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8 **IN THE SUPREME COURT**
9 **OF THE STATE OF ARIZONA**

10 In the Matter of :) Supreme Court No. R-10-
11) 0019 _____
12)
13 PETITION TO AMEND)
14 RULES 34-37, RULES OF THE) Comment on “Alternative Proposal” to
15 SUPREME COURT) Petition to Amend Rules 34-37,
Rules of the Supreme Court

16 Pursuant to Rule 28, Arizona Rules of the Supreme Court, undersigned
17 counsel respectfully submits her comments on the above-referenced Alternative
18 Petition regarding proposed changes to the rules pertaining to the Character and
19 Fitness process. Undersigned counsel’s comments are based on her formal
20 representation of approximately 40 applicants over the last several years, her
21 consultations with approximately an additional 40 applicants during that same time
22 period, and her scrutiny of the rules both here in Arizona and in other states
23 throughout the course of those representations.
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1 Undersigned counsel has reviewed the “Alternative Proposal,” the Comment
2 by Mark I. Harrison, the Comment by the Co-Chairs of the Committee on
3 Character and Fitness, and the Comment by the Committee on Examinations.¹
4
5 Counsel appreciates the efforts by Mr. Harrison and the Committees and
6 appreciates the opportunity to comment on the proposed revisions. Counsel would
7 like to thank the Co-Chairs of the Committee on Character and Fitness (hereafter
8 “the Committee”) for alerting Counsel to these proposed revisions in order that she
9 may comment.
10

11 **I. Proposed Changes and the Corresponding Comments**

12 The suggested changes proposed by the Committee on April 15, 2011, are
13 preferable to the proposed language in the original “Alternative Proposal.” It
14 further appears that the Committee’s suggested changes do a better job of
15 addressing the concerns expressed by Mr. Harrison than the current rule language
16 or the “Alternative Proposal.” One concern remains.
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19 **1. Mr. Harrison’s Comments**

20 Counsel strongly agrees with Mr. Harrison’s analysis of the governing case
21 law regarding the use of “confidential” information against applicants. In addition
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24 ¹ As the Comment by the Committee on Examinations simply joins with the Comment by the
25 Committee on Character and Fitness, undersigned counsel will not be addressing the
26 Examination Committee’s Comment separately. Consequently, subsequent references to “the
Committee” refer solely to the Committee on Character and Fitness.

1 to the case law cited by Mr. Harrison, counsel would point this Court to the
2 following cases: *Application of Guberman*, 90 Ariz. 27, 363 P.2d 617 (1961)
3 (reiterating that the use of a “confidential” file is foreclosed as a basis for keeping
4 an applicant from the practice of law when he has had no opportunity to meet and
5 rebut any possibly derogatory matters contained therein); *Application of Levine*, 97
6 Ariz. 88, 90-92, 397 P.2d 205, 206-07 (1965) (“We have held the practice of law
7 rises above that of a mere privilege. For those who have the necessary
8 qualifications, it is a right.”) (Internal citations omitted.)²

11 To remedy problems relating to the failure to or delay in disclosure to
12 applicants of materials in their files, Mr. Harrison recommends incorporating
13 language requiring that staff initially determine whether a witness will agree to
14 have his or her identity disclosed to the applicant, and if not, precluding the staff
15 from distributing that witness’s statements to the Committee. Counsel agrees with
16 that suggestion, which would not be difficult to incorporate with the Committee’s
17 proposed language.

20 ² “[O]ne may not be excluded by state action from a business, profession or occupation in a
21 manner or for reasons which contravene the due process clause of the Fourteenth Amendment of
22 the Constitution of the United States, and that due process means that there must be given notice
23 of time and place of hearing, a reasonable definite statement of the charge or charges, the right to
24 produce witnesses and to examine adverse witnesses and to have a full consideration and
25 determination according to evidence before the body with whom the hearing is held.” *Levine*, 97
26 at 91, 397 P.2d at 207. “At all stages in the investigation, it is the applicant's right to produce
witnesses and evidence on his own behalf **and, if there are accusers and adverse witnesses, to
be confronted by and to examine them.** It is, finally, the responsibility of the committee to
consider the evidence **on the open record** [. . .].” *Id.* at 92, 397 P.2d at 207 (emphasis added;
internal citations omitted).

1 Counsel further agrees with Mr. Harrison's statement that the proposal
2 mandating disclosure by the applicant and the Committee in advance of the hearing
3 would be a major improvement. However, Counsel agrees with the Committee
4 that 30 days is excessive. As it stands, these proceedings already take too much
5 time. Rule 34(b)(2), Ariz.R.Sup.Ct., provides that the Committee shall endeavor to
6 complete its inquiries in time to recommend for or against an applicant's admission
7 no later than the date of the results of the bar examination. Yet in practice, if there
8 is an informal hearing, the applicant rarely receives the recommendation by the
9 date of the results of the bar examination. Unfortunately, it is not at all uncommon
10 in that situation for the process to take three to six months after the results of the
11 bar examination. Where there is a formal hearing, the process often takes six
12 months after the results of the bar examination, and sometimes more.
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16 Additionally, it is a rare occurrence that the applicants are even notified that
17 there will be a hearing more than 30 days in advance of that hearing. This is
18 understandable and probably commendable in that the applicants' interests are
19 almost always to have the hearing as soon as possible. Nevertheless, to require the
20 applicant to then submit his or her materials 30 days in advance would likely be
21 impossible and would certainly be impractical. The Committee's suggestion of 12
22 days is preferable—with one modification to be discussed below.
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1 **2. The Committee’s Comments**

2 Counsel commends the Committee for its research into other states’ rules
3 concerning this process and its thoughtful attempt to balance the interests of the
4 operational needs of the Committee with the need of an applicant to receive the
5 information required by due process and the applicant’s right to confidentiality.
6 Counsel largely agrees with the Committee’s comments, with a few exceptions
7 and/or requested clarifications.
8

9 **a) Disclosure Timeframes**

10 As mentioned above, Counsel agrees with the Committee that 30 days is an
11 excessive amount of time to require the applicant to disclose exhibits and
12 witnesses, particularly given the valid reasons for expediting this process so that
13 applicants may be licensed and able to obtain employment within a reasonable
14 amount of time. Counsel has no objection to the 12 day timeframe proposed by the
15 Committee for the formal disclosure of witnesses and exhibits. However, Counsel
16 disagrees with the language suggesting that the disclosures of the applicant and the
17 Committee should be simultaneous. This is impractical.
18

19 The applicant should first have the opportunity to review the materials the
20 Committee will be using at the hearing in order to determine what exhibits and
21 witnesses may be appropriate for the applicant to gather and then disclose. Given
22 that the Committee does not send out notices of hearing until its review of the file
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1 is complete, Counsel suggests that the Committee send out its disclosure of the file
2 materials that will be used at the same time as it sends out the notice of hearing.
3 The disclosure by the Committee should automatically consist of any information
4 in the file other than that already provided by the applicant, work product of the
5 Committee, and any information provided by individuals who request their
6 information remain confidential. The notice of hearing and the accompanying file
7 materials should be provided at least 30 days in advance of the hearing date.
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10 Further, and perhaps more importantly, this would, and should, eliminate the
11 requirement for applicants to make written request to the custodian of record for a
12 copy of the information in the applicant's file. It is unlikely that unrepresented
13 applicants would know to request copies of their file. There is no need for a
14 request to be required and it only adds an unnecessary additional step which also
15 adds extra time and confusion to the process. The proposed change of language is
16 set forth below, and also incorporates changes suggested by subsequent comments.
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19 **36(e)(3):**

20 3. Permissible Evidence, Disclosure, Discovery. Applicants
21 receiving notice of a hearing as set forth in paragraph (e)(1) of this
22 rule shall receive a copy of all information in the applicant's
23 Character and Fitness file, excluding the following materials: work
24 product and information provided by individuals who request their
25 information remain confidential. Documents in the file that were
26 submitted by applicant will not be reproduced other than by specific
request of the applicant with corresponding payment of reasonable
copying costs. Information provided by individuals requesting their

1 information remain confidential shall not be provided to the
2 Committee or to the applicant by the custodian of record and shall not
3 be presented at the hearing or otherwise considered by the Committee.
4 At least twelve (12) days prior to the informal hearing, or otherwise as
5 agreed by the parties, the applicant and the Committee shall
6 simultaneously disclose a List of Witnesses and Exhibits, with copies
7 of exhibits attached, excluding documents previously provided under
8 Rule 36(e)(3). Information disclosed within twelve (12) days of the
9 hearing and without agreement of both parties may be admitted at the
10 discretion of the Chair with good cause shown.

11 **36(f)(3):**

12 3. *Permissible Evidence, Disclosure, Discovery.* Applicants
13 receiving notice of a hearing as set forth in paragraph (f)(1) of this
14 rule shall receive a copy of all information in the applicant's
15 Character and Fitness file, excluding the following materials: work
16 product and information provided by individuals who request their
17 information remain confidential. Documents in the file that were
18 submitted by applicant will not be reproduced other than by specific
19 request of the applicant with corresponding payment of reasonable
20 copying costs. Information provided by individuals requesting their
21 information remain confidential shall not be provided to the
22 Committee or to the applicant by the custodian of record and shall not
23 be presented at the hearing or otherwise considered by the Committee.
24 At least twelve (12) days prior to the informal hearing, or otherwise as
25 agreed by the parties, the applicant and the Committee shall
26 simultaneously disclose a List of Witnesses and Exhibits, with copies
of exhibits attached, excluding documents previously provided under
Rule 36(e)(3) or 36(f)(3). Information disclosed within twelve (12)
days of the hearing and without agreement of both parties may be
admitted at the discretion of the Chair with good cause shown.

**b) Exclusion of Documents Already Provided by Applicant
From Disclosure**

Counsel understands the intent behind including this clause in the sentence
regarding the disclosure by the Committee to the applicant. There is no use in the

1 Committee disclosing materials to the applicant that the applicant already provided
2 and it would be unduly burdensome as well as a waste of paper. However,
3 Counsel is concerned that in including that clause in the rule as currently stated
4 following the word “excluding,” as it could be interpreted as a bar to the staff from
5 providing those materials to the applicant if the applicant lost their materials and
6 requested them. Obviously, applicants are entitled to obtain a copy of their
7 application if they need it. Counsel is aware that the current practice is to charge
8 the applicant a minimal cost per page of copies that the applicant may request.
9 Thus, Counsel believes it would be preferable to substitute the above-referenced
10 language for the Committee’s proposal for Rule 36(e)(3) and (f)(3).
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14 **c) “Applicants shall not disclose, share or disseminate**
15 **information to any party other than counsel, for use at the**
16 **hearing.”**

17 Counsel does not understand what this means or the purpose of this
18 sentence, which the Committee has included in its proposed language for Rule
19 36(e)(3) and (f)(3). Counsel is concerned that this language prevents an applicant
20 from consulting with character references, licensed professionals for independent
21 evaluations, *et cetera*. Counsel believes that applicants generally wish this process
22 to remain as confidential as possible and are unlikely to publicly broadcast any
23 information from their file anyway. As Counsel sees no reason for this sentence,
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1 she recommends against including it and deleted it from the above-referenced
2 proposed language.

3 **d) Rule 37(c)**

4 Counsel agrees with the Committee's proposed changes to this section.
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6 Counsel has additional comments about confidentiality that will be addressed
7 below under Section II of this Comment.

8 **e) The Omission of the Provisions Relating to a "Panel"**

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10 It is unclear whether it was intended, but both the original "Alternative
11 Proposal" and the Committee's suggested changes to that proposal provide new
12 language for Rules 36(e)(3) and 37(f)(3), but omit the language that was previously
13 there. The previous sections (e)(3) of Rules 36 and 37 contained the definition of a
14 panel. Rule 36(e)(3) contained the number of members required for an informal
15 hearing panel, and Rule 36(f)(3) contained the number of members required for a
16 formal panel.
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19 Those provisions are necessary and should not be removed. Counsel
20 suggests that the text of the current 36(e)(3) be incorporated into existing 36(e)(4).
21
22 The text of the current 36(f)(3) is too detailed to be incorporated into another sub-
23 section of 36(f) and consequently it should be re-numbered as (e)(4), with the
24 current (4) moving to (5), the current (5) moving to (6), *et cetera*.
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1 Further, Counsel has noticed a problem that can occur when there is an even
2 number of members of a Committee present at a hearing. In such instances, a tie
3 vote may occur. This is problematic and requires further work for the Committee
4 and further time and stress for the applicant. Counsel suggests incorporating
5 language to the revised rules regarding a panel that states that a panel must in all
6 events constitute an odd number.
7

8 **3. The Tension Between the Committee’s Proposed Solution, Mr.
9 Harrison’s Proposed Solution, and the Proposed Compromise.**

10 Mr. Harrison recommends incorporating language requiring that staff
11 initially determine whether a witness will agree to have his or her identity
12 disclosed to the applicant, and if not, precluding the staff from distributing that
13 witness’s statements to the Committee. The Committee had not included that in its
14 proposal, but did set forth affirmatively that information provided by individuals
15 who requested their comments to remain confidential would not be used at hearing
16 or considered by the Committee.
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19 While the Committee’s proposal goes a long way toward alleviating the
20 problems with the current rules, it does not address Mr. Harrison’s concern about
21 the difficulties in “un-ringing the bell.” This is a valid concern and it is supported
22 by the case law, particularly the quote Mr. Harrison included from *Application of*
23 *Burke*, 87 Ariz. 336, 351 P.2d 169, 172 (1960) (“To do so would be to open the
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1 door to the most noxious type of character assassination and guilty by innuendo.”).
2 Counsel believes that including the clause: “shall not be provided to the Committee
3 or to the applicant by the custodian of record” as set forth in her proposal above
4 accommodates the concern without any burden to the Committee.
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6 **II. Additional Concerns and Comments**

7 **1. Confidentiality/Privacy Rights**

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9 The Committee referenced the valid concern for confidentiality in this
10 process and cited to other states’ rules for example, as well as the American Bar
11 Association’s Model Rule on Conditional Admission to Practice Law (the “Model
12 Rule”). Counsel appreciates the Committee’s reference to the Model Rule as
13 Counsel has been harping on that Model Rule recently. Counsel asks this Court to
14 consider adopting the Model Rule into our Rules. The Model Rule could be
15 incorporated into the end of either Rule 36 or Rule 37. The incorporation of the
16 Model Rule would assist with a number of issues that applicants face in this
17 process and would add both guidance for the Committee and the applicants, as well
18 as a much needed transparency for law students and law schools.
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22 While the Committee notes that the term “confidential” is “essential to the
23 workings of the committee,” Counsel believes it is imperative to note that
24 confidentiality is also essential to the applicants’ rights. At times, Counsel sees a
25 tension between the staff’s and the Committee’s concerns with confidentiality and
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1 the rights of the applicant. Counsel believes this tension stems from a lack of
2 clarity as to the purpose of confidentiality in these proceedings. The Model Rule
3 clarifies that confidentiality is essential to protect applicants' privacy rights as well
4 as to facilitate the willingness to seek assistance and treatment for those law
5 students or future law students who may be facing substance abuse issues.
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7 Counsel will not regurgitate all of the wording of the Model Rule, but will
8 ask this Court to review it. The text of the Proposed Model Rule, and the
9 accompanying Report detailing the research behind the proposal, may be found at:
10 http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/colap/ABAModelRule_ConditionalAdmission_Feb2008.authcheckdam.pdf. The

13 Model Rule as adopted (which appears to be the exact language of the proposal but
14 is missing the Report) may be found at the following link:
15 http://apps.americanbar.org/legalservices/colap/downloads/model_rule_on_conditional_admission_aug2009.pdf.

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19 An important part of the Model Rule is the provision specifying that
20 Conditional Admission Orders shall be confidential. This provision would require
21 a slight change in procedure from the current process. In the current process, the
22 Committee and this Court have apparently interpreted the confidentiality rules as
23 applying only through the close of the hearings. Thus, after the hearing, the
24 Committee transmits and the Court Clerk publishes the names of applicants being
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1 referred for conditional admission on the Court’s calendar, where they are easily
2 discoverable by an Internet search. This practice should end. The Committee and
3 the Court Clerk should instead refer to applicants as “*In re Applicant John Doe*”
4 and/or by case number.
5

6 It is also worth noting that this practice of transmitting the names of the
7 applicants referred for conditional admission recently raised questions by bar
8 counsel (during meetings of the Task Force on the Discipline Rules during late
9 2009 and early 2010) as to whether the Lawyer Regulation section of the State Bar
10 should continue to keep conditional admittee status confidential. The answer to
11 that question is definitely “yes” and the Model Rule provides a valuable line of
12 reasoning as to why that is so.
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15 Aside from the valid concerns discussed in the Model Rule, confidentiality
16 is also imperative because no applicant should be forced to start off their career
17 with a black mark against their name. While it is understandable that in some
18 cases conditions may be warranted for cautionary reasons to promote protection of
19 the public, the fact remains that there is always a tension in balancing that goal
20 with the rights of an individual to put their past behind them and to embark on a
21 career. We cannot encourage a proposition that mistakes made in one’s youth
22 should forever ruin one’s life. The doctrine that “a leopard never changes its
23 spots” is hostile to the rules of this court. *Application of Guberman*, 90 Ariz. 27,
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1 363 P.2d at 618-19 (“Almost universal human experience dictates that moral
2 character can and does change both for better and worse--examples of great
3 extremes of both are widely known.”) In sum, the goal of protection of the public
4 can and should be balanced with due respect for the applicant’s privacy rights.
5

6 **2. Confidentiality from Applicant**

7 Another issue that has recently arisen about confidentiality, is that the
8 Committee has come to the conclusion that the number of votes for or against in
9 informal hearings and formal hearings should be withheld from the Applicant.
10 Counsel disagrees with that interpretation. It is unclear why the confidentiality
11 provision would apply as against the applicant that is the subject of the hearing.
12 But beyond that fundamental difference of view on the purpose of confidentiality,
13 there are practical reasons why the applicant needs to know the votes.
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16 Specifically, there are provisions in the rules that mandate different results
17 depending on the number of votes. For example, current Rule 36(e)(4) provides:
18 “In the case of informal hearings required by paragraph (d)(4) of this rule, a
19 recommendation of admission shall require the concurrence of a majority of the
20 panel members, but in no even less than three members.” If the applicant is not
21 told the vote, the applicant has no way to ensure that a decision to send the
22 applicant to a formal hearing is necessary or required under the rules.
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1 By not telling the applicant the number of votes, the applicant has no idea
2 what transpired and no idea whether it is in accord with the rules. There are other
3 examples of situations under 36(f) where it could also be relevant to the applicant
4 to know the number of votes. This is not to say that the Committee does not intend
5 to follow the rules—of course it does. Counsel echoes Mr. Harrison’s comment
6 that the Committee admirably contributes significant time and performs their work
7 in good faith. But the Committee is made up of human beings, all of whom are
8 volunteers, and the individuals appointed vary over the years. There are going to
9 be times that mistakes are made and the applicant may need to challenge the
10 decision or in any event should be able to inquire as to the correctness of the
11 interpretation. This cannot happen if the applicant does not know. There is no
12 legitimate need that Counsel can see for a rule that the confidentiality of the
13 process includes keeping relevant information from the applicant.
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18 **3. Timing of Prior Conduct and its Relevancy to Admission**

19 The Model Rule also provides instructive guidance on the issue of when past
20 conduct should be relevant to admission to the Bar.
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22 Conditional admission is not intended to apply to all applicants who
23 have rehabilitated themselves from prior conduct or other matters of
24 concern to bar admissions authorities, but only to those whose
25 rehabilitation or treatment is sufficiently recent that protection of the
26 public requires monitoring of the applicant for a specified period. The
availability of conditional admission does not preclude unconditional
admission in cases where rehabilitation or treatment has been

1 successful for a sustained time period; nor does it preclude denial or
2 deferral of admission in cases where rehabilitation or treatment has
3 been of shorter duration.

4 Model Rule, page 3 (emphasis added).

5 This language and other language in the Model Rule would be exceedingly
6 helpful for our Committee’s process. As the Court may or may not be aware, in
7 recent years applicants with substance abuse related arrests in their past are
8 routinely being sent for substance abuse evaluations, regardless of the amount of
9 time that has passed since the subject incident. Counsel believes it is imperative
10 that the Committee have some guidance as to appropriate time frames for such
11 referrals and to the appropriateness of conditions on applicants whose misconduct
12 is long in the past.

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15 **4. Substance Abuse Screening**

16 Finally, Counsel would like to address the current practice of referring all
17 applicants with substance abuse arrests in their past to a substance abuse evaluation
18 by the Director of the State Bar’s Member Assistance Program (the “MAP
19 Director”). Counsel has addressed this issue with the Committee and was advised
20 to submit a rule change. Counsel is not sure that a rule change is what is needed,
21 but having no other method to make the concerns known to this Court, will address
22 her concerns here.

1 This Court may or may not be aware that the cost for the evaluation by the
2 Bar is \$550.00. That is twice the going market rate. This is a significant burden
3 for applicants, who are already facing extensive costs of law school, the
4 application process to the Committee, and the difficulty in obtaining employment
5 (particularly in this economy). The cost is one concern—the associated concern is
6 that the applicant is forced to go to a particular provider. This presents an
7 appearance of impropriety as well as raising other concerns.
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10 With regard to the appearance of impropriety, the applicants almost
11 uniformly are suspicious as to why they must go to an individual who costs twice
12 as much as other providers and who will be the same individual who monitors the
13 applicants if conditions are recommended. Counsel agrees. Further, this Court
14 may or may not be aware that the MAP Director currently utilizes the standardized
15 substance abuse screening instrument referred to as the “SASSI” (Substance Abuse
16 Subtle Screening Inventory). On the SASSI’s webpage, in a paper titled “Clinical
17 Support: Screening Issues,” Counsel found the following statement under “Other
18 Considerations”: “Is it free from conflicts of interest such as the assessment agent
19 also serving as the treatment provider?” See the article at page 2, third paragraph
20 from the bottom: <http://www.sassi.com/services/screeningissues.html>.
21
22 Consequently, it appears that the SASSI Institute’s own materials suggest that in a
23 forced evaluation setting, the screening individual should not be the treating
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1 individual. While Counsel recognizes that monitoring is not necessarily the same
2 as treating, Counsel believes that the underlying concerns are largely the same.

3 Further, professionals that are permitted to provide substance abuse
4 screenings are bound by licensing requirements under Arizona law (Titles 12 and
5 32). These titles contain a number of requirements including confidentiality of
6 medical records and related information, in addition to stringent rules regarding
7 how such information may be gathered and disclosed, and to whom. Such
8 professionals are also typically bound by the Health Insurance Portability and
9 Accountability Act (HIPAA). By requiring attendance at a particular provider, it
10 may well be that the Committee then becomes responsible for any violations of
11 those legal requirements. This could operate against the immunity provided for
12 under the Rules.
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16 Counsel has reviewed the requirements of the Arizona Department of
17 Transportation for reinstating drivers' privileges after a substance abuse related
18 arrest, and specifically the Revocation Investigation Packet of the Motor Vehicle
19 Division, which may be found at the following link:
20 <http://mvd.azdot.gov/mvd/formsandpub/mvd.asp> (choose "Revocation
21 Investigation Packet). Several points are worth noting.
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24 First, the second page states: "We do not maintain a list of health
25 professionals or make any recommendations. Please refer to a telephone yellow
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1 page directory under “Counselor” or “Alcoholism.” Second, that same page states
2 the required credentials of an acceptable health professional (certified counselor,
3 physician or psychologist). Third, on the fifth page, a form is provided for the
4 health professional to complete with his or her evaluation. That form states that a
5 minimum of two standardized testing instruments are required. It also requires a
6 DSM evaluation. It may be a good idea for a similar form to be developed and
7 utilized by the Committee and it could even be made available with Application
8 materials on the website, such that applicants would be on notice of the issue.
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11 However, the main reason that Counsel directs the Court to the packet is the
12 statement by the ADOT/MVD that it will not maintain a list of professionals or
13 make any recommendations. Counsel has no knowledge of how the ADOT/MVD
14 came to this decision but considers it to be a wise policy choice. It appears to be
15 against public policy to make any direction other than requiring appropriate
16 credentials such as being licensed and in good standing.
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19 There are other concerns involved in specifying only one individual as the
20 designated evaluator, but as this Comment is 19 pages long, Counsel will end here.
21 She is available to discuss these issues with the Court or the Committee or the
22 upcoming Attorney Regulation Committee.
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RESPECTFULLY SUBMITTED this 17th day of April, 2011.

/s/

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