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August 15, 2007

To: Supreme Court of Arizona

From: H. Theodore Werner

RE: Comments on R-06-0035 Petition To Amend Supreme Court Rule 46[f][21]

It just came to my attention that after the comment period ended in May Robert Van Wyck replied in June to comments by Nancy Greenlee, Mark Harrison and others. This late comment is about the proposed amendment of Rule 46[f][21] and one sentence in Mr. Van Wyck's Reply to those Comments. Mr. Van Wyck wrote:

“Summaries of allegations of misconduct and respondents' responses thereto contain bar counsel's thought processes, analyses, and recommendations, which should not be made available to respondent lawyers, their counsel or others.”

When the Bar Counsel Summary to the Probable Cause Panelist [PCP] is not made available to the Respondent in the Disciplinary Proceeding, Bar Counsel's failure to summarize the investigation so as to replace it with a false fictional account can go unchallenged for lengthily periods of time. Some fictional summaries submitted to PCPs during the 1990 – 1997 period remain uncorrected nor resubmitted to a PCP. This is in spite of the resulting PCP decision being challenged immediately by the Respondent. Later Voluntary Bar Counsel plead for the State Bar of Arizona [SBA] that all SBA's lawyers lacked the competency to analyze and summarize the type of events out of which the complaint arose i. e. litigation in which SBA was neither a party nor the arbiter. It remains undone.

In one case, 91-2353, Bar Counsel's fictional summary caused clients in the litigation to waive a \$100,000 right based on the PCP decision. The clients relied because the clients assumed the Bar Counsel submission could and did accurately reflect the investigation and the PCP decision was based on the facts found in the investigation. Instead Staff Bar Counsel submitted a fictional account. The fictional summary as disclosed 21 months later in the Complaint and 24 months later in the Disclosure Statement deleted the clients' rights at issue and won in the litigation and shrunk the "matter" in which their counsel was involved and for which he was responsible.

Mr. Van Wyck said the summaries include the allegations of misconduct, respondents' responses, bar counsel's thought processes, analyses, and recommendations. Summaries are supposed to also contain facts found in the investigation. A fictional or incompetent presentation of the facts should be subject to challenge early, particularly if expediting the disciplinary process is a goal. The Respondent should be entitled to the Summary as soon as the PCP has issued the decision or at least concurrent with a Bar Counsel being selected to prepare the formal complaint.

DATED this 15th day of August 2007.

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Attachment: Disk w/this comment

A copy of this comment has been mailed this 15th day of August 2007 to:

Robert Van Wyck
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