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6 **IN THE SUPREME COURT
STATE OF ARIZONA**

7) Supreme Court No. R-06-0035
In the Matter of PETITION)
8 TO AMEND RULES 43, 44, 46-48,) **State Bar's Reply to Comments**
53-58, 60, 61, 64, 70-72, 75) **Filed Regarding the State Bar's**
9) **Petition to Amend Rules 43, 44,**
10) **46-48, 53-58, 60, 61, 64, 70-72, 75**
_____)

11 The State Bar of Arizona, pursuant to Rule 28(D)(2), Ariz.R.S.Ct., hereby
12 replies to the comments filed with this Court regarding the Rule 28 petition to
13 amend Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, and 75 of the Rules of the
14 Supreme Court, which it filed on November 1, 2006.

15 I. Procedure Utilized by the State Bar To Obtain and Consider
16 the Input of State Bar Members Prior to Filing the Rule 28 Petition

17 The Rule 28 petition filed by the State Bar resulted from a lengthy process
18 that was undertaken to determine whether the Rules of the Supreme Court (in
19 particular, the procedural rules pertaining to lawyer discipline) should be
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1 amended to expedite the discipline process without sacrificing due process.¹
2 Members of the Board of Governors of the State Bar and State Bar staff spent a
3 significant amount of time considering and discussing the need for changes and
4 the specific changes that should be made. In addition, a number of steps were
5 taken to obtain input from the membership before the State Bar filed the Rule
6 28 petition. Based upon comments made by various members of the State Bar,
7 including a group of lawyers who regularly represent respondent-lawyers in
8 discipline proceedings,² a number of changes were made to the proposed rules
9 before the Rule 28 petition was filed. Although the group of respondents'
10 counsel asked this Court not to adopt the proposed rule changes without further
11 study and comment, the State Bar undertook substantial efforts, which should
12 not have to be repeated, to submit proposed rule changes that are appropriate
13 and acceptable to the majority of the State Bar membership.

14 Over one year ago, at the request of this Court, the State Bar began
15 considering whether the disciplinary procedural rules could be amended to
16 address concerns regarding delay in the discipline process. Bar counsel
17 considered and discussed on a number of occasions possible rule changes that

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19 ¹ “[P]rocedural due process in attorney disciplinary proceedings include[s] fair notice of the charges
20 made and an opportunity for the accused to provide an explanation and present a defense.” *In re Walker*, 200 Ariz. 155, 158, ¶ 13, 24 P.3d 602, 605 (2001) (citing *In re Brady*, 186 Ariz. 370, 373, 923 P.2d 836, 839 (1996)).

² Nancy Greenlee, Mark Harrison, Denise Quinterri, Scott Rhodes, Mark Rubin and Lynda Shely.

1 would accomplish that result. Once a set of proposed rule changes was
2 developed, it was submitted to the Discipline Oversight Committee of the
3 Board of Governors of the State Bar. The Discipline Oversight Committee
4 appointed a sub-committee consisting of bar counsel and Discipline Oversight
5 Committee members to review and refine the proposed rule changes.

6 The sub-committee met independently and with the Discipline Oversight
7 Committee on several occasions over a period of months to discuss the
8 proposed rule changes. A number of changes were made to the initial proposal
9 based upon discussions during those meetings.

10 On June 28, 2006, Dan McAuliffe, the chair of the Discipline Oversight
11 Committee, sent copies of the modified proposed rule changes to Tom Zlaket,
12 Mark Harrison, J. Scott Rhodes, Lynda Shely and Nancy Greenlee. On June
13 29, 2006, copies of the proposed rule changes were also sent to Mark Rubin
14 and David Dodge. These individuals were selected due to their familiarity with
15 the discipline process and the fact that they frequently represent respondents in
16 disciplinary proceedings.

17 The Discipline Oversight Committee received comments from Mark
18 Harrison, J. Scott Rhodes, Lynda Shely and Nancy Greenlee.³ Members of the
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20 ³ Comments were received from Lynda Shely on July 11, 2006, from J. Scott Rhodes on July 20 and August 10, 2006, from Mark Harrison on August 10, 2006, and from Nancy Greenlee on August 10,

1 Discipline Oversight Committee and the sub-committee discussed and
2 considered every concern expressed by those lawyers, along with their
3 suggestions for altering the proposed rule changes to address their concerns.
4 Contrary to the comment filed by the group of respondents' counsel, which
5 asserted that "limited consideration" was given to the comments they
6 submitted, members of the Discipline Oversight Committee and the sub-
7 committee gave substantial consideration to their suggestions, which resulted
8 in a number of their suggestions being incorporated into the Rule 28 petition.

9 The Discipline Oversight Committee communicated the proposed rule
10 changes to the State Bar membership, including hearing officers, on several
11 occasions between August 21, 2006, and September 15, 2006.⁴ The State Bar
12 received 43 comments from State Bar members regarding the proposed rule
13 changes. Those comments were considered by the Committee at its meeting on
14 September 21, 2006.

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16 2006.

17 ⁴ An e-mail was sent to members on August 21, 2006, which contained a computer link to the proposed
18 rule changes; an e-mail was sent to Section chairs and County and Specialty Bars on August 21, 2006;
19 the edition of eLegal (an Internet newsletter for State Bar members) that was sent to members on August
20 22, 2006 and September 5, 2006, included information about the proposed rule changes; a reference to
the proposed rule changes was included in Myazbar-News on August 22, 2006; and a reference was
included in the Board Highlights Report in September 2006. The State Bar membership was informed
that the Discipline Oversight Committee would meet on September 21, 2006, and that the Board of
Governors intended to address the proposal at its meeting on September 22, 2006. The membership was
also informed that the Board intended to vote on the Committee's proposal at the Board's October 2006
meeting.

1 The Disciplinary Commission of the Supreme Court, aware of the State
2 Bar's draft proposal, filed a memorandum with this Court on September 22,
3 2006, setting forth its concerns about the draft rule changes that were
4 communicated to the State Bar membership. Thereafter, the Commission had
5 an opportunity to submit written comments and meet with members of the
6 Discipline Oversight Committee to discuss its concerns. Most of the
7 Commission's concerns were resolved through that process.

8 The Discipline Oversight Committee further modified the proposed rule
9 changes on October 19, 2006, based upon comments it had received. On
10 October 20, 2006, the Board of Governors considered the rule change proposal
11 submitted by the Discipline Oversight Committee. Both Mark Harrison and
12 Nancy Greenlee addressed the Board at that meeting. Following discussion
13 and argument, the Board voted on several motions to further modify the
14 proposed rule changes. Two of those motions were approved, which resulted
15 in two modifications being made to the proposed rules. The Rule 28 petition,
16 which included the modifications made by the Board, was filed on November
17 1, 2006.

18 II. Response to Specific Comments

19 A. Rule 43(d)

20 Most of the comments regarding the proposed changes to the trust

1 account rules pertain to the inclusion of a provision authorizing random trust
2 account examinations. The objectives of a random trust account examination
3 rule include promoting greater compliance with the trust account rules,
4 deterrence of non-compliance with the trust account rules, and discovery of
5 misappropriation or non-compliance with the trust account rules that might
6 otherwise go undetected. Furthermore, it is expected that a random trust
7 account examination rule will reduce the number and size of claims against the
8 Client Protection Fund.

9 Eleven jurisdictions currently have random trust account audit programs.⁵
10 The Commission on Evaluation of Disciplinary Enforcement (the “McKay
11 Commission”) determined that random trust account audits were a proven
12 deterrent to the misuse of money and property in the practice of law. The New
13 Jersey Office of Attorney Ethics has stated that the objectives of its random
14 trust account audit program include ensuring compliance with the trust account
15 record keeping rules, deterrence, and detection of misappropriation.⁶ In 1985,
16 North Carolina instituted a random audit program “to reduce the incidence of
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18 ⁵ The trust account examination envisioned by the State Bar is equivalent to the trust account audits
19 conducted in other jurisdictions. The State Bar chose to refer to the review of a trust account as an
“examination” rather than “audit” because a limited review and verification of trust account records and
activity does not amount to an “audit,” as that term is commonly used in the accounting profession.

20 ⁶ New Jersey Office of Attorney Ethics’ April 9, 2007, report to the Supreme Court of New Jersey.

1 misappropriation and mishandling of clients' funds by monitoring compliance
2 with the procedures and record keeping requirements established by the Rules
3 of Professional Conduct.”⁷

4 The public expects lawyers to handle funds entrusted to them with the
5 highest degree of care and integrity. In order to adequately protect clients'
6 funds and other property, lawyers must maintain appropriate trust account
7 records, which requires compliance with the trust account rules. Ensuring
8 compliance with the trust account rules will ensure that trust funds are
9 protected, thereby serving one of the primary goals of a random trust account
10 examination program.

11 The group of respondents' counsel stated in their comments to the Rule
12 28 petition that it would like to see guidelines established before this Court
13 authorizes random trust account examinations. The State Bar asserts that is not
14 necessary because the proposed rule would require the Board of Governors of
15 the State Bar, not bar counsel, to adopt appropriate guidelines for conducting
16 random trust account examinations. During the adoption process, members of
17 the State Bar will have an opportunity to participate in the development of the
18 guidelines. At a minimum, members will be permitted to submit comments or
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20 ⁷ The North Carolina State Bar Attorney's Trust Account Handbook (revised March 2005).

1 proposals to the Board, the Discipline Oversight Committee, or another
2 committee appointed by the president of the Board. Under current Rule 43(c),
3 this Court has given the Board representative discretion regarding the extent of
4 a trust account audit.⁸ This Court should likewise give the Board discretion
5 regarding the formulation of appropriate guidelines that establish a process for
6 reviewing lawyers' trust account records and the records that will be reviewed.

7 This Court should have confidence that the State Bar will adopt
8 appropriate guidelines through a process in which the State Bar membership is
9 involved. The process of developing guidelines for random trust account
10 examinations will make the Board keenly aware of the concerns of the
11 membership, including respondents' counsel. Furthermore, the Board's
12 lawyer-members will be bound by the guidelines it adopts, which will ensure
13 the adoption of guidelines that are both fair and reasonable.

14 The Board of Governors can address during the guideline adoption
15 process the concern expressed by the group of respondents' counsel that firms
16 may be subject to "multiple audits over a compressed period of time if more
17 than one attorney practicing at the firm were randomly selected." For example,

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19 ⁸ Current Rule 43(c), Ariz.R.S.Ct., authorizes a representative of the Board of Governors to "audit and
20 verify" funds and property held in trust, as well as records related thereto, including a review of
unspecified "all other records" pertaining to trust account transactions.

1 the Board could choose to adopt a guideline that will limit a firm to no more
2 than one examination during a specified time (e.g., three years) regardless of
3 the number of lawyers in that firm who are randomly selected.⁹

4 Although the proposed rule regarding random trust account examinations
5 does not describe what comprises an examination, it is the State Bar's
6 expectation that random examinations will entail a review of trust account and
7 financial documents, and the procedures by which they are maintained, in order
8 to determine whether selected lawyers have complied with the trust account
9 rules adopted by this Court. The State Bar does not envision an examination
10 that is as extensive as an "audit" as that term is commonly used by the
11 accounting profession. If an examination reveals non-compliance with the
12 trust account rules, however, further examination or investigation may be
13 appropriate.

14 Whether the proposed rule is adopted or not, the State Bar will continue
15 to offer a number of educational programs that address the trust account rules
16 and procedures. There are many solutions to address the concern that members

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18 ⁹ In New Jersey, the "annual random selection of audit candidates is made from the statewide list of
19 licensed attorneys using the law firm as the entity subject to audit, rather than individual attorneys." New Jersey Office of Attorney Ethics' website (June 17, 2007) (emphasis added). In North Carolina,
20 "[i]f some of the trust accounts maintained by the firm were subject to random audit within the preceding three years, the audit is limited to records for any trust account used by the subject lawyer which was not audited during the three year period." The North Carolina State Bar Attorney's Trust Account Handbook (revised March 2005).

1 will not have adequate education regarding the appropriate handling of their
2 trust accounts, but be subject to a random examination. For example, some
3 states require mandatory educational training regarding the appropriate
4 handling of trust accounts. The Board of Governors agrees that such education
5 is appropriate, and has approved the filing of a Rule 28 petition seeking such
6 mandatory education.

7 The guidelines adopted by the Board of Governors will establish the
8 number of random trust account examinations that will be conducted each year.
9 The Board might choose to limit the number initially, in order to determine the
10 viability and effectiveness of the program, and to limit the expense of
11 additional staff.

12 Regarding the random selection of lawyers whose trust accounts would be
13 examined, the Board of Governors might choose to utilize a software program,
14 similar to that employed in selecting lawyers for random audits regarding
15 compliance with the requirements of mandatory continuing legal education.
16 New Jersey and North Carolina currently use such software in their random
17 audit programs.

18 Respondents' counsel's assertion that a "firewall" should be established
19 between the staff that conducts the examinations and bar counsel is misplaced.
20 The State Bar's primary concern is to ensure compliance with the trust account

1 rules, in order to protect the public, rather than to undertake additional
2 disciplinary proceedings. In other jurisdictions with random trust account
3 audits, minor violations of the trust account requirements (e.g., minor record
4 keeping errors) are addressed through immediate, on-site education. More
5 serious violations are referred to bar counsel, which may result in the
6 imposition of disciplinary sanctions.

7 Random trust account audit programs around the country have proven
8 effective. For example, in its April 9, 2007 report to the Supreme Court of
9 New Jersey, the New Jersey Office of Attorney Ethics, which began such
10 audits 25 years ago, reported that the Random Audit Program conducted 387
11 audits of law firms in 2006. Although only 1.3% of the audits over the past
12 quarter century found "serious violations of ethics," such as misappropriation
13 of clients' trust funds, a substantial number of technical accounting
14 deficiencies were found and corrected. Accounting deficiencies still exist in
15 New Jersey even though the Supreme Court established mandatory trust
16 account education for all newly admitted practitioners in 1987 and the fact that
17 the Court has made known for 27 years that the knowing misappropriation of
18 clients' trust funds would result in permanent disbarment.

19 In New Jersey, a representative cross-section of the bar is selected for
20 audits. The random selection methodology, approved by the Supreme Court, is

1 made by a Microsoft algorithm for randomness. Every firm, regardless of size,
2 has an equal chance of being selected. Law firms selected for audit are given
3 ten to 14 days advance notice of the date and time of the audit, at which they
4 must provide access to two years worth of trust account records. In the case of
5 minor deficiencies, the auditor issues a deficiency letter following the audit
6 describing any shortcomings for which corrective action is necessary. If within
7 45 days the lawyer certifies in writing how the deficiencies have been
8 addressed, the case is administratively closed. If the lawyer fails to certify how
9 the deficiencies have been addressed, a disciplinary complaint will be issued.
10 If, at any point during the audit process, major deficiencies are discovered,
11 such as misappropriation of a client's trust funds, the matter is immediately
12 referred for disciplinary action. During the 25 years that random audits have
13 been conducted, "serious financial misconduct by 117 attorneys was detected
14 solely as a result of being randomly selected for audit."¹⁰

15 North Carolina instituted a random audit program in 1985 "to reduce the
16 incidence of misappropriation and mishandling of clients' funds."¹¹ "The
17 audits were limited to procedural audits rather than the more familiar and
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19 ¹⁰ New Jersey Office of Attorney Ethics' April 9, 2007, report to the Supreme Court of New Jersey.

20 ¹¹ The North Carolina State Bar Attorney's Trust Account Handbook (revised March 2005).

1 extensive financial audit.”¹² Minor technical violations of the trust accounting
2 rules are addressed by the auditor and do not generally become the subject of
3 disciplinary proceedings. More serious violations are reported to the Counsel
4 of the State Bar, who determines whether disciplinary proceedings should be
5 instituted. On January 16, 2007, the Office of Counsel for the North Carolina
6 State Bar issued a report regarding the random audits in the fourth quarter of
7 2006. Sixty lawyers were selected for audit. In 45% of the cases, the trust
8 accounts were not reconciled appropriately. Written accountings were not
9 provided to clients by 45% of the lawyers audited. Forty percent of the
10 lawyers had dates on client ledgers that did not reconcile with the bank records.
11 Deposit slips failed to identify the identity of the client or source of funds in
12 37% of the audits. Twenty-seven percent of the lawyers failed to have a ledger
13 for attorney funds held in trust to pay bank service fees. In 11% of the audits,
14 ledgers were not maintained for each person or entity from which the lawyer
15 received trust funds. The North Carolina report stated, “[I]t is clear that the
16 random audit program has been most successful in raising the overall level of
17 compliance with and understanding of the rules governing lawyer trust
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20 ¹² The North Carolina State Bar Attorney’s Trust Account Handbook (revised March 2005).

1 accounts.”¹³

2 B. Rule 43(f)

3 The State Bar does not object to the recommendation to amend Rule 43(f)
4 that was made by the Arizona Foundation for Legal Services and Education.

5 C. Rule 46(f)(21)

6 Summaries and memoranda prepared by law firms for internal use are not
7 discoverable. Under the current Rule 46(f)(21), “work product of bar counsel
8 and working files of state bar staff” are not considered part of the “State Bar
9 file.” Furthermore, pursuant to current Rule 70(b)(1), Ariz.R.S.Ct., “work
10 product and working files of state bar staff, bar counsel, the panelist, court
11 staff, hearing officers, the commission, [and] this court” are not public.
12 Summaries of allegations of misconduct and respondents’ responses thereto
13 contain bar counsel’s thought processes, analyses, and recommendations,
14 which should not be made available to respondent-lawyers, their counsel or
15 others. A respondent-lawyer who disagrees with an order entered by a
16 Probable Cause Panelist based upon a summary prepared by bar counsel¹⁴

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18 ¹³ The North Carolina State Bar Attorney’s Trust Account Handbook (revised March 2005).

19 ¹⁴ Historically, panelists have relied on summaries prepared by bar counsel due to the substantial volume
20 of documents that result from screening investigations undertaken pursuant to Rule 52(b)(1) and Rule
54(b)(1) and (2), Ariz.R.S.Ct. The entire file is, however, available to panelists for review if deemed
necessary.

1 could file an appeal pursuant to proposed Rule 54(c), if the order included
2 diversion, stay, informal reprimand, probation, restitution or assessment of
3 costs and expenses. The proposed rule would exclude “information protected
4 by any legally recognized privilege in Arizona” from what comprises the
5 “State Bar file” because there is no legitimate reason why the State Bar should
6 not be entitled to assert the same legally recognized privileges that others are
7 entitled to assert.

8 D. Rule 47(b)(1)

9 It is not necessary to include a provision that would permit a respondent-
10 lawyer to move to amend his/her answer to conform to the proof because the
11 burden of proof is on the State Bar.¹⁵ Regardless of the respondent-lawyer’s
12 answer, the burden of proof remains on the State Bar. Although the State Bar
13 may not know everything about a respondent-lawyer’s conduct at the
14 beginning of a hearing, the respondent will always know what conduct s/he
15 engaged in. Therefore, there should be no reason why a respondent-lawyer
16 would need to alter his/her answer during a hearing. Furthermore, the hearing
17 officer will enter findings of fact and conclusions of law based upon the
18 evidence and oral argument presented by both the State Bar and the
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20 ¹⁵ Rule 48(e), Ariz.R.S.Ct.

1 respondent-lawyer at the hearing.

2 E. Rule 47(b)(2)

3 The State Bar understands the concerns expressed by the group of
4 respondents' counsel regarding the need, in some instances, to continue a
5 scheduled hearing, however, such discretion should be limited and based upon
6 substantial new or additional information. The State Bar moves to amend the
7 proposed rule to include the following language at the end of proposed Rule
8 47(b)(2):

9 If the State Bar's amended complaint includes substantial new or
10 additional information, the hearing officer may continue a
11 scheduled hearing pursuant to Rule 57(j)(1), Ariz.R.S.Ct., upon a
showing by respondent that substantial additional discovery is
necessary to adequately defend against the new information.

12 F. Rule 47(j)(3)

13 Current Rule 47(j)(3) is unnecessary because it duplicates the provision of
14 ER 1.6(d)(4).

15 G. Rule 47(m)

16 The State Bar understands the concerns expressed by the group of
17 respondents' counsel. The State Bar moves to amend proposed Rule 47(m) to
18 include the following sentence after the italicized title of paragraph (m)(3), but
19 before the first sentence of text:
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1 referred back to bar counsel to determine whether a screening investigation
2 should be undertaken. This proposed rule change is intended to reduce the
3 number of screening investigations that must be undertaken by bar counsel,
4 while permitting experienced fee arbitrators to make determinations regarding
5 the reasonableness of lawyers' fees.

6 J. Rule 54(b)(4)

7 The concerns of respondents' counsel are misplaced regarding the ability
8 to file substantive motions with the Probable Cause Panelist. In those cases
9 where the charges are dismissed, there is no need for further proceedings
10 before the panelist. In those cases in which diversion or a disciplinary sanction
11 is imposed, respondents can appeal that decision to an alternate panelist, before
12 whom s/he will have an opportunity to argue any substantive matters. In those
13 cases in which the panelist enters an order of probable cause, respondents will
14 have an opportunity to litigate all substantive matters before a hearing officer.

15 K. Rule 54(b)(5)(B) and (c)

16 The "level" or amount of due process that should be afforded respondent-
17 attorneys is in some regards dependent on the severity of the sanction imposed
18 (i.e., appeals for low-level rule violations should not be accorded the same
19 number and type of procedures that are appropriate for serious violations of the
20 rules). The proposed rule would provide an appeal through an alternate

1 probable cause panelist rather than a formal hearing, which is currently
2 available when a panelist imposes diversion or any disciplinary sanction. The
3 proposed rule provides for a 2-hour hearing before an alternate panelist in cases
4 involving diversion, informal reprimands, probation, restitution, or the
5 assessment of costs and expenses. That procedure complies with the
6 requirements of due process, and permits an unbiased review by a panelist
7 other than the one who entered the initial order.

8 Respondent-lawyers should not have a right to an appeal to an alternate
9 panelist, and then request a formal hearing before a hearing officer. The
10 adoption of such a dual level right of review will lengthen an already lengthy
11 discipline process, rather than reduce it, which is one of the primary objectives
12 of the State Bar's Rule 28 petition. A dual appeal process would result in
13 additional work for the Disciplinary Clerk, respondent-lawyers (or their
14 counsel, if represented), and bar counsel.

15 L. Rule 55(a)

16 The McKay Commission recommended that disciplinary counsel have the
17 discretion to divert cases involving minor misconduct, minor incompetence, or
18 minor neglect to non-disciplinary proceedings in lieu of discipline.¹⁷ In
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20 ¹⁷ In Arizona, "[d]iversion is an alternative to formal discipline." Rule 55, Ariz.R.S.Ct.

1 Arizona, virtually all respondents participating in diversion are in the program
2 at the recommendation of bar counsel. Bar counsel can recall perhaps one to
3 three respondents in the last several years who were placed into diversion when
4 bar counsel recommended the imposition of a disciplinary sanction. Even in
5 those cases in which lawyers are not eligible for diversion based upon the Board
6 of Governors' guidelines, respondents' counsel regularly argue that their clients
7 should be placed into a diversion program.

8 The Board of Governors' diversion guidelines identify cases that are not
9 appropriate for diversion. Bar counsel are intimately familiar with the
10 guidelines and the circumstances under which diversion is appropriate (e.g.,
11 diversion is not available in cases of serious misconduct). Furthermore, the
12 proposed rule does not prohibit the imposition of diversion at any stage of the
13 proceedings.

14 M. Rule 56(e) and (f)

15 The proposed rule allowing the use of "check-off boxes" for aggravating
16 and mitigating factors would not discharge bar counsel or respondent-lawyers
17 from complying with this Court's expectation that they provide hearing officers
18 with sufficient evidence of the existence of aggravating and mitigating factors
19 to permit them to determine whether such factors exist. The proposed
20 comment to Rule 56 states, "The parties may provide additional or explanatory

1 information to supplement a check-off box.”

2 The use of “check-off boxes” is particularly appropriate regarding the
3 terms of probation that bar counsel and respondent-lawyers agree must be
4 included in consent agreement documents.

5 N. Rule 57(b)

6 The proposed rule continues to give hearing officers the authority to
7 extend, for good cause, the time to file an answer. Lawyers in discipline
8 proceedings are in a unique situation regarding the preparation that must be
9 undertaken to file an answer. In a typical civil case, the defendant may not
10 have been aware of the allegations prior to a complaint being served. In
11 discipline cases, however, respondent-lawyers have already been provided with
12 a copy of the allegations of misconduct and given an opportunity to submit a
13 written response to bar counsel. In many cases, respondent-lawyers have also
14 have a second opportunity to address the allegations.¹⁸ By the time a formal
15 complaint has been filed, respondents are completely aware of the allegations
16 of misconduct and the concerns of the State Bar.

17 In those situations where respondent-lawyers are represented by counsel,
18 they are in a unique position, unlike lay people, to assist their counsel—they

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20 ¹⁸ Respondent-lawyers are given a second opportunity to submit a written response in those cases in which the complainant files a reply to the respondent’s initial response.

1 have attended law school, passed the bar examination, and presumably
2 practiced law. Respondent-lawyers initially have 20 days to file an answer, but
3 with permission of a hearing officer, that period can be extended to 30 days. In
4 those rare situations where a respondent-lawyer cannot file an answer within
5 30 days, perhaps due to the respondent-lawyer's absence from the country
6 while on vacation, hearing officers may extend the time pursuant to Rule 47(k),
7 Ariz.R.S.Ct.

8 O. Rule 57(c)

9 The proposed rule would require respondent-lawyers to "attend" the
10 initial case management conference. At present, most initial case management
11 conferences are telephonic. In order to comply with the deadlines established
12 in the rules, hearing officers need to know whether respondent-lawyers are
13 available for hearings on specific dates. Without that information, initial case
14 management conferences may have to be re-scheduled, which might further
15 delay the proceedings. Telephonic appearances by respondent-lawyers will
16 limit any disruption to their schedules (e.g., there will be no travel time).

17 P. Rule 57(e)

18 Respondent-lawyers are seldom surprised by the allegations set forth in a
19 formal complaint because they learn about the allegations during the screening
20 investigation that preceded the entry of a Probable Cause Order. Since

1 respondent-lawyers are required to provide bar counsel with a written response
2 to the charges filed by complainants during the screening investigation, bar
3 counsel's disclosure statements will address any defense or argument made by
4 respondents during the screening investigation. Furthermore, respondent-
5 lawyers should not need substantial time to prepare and file their initial
6 disclosure statements because they have been aware of the allegations since the
7 inception of the screening investigation. In addition, disclosure statements in
8 lawyer discipline proceedings are simplified versions of the disclosure
9 statements that must be provided in civil proceedings. Contrary to many civil
10 cases in which the defendant is surprised by the service of a complaint,
11 respondent-lawyers are well aware of the allegations prior to the filing of a
12 formal complaint by bar counsel.

13 If a respondent-lawyer or bar counsel objects to the other's use of a
14 standardized disclosure form, the assigned hearing officer can require further
15 disclosure.

16 The discipline process should not be delayed due to a respondent-
17 lawyer's failure to promptly retain counsel. Furthermore, hearing officers still
18 have discretion, in exceptional cases, pursuant to Rule 47(k), Ariz.R.S.Ct., to
19 modify the disclosure deadlines.

1 Q. Rule 57(e)(8) and (9)

2 Although proposed Rule 57(e) requires the disclosure of certain
3 information at the time a respondent-lawyer's answer is served, that disclosure
4 can be supplemented at any time. It is incumbent upon respondent-lawyers to
5 disclose all information available at that time, even if it is not complete. If a
6 respondent-lawyer learns additional information, s/he must promptly disclose it
7 or be subject to sanctions. Discovery sanctions likely will not be imposed if
8 respondent-lawyers undertake reasonable, good faith efforts to discover and
9 promptly disclose information required by Rule 57(e).

10 R. Rule 57(f) and Rule 57(f)(3)(D)

11 The group of respondents' counsel asserts that the proposed rule does not
12 provide sufficient time to submit or respond to discovery requests. The State
13 Bar proposed this rule because it should not be subject to the receipt of "last
14 minute" discovery that prevents or limits the State Bar's ability to verify and/or
15 challenge the information provided by respondent-lawyers or their counsel.
16 The proposed rules establish deadlines shorter than those in civil cases because
17 lawyer discipline cases must be tried within 150 days of the date the formal
18 complaint is filed, whereas civil cases might not be tried for several years. For
19 example, 40 days might be reasonable if the hearing did not have to be held
20 within 150 days.

1 S. Rule 57(j)(6)

2 The procedure suggested by the group of respondents' counsel regarding
3 evidence of prior sanctions is unnecessary and would create additional work
4 for both parties; that result would be contrary to the purpose for which the
5 Rule 28 petition was filed—to expedite lawyer discipline proceedings. This
6 Court stated in *State v. Djerf*, 191 Ariz. 583, ¶41, 959 P.2d 1274 (1998)
7 (citations omitted), that it “presume[s] the trial court disregards all
8 inadmissible evidence in reaching a decision.” Hearing officers should be
9 accorded the same presumption. Hearing officers take their roles seriously,
10 and would not jeopardize the discipline process by allowing the existence of
11 prior sanctions to affect their decisions whether the State Bar has proven the
12 substantive allegations by clear and convincing evidence.

13 T. Rule 58(e)

14 The group of respondents' counsel apparently objects to the language in
15 current Rule 58(e), which allows the Disciplinary Commission to affirm,
16 reverse, or modify the findings of fact, conclusions of law, and recommended
17 resolution. They would like the proposed rule to include a reference to the
18 “clearly erroneous” standard of review set forth in Rules 58(b) and 59(b),
19 Ariz.R.S.Ct. They rely on *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004), for
20 their request.

1 This Court has held on several occasions, based upon the clearly
2 erroneous standard, that neither it nor the Disciplinary Commission may add
3 findings of fact to those made by a hearing officer, even if clear and convincing
4 evidence of additional facts was presented to a hearing officer. *See, e.g., In re*
5 *Clark, id., In re Van Dox*, ___ Ariz. ___, 152 P.3d 1183 (2006), and *In re*
6 *Tocco*, 194 Ariz. 453, 984 P.2d 539 (1999). In essence, this Court has held that
7 it is not clearly erroneous for a hearing officer to fail to make a finding of fact
8 that is proven by clear and convincing evidence. Such a position is contrary to
9 a discipline system, or any system of justice, that is based on fairness and due
10 process. If justice is the goal of disciplinary proceedings, then all relevant facts
11 proven by clear and convincing evidence should be considered—including
12 proven facts that a hearing officer failed, for whatever reason, to include in
13 his/her findings of fact.

14 Not only have hearing officers failed to make relevant findings of fact for
15 which there was no controverting evidence, at least one hearing officer failed
16 to make relevant findings of fact to which the State Bar and the respondent-
17 lawyer stipulated.

18 There is no legitimate reason to disregard evidence that has been proven
19 by clear and convincing evidence. The interests of justice demand that all
20 relevant evidence be considered. A decision regarding the existence of an

1 ethical violation and a determination of an appropriate sanction should be made
2 after considering all proven facts. A hearing officer's error in failing to make
3 findings of relevant fact that were proven by clear and convincing evidence
4 should not impede a just resolution. A hearing officer's failure to include
5 relevant proven facts can adversely affect the State Bar's case or a respondent-
6 lawyer's defense. Therefore, the proposed rule would benefit not only the
7 State Bar and respondent-lawyers, but also the general public.

8 The State Bar suggests this Court amend the proposed rule by adding the
9 following to the Comment to Supreme Rules 58(b) and 59(b):

10 A hearing officer's failure to make a finding of fact that is both
11 relevant and proven by clear and convincing evidence is clearly
12 erroneous. The Disciplinary Commission and the Supreme Court
13 may make additional findings of fact after concluding that the
14 hearing officer was clearly erroneous in failing to include relevant
15 findings of fact that were proven by clear and convincing evidence.

16 U. Rule 60(a)(5)(C) and (a)(6)

17 Proposed Rule 60(a)(5)(C) would change the standard of proof for
18 probation violations from clear and convincing evidence to preponderance of
19 the evidence, making it consistent with the standard of proof in criminal
20 probation violation cases. It is inconceivable that lawyers believe they should
be accorded a higher standard of proof than criminal defendants, whose
probation violations may subject them to incarceration.

1 Proposed Rule 60(a)(6) would change the standard of proof for restitution
2 from clear and convincing evidence to a preponderance of the evidence.
3 Imposition of restitution by an errant lawyer should not be subject to a standard
4 of proof that exceeds the standard of proof in a civil proceeding in which a
5 civil judgment can be obtained.

6 III. Conclusion

7 For the reasons set forth above, the State Bar of Arizona respectfully
8 petitions this Court to amend Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, and
9 75 of the Rules of the Supreme Court, as set forth in its Rule 28 Petition filed
10 November 1, 2006, with the modifications suggested in this reply.

11 Respectfully submitted this 26th day of June, 2007.

12 State Bar of Arizona

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14 Robert B. Van Wyck
15 Chief Bar Counsel

16
17 Electronic copy filed with the
18 Clerk of the Supreme Court of Arizona
19 this _____ day of June, 2007.

20 by: _____