May 16, 2007

To: Supreme Court of Arizona

From: Nancy Greenlee, Mark Harrison, Denise Quinterri, Scott Rhodes, Mark Rubin and Lynda Shely[1]

Re: Comments on R-06-0035 Petition to Amend Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, 75 ("Petition")

Introductory Comments

We are a group of lawyers with significant experience in the discipline system. Presently, we all represent respondents in Bar discipline matters. However, some of us have been volunteer or staff Bar counsel, one of us is a former member of the Board of Governors (and a past President of the State Bar of Arizona), and another one of us is a former member (and Chair) of the Disciplinary Commission.

We all believe the Arizona discipline system is an excellent system, and a model for lawyer discipline (and self discipline by any profession). We also believe the system has its share of problems, and that any review of the discipline system–designed to improve the system–is a worthy effort.

We do not believe the proponents of the Petition sought and obtained adequate input from the discipline "community" before the Petition was submitted to the Court. While some of us were asked for (and did provide) input, that input received limited consideration. More significantly, no input was sought from the Hearing Officers, the group of individuals in the discipline system who may work hardest and the group–other than individual respondents–that will be affected most by the proposed rule changes.

We believe the review process, before the Board of Governors, resulted in a better product than the document that was submitted to the Board of Governors; however, we believe the Petition still reflects, overwhelmingly, the perspective of the State

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[1] This comment reflects the consensus of the drafters. Not every drafter agrees completely with the views expressed in this memo regarding every issue that is addressed in this memo. This memo has been circulated to a number of people either with experience or interest in the lawyer discipline system with a document entitled "Support of Interested Parties." By signing the attached "Support of Interested Parties" document, the signers have confirmed that they support in principle the views expressed in this Comments memo to the Court.

Bar and its interests. Only so much can be done through the review process and, unfortunately, the Petition is still a flawed piece of work.[2]

We appreciate and respect the desire for a prompt resolution of discipline matters. An outsider who looks at the proposed rule changes would believe that delay in the system occurs, almost exclusively, after the formal Complaint is filed. In fact, too often the delay occurs before the formal Complaint is filed. The fact that the proposed rule changes do not address any period prior to the filing of a formal Complaint, in any significant way, explains why someone would believe the delay occurs between the filing of the formal Complaint and the end of the case.

We all have recent experience with cases in which the screening process is not completed for a matter of many, many months and, in a few instances, more than one year. We all have (or have had) cases where, after a Probable Cause Order issues, months or, in some instances, more than a year, passes without a formal Complaint being filed. In these instances, respondents cannot do anything to "speed up" the process and, in fact, should not be expected to do anything other than "wait for the Bar!"

We recognize the fact that if our system is not sufficiently responsive to the public, we may face attempts by the legislature to regulate the disciplining of lawyers–a result that none of us wants. We also know, however, that the public is not interested in what part of the process is slow; instead, complainants want *their* case resolved within a reasonable period of time.

We have all been involved with the discipline system long enough to know that the time period, from the State Bar's receipt of a complaint until a formal Complaint is filed is getting longer, not shorter. Thus, we fail to understand how or why rule changes that focus on a period where delay is not a problem will solve the problem that is clearly present.

Unfortunately, in trying to solve a real problem by focusing on a part of the process where no real problem exists, the proposed rule changes create significant problems for respondents, their lawyers and Hearing Officers. Delay–often occasioned by inaction by the State Bar before a formal Complaint is filed–does not justify a set of rule changes that make it harder to properly defend respondents.

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[2] Generally, our comments only respond to proposed changes embodied in the Petition. We believe there are several areas in which additional changes ought to be considered; however, those issues are not before the Court and, therefore, we have not addressed them.

We note, finally, that very few lawyers are "criminals." Many respondents are good lawyers who made a mistake, whether it be an error in judgment or a simple failure to be attentive to matters. Some are good lawyers who did nothing wrong, and simply find themselves caught up in a system that will, with time, send them on their way with a dismissal (and, in all likelihood, a smaller wallet). The proposed changes, unfortunately, have a punitive tone about them. The time frames seem to assume a lawyer will not, while the discipline case is pending, continue to have clients, attend depositions, try cases and, by the way, have a life outside of the practice. For the lawyer whose wrongdoing seems evidently serious, interim suspension is an appropriate remedy. For others, however, simply being a respondent is often penalty enough, relative to the alleged wrongdoing. Unfortunately, the proposed rule changes, without any evident benefit to the system, simply make being a respondent more difficult.

Because the proposed adoption of a random examination of trust accounts program differs in kind from the other proposed rule changes, that issue is addressed directly below.

Rule 43(d)[3]

We all believe the amendments to Rule 43(d), permitting random trust account examinations, should not be adopted until the Guidelines, referred to in the Notes to 2008 Amendments, are proposed and submitted for review to the Board of Governors of the State Bar. Moreover, since the Guidelines are used in evaluating a lawyer's compliance with the trust account rules, we believe the Guidelines should be part of the applicable rules and, therefore, adopted and only subject to change as part of the Court's rule-making process.

We understand that one of the rationales behind this proposed rule is to cause greater scrutiny over the trust accounts of larger firms. Because many trust account cases originate with a bank's mandatory report to the Bar of an insufficient funds notice, larger firms with more money on deposit in their trust accounts run a minimal risk of having insufficient funds in their trust accounts. This fact has been a source of concern for sole practitioners and lawyers practicing in small firms for years. We believe the proposed rule change is an attempt to create a "level playing field."

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[3] All references are to the Rules of the Supreme Court.

We all agree that a rule change that would cause greater scrutiny of mid-sized and large firm trust accounts would be reasonable. The scope of the proposed rule, however, extends beyond these firms. It would expose all lawyers, no matter where they practice, to potential random audits (including government lawyers). With respect to mid-sized and large firms, it could conceivably require the firm to submit to multiple audits over a compressed period of time if more than one attorney practicing at the firm were randomly selected.

We believe the best approach before adopting any rule change that involves random trust account audits is to invite comment and discussion among representatives of the State Bar, the Board of Governors, the Disciplinary Commission, and mid-sized and large firms. This discussion should involve not only the possibility of regular or random audits of the trust accounts of larger firms, but also any challenges that currently exist for the management of larger trust accounts in light of the current trust account rules.

Whether such discussions would result in random or regular audits of the trust accounts of only larger firms or would also include some random sampling of the trust accounts of sole practitioners and lawyers practicing in small firms, we believe the approach of such audits should be to identify issues and implement a corrective plan, rather than identification of possible lawyer regulation cases (with the exception of audits that unveil intentional misconduct). To this end, we believe that any system involving random audits must be established only with a true "firewall" established between the branch of the State Bar that conducts the audits and Lawyer Regulation. Such firewall should include a clear statement of the ER 8.3 reporting duties of any lawyer involved in a random audit.

Further, we believe that, should the idea of implementing random audits move forward, the State Bar needs to provide information to the membership of the State Bar and a significant opportunity for the membership to be heard, before any rule change is submitted to the Court for adoption.[4] We cannot emphasize too strongly the negative reaction and disaffection that can be expected from the solo and small firm portion of the bar. A significant communications effort, before any rule change is adopted, can only assist in educating members about the discipline process and in reducing the level of upset that a rule change will cause.

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[4] For example, there were state-wide hearings and substantial publicity before the Rules of Professional Conduct were amended in 2002. The rules which govern the process by which the Rules of Professional Conduct are *enforced* are of equal, if not greater importance to the membership.

None of us oppose the notion of random examinations of trust accounts. We all recognize that trust account violations occur. Our experience tells us, however, that many of the trust account violations that come to light involve record keeping errors and other comparable negligence. There are certainly cases in which lawyers misappropriate funds, but many more cases involve misapplied funds, small overdrafts resulting from a failure to post and reconcile, and situations in which lawyers do not know when they must/must not use their trust account.

The Petition provides no reason for the proposed rule change, and no information about how the proposed solution will address the alleged problem. What is the problem for which this solution is proposed? Is the problem significant? How significantly does the public suffer harm because of the problem? Will random trust account examinations reduce the number of problem situations? How much will the random trust account examinations process cost? How significant will the burden on lawyers be? What State Bar staff will be utilized and will implementing this program affect the already slow screening of cases?

We have doubts about the likelihood that a random trust account examinations process will make dishonest lawyers honest. At the other end of the spectrum, we question the value of a costly and intrusive random trust account examinations process if its purpose is to catch the 60-year-old lawyer who, with an awareness of his/her lack of accounting skills, decides to leave $5000 of his/her money in the trust account to protect against overdrafts and shortfalls. We do not justify leaving money in a trust account, but we question the need for an expensive process to catch that class of violators.

Rule 46(f)(21)

With respect to the revised definition of the "State Bar file," we are concerned about the likelihood this change has as its purpose excluding from the "State Bar file" any memorandum that the State Bar may provide to the Probable Cause Panelist. The Panelist may make his or her decision, in whole or in part, in reliance on that memorandum, and as a matter of basic fairness respondent or counsel should have access to that memorandum if it was provided to the Probable Cause Panelist.

Rule 47(b)(1)

We are aware of no court rule that allows only one party's pleadings to be amended to conform to the proof. Therefore, we propose the following language to supplement the language offered through the Petition:

> At any time prior to the conclusion of a hearing on the merits, the State Bar counsel may move to amend the complaint or amended complaint, or the respondents may move to amend the answer or amended answer, to conform to the proof.

Rule 47(b)(2)

Giving the Hearing Officer the right to permit the filing of an amended Complaint is not an issue; however, without providing for a reasonable continuance of the hearing date, a substantial lack of due process is possible. The State Bar might seek leave to amend its Complaint two weeks prior to the hearing date. The Hearing Officer might not be able to continue the hearing date without violating Rule 57(i)(1)(current version). Under these circumstances, having ten (10) days to file an amended Answer provides no due process [to or for] a respondent. To avoid this outcome, we propose the following language, to be added at the end of Rule 47(b)(2):

> ... and in the discretion of the hearing officer, the hearing date shall be continued to provide the respondent with adequate time to meet the factual allegations and/or alleged ethical violations first presented in the amended pleading.

Rule 47(j)(3)

The proposed rule change eliminates a provision that expressly allows a lawyer, during the screening phase, to disclose confidential information. While ER 1.6(d)(4) states an exception to the confidentiality rule, the Petition offers no rationale for deleting Rule 47(j)(3) and, in fact, never even mentions this change. We are concerned about a rule being eliminated when no reason is given and no apparent reason is evident. Unless there is a rationale for the proposed deletion, we recommend that this provision not be deleted.

Rule 47(m)

The proposed rule change formalizes the "appearance" requirements for representing respondents. What it does not address is the requirements for bar counsel. We have all experienced cases where we have dealt with three or four lawyers acting on behalf of the State Bar. Often, we do not know who is handling the case. A simple requirement that the responsible lawyer for the State Bar, when the lawyer takes over the case, must provide written notice to respondent (or counsel, if the respondent is represented) and the Hearing Officer addresses this problem.

Rule 53(c)

The Petition proposes a change in the *mens rea* necessary to support a discipline action, changing the standard from "willful" to "knowing." Yet again, there is nary a word about the need for this change, from what source it comes; or its likely impact on the discipline system. The proposed change ignores the substantial body of law which recognizes the possibility of "negligent" but "knowing" violations of law and court orders, and would be especially problematic for criminal defense lawyers who are affirmatively obligated to challenge every aspect of the state's case. *See* ER 3.1; and *see e.g., U.S. v. Cavin*, 39 F.3d 1299 (5th Cir. 1994) (duties of client loyalty and zealous representation include advocacy of positions lawyer in good faith believes have arguable basis despite contrary authority).

We are also particularly concerned about knowing, yet reasoned, judgment calls that a court later decides to have been rule violations–discovery and disclosure issues in particular. The rule as it stands appropriately provides discipline for patterns of violations and intentional violations. We think it would be a mistake for disciplinary sanctions to loom as the possible consequence of a lawyer making an aggressive but reasoned litigation strategy decision.

Rule 54(b)(1)(E)

We like the concept of a right to refer matters to fee arbitration; however, we believe the following language must be added at the end of the proposed language: "... and where both the respondent and complainant agree to participate in fee arbitration." Fee arbitration is a voluntary process and, while it may be wise for both parties to arbitrate their dispute, the State Bar cannot force the process on them.

Rule 54(b)(4)

We disagree with the limitation on the filing of substantive motions with the Probable Cause Panelist. Once again, we believe a solution is looking for a problem. Collectively, we rarely file motions with the Probable Cause Panelist, and do not believe respondents or their counsel engage in this form of practice with any regularity. That said, we see no reason to further insulate the Probable Cause Panelist from a balanced presentation of pertinent facts and law before making what for every respondent is a decision of monumental importance – whether to dismiss the charge or direct that formal proceedings commence. Being in formal proceedings and choosing to retain a lawyer wreaks financial and emotional havoc

on many a lawyer.[5] A reasonable chance to resolve a matter before a Probable Cause Order issues should not be eliminated. Certainly, without evidence that Probable Cause Panelists are currently awash in motions, frivolous or otherwise, there is no basis to eliminate the rarely used right to file a substantive motion before the Probable Cause Panelist.

Generally, we are very concerned about the entire Probable Cause system. Without doubt, Panelists work hard and face many significant decisions. That said, the system is very heavily weighted in favor of the State Bar. To the best of our knowledge the Panelist does not receive, routinely, the respondent's material. Instead, he or she gets a summary from the Bar counsel that follows no particular set of standards or protocols.[6] We understand that the Probable Cause Panelist receive what purports to be a *summary* of the respondent's position, but see no good reason for not providing the Panelist with the respondent's position, in the respondent's own words or in the words of his or her counsel.[7] Moreover, the respondent is not privy to the summary of the case prepared by bar counsel. *See* discussion re: Rule 46(f)(21), *supra*. In sum, we have a process–critically important to lawyers–that lacks reasonable standards to insure fundamental fairness.

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5 Hiring a lawyer in discipline proceedings brings to mind the famous scene in *Butch Cassidy and the Sundance Kid* when the bank robbers face oncoming lawmen and a raging river at the bottom of the canyon. Upon learning that his partner won't jump because he can't swim, Butch Cassidy (Paul Newman) observes: "Why, you crazy - the fall'll probably kill ya!"

6 In at least one jurisdiction, bar counsel cannot recommend the issuance of a Probable Cause Order without first submitting to the Panelist a detailed memo, accessible to the respondent, in which bar counsel details the evidence which will be offered to support each charge of the proposed Complaint. *See* 22 NYCRR Sec. 605.7(a), which requires that a transmittal to New York's equivalent of Arizona's Probable Cause Panelist must come from chief counsel for the charging body, and must include "the file, the proposed charges, and *a memo summarizing the evidence adduced in support of the charges . . . " (emphasis added).*

7 The situation brings to mind another famous scene from another Paul Newman movie. In *The Verdict*, Frank Galvin (played by Paul Newman) faces a hostile judge who elicits adverse testimony from a witness. Frustrated, Mr. Galvin says: "Your honor, if I'm going to lose this case, I'd like to lose it on my own." No matter how well-intentioned Bar counsel may be, they cannot present the respondent's case to the Probable Cause Panelist as effectively as the respondent or her counsel.

Rule 54(b)(5)(B) and (c)

We like the concept of a right of review from the Probable Cause Panelist's order, if he or she orders diversion, a stay, an informal reprimand, probation, restitution, or an assessment of costs and expenses. We commend the parties advancing the Petition for developing a creative means for reviewing certain Probable Cause Panelist orders. However, we believe the respondent must have a right to appeal, through the formal process, if an informal reprimand is imposed.

An informal reprimand is a disciplinary sanction. It is reported on the State Bar website. It is reported to other jurisdictions in which the respondent is licensed. It may be used to enhance the sanction in a subsequent discipline proceeding. Frankly, it is a big deal, even though it is the lowest level sanction that can be imposed. For those of us who have been involved in the discipline process for many years, it is a more significant sanction that it was, largely as a result of the public availability of information concerning sanctions.

To permit a lawyer to be sanctioned after a process that involves a one-sided review, coupled with a two hour hearing–that may be conducted by telephone–is inconsistent with the due process that must be part of our discipline system. At a minimum, the right to have a formal hearing should be retained while this process develops in practice. Finally, we strongly recommend that Hearing Officers be used to conduct the two-hour appellate hearings, as they have more experience with evidentiary matters.

Rule 55(a)

We strongly disagree with the proposed amendment that gives Bar counsel a right to decide whether diversion is or is not available in any given case. Unfortunately, we have had too many experiences in which Bar counsel's decision not to recommend diversion seems unjustified. The Petition notes the fact that prosecutors have this authority. While that may be true, discipline proceedings are *not* criminal proceedings! Our system ought to provide a check on Bar counsel's power. The likelihood that "diversion review" will become a significant problem is slim, but that review will provide a useful means for making sure diversion recommendations are being applied fairly and consistently.

If a respondent can only be "diverted" with Bar counsel's consent, it is highly likely that a smaller number of lawyers will be diverted out of the discipline

system.[8] Adopting this change is inconsistent with the State Bar policy and philosophy associated with the development of the diversion program. Arizona was the first state in the country to initiate diversion as a prophylactic, remedial alternative to formal discipline.[9] The system was heralded as sensible and progressive.

Finally, Rule 55 permits diversion *at any stage of a proceeding*. Thus, adoption of the proposed change will, necessarily, prevent Hearing Officers, the Disciplinary Commission and this Court from dismissing disciplinary charges and remanding a case for diversion, absent consent from Bar counsel.[10] We believe it makes little sense for an independent person or body's hands to be tied because a rule vests sole discretion in Bar counsel.

Rule 57(b)

We see no reason to limit the Hearing Officer's discretion, in granting an extension with respect to filing an Answer. Nothing in the current rule mandates that an extension be granted, or that an extension be thirty (30) days in length. Hearing Officers should have the right to use their judgment in making this decision. We find it anomalous that we have a system that vests in Hearing Officers the right to

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[8] Statistics provided by the State Bar indicate that incrementally, informal reprimands (with probation) are being used more frequently than diversion. This is significant because informal reprimands are considered "discipline" by bar counsel. They are reported on the State Bar website and to other jurisdictions in which the lawyer is licensed. In contrast, diversion is an *alternative* to discipline; if the respondent fulfills the diversion contract, the original charges are dismissed and the lawyer has no disciplinary record. The difference is, therefore, dramatic. Diversion provides an incentive for rehabilitation and improvement. In our experience, formal discipline usually has the opposite effect on the respondent.

[9] *See* Bacon, Roxana, "Supreme Court Adopts Sweeping Changes in Attorney Discipline", *Arizona Attorney*, February, 1992, p. 10-11 ("The Diversion program is designed to trade the adversarial system of discipline previously applied to all violations of Rule 42 for a contract of conduct and assistance , signed by the lawyer and the Bar, tailored to the lawyer's presenting problems. Instead of accepting a finding of probable cause or accepting an informal reprimand or censure, *which does nothing to uncover and solve the underlying conduct giving rise to the Bar complaint,* the attorney can accept the Diversion program and, upon its successful completion, have no discipline record.")(italics added)

[10] In 1994, a Committee appointed by the Board of Governors examined the use and application of diversion and clarified and expanded the then existing diversion guidelines making it quite clear that diversion is to be liberally applied to effectuate its purposes *at any stage of a disciplinary proceeding.*

make factual findings that will govern a discipline matter, and to decide the case and recommend a sanction, yet–with this rule change–we tell them they cannot grant a fifteen (15)-day extension (when the situation may clearly call for that remedy).[11]

Limiting the time creates other problems. Respondents–in particular, those who are still practicing and whose alleged violation may not call into question their fitness to continue practicing law–have clients and matters that require attention. Arbitrary time frames may impose significant hardships on respondents. An illness, scheduled surgery, or major trial can make the limit on the extension time wholly arbitrary and capricious in any given case.

The system encourages the use of counsel. The system works better when respondents are represented. Respondents present their cases in a more able fashion when they are represented. *See In re Augenstein*, 178 Ariz. 133, 139, 871 P.2d 254, 260, Feldman, C.J., specially concurring ("The best that one can say for him is that he represents himself no better than he represented his clients."). That the Arizona Association of Defense Counsel developed its Volunteer Counsel Program, in which experienced lawyers represent respondents at a discounted rate, is a testament to the need for counsel. That said, setting an arbitrary ten (10) day extension limit may, in any given case, make getting a lawyer even more difficult.

Rule 57(c)

We believe there is no need for a *represented* respondent to participate in the initial case management conference. Clients are not required to participate in Rule 16 case management conferences, in the state or federal courts, and we see no need for that requirement here.

Rule 57(e)

The forty (40)-day period (after the Answer is filed) for filing disclosure statements is designed to give parties an opportunity to see what the other side is talking about. Requiring that the State Bar provide its disclosure statement with the formal Complaint means the State Bar's disclosure statement will not be responsive to any issues raised in the respondent's Answer. Further, the rule change that permits the use of a "standardized 'form' disclosure statement" means, we fear, that the State Bar will provide a generic statement in every case or, perhaps, have a "trust account" statement, a "failure to communicate" statement,

[11] We do not suggest, with this footnote, that a fifteen (15)-day limit is appropriate.

etc. Respondents may get plenty of paper, quickly, and very little meaningful information. While, in theory, each side can use a "canned" disclosure statement, the proposed rule change will clearly affect the State Bar 's work product in most cases.

Problematic as the timing of the State Bar 's disclosure statement may be, it pales in comparison with the new proposed requirement that the respondent's disclosure statement be provided with the Answer. As we previously noted, we all have cases in which the process, from initial letter to service of the formal Complaint, is more than one year in duration. Thus, even if a diligent, financially successful lawyer hires counsel promptly after the State Bar sends its first letter, there is a significant amount of downtime before a formal Complaint is filed and served. There will not likely be any warning, either, as we have situations in which formal Complaints are not being filed for more than one year after the Probable Cause Order issues. The Complaint may arrive when retained counsel is in trial, ill, or out of town. Nevertheless, and with the State Bar totally in control of the timing, an Answer and a disclosure statement may be due in as few as twenty (20) days (and, if the proposed change in subsection (b) is adopted, no more than thirty (30) days).

Of course, the foregoing scenario involves a respondent who promptly hired a lawyer. We have all had many situations in which a respondent appears in our office with a formal Complaint that was served 18 or 19 days ago. The desire to assist--and, admittedly, to serve a client and collect a fee--will often cause us to accept the case. That situation will certainly change if, in addition to filing an Answer, we must prepare and submit a disclosure statement. We simply will not accept those cases. The net effect will be fewer represented respondents (with all of the problems that presents, both for the respondents and the system), more procedural fighting about overdue disclosure statements and a system more dependent on arbitrary exchanges of basic (and often worthless) information.

We recognize that lawyers always face deadlines, and that other work, illness, vacations and the like make the practice of law difficult from time to time. We do not advocate the absence of deadlines. We also do not suggest that discipline work should come last! However, when time frames are very short and the "judge" lacks the power to deal with unusual circumstances, we believe a good system is being made worse.

Rule 57(e)(8)&(9)

The additional requirements set forth in subparts 8 and 9 (aggravation/mitigation and legal theories) are not inherently problematic, if a reasonable deadline–the current twenty (20) days, for example–for exchanging disclosure statements is used. With the Answer, however, the respondent may not have aggravation/ mitigation information, and may not have fully explored all legal theories. Since Rule 57 includes no reference to supplementing disclosure statements, however, this proposed change, when it is coupled with the shortened time frame for providing disclosure statements, creates the potential for significant unfairness.

Rule 57(f)

The proposed changes to the discovery rules do have, as their only saving grace, that deadlines can be extended by agreement of the parties. That said, the notion that all discovery must be commenced in the first thirty (30) days is arbitrary. A respondent or his counsel may be in trial when the thirty (30) day period begins; nevertheless, a discovery plan must be put together and discovery submitted to the State Bar. This burden may not be too great if a respondent hires a lawyer who is experienced in discipline matters. Many lawyers will, however, seek assistance from a friend or, more often, get help from no one.

The notion that discovery responses are presumptively due in fifteen (15) days creates significant problems for respondents and their lawyers. Time frames in the Rules of Civil Procedure evidence a healthy respect for the fact that lawyers: (a) have many clients; and (b) have lives outside the office. Forty (40) days is a reasonable time for preparing discovery responses. Fifteen (15) days is not.

We recognize the fact that the 150-day rule may create the need for compressed deadlines. We believe, nevertheless, that the thirty (30)-day deadline for making discovery requests and the fifteen (15)-day deadline for responding are unwise, and that they will simply create discovery disputes. We also believe all of these issues are best left to the discretion of the Hearing Officer at the case management conference.

Rule 57(f)(3)(D)

We disagree with the limitation on the number of extensions that can be granted by the Hearing Officer for good cause. *See* Rule 57(b) discussion. If the system vests in the Hearing Officers significant responsibility, the rules should not take from them the right to use that discretion with respect to case management issues.

Rule 57(j)6

We do not oppose the proposed language; however, we believe additional language is necessary to protect against prior discipline "infecting" the case before the Hearing Officer. Simply, we think evidence of a prior sanction should be addressed before the hearing, by the parties, but that the Hearing Officer should only consider a prior sanction or sanctions *after* the Hearing Officer has decided that the State Bar has proved an ethical violation by clear and convincing evidence. This language should be added to the end of the proposed rule:

> Such evidence may be presented only in the form of a separate memorandum, to be provided to respondent at least ten (10) days before the hearing. Respondent may present a rebuttal memorandum, which may present argument on the applicability, if any, of the prior discipline. The rebuttal memorandum shall be provided to the State Bar by no later than two (2) days prior to the hearing. The memoranda, if any, submitted by the State Bar and respondent shall be provided to the hearing officer under seal prior to the close of the hearing but the hearing officer shall neither review nor consider the memoranda submitted under seal unless and until the hearing officer has first determined that the State Bar has met its burden of proving at least one ethical violation in the case in chief.

Rule 58(e)

This rule, in its present form, is inconsistent with Arizona law. *See In re Clark*, 207 Ariz. 414, 417, ¶¶13-17, 87 P.3d 827 (2004). The rule seems to give the Commission the power to reverse or modify findings of fact when, according to the Court, the Commission's exercise of that power requires that the Commission make a "clearly erroneous" finding. We recommend, therefore, the insertion of the following language at the end of the first sentence in Rule 58(e): "...: provided, however, that findings of fact may only be modified or reversed if they are clearly erroneous."

Rule 60(a)(5)(C) and (a)(6)

We do not agree, generally, with the change in the burden of proof in probation violation cases. The State Bar has provided no factual basis in support of the proposed change. A probation violation is an event that may result in additional sanctions. Absent some evidence of a significant problem with probation violation cases, the rule change should not be adopted.

The State Bar's reliance on criminal law analogies is troubling. While bar discipline proceedings are generally considered quasi-criminal in nature, they are not criminal matters. Frankly, if the State Bar wants to rely on the notion that "if it's good enough for criminals, it's good enough for lawyers," the due process limitations inherent in the changes proposed in the Petition would have to be considered in light of the extensive due process accorded criminal defendants.

Conclusion

We think the proposed rule changes will not solve the problems on which we believe the proponents seem to be focused. The very rules that are the subject of this Petition were reviewed less than four years ago by a diverse Task Force appointed by former Chief Justice Jones. As a result of that review, the rules were modified, extensively. We also note, specifically, that the earlier set of changes set a 150-day limit, from the date on which the formal Complaint is filed, to complete the hearing on the merits. The current set of proposed changes do not change that time frame and, thus, we question the notion that tinkering with what happens *during the 150-day period* will have any impact on the amount of time it takes to process a case.

We also believe the process used to advance the proposed set of rule changes was flawed. Input has not been adequate and respondents' counsel, Hearing Officers and others with a legitimate interest in the system have not had the opportunity or sufficient time to play a meaningful role in the process.

We urge the Court to reject the Petition. We also stand ready to meet with the Court should the Court believe a dialogue on these matters will be helpful in considering the Petition.

Support of Interested Parties

The parties signing below signify their support in principle for the Comments on R-06-0035 Petition to Amend Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, 75 ("Petition") submitted by Nancy Greenlee, Mark Harrison, Denise Quinterri, Scott Rhodes, Mark Rubin and Lynda Shely to the Supreme Court of Arizona on or about May 11, 2007.

Terry H. Phillips 4371

Name (Signed) (Printed)

Certified Specialist

Title (if applicable)

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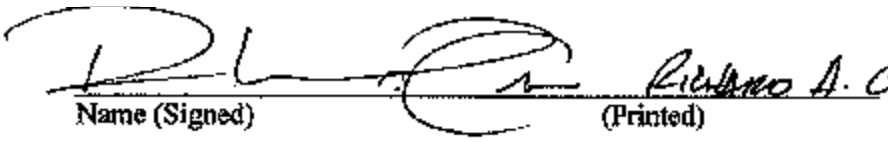

Name (Signed) Richard A. Cleat, ESQ. (Printed)

Title (if applicable)

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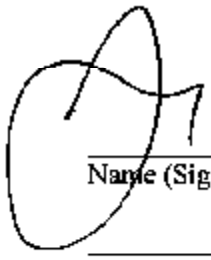
Title (if applicable)

Support of Interested Parties

The parties signing below signify their support in principle for the Comments on R-06-0035 Petition to Amend Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, 75 ("Petition") submitted by Nancy Greenlee, Mark Harrison, Denise Quinterri, Scott Rhodes, Mark Rubin and Lynda Shely to the Supreme Court of Arizona on or about May 11, 2007.



Name (Signed) Bernard M. Rethore

Title (if applicable)

Support of Interested Parties

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William S. Graves
Name (Signed) (Printed)

Green Graves & Rothrock, P.C.
Title (if applicable)

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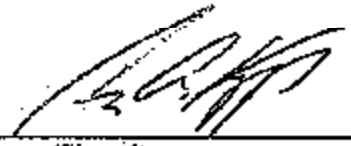

CRAIG A. KNAPP

Name (Signed) (Printed)

ATTORNEY

Title (if applicable)

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Name (Signed)

SCOTT J. RICHARDSON

(Printed)

ATTORNEY AT LAW

Title (if applicable)