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COMMENT TO BE FILED REGARDING  
PENDING SUPREME COURT RULE  
PETITION R-14-0011

**FILED**  
MAY 20 2014  
CLERK SUPREME COURT  
BY:

RECEIVED

MAY 20 2014

CLERK SUPREME COURT

Petition R-14-0011 filed by John Tuchi on behalf of the Attorney Regulatory Advisory Committee (“ARC”) is the culmination of months of investigation and proposed changes in the assessment of moral character and fitness to practice law in Arizona. ARC’s task was to determine whether the Committee on Character and Fitness (“Committee”) was using valid measures of fitness, whether the process created transparency for applicants, and whether conditional admission was being properly applied by the Committee.

During ARC’s investigation, it was determined that conditional admittees are disciplined after admission at a rate higher than regular admittees. As presently administered after admission, conditional admission utilizes the same process as the State Bar discipline process. ARC’s work demonstrates that conditional admission compliance monitoring and “enforcement” needs differ from the State Bar’s disciplinary process. Presently, conditional admittees are shifted into traditional discipline for violations of their conditional terms, often taking months to bring a violation to light, requiring the State Bar to prove by preponderance of the evidence that a violation of the conditional admission has occurred and often leaving the disciplinary authority unaware of the fact that an applicant was a conditional admittee, what his terms were, or that the conduct was a violation of conditional admission. The proposed petition does not address these fundamental problems.

#### **Granting Temporary Admission**

Supreme Court Rule 36(e)(8)(C) currently provides conditional admission as a potential outcome of the admission process, without providing guidelines to help the Committee define fitness or assess when current fitness is achieved, leaving that assessment to a Committee consensus. As presently interpreted, an applicant that is conditionally admitted has been determined to be an individual possessing the character and fitness appropriate for admission to the bar but is also an individual upon whom the Committee has determined that it is appropriate to place additional admission requirements to further monitor the individual.

The proposed Rule makes an appropriate change to the characterization of “conditional admission” as “temporary admission.” While this may appear to be semantics, this is an important change. Temporary admission should be reserved for those situations in which an individual has past conduct that calls into question his character or fitness and sufficient time has not passed to demonstrate to the Committee’s satisfaction that rehabilitation is complete. In appropriate circumstances, the applicant should be given a period of time to demonstrate rehabilitation by clear and convincing evidence. Proposed Rule 36(a)(4)(D) should be modified to recognize that an individual granted temporary admission has not yet demonstrated by clear and convincing evidence appropriate character and fitness and admission is temporary, allowing the applicant a period of time to prove rehabilitation and appropriate character and fitness.

Within proposed Rule 36(a)(4)(D)(i), structure should be provided to assist the Committee in determining when temporary admission is appropriate, such as a requirement that the applicant bears the burden of proving problematic behavior has been in full remission for at least twelve consecutive

months prior to temporary admission. In addition, guidance should be provided concerning the nature of past behavior that is subject to temporary admission. For example, temporary admission may be appropriate for a past substance abuse situation but may not be appropriate for a situation where candor or truthfulness are in doubt.

### **Jurisdiction and Burden of Proof**

Presently, given that the Committee has determined that a conditional admittee has the appropriate character and fitness for admission, once an applicant is conditionally admitted the Committee is no longer involved in the process. All monitoring and discipline decisions are approached through the traditional attorney discipline process. Given that we are advocating for changes to the proposed rules clarifying that a temporary admittee has not yet demonstrated the necessary character or fitness, the proposed Rule should be clarified to provide that the Committee maintains jurisdiction over the temporary admittee until the temporary admittee demonstrates full admission is appropriate. While the Committee should rely on the assistance and resources of the State Bar to assist in monitoring compliance with terms of temporary admission, the Committee should remain the final decision-maker concerning whether there has been compliance with the terms of temporary admission, the materiality of any non-compliance, the ramifications for failure to comply with temporary admission terms, and whether the individual has demonstrated current fitness for full admission at the expiration of the temporary term.

Proposed revisions to Rule 36(a)(4)(D)(iv) cause bar counsel to be the “moving party” to initiate “conversion” of temporary admission to full admission. This approach should be modified to cause the temporary admittee to be the “moving party” in the event that individual seeks full admission at the conclusion of temporary admission.

Proposed Rules 36(a)(4)(D)(ii) and 36(e)(8)(C) provide that the State Bar and the Committee share discretion to determine whether a breach of temporary admission conditions is “material” and actionable. While we recognize such shared powers may be seen by some as diluting the Committee’s authority over temporary admittees, we believe this is an appropriate approach. The proposed rule should be modified, however, to clarify that once the Bar refers a matter to the Presiding Disciplinary Judge it must notify the Committee of the referral and report to the Committee on the progress of that matter.

Proposed Rule 36(a)(4)(D)(iii) seems to suggest that the Bar has the burden to prove violations by a preponderance of the evidence. This proposal fails to recognize that jurisdiction remains with the Committee and the temporary admittee maintains a “clear and convincing” standard of proof to achieve full admission throughout proceedings.

The proposed Rule (a)(4)(D)(iii) requires all violations of terms to be reported to the Committee. For this population of attorneys who are under scrutiny and where the Court has ordered terms of admission, there should be no discretion and full reporting. All non-compliance should be reported to the

Committee, for review and possible referral for action. If the Committee determines that a matter requires action, it should be referred to the State Bar for investigation.

#### **Conversion to Full Admission**

The proposed Rule 36 (a)(4)(D)(iv) should be modified so that temporary admission expires at a given time, during which the admittee continues to have the burden to prove that he has complied with the terms of temporary admission and qualifies for full admission status. The burden of proof should remain with the applicant to prove fitness by clear and convincing evidence until full licensure status is complete. Finally, the mechanism for conversion to full licensure should require that the applicant request action at a specific time prior to termination date of temporary admission asking either for extension of temporary status or conversion to full licensure, triggering a final review by the Committee to determine compliance.

#### **Formal Hearing Panels**

As described in proposed Rule 36(f)(2)(A), the formal hearing panels will move from quorum of the full Committee to a panel consisting of the Presiding Disciplinary Judge, with two attorney and two public members of the Committee. Public membership of the Committee should be increased to roughly equal that of attorney membership. The suggested panels would create a disproportionate burden on the current relatively small number of public members. The Court might consider, over time, converting attorney vacancies to public members to equalize representation.

Submitted by:

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