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7 **IN THE SUPREME COURT**

8 **STATE OF ARIZONA**

9 **In the Matter of:**

**Supreme Court No.: R-15-0023**

10 **PETITION TO AMEND RULES 32, 41,  
11 42 AND 66 THROUGH 69, ARIZ. R.  
12 SUP. CT.**

**Comments of the Pima County Bar  
13 Association Regarding the  
14 Succession Planning Petition**

15 The Pima County Bar Association (hereinafter “the PCBA”) hereby files the  
16 following comments regarding the State Bar’s petition regarding succession  
17 planning.

18 While the intent behind the proposed rule changes is to address a reasonable  
19 concern, the specific rules and the obligations they impose raise serious concerns.  
20 Questions raised by our membership include those regarding the scope of the new  
21 obligations, lawyers’ abilities to comply with them, and ultimately the proposed rules’  
22 practicality and effectiveness. The purpose of this Comment is to summarize the  
23 concerns raised by our membership and to suggest some alternatives.

24 **I. Overview of Our Members’ Concerns.**

25 The PCBA recognizes the significant financial burden placed on the State Bar  
26 when a lawyer fails to plan for the termination of or inability to continue a law  
practice. The proposed rule changes, however, appear to be aimed at remedying

1 what is a relatively isolated problem. By report, there have been only 4 or 5  
2 conservatorships under Rules 66 through 69, Ariz. R. Sup. Ct., in Pima County in the  
3 last four (4) years.

4 The PCBA's membership has raised concerns that the proposed new rules  
5 would, if adopted, impose new obligations on all members of the Bar that are  
6 burdensome, impractical, and not necessarily the best way to further the Petition's  
7 stated goal of ensuring better succession planning. Some of the concerns that our  
8 members have raised in response to the Petition are as follows:

9 **A. The Obligations of Successor Counsel Are Ambiguous.**

10 Under the proposed rules, the obligations of a lawyer who agrees to serve as  
11 successor counsel are ambiguous. One of the obligations would certainly be the  
12 closing of the practice; however, the successor's obligations may extend beyond  
13 that. There is language in the proposed Comment to Rule 41 and in proposed Rule  
14 32(c)(13) which suggests that the successor counsel may be required to continue  
15 operating the practice to some extent, and the proposed rules do not make clear  
16 how far these obligations extend. Is successor counsel responsible solely for  
17 notifying clients of the lawyer's inability to continue the practice? Does successor  
18 counsel have to reschedule hearings and other court dates? Must successor  
19 counsel appear on behalf of the client at any scheduled court dates until new  
20 counsel is found?

21 **B. The Obligations on Successor Counsel May Raise Ethical Concerns.**

22 On a related note, the potential obligations of successor counsel may raise  
23 ethical concerns for the successor counsel when closing down or operating an  
24 incapacitated lawyer's practice. Successor counsel would potentially be in violation  
25 of multiple ethics rules any time counsel assumes responsibility for another lawyer's  
26 practice as the successor would be assuming responsibility for a practice with which

1 the successor is not familiar, and could, for example, miss a deadline, especially if  
2 the successor was also not familiar with the incapacitated lawyer's calendaring  
3 system. The alternative would require successor counsel to maintain constant  
4 familiarity with the caseload and practice management procedures of the lawyer in  
5 the event that the lawyer becomes unable to continue his or her practice. While this  
6 may not be an issue for lawyers in multi-lawyer firms, it imposes a significant new  
7 burden on sole practitioners who we anticipate would be forced under the new rules  
8 to act as successor counsel for each other. A sole practitioner, or any lawyer acting  
9 as successor for a sole practitioner, would be forced to maintain familiarity with  
10 another lawyer's caseload and practice management procedures, or risk violating  
11 the ethics rules in the event the successor is required to step in for the lawyer. Such  
12 extensive sharing of information may raise concerns regarding a lawyer's duties of  
13 confidentiality, as well. Ultimately, such requirements place an undue burden on  
14 sole practitioners.

15 **C. Lawyers May Have Great Difficulty in Finding Successor Counsel.**

16 The proposed rules make a lawyer's ability to practice law and earn a  
17 livelihood contingent on the lawyer's ability to find successor counsel. The  
18 requirement has nothing to do with a lawyer's ability, competence, or ethics. There  
19 may be many reasons why a lawyer would not be able to find successor counsel,  
20 including, but not limited to, the following:

- 21 1. Many lawyers may be unwilling to assume the responsibility of  
22 successor counsel in light of the ambiguities and ethical concerns  
23 set forth above;
- 24 2. New lawyers, especially those practicing as sole practitioners, may  
25 find it difficult to find successor counsel. New lawyers may not be  
26 able to find successor counsel simply because they are new to the

1 profession, do not know anyone, and no one knows them  
2 sufficiently well to agree to be their successor counsel;

3 3. Lawyers who have recently relocated to Arizona may have similar  
4 issues as new lawyers; and

5 4. Lawyers may find it difficult to find replacement successor counsel.

6 Finding successor counsel may not be an easy process even for  
7 lawyers who were initially able to obtain one. In the event that  
8 successor counsel becomes unavailable (e.g., due to relocation,  
9 loss of active status with the Bar, or death), the lawyer must  
10 immediately find replacement successor counsel and notify the  
11 State Bar within 30 days under the proposed rules. Failure to do so  
12 can result in the lawyer's summary suspension. Given the potential  
13 difficulties in finding successor counsel, finding a replacement  
14 almost immediately upon what could be an unanticipated  
15 occurrence would likely be impossible for many lawyers, and could  
16 subject the lawyer to discipline.

17 **D. It is Ambiguous Whether Successor Counsel Must Have a Similar**  
18 **Practice Area.**

19 Although not stated in the Petition, there has been some indication that any  
20 successor counsel must practice in the same practice area as the lawyer. If this is  
21 the case, then the issues described above are greatly exacerbated. Some of the  
22 concerns are set forth below:

23 1. Law-firm lawyers who are sole attorneys in their practice areas  
24 would have to deal with the same difficulties as sole practitioners  
25 described above;

- 1 2. If a lawyer practices in more than one practice area, the lawyer  
2 would need multiple successor counsels, which would multiply the  
3 concerns raised above;
- 4 3. If a lawyer practices in a unique or specialized practice area (e.g.,  
5 environmental law), the lawyer may not be able to find conflict-free  
6 successor counsel simply because there are limited or no other  
7 lawyers in the locality practicing in the same area; and
- 8 4. If, on the other hand, successor counsel need not practice in the  
9 same area (e.g., a criminal defense lawyer can be successor for a  
10 bankruptcy lawyer, or estate planning lawyer can be a successor to  
11 a criminal defense lawyer), and need not even be admitted to  
12 practice in the same courts as the lawyer, the questions arises as  
13 to why successor counsel needs to be an active member of the  
14 State Bar, or why the person responsible for closing the practice  
15 needs to be an attorney at all.

16 With these concerns raised by the PCBA membership in mind, we turn to the  
17 specific proposals in the Petition.

18 **II. Proposed Revisions to Clarify & Streamline Rules 66-69, Ariz. R.  
19 Sup. Ct.**

20 The PCBA supports the Petition's proposal to clarify and streamline the  
21 conservatorship rules.

22 As indicated in the Petition, the impetus for the proposed rule changes was  
23 the burden on the State Bar from having to gather and maintain the files of lawyers  
24 who leave practice without a succession plan. The proposed changes to Rules 66-  
25 69 and the proposed Comments to Rules 1.15 and 1.16, to the extent they provide  
26 that failing to designate a successor may result in the State Bar perfecting a

1 conservatorship and assessing the lawyer's estate with costs, address those  
2 concerns and should alleviate the financial burden on the State Bar. These  
3 provisions alone, if adopted, would shift the costs of closing down the practice to the  
4 lawyer as the State Bar desires.

5 As to the other proposals in the Petition, the PCBA believes that the  
6 provisions imposing the requirement of designating successor counsel who is an  
7 active member of the Bar, and imposing summary suspensions for failure to do so,  
8 are more burdensome than beneficial, and accordingly should be rejected and/or  
9 modified as set for the below.

10 **III. Proposed New Rule 41(i), Ariz. R. Sup. Ct.**

11 In light of the concerns raised above, the Court has several options regarding  
12 the proposed new Rule 41(i), Ariz. R. Sup. Ct.:

13 A. It can reject the proposed Rule 41(i) which the Petition acknowledges  
14 would be a *new* professional obligation on *all* lawyers to plan for their  
15 termination or inability to continue a law practice;

16 B. It can adopt the proposed Rule 41(i), reject the proposed comment to Rule  
17 41(i) which imposes the obligation to designate successor counsel, and  
18 provide no guidance in the Comments;

19 C. It can adopt the proposed Rule 41(i), reject the proposed comment to Rule  
20 41(i) which imposes the obligation to designate successor counsel, and  
21 insert a comment that provides that the lawyer retains discretion in  
22 determining the best method of succession planning for that lawyer's  
23 practice; or

24 D. It can adopt the proposed Rule 41(i), and the proposed comment to Rule  
25 41(i) which imposes the obligation to designate successor counsel.

26

1 Of these alternatives, the PCBA favors options B or C above as it agrees that  
2 lawyers should have a professional obligation to plan for their termination of or  
3 inability to continue a law practice.

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5 **IV. Proposed New Comments to ERs 1.15 and 1.16, Rule 42, Ariz. R. Sup. Ct.**

6 As to the proposed new Comments to ERs 1.15 and 1.16, Ariz. R. Sup. Ct.,  
7 which are identical, the PCBA would propose the following alternative language:

8 Lawyers have an ethical duty to assure that all documents provided to them  
9 by their clients are returned or tendered to the clients. If a client does not  
10 receive all client-provided documents, the lawyer has a duty to safeguard that  
11 property for the length of time required for the practice area. Lawyers are  
12 encouraged to return original documents to their clients, unless safeguards  
13 are in place to keep the clients' files. Consistent with Rule 41(i), Ariz. R. Sup.  
14 Ct., all lawyers in private practice must identify successor counsel **should**  
15 **identify a responsible successor** to assume responsibility for the lawyer's  
16 files when the lawyer ceases to practice law, either temporarily or  
17 permanently. Failing to designate ~~successor counsel~~ **a responsible**  
18 **successor** may result in the State Bar perfecting a conservatorship pursuant  
19 to Rules 66-69, Ariz. R. Sup. Ct., including assessing the lawyer or the  
20 lawyer's estate with costs.

21 The PCBA agrees that the first three sentences in the Petition's proposed  
22 Comments are appropriate. As to the second half of the proposed Comments, the  
23 term "responsible successor" is taken directly from existing Rule 66(a), Ariz. R. Sup.  
24 Ct., and is retained in the proposed amendments to that Rule. Also, if the Court  
25 chooses to reject the proposed amendments to Rule 41, then the cross-reference to  
26 Rule 41(i), Ariz. R. Sup. Ct., should be eliminated.

27 **V. Proposed New Rule 32(c)(13), Ariz. R. Sup. Ct.**

28 In light of the concerns raised above, the Court has several options regarding  
29 the proposed new Rule 32(c)(13)(A), Ariz. R. Sup. Ct., which would impose an  
30 obligation on the lawyer to disclose annually the identity of successor counsel and

1 subject the lawyer to potential summary suspension for failing to identify successor  
2 counsel:

3 A. It can adopt the proposed Rule 32(c)(13)(A) as submitted;

4 B. It can adopt the proposed Rule 32(c)(13)(B) and a modified Rule  
5 32(c)(13)(A) which would impose annual disclosure of whether there is a  
6 succession plan in place and the identity of the responsible successor,  
7 and would read as follows:

8 Each active member of the State Bar of Arizona shall certify to the  
9 State Bar on the annual dues statement or in such other form as may  
10 be prescribed by the State Bar on or before February 1 of each year:  
11 (1) whether the lawyer is engaged in the private practice of law; (2) if  
12 engaged in the private practice of law, whether the lawyer has made  
13 arrangements with another active member of the State Bar  
14 (“Successor Counsel”) a responsible successor to close down the  
15 lawyer’s practice if the lawyer dies, or to handle it in the event the  
16 lawyer is incapacitated; and (3) if such arrangements have been  
17 made, the name of the Successor Counsel responsible successor. If  
18 the identity of the Successor Counsel responsible successor  
19 changes, or the arrangements with the responsible successor are  
20 terminated, the lawyer shall notify the State Bar of Arizona in writing  
21 within thirty days as soon as practicable;

22 C. It can adopt the proposed Rule 32(c)(13)(B) and a modified Rule  
23 32(c)(13)(A) which would impose annual disclosure of whether there is a  
24 succession plan in place, and would read as follows:

25 Each active member of the State Bar of Arizona shall certify to the  
26 State Bar on the annual dues statement or in such other form as  
may be prescribed by the State Bar on or before February 1 of  
each year: (1) whether the lawyer is engaged in the private practice  
of law; and (2) if engaged in the private practice of law, whether the  
lawyer has made arrangements with another active member of the  
State Bar (“Successor Counsel”) a responsible successor to  
close down the lawyer’s practice if the lawyer dies, or to handle it in  
the event the lawyer is incapacitated;

or

1 D. It can reject the proposed new Rule 32(c)(13)(A)-(B).

2 According to the Petition, the model for the proposed new Rule 32(c)(13),  
3 Ariz. R. Sup. Ct., is the existing Rule 32(c)(12), which requires a private practice  
4 lawyer to disclose the existence of professional liability insurance, but does *not*  
5 require a lawyer to have professional liability insurance or disclose the insurer.  
6 Option C would most closely mirror Rule 32(c)(12) as it would impose an obligation  
7 to disclose whether a succession plan is in place, but would not require the  
8 disclosure of any details of the plan or successor. If the Court believes that an  
9 annual disclosure of a responsible successor is the better rule, Option B would be  
10 best. Under either Options B or C above, the penalty of summary suspension under  
11 proposed Rule 32(b)(13)(B) could be made available.

12

### 13 VI. Conclusion

14 In summary, the PCBA respectfully urges the Court to adopt the proposed  
15 changes to Rules 66-69 (the conservatorship rules), and modified comments to  
16 Rules 1.15 and 1.16 to provide that failing to designate a responsible successor may  
17 result in the State Bar perfecting a conservatorship and assessing the lawyer's  
18 estate with costs. These provisions alone, if adopted, would shift the costs of  
19 closing down the practice to the lawyer, and would address the State Bar's  
20 concerns.

21 The PCBA would also respectfully urge the Court to reject the proposed  
22 provisions imposing the requirement of designating successor counsel who is an  
23 active member of the Bar, and imposing summary suspensions for failure to do so  
24 as these requirements are more burdensome than beneficial. If the Court desires  
25 some more specific obligations on lawyers regarding succession planning, the PCBA

26

1 has proposed alternatives above, and would urge the Court to adopt one of the  
2 alternatives.

3 RESPECTFULLY SUBMITTED this 18th day of May, 2015.

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5

/s/ E. Hardy Smith

6

/s/ D. Greg Sakall

/s/ German Yusufov

7

E. Hardy Smith, President

D. Greg Sakall, Chair – Rules Committee

German Yusufov, Board Member

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Electronic copy filed  
9 with the Clerk of the Supreme  
10 Court of Arizona this 18th day  
of May, 2015.

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By: G. Sakall

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