faced many cases under the present system where the letter from Bar Counsel (and the correspondence from the complainant) is so vague that we have a difficult time responding with clarity on behalf of our clients.

The process of giving notice and requiring a response from the respondent is satisfactory. If the process ensures that the respondent gets notice, and has adequate information in the notice to permit an intelligent response, we have no objection to this process and, in fact, think it improves upon the current system. Nonetheless, this proposal is but one in a series providing ever-shorter time frames within which a respondent must respond to a bar investigation.

These proposals are presumably intended to address the Supreme Court's legitimate concern that bar discipline cases be handled in a timely manner. However, the biggest delay in the current process is caused not by dilatory responses from respondents, but rather by delays during the Bar's investigation. Under the current system, as well as under the proposed rules, bar counsel solicit a reply from the complaining party after the respondent has submitted an initial response to the charges. There are no time lines, under either the current or proposed system, within which complainants must submit their reply, if any. Similarly, there are no time limits for any supplemental information provided by complainants during the course of the investigation. This deficiency is not caused by bar counsel and could be easily addressed by a rule that prescribes a specific time within which complainants must provide a reply to the response, and/or additional information requested of them by bar counsel.

More importantly, however, there are no deadlines for bar counsel under either the current or proposed system to conclude the screening investigation and make a recommendation to the Committee. Respondents,

and we as counsel who represent them, share the Court's concern that without sacrificing due process and fundamental fairness, State Bar investigations should be as expeditious as possible. However, there comes a tipping point where placing over-arching importance on expedition inevitably compromises fairness to the respondent. We believe that the proposed system crosses that line and the emphasis on speed will ultimately prove counter-productive. Placing all the onus for timeliness on a respondent is not only unfair – it also will disserve the Court's goal of achieving a more timely resolution of discipline cases, as it will not lead to any appreciable shortening of the time it takes for the State Bar to conclude its investigation.

F. Deadlines after investigation: Rule 55(b)(2)

Under the Task Force's original proposal, bar counsel must notify a complainant within 20 days of the dismissal of an investigation. The complainant then has 10 days to object to the dismissal. The recommended dismissal and the complainant's objection are subject to review by the Committee. Similarly, when bar counsel recommends diversion, stay, probation, restitution, admonition, or assessment of costs and expenses, respondents must file a "Summary Response" to the charges within 10 days of the "written explanation" of the charges prepared by bar counsel. The Summary Response is presented to the Committee along with the bar counsel's recommendation. However, there is no time limit specified in the rules within which the Committee is required to review and rule on these matters.

We submitted comment on this proposed rule, and because it remains unchanged in the Task Force's latest submission, we re-state our concerns here. In the proposal as a whole, the burden of expediting the process remains disproportionately on the respondent. It is neither realistic nor fair

to expect a respondent to respond within ten days to the bar's recommended sanction. If a respondent is in trial, or on vacation, or simply consumed with the business of representing clients, it will not be possible to comply with this deadline. The rules provide no recourse for a respondent to seek an extension of time. *Without the time to make an informed decision*, a respondent may either simply capitulate and sacrifice his or her legitimate interest in requesting a hearing or demand a hearing when prudence and counsel would dictate otherwise. By focusing exclusively on the deadlines incumbent on the respondent, the proposal achieves neither the court's goal of timeliness nor its commitment to provide respondents with a fair opportunity to make informed decisions and respond rationally to the bar's decision.

G. Request for Hearing: Rule 55(b)(4)B)

Under both the original and current proposal, a respondent must file a demand for formal proceedings within 10 days' notice of the Committee's decision. For the reasons stated in connection with proposed Rule 55(b)(2), we believe this does not provide respondents with adequate time in which to make such an important decision.

H. Decision by Committee: Rule 55(c)(2)

The Task Force in its Amended Petition proposes a new change to Rule 55(c)(2), requiring the Committee to consider whether a respondent has previously participated in diversion in deciding whether to authorize bar counsel to file a formal complaint. We are concerned that this proposal will allow the Committee to consider past conduct which does not rise to the level of probable cause and is not sanctionable. The proposed Rule 55(c)(2) requires the Committee to consider the following in determining whether to authorize bar counsel to file a complaint: "whether it is reasonable to believe that the misconduct warranting discipline can be proven by clear and

convincing evidence, [...] whether the conduct in question is generally considered to warrant commencement of disciplinary proceedings, [...] the level of actual or potential injury, and whether the respondent has previously been disciplined *or participated in diversion.*" (Emphasis added.)

Proposed Rule 55(a)(2) allows bar counsel to "enter into a diversion agreement [...] without conducting a full screening investigation where warranted." In addition, under the proposed revisions to Rule 56(b)(1) (*see* discussion, *infra*) bar counsel may offer diversion if "the lawyer committed professional misconduct [...] **or the state bar and the respondent agree that diversion will be useful.**" (Emphasis added.)

The practical effect of these provisions is that conduct: (1) which does not violate the ethics rules; (2) which the state bar cannot prove is misconduct by clear and convincing evidence; and (3) which is not sanctionable; could nonetheless be used as justification for a formal complaint.

Bar counsel is required to dismiss proceedings "if, after conducting a screening investigation, there is no probable cause to believe misconduct [...] exists pursuant to these rules." *See* proposed Rule 49(b)(6). On the other hand, no such guarantees are attendant to a diversion ordered prior to a screening investigation. Moreover, it is entirely possible that a respondent could enter into a diversion agreement, not because he or she had committed any misconduct, but merely to put the matter to rest and avoid the expense and anxiety of any ongoing proceedings. In the prescreening context, we believe a respondent would be entirely justified in accepting diversion without admitting any misconduct. Under those circumstances, the diversion agreement should not be usable in any subsequent proceeding. In fact, such settlements are commonplace in the administrative arena where consent

judgments are entered without admissions of liability and often are expressly not valid for use in subsequent proceedings.

The dialectic nature of diversion and the possibility for abuse is replete in the proposed rules. Rule 46(f), for example, defines "discipline" to mean "those sanctions and limitations on members in the practice of law provided in these rules. *Discipline is distinct from diversion [...], but the term may include that status where the context so requires.*" (Emphasis added). When would the context so require? Rule 46(f), moreover, defines misconduct to mean "any conduct sanctionable under these rules, including unprofessional conduct as defined Rule 31(a)(2)(B) *or conduct that is eligible for diversion.*" (Emphasis added.) We assert that Rule 55(c)(2)(D), which allows consideration of a respondent's prior participation in diversion as a factor in determining whether a complaint should issue, is ill-advised and should be rejected.

I. Diversion: Rule 56

The first stated goal of the Court for the Arizona's new discipline system, as set forth in Appendix A to Order 2009-73, is as follows:

> The intake process at the State Bar will be modified to allow intake attorneys to divert more cases. The goal is to reduce the processing time for cases and to reduce the number of cases proceeding to investigation, as is the case in Colorado. This would allow the more serious matters to receive more attention.

In our previous comments, we noted that while the Court indicated its desire to modify the State Bar's intake process to divert more cases, diversion has actually *been an available and authorized option for intake bar*

counsel since at least 2004 (*see* State Bar's 2004 Annual Report of Discipline, page iii).[1]

The Court's clearly stated intention was that a greater number of cases that would otherwise be subject to screening and possible formal proceedings would be diverted under the new system. Currently, the guidelines allow for diversion in cases that would otherwise warrant a censure ("reprimand" under the proposed rules) or lower. We have represented literally hundreds of respondents who we believe were eligible for diversion under the existing guidelines, but the State Bar nevertheless insisted on proceeding with a formal investigation, complaint and sanction. We were hopeful that the Court's Administrative Order 2009-73 would result in a system in which diversion was used with greater frequency in such low-level misconduct cases. Indeed, some of us were present for Task Force meetings at which repeated discussions were held among its members - including bar counsel - about whether Arizona would, in fact, follow the Colorado model, and use diversion to resolve cases that are now prosecuted to a formal sanction, even including censure.

However, since our original comments were filed, the Task Force has inserted an entirely new provision in its revised rule proposal concerning diversion. This new provision is problematic on its face and also causes us great concern about the direction the State Bar may take under the new discipline system in general, and regarding the potentially inappropriate use of diversion specifically.

The new proposed Rule 56(b)(1) has been modified to state that diversion may be offered if "the lawyer committed professional misconduct [...] **or the state bar and the respondent agree that diversion will be**

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[1] The original diversion rule was adopted in the early 1990s and initially amended in 1995. [*See* Notes to current Rule 55, Rules of the Supreme Court.]

useful." (Emphasis added.) While this new provision appears innocuous, in fact it is quite pernicious, and may portend an alarming departure from the Court's goals as stated in Appendix A to Order 2009-73.

Respondents at the intake stage, under both the current and proposed systems, have not been fully and formally "screened" to determine whether, in fact, they have engaged in any ethical misconduct. As the State Bar's intake office now operates, and will presumably continue to operate under the proposal, the respondent is contacted by intake bar counsel concerning the nature of the charges. At the end of the truncated intake investigation - which is not a full screening investigation and under the current Colorado and proposed Arizona systems may involve nothing more than a series of phone calls - respondents are offered the opportunity to participate in diversion, if it is warranted and they are eligible.

Under the current system, if a respondent disagrees that he or she has engaged in misconduct and rejects diversion, intake bar counsel has the option of sending the matter to Lawyer Regulation for a screening investigation. At the end of that process – if and only if – bar counsel has clear and convincing evidence that the respondent engaged in misconduct – then and only then – can bar counsel seek an order of diversion from the probable cause panelist.

Under this new proposal, however, intake bar counsel can offer the respondent diversion – *without a determination that there has in fact been any misconduct* – merely if intake bar counsel thinks that diversion would be "useful," an amorphous term not defined in the proposal. At that point, the respondent will be faced with the prospect of choosing between taking diversion, a certain outcome, or "rolling the dice" by refusing to do so, with the risk of a referral for a formal screening investigation, with all the attendant cost, stress and time - and most importantly, the uncertainty the

decision implicates. All the while, the respondent would not know – though the intake bar counsel might likely know – that **the State Bar may not have clear and convincing evidence that any misconduct has in fact occurred.**

It seems obvious what the respondent will choose: take the offer of diversion, pay the State Bar for the costs associated with whatever programs are offered, and put the matter behind them.

There are myriad problems with such an approach, not the least of which is that this is completely contrary to the goals of and philosophy behind both the Court's Administrative Order and the Colorado system: to divert **lower level cases *of misconduct – not cases in which there was no misconduct at all.***

This appears to be a somewhat disingenuous process because there is nothing in the proposed rules that requires intake bar counsel to inform the respondent that the intake investigation has not produced evidence sufficient to prove a violation, and that diversion is being offered ostensibly because it would be somehow "useful" to the respondent. Such a system would provide an unwarranted incentive and opportunity for intake bar counsel to offer diversion if a respondent seems willing to accept it even if there is little or no proof of a violation and the matter should be dismissed outright.

Such a system appears to us to be entirely inconsistent with the Colorado model, which favors using diversion in cases where there is demonstrable, low-level misconduct that would otherwise warrant a low-level sanction such as private probation, private admonition, or even censure. It also subverts this Court's stated goal to divert cases where there is low-level misconduct that would otherwise warrant a formal screening investigation, and perhaps formal sanction - so that the Bar can focus its resources and time on the serious cases of misconduct.

Furthermore, participation in diversion, in light of positions taken by bar counsel in recent years, has risks and consequences of which most respondents are completely unaware. First, if a respondent accepts bar counsel's offer to participate in a diversion program to address any given specific ethical rule, the respondent will not normally be offered diversion again if there is a future violation of the same rule. In most such cases, the State Bar will then "up the ante," by seeking to sanction the respondent for the second case. Respondents who have not in fact engaged in conduct that violated the rules, but unwittingly and undeservedly accepted intake diversion to avoid further investigation and prosecution, will not understand that likely, they will be ineligible thereafter for diversion for subsequent misconduct violative of the same rule.

Moreover, bar counsel, with increasing frequency, seek to use prior participation in diversion against a respondent in subsequent formal disciplinary proceedings. Bar Counsel often seek to use diversion as an "aggravating factor" in formal discipline cases, similar to use of prior disciplinary sanctions, in order to justify an increased or "aggravated" sanction against the respondent. While this position by bar counsel is not often successful, it is nonetheless routinely attempted.

Indeed, under the revised changes to Rule 55(c)(2)(D), the Task Force has required the Committee to consider a respondent's previous participation in diversion in deciding whether, in a subsequent discipline matter, a formal complaint is warranted. *See* discussion, *supra*.

In addition, in a recent case, the State Bar took the position that a respondent currently in diversion has the following ethical obligations: (1) the respondent must inform clients, pursuant to ER 1.4, that he or she received prior informal discipline and/or diversion; (2) respondent must advise clients about the material risks of being represented by a lawyer who

has received diversion for violating the ethics rules; (3) respondent must communicate with clients about reasonably available alternatives to being represented by that lawyer, as opposed to a different attorney who is not being counseled on how to practice law ethically; and (4) respondent must explain to clients the dynamics of being represented by a lawyer with a known penchant for violating the ethical rules, to allow clients to make an informed decision about whether they want the lawyer to continue to represent them.[2]

As set forth above, diversion is available to respondents under our current discipline system - during intake or any other stage of the proceeding thereafter - without the need for a rule change. The Court in its Administrative Order asked the Task Force to facilitate the expanded use of diversion. To the extent that the revised proposal seeks to expand the use of diversion to **cases that would not warrant any sanction at all - but would actually be dismissed under the current system** - we reject this as both a step backward as well as a presumably well-intentioned but misguided effort that would subvert the stated goals of this Court. We strongly believe that the Court intended to follow the Colorado model, so as to increase the use diversion for lower level misconduct cases – not for borderline dismissal cases. Accordingly, we respectfully urge the Court to reject the revisions to proposed Rule 56(b)(1).[3]

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[2] *See* Hearing Officer report filed in *In re Petersen*, SB 08-1964 (2009). While the State Bar's arguments in this case regard were rejected by the hearing officer, this case nonetheless reflects the anomalous views of bar counsel concerning the obligations of attorneys who have been on diversion.

[3] While we recommend the proposed change be rejected in its entirety, if it is retained we urge that it be revised to include the language of Rule 55(a)(2)(C), such that diversion be offered only if "there exists misconduct which may warrant the imposition of a sanction".

J. Special Discipline Proceedings: Rule 57

Rule 57(a)(5)(B) deals with the Court's acceptance of a consent to disbarment. The language in the proposed rule creates what appears to be perpetual jurisdiction over disbarred lawyers, even for conduct unrelated to the practice of law. Moreover, the language is inconsistent with Rule 46(e) which provides for jurisdiction over disbarred attorneys only for conduct occurring prior to the disbarment.

The Court has addressed the issue of its jurisdiction over attorneys for conduct prior to disbarment and for violations of orders of disbarment. *See In re Creasy*, 198 Ariz. 539, 12 P.3d 214 (Ariz. 2000). However, there is no rule provision, and indeed no legitimate basis we are aware of, for retaining jurisdiction over a non-member disbarred lawyer for conduct which preceded the order of disbarment or for conduct in contempt of the order of disbarment.

We suggest that Rule 57(a)(5)(B) be changed to read as follows: "but will remain subject to the jurisdiction of this the court consistent with Rule 46(e)."

K. Formal Proceedings: Rule 58

Both the original and current proposals include a provision that shortens the time for a notice of default from ten days to five. We continue to assert that this serves no useful purpose. It is contrary to the Rules of Civil Procedure, with which most practicing lawyers are familiar. We also note that this change was proposed in the most recent set of rule changes, and was rejected by the Board of Governors for the reason that it was contrary to the Rules of Civil Procedure. We continue to express our opposition to this change. We further believe that for good cause, the PDJ should have the power to extend the hearing date beyond the existing 150 day requirement.

L. Rule 59(c) (Appeals)

The Task Force's original proposal required a respondent to seek a stay pending appeal, and stated that such applications "**should** be granted subject to appropriate conditions of probation and supervision, except when an interim suspension has been ordered or when the hearing panel, in its discretion, determines no conditions of probation and supervision will protect the public while the appeal is pending." (Emphasis added.) The proposal provided then, as it does now, that in the absence of a stay, the respondent would be disciplined as ordered by the hearing panel.

We submitted comment expressing our concern with this proposal, and the Task Force then made substantial changes to the overall proposal. With regard to concerns about applications for stay, the revised proposal deletes the word "should" from the above-quoted provision, and replaces it with the word "shall." We are pleased with this change. However, the revised proposal is still problematic.

In Arizona, probation is an independent sanction. *See* Rule 60(a)(5). The proposed rule therefore requires that "probation" be imposed pending an appeal. The idea that a respondent will be sanctioned immediately for conduct that is the subject of a pending appeal is both unworkable, and counterintuitive. We therefore suggest deleting the word "probation" from proposed Rule 59(c), and leaving the term "supervision." With this change, we endorse the proposal.

M. Imposition of Suspension Upon Conviction of Crime: Rule 61(c)(1)

Under both the original and revised proposals, a lawyer convicted of a felony shall be suspended ten days after receipt *by the court* of a notice of conviction, unless the respondent files a motion showing good cause why the court should not implement the suspension. However, there is no

requirement that the court notify the respondent of the date it received notice of the conviction, or the date on which the suspension will be implemented by the court. Therefore, unless the respondent independently ascertains those critical facts, the respondent could be suspended before he or she is even aware that the court has received notice of the conviction.

A lawyer convicted of a misdemeanor involving a "serious crime" may be suspended pending final result in the discipline proceeding. The State Bar must file a motion with the court and respondent has the opportunity to file a response. We think before any suspension resulting from a conviction occurs, the respondent should receive timely notice of the date on which the suspension will be imposed so that the respondent can take timely action to forestall the suspension, if warranted.

N. Reinstatements: Rule 65

We have two areas of concern regarding proposed Rule 65. First, Rule 65(a)(1) changes the language regarding the entity to which a reinstatement applicant must provide a release or authorization. The previous rule required the applicant to provide the release to the hearing officer. The proposed rule requires authorization be given to bar counsel. This change makes good sense. It is not the change in the authorized entity that is problematic; rather, the concern is the confidentiality of the records obtained. Rule 65(a)(1) contemplates that the State Bar will "obtain documents or information in the possession of any third party, including a physician, psychologist or psychiatrist." However, Rule 70 (a)(5) provides that the State Bar file becomes public upon "the filing of an application for reinstatement pursuant to Rules 64 and 65." Consequently, absent a protective order, the rules make the documents and information gathered by the State Bar public upon filing of the application.

Proposed Rule 65(a)(1) does not appear to change existing practice. The difference is that the State Bar will now be authorized to obtain the documents without an order (subpoena) from the hearing officer. Without a protective order, the previous rules never adequately protected confidential information. Because the rules are being amended, they should be clarified to ensure confidentiality of certain records obtained by the State Bar.

Second, proposed Rule 65(b) lengthens the time in which to hold a hearing on reinstatement applications. The proposed rules require a hearing within 150 days of the application, whereas the previous rule provided for hearing within 120 days. While it may be that the State Bar needs additional time to perform its investigation, from the applicant's perspective, any additional time is additional discipline.

O. Public Access to Information: Rule 70

Because we are urging the Court to make probation and admonition private, Rule 70(b)(3) should include those sanctions, along with diversion, as sanctions for which there is an exception to the availability of information. Also, revised proposed Rule 70(g) (Sealing the Record/Protective Orders) represents a significant change to the process of seeking and appealing decisions regarding protective orders. This proposed rule allows only the PDJ to issue a protective order. While we are in favor of the change that removes that function from the probable cause panelist (the Board of Governors), we are not entirely comfortable with the portion of the proposal that requires an aggrieved party to file a petition for special action with this Court. This would preclude reconsideration by the PDJ via rule 47(j) or any other less onerous, expensive and time-consuming procedure.

The cost of filing a petition for special action is unjustifiably burdensome for respondent lawyers, and in some cases prohibitively so. Moreover, it seems unlikely that the Court's time would be well spent

deciding issues such as these until other alternatives have been exhausted. A reasonable alternative may be to allow the Committee to be the first step in issuing a protective order, and the PDJ to then be available to review appeals of Committee decisions regarding protective orders. This Court would then be available for special actions only as a last resort.

Finally, the State Bar has, historically, automatically disseminated information for which a protective order was sought upon its receipt of an order denying the request for a protective order. At times, dissemination took place prior to respondent receiving notice of the denial. This practice negates any right to appeal or to seek a special action review. We therefore suggest adding a provision allowing a stay prior to dissemination of the information.

III. Conclusion:

We respectfully urge the Supreme Court to consider and implement our Comments concerning the rule changes in the Amended Petition and revised proposed rules contained in Attachment A thereto. The undersigned lawyers appreciate the work of the Task Force and are prepared and willing to assist the Court in evaluating and implementing its proposals.

Respectfully submitted this 11th day of June, 2010.

/s/ Mark I. Harrison
Ralph Adams
James J. Belanger
Karen Clark
Nancy A. Greenlee
Mark I. Harrison
Denise M. Quinterri
Mark D. Rubin
Lynda C. Shely
Donald Wilson, Jr.

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 11th day of June, 2010.

By: /s/ Joni J. Jarrett-Mason
3161419

EXHIBIT 1

CHART 1

LAWYER POPULATION AND AGENCY CASELOAD VOLUME, 2007

Survey on Lawyer Discipline Systems, 2007
ABA Center for Professional Responsibility

STATE	No. of Lawyers with Active License	No. of Complaints Received by Disciplinary Agency	No. of Complaints Pending from Prior Years	No. of Complaints Summarily Dismissed for Lack of Jurisdiction	No. of Complaints Investigated	No. of Complaints Dismissed After Investigation	No. of Lawyers Charged After Probable Cause Determination
Alabama	14,285	1,398	291	1,181	233	145	28
Alaska	2,913	264	58	205	31	21	6
Arizona	16,038	3,914 [1]	864	1,047	1,797	545	101
Arkansas	8,500 *	819	N/A	0	924	784	140 [2]
California	161,437	16,684 [3]	3,526	13,310	4,889	1,637	385
Colorado	21,900	4,016 [4]	33	3,471	372	189	52
Connecticut	35,387	1,263	N/A	158	1,110 *	861	163 [2]
Delaware	3,435	354	59	75	338	228	32
District of Columbia	63,115	1,277	388	803	862	474	38
Florida	68,589	7,827 [5]	3,321	1,767	7,296	5,315	73
Georgia	31,528	2,794 [6]	341	2,496	356	178	193 [2]
Hawaii	4,700	549	340	101	448	46	331
Idaho	3,988	414	232	429	351	40	9
Illinois	82,380	5,988 [7]	1,896	1,508	6,070	4,117	279

* = Estimated.

[1] Arizona: Includes 2,742 matters handled by consumer assistance program.

[2] Arkansas, Connecticut, Georgia: Represents number of cases, not lawyers.

[3] California: Includes matters handled by central intake. The State Bar of California defines a complaint as a communication concerning the conduct of a member received by the Office of the Chief Trial Counsel which is designated for evaluation to determine if any action is warranted.

[4] Colorado: Includes matters handled by central intake.

[5] Florida: Excludes 1,898 matters handled by consumer assistance program.

[6] Georgia: Excludes matters handled by consumer assistance program.

[7] Illinois: Includes 4,117 matters handled by central intake.

CHART I

LAWYER POPULATION AND AGENCY CASELOAD VOLUME, 2007

Survey on Lawyer Discipline Systems, 2007
ABA Center for Professional Responsibility

STATE	No. of Lawyers with Active License	No. of Complaints Received by Disciplinary Agency	No. of Complaints Pending from Prior Years	No. of Complaints Summarily Dismissed for Lack of Jurisdiction	No. of Complaints Investigated	No. of Complaints Dismissed After Investigation	No. of Lawyers Charged After Probable Cause Determination
Indiana	16,885	1,598	839	960	1,477	411	34
Iowa	8,578	904	260	120 *	799	595	40
Kansas	10,532	893	N/A	359	524	411	53
Kentucky	15,581 *	1,285 [8]	491	809	1,091	426	50
Louisiana	20,228	2,712	2,566	1,436	3,810	805	113
Maine	4,869	342	74	42	381	211	21
Maryland	33,487	1,940	354	1,589	722	368	57
Massachusetts	52,143	970 [9]	955	53	1925	881	150
Michigan	37,668	3,293	NA	2,219	686	535	168
Minnesota	25,775	1,226	578	552	1,252	465	23
Mississippi	8,331	549	21	382	28	11	22
Missouri	29,343	2,359 [10]	524	1,422	1,240	514	47
Montana	3,402	379	219	140	484	197	41
Nebraska	6,381	544	78	169	375	319	48
Nevada	7,463	1,614	N/A	161 [11]	1,453 [12]	71 [13]	17
New Hampshire	4,531	134	107	130	178	50	21
New Jersey	81,684	1,553	1,067	6,217 *	1,494	N/A	219

* -- Estimated.

[8]Kentucky: Includes 552 matters handled by central intake.
[9]Massachusetts: Excludes 5,292 matters handled by consumer assistance program.
[10]Missouri: Includes matters handled by central intake.
[11]Nevada: Reflects best estimate of cases summarily dismissed by Bar Counsel with no investigation and without a grievance file being opened (no screening panel review).
[12]Nevada: 1,199 cases were investigated, but no grievance file opened, plus 254 grievance files opened for a combined total of 1,453.
[13]Nevada: Of 254 grievance files opened, 71 were dismissed outright or dismissed with letters of caution, and an additional 16 were closed with private reprimands.

CHART I

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New Mexico	6,365	484	196	456	61	0	18
New York 1st Judicial Department	88,000	3,517	1,111	1,293	3,335	2,032	59
New York 2nd Judicial Department 2nd & 11th Districts	13,857	2,076	885	1,183	1,244	437	60
New York 2nd Judicial Department 9th District	13,634	1,341	669	409	789	412	103
New York 2nd Judicial Department 10th Judicial District	19,943	2,137 [14]	1,543	1,069	803	670	40
New York 3rd Judicial Department	9,500 *	1,709	617	1,024	591	255	224
New York 4th Judicial Department 5th, 7th & 8th Districts	13,153	2,224	847	1,123	1,948	1,047	22
North Carolina	22,222	1,466 [15]	700	965	581	385	30
North Dakota	1,931	194	115	57	252	134	N/A

* = Estimated.

[14] New York 2nd Judicial Dept. 10th Judicial District: Includes 609 matters handled by central intake.
[15] North Carolina: Excludes 2,789 complaints handled by consumer assistance program.

CHART I

LAWYER POPULATION AND AGENCY CASELOAD VOLUME 2007

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Ohio	41,831	5,284	N/A	3,037	2,247	N/A	103
Oklahoma	16,027	390	283	1,071	444	378	20
Oregon	13,500	1,721 [16]	N/A	650 *	1,070 *	890 *	133
Pennsylvania	60,619	4,733	883	114	5,502	4,045	237
Rhode Island	8,000	388	N/A	98	290	276	14
South Carolina	8,200	1,402	713	203	1,280	1,025	255
South Dakota	2,282	118	48	20	118	97	9
Tennessee	18,568	1,064 [17]	315	180	1,363	412	69
Texas	80,094	6,954 [18]	N/A	4,445	2,247	1,574	582
Utah	7,245	999 [19]	435	904	1,466	74	24
Vermont	2,000 *	262 [20]	50	71	333	156	14
Virginia	26,937	4,045 [21]	837	2,414	1,895	720	N/A

* = Estimated.

[16] Oregon: Includes 1,629 matters handled by consumer assistance program.
[17] Tennessee: Excludes 4,380 matters handled by consumer assistance program.
[18] Texas: Excludes 4,160 cases handled by consumer assistance program.
[19] Utah: Includes 42 matters handled by central intake.
[20] Vermont: Excludes 33 matters handled by consumer assistance program.
[21] Virginia: Includes 2,987matters handled by consumer assistance program.

CHART I

LAWYER POPULATION AND AGENCY CASELOAD VOLUME, 2007

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Washington	26,730	2,589 [22]	1,067	1,125	2,196	906	83
West Virginia	6,169	577	411	204	989	580	15
Wisconsin	18,767	1,896 [23]	817	1,564	1,149	128	37
Wyoming	1,864	172	4 *	119	55 *	31	.4 *
TOTAL*	1,412,514	117,598	32,028	67,109	75,243	37,514	5,109
AVERAGE*	25,223	2,100	681	1,198	1,344	695	95
MEDIAN*	14,933	1,370	435	727	893	412	5,109

* = Estimated.

[22] Washington: Includes matters handled by central intake.
[23] Wisconsin: Includes matters handled by central intake.