MEMO

TO: Supreme Court of Arizona

FR: Mark I. Harrison

RE: Petition to Amend Rule 36 [R-10-0019 - Alternative Proposal]

DA: April 15, 2011

I have reviewed the "Alternate Proposal" to amend Rules 36(e) and (f) relating to the procedure before the Committee on Character and Fitness and submit the following comments and recommendations relating to the Alternate Proposal. My comments and recommendations are based on my experience handling 89 admissions cases over the past 25 years.

The proposals reflected in the "Alternative Proposal" [R-10-0019] help address some of the current deficiencies in the procedures governing the Committee's operation but do not adequately resolve all of those deficiencies. The proposed amendment which mandates disclosure by the applicant and the Committee thirty (30) day prior to the hearing, whether informal or formal, would be a major improvement if the Committee discloses all of the evidence on which it can properly rely in evaluating the applicant's application.

However, the pending proposal also states that in the absence of an agreement by the "providing party," confidential information "shall not be presented at the hearing or otherwise considered by the Committee in determining the applicant's character and fitness for admission to practice law." This is analogous to instructing a jury to disregard inadmissible evidence that the trial court has ordered stricken. It is generally acknowledged that such an admonition only serves to reinforce the information in the minds of the jurors. Similarly, it is reasonable to conclude that once a Committee member has seen negative, prejudicial evidence, it is unrealistic and fundamentally unfair to the applicant to assume that such evidence will be wholly disregarded in the decision-making process by that member and other members with whom the information has been shared.

To remedy this deficiency, I would recommend the following amendment to Rule 36(e) and (f) governing the admission process:

> **When information is submitted by potential witnesses, the staff should initially determine whether the witness will agree to have his or her identity disclosed to the applicant and agree to the disclosure of the information submitted by the witness. If the witness will not waive confidentiality and provide that agreement, *the information should not be distributed or accessible to members of the Committee.*** This is the only method that assures the Committee will not rely, *consciously or subconsciously*, on evidence this Court has held cannot be properly considered in deciding whether the applicant should be admitted to practice law in Arizona. Moreover, this procedure would enable the Committee to disclose to the applicant all evidence on which it can properly rely in evaluating the applicant's application as contemplated by the proposed amendment set forth in proposed Rules 36(e)(4) and (f)(4) of the Alternative Proposal.

The legal justification for the recommended change can be found in the decisions of this Court and the Supreme Court of the United States. The current rules are in conflict with decisions of both Courts. As this Court is aware, lawyers seeking admission to practice law are entitled to due process in the admissions process. *See, e.g., Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39, 77 S.Ct. 752, 756 (1957)("A State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.") The current Arizona rules do not assure that applicants receive due process. The formal "Notice" typically issued by the Committee at the present time lists only very general "categories" of information (e.g., "Misconduct in employment"; "Acts involving dishonesty, fraud, deceit or mispresentation"; and typically includes a "catch-all" category ("All other matters that may bear upon your character and fitness to practice law") which will be the subject of the Committee's inquiry. It is self-evident that "Notices" of this kind are not notices that comport with due process. Under the current rules, the Committee is not required to timely disclose to applicants in advance of either an informal or formal hearing (a) the names of adverse witnesses or (b) notice of the negative evidence (or even a summary of the negative evidence) that may adversely affect the applicant's ability to secure admission to the Bar and enable the applicant to prepare for the hearing. Denying the applicant this information in advance of the informal and formal hearings obviously deprives the applicant of due process and the ability to properly prepare to respond to negative evidence. Presumably, the proposed amendment to Rules 36(e) and (f), if coupled with the primary recommendation set forth in these comments, would remedy the current lack of due process.

In *Application of Burke*, 87 Ariz. 336, 351 P.2d 169, 172 (1960), this Court held:

> …we cannot allow (confidential) information of this nature to be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. To do so would be to open the door to the most noxious type of character assassination and guilt by innuendo. If respectable persons have derogatory information or *bona fide* charges to level against an applicant, they should not hesitate to come out into the open and speak the truth. If they insist on hiding behind a cloak of secrecy, then their evidence cannot be used to impeach the character of a man whose only apparent fault has been to acquire a few devious secret enemies. (Parenthetical matter added).

The decision of this Court in *Burke*, *supra* and in *Schware* and other decisions of the Supreme Court of the United States squarely support the recommendation set forth above in these comments.

It should be added that the deficiency that is the subject of this recommendation is attributable to inadequacies in the rules governing the admissions process, not in the operation of the Committee. The Committee, comprised of volunteers who contribute significant time and perform their work in good faith, must operate pursuant to the rules and apply the rules prescribed by this Court. As noted above, the current rules are seriously deficient and should be revised as recommended above. I would be pleased to discuss these issues with the Court and would be willing to suggest specific language to implement the recommendation set forth above.