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Re: Comment to Pending Supreme Court Rule Proposal 14-0009,
Petition to Amend Rule 60 or Rules 64-65, Rules of the Supreme Court

This comment addresses the Petition filed by Presiding Disciplinary Judge William O'Neil, which proposes two alternatives regarding permanent disbarment, and the comment filed by Mark Harrison and Geoffery M.T. Sturr. This comment advocates for no change in the current rule, because: (1) permanent disbarment is not necessary in any form; and, 2) compelling reasons weigh against permanent disbarment in any form.

I. Permanent Disbarment Is Not Necessary

A. Current Rules and Case Law Provide Adequate Protection For the Public and the Profession

In 2004, the Supreme Court of Arizona issued its Opinion in *In re Arrotta*, 96 P.3d 213, 208 Ariz. 509 (Ariz. 2004). *Arrotta* is the seminal case in reinstatements in Arizona. *Arrotta* requires that a disbarred person, or suspended member who has been suspended for longer than six months demonstrate, *inter alia*, rehabilitation. The Court in *Arrotta* required that to demonstrate rehabilitation, the disbarred person or suspended lawyer "[] must first establish by clear and convincing evidence that he has identified just what weaknesses caused the misconduct and then demonstrate that he has overcome those weaknesses."

In a more recent case, *In re Johnson*, 298 P.3d 904 (Ariz. 2013), the Court clarified that the burden for the person or member seeking reinstatement increases with the severity of the conduct. In *Johnson* the Court stated that:

> In concluding that Johnson had not met his burden of showing rehabilitation, the hearing panel relied in part on *In re Lazcano,* 223 Ariz. 280, 222 P.3d 896 (2010), *In re (Lee K.) King*, 212 Ariz. 559, 136 P.3d 878 (2006), and *In re Hamm*, 211 Ariz. 458, 123 P.3d 652 (2005). These cases correctly recognize that the applicant's burden of proving rehabilitation increases with the severity of the underlying conduct.

In other words, those cases for which a hearing panel might permanently disbar a lawyer already mandate a showing for reinstatement that is commensurate with the severity of the underlying conduct. Consequently, permanent disbarment is unnecessary.

B. There is a Significant Distinction between Long-Term Suspension and Disbarment

i. Both Supreme Court Rule and Case Law Distinguish Disbarment from Long-Term Suspension

The distinction between long-term suspension and disbarment is critical to the consideration of permanent disbarment. The Petition states that:

> Notwithstanding, there is no rule that outlines how or why disbarment is different from a five year suspension, either in sanction or for readmission.

However, Rule 32(c)(1), Ariz.R.S.Ct. states:

> Classes of Members: "Disbarred or resigned *persons* are not *members* of the bar" (emphasis added)

Jurisdiction for disciplinary purposes is the critical distinction between suspended *members* and disbarred *persons*. In *In re Creasy*, 12 P.3d 214, 198 Ariz. 539 (Ariz. 2000), the Court considered the specific issue of jurisdiction over disbarred persons. The Court reached the conclusion that it retains jurisdiction, for purpose of

discipline, based on the continuing conduct of a disbarred person in contempt of the disbarment order precluding the practice of law. Where a disbarred person continues to practice law after disbarment, that person may be found in contempt of the Court's Judgment and Order, or the Court's Mandate, stripping that person from membership in the State Bar of Arizona. Such a person would not be subject to the jurisdiction of the Court for violation of the ethical rules where a suspended member would be, regardless the length of the suspension.

Once again, the distinction between suspension of any length and disbarment is critical to the reinstatement analysis under *Arrotta* and *Johnson*. Where the misconduct resulted in suspension rather than disbarment, the burden will be greater upon the disbarred person to demonstrate the requisite rehabilitation.

II. Compelling Statistics Undermine the Notion of Permanent Disbarment

A review of the discipline cases from 2013 resulting in orders of disbarment reveals the following:

1. 24 total disbarment orders;
2. 12 of the 24 resulted from the lawyer's default;
3. 8 resulted from consent to disbarment;
4. Only 3 of the total 24 were represented by counsel;
5. Only 1 was represented by counsel in a contested case (two were represented by counsel in consent to disbarment);
6. The only case that was appealed was overturned because of clearly erroneous findings by the Hearing Panel.

These statistics demonstrate that the vast majority of cases resulting in orders of disbarment occur where the responding lawyer is unrepresented by counsel, and has simply given up. Lawyers facing disciplinary charges likely throw in the towel for myriad reasons. Among these reasons are: lack of resources and/or lack of capacity (mental and/or physical) to present a defense. In such cases, permanent disbarment is a draconian result. In cases based on default, the findings of facts are established based on mere allegations by the complainant without benefit of an adversarial inquiry. In cases of self representation, the lawyer likely

has little or no experience in the disciplinary process, and, as the adage goes, the self-represented lawyer has a fool for a client. Moreover, as in the appeal referenced above, Hearing Panels sometimes err. Under any of these circumstances, permanent disbarment is clearly an unsupportable result.

CONCLUSION

Where there is no necessity to change the current reinstatement process, and, compelling reason not to do so, the Court should not adopt permanent disbarment in any form.