

COMMENT OF THE UNDERSIGNED LAWYERS IN SUPPORT OF SUPREME
COURT PROPOSED RULE 49(e) CREATING A
DISCIPLINE OVERSIGHT COMMITTEE

On January 10, the Supreme Court issued *sua sponte*, proposed changes in and additions to various Supreme Court rules. One of the proposed additions is Rule 49(e) which provides:

(e) Attorney Discipline Oversight Committee. The Board of Governors shall appoint a board committee to oversee the performance of the disciplinary duties delegated to chief bar counsel. In order to help ensure that the discipline system is adequately protecting the public, the committee shall periodically review the effectiveness, efficiency, and quality of bar counsel's performance . The committee may meet in executive session to review individual cases if needed to perform its duties. Committee may make recommendations to the executive director and the board regarding bar discipline activities, including staffing levels needed to perform assigned duties.

The Court invited comment on the proposed rules and the State Bar submitted a lengthy comment which ultimately urged the Court not to adopt proposed Rule 49(e). The signers to this comment include former members of the State Bar Board of Governors (“BOG members”), former Bar Counsel and Ethics Counsel, and other lawyers who regularly represent clients in the lawyer discipline system. We strongly support the adoption of proposed rule 49(e) with the amendment we recommend in this Comment.

The State Bar’s proposed comment correctly recites the history of the prior Discipline Oversight Committee (“DOC”) originally created by the Board of Governors in 2009. However, the State Bar’s opposition to the Court’s proposed Rule 49(e) re-creating a DOC is unpersuasive. The State Bar’s primary objection to the re-creation of a DOC by the Court is the State Bar’s apparent concern that the DOC will create an “appearance of conflicts of interest” or more generally implicate “the internal politics” of the bar. The State Bar also argues that the DOC is unnecessary because Chief Bar Counsel reports to the Board of Governors at each meeting and issues an annual report which summarizes pertinent facts and statistics about the operation of the Discipline Department during the preceding year. The State Bar’s concern about mixing bar politics with bar discipline is a legitimate concern but it can be easily and definitively resolved by a simple amendment to proposed Rule 49(e).

The proposed rule would permit the DOC “to review individual cases if needed to perform its duties.” In order to resolve the “political” problem raised by the State Bar, we propose an addition to the proposed language which would, if adopted, negate any legitimate concern that the DOC will unavoidably introduce “politics” or “conflicts” into the process. The suggested addition to the proposed rule would read as follows:

“ . . . the committee may meet in executive session to review individual cases to perform its duties *only after those cases have been finally adjudicated by a Consent Agreement, the Arizona Discipline Probable Cause Committee, an Order of the Presiding Disciplinary Judge or this Court.* (italicized language added).

We believe the creation of the DOC is essential to assure transparency in the discipline process, to give the BOG (*and those appointed by the BOG to serve on the DOC*) a direct and more meaningful connection with the discipline process and more generally, give bar counsel a greater sense of responsibility and accountability to the Court, the BOG and the membership. In the absence of the DOC, bar counsel are effectively immune and insulated from any meaningful accountability because as a practical matter, reports by the Chief Bar Counsel to the BOG at its regular meetings and annual reports of the Chief Bar Counsel do not typically provide Board members with the information needed to ask hard questions or to convey concerns raised with them *by their constituents and others* about the discipline process. It has been asserted by the State Bar that Administrative Order (A.O. 2011-44) creating the Attorney Regulation Committee (“ARC”) gives that Committee the authority necessary to provide meaningful oversight of the operation of the disciplinary process and the performance of discipline counsel. The undersigned lawyers respectfully disagree because the A.O. creating the ARC imposes on ARC a wide range of responsibilities including, *inter*

alia, examinations and admissions, reinstatement, and the disability and the disciplinary process. Moreover, the ARC includes as members the Chief Bar Counsel and the Presiding Disciplinary Judge, both of whom have an important but understandable point of view which may inhibit members of the ARC from criticizing or raising concerns about the disciplinary process. If the DOC is created pursuant to Rule 49(e), it will not, unlike the ARC, include members who have an understandable but subjective interest in assuring colleagues that everything about the operation of the disciplinary process is copacetic.

By limiting the discussion of individual cases *only to those cases that have been finally and fully adjudicated*, the DOC can nonetheless raise questions about issues brought to their attention by members of the bar and others about anomalies or concerns about the disciplinary process. Bar counsel regularly argue that transparency is essential to the operation of the disciplinary process and by shielding themselves from any oversight by the BOG//DOC, they negate the transparency required to assure members of the Bar that the discipline process is fair and that the BOG – their representatives – provides an “oversight” function to assure that the process is fair. Since nearly 60% of the Bar budget is devoted to the discipline process, the additional oversight provided by the proposed DOC is clearly warranted.

The lawyers joining in this comment believe that it would be desirable not only to adopt Rule 49(e) but to authorize the BOG to appoint as members of the proposed DOC at least two lawyers with substantial experience in the representation of respondents. It is our understanding that commencing in 2019, the BOG will include members and non-members appointed by the Court in addition to those elected by the membership. [See rule 32(e)(4), effective in 2019] If our understanding is correct, the appointment of those appointed members to the DOC would further neutralize any “political” concern raised by the involvement of elected BOG members on the DOC. However, without regard to the impending rule change affecting the composition of the BOG, we would urge the Court to confirm in Rule 49(e) that the BOG can and should appoint to the DOC *some members who have substantial experience with the discipline process*. Finally, we note that limited research discloses that a number of other states have “oversight” committees like the committee proposed in Rule 49(e) and in some states, those committees include members who are not part of the State Bar governing Board.

The following lawyers join in this comment:

Ralph Adams
Peter Akmajian
Karen Clark
Richard Coffinger
Steve Dichter
David Dodge
Artie Eaves
Nancy Greenlee
Mark Harrison
Steve Montoya
Denise Quinterri
Mark Rubin
Lynda Shely
Geoff Sturr
Bob VanWyck
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