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BEFORE THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULES 47, 48, 50, 56, 57, 65 AND 72, ARIZONA RULES OF PROFESSIONAL CONDUCT	Supreme Court No. R-09-0003 **Comments of the State Bar of Arizona Regarding Petition to Amend Rules 47, 48, 50, 56, 57, 65 and 72, Arizona Rules of Professional Conduct**

The State Bar of Arizona, pursuant to Rule 28, Ariz.R.Sup.Ct., hereby files its comments to the Rule 28 Petition to Amend Rules 47, 48, 50, 56, 57, 65 and 72, Ariz.R.Sup.Ct., filed on January 9, 2009, by the Administrative Office of the Courts (AOC). The State Bar has no comment or objection to a number of the proposed changes and appreciates the AOC's efforts to embrace the timeliness and efficiency of the discipline process. The State Bar objects, however, to some of the proposed changes as they may not, upon closer analysis, significantly improve the efficiency or timeliness of the process and in some cases may extend the process. Additionally, both the Bar and the AOC

may need to tread carefully and closely examine the impact on some critical aspects of the process before making further changes.

The State Bar will address its comments in the same order as the proposed rule changes in petitioner's petition. If there is no comment to a proposed rule change then the Bar does not oppose the proposal.

I. Rule 47 Ariz.R.Sup.Ct., Rules of Procedure

Currently, Rule 47(h), Ariz.R.Sup.Ct., gives the hearing officer the authority to issue subpoenas in a disciplinary matter. The recommended change would give the Disciplinary Clerk the same authority to issue subpoenas.

This amendment makes sense, as it conforms the disciplinary procedure with the existing practice in other judicial systems. The Bar is confident that the AOC will implement this change to make the subpoena request procedure more efficient for the clerk's office as well as relieving the hearing officers of a routine but rule-driven task.

II. Rule 50, Ariz.R.Sup.Ct., Hearing Officers

The petition proposes a number of changes to Rule 50 (a), (b), and (c) Ariz.R.Sup.Ct., which would codify the current practice of using both paid and volunteer hearing officers. The State Bar recently filed its own petition (R-09-0011) to modify Rule 50, Ariz.R.Sup.Ct., and to add Rule 50.1, Ariz.R.Sup.Ct., addressing theses issues. In contrast to the current proposal to incorporate

changes that reinforce the use of volunteer hearing officers, the State Bar's proposal is to use paid hearing officers exclusively, which it believes would more likely result in greater efficiency, consistency and fairness in the process.

Exclusively using paid hearing officers will expedite the disciplinary process while enhancing the quality and consistency of decisions and improving the overall integrity of the process. The time dedicated by a paid hearing officer, who will have greater familiarity with the disciplinary process, should result in reduced time to complete the formal adjudicatory process and produce a more consistent result. The State Bar's proposal still recommends using volunteer lawyers as settlement officers in formal disciplinary matters.

The AOC's rule-change petition also seeks to modify the current rule, which allows both parties to seek a change of hearing officer as a matter of right. The AOC petition proposes incorporating portions of Rule 10.2, Ariz.R.Crim.P., and would require a lawyer to avow that noticing a hearing officer is not made for an improper purpose. The suggested comment to the proposed rule states that the purpose of incorporating the criminal rule is to address abuses of the disciplinary rule in its current form. The explanation of the change sought implies that parties seek to change hearing officers, in part, for some improper purposes. The State Bar, however, is unaware of any alleged abuses of this particular right so it may not be an issue that necessitates a rule change.

It is also believed that the proposed change to this rule may not necessarily improve the efficiency in the process. Exercising the right to change the hearing officer does not affect the time limits that currently govern the completion of the hearing. Current rules require that a hearing be held and completed within 150 days of the filing of the formal complaint. *See* Rule 57(j)(1), Ariz.R.Sup.Ct. A change as a matter of right must occur within 10 days of service of notice of assignment of that hearing officer. *See* Rule 50(d)(2), Ariz.R.Sup.Ct. Irrespective of a party exercising his/her one-time right to change the hearing officer, the hearing must still be held within 150 days.

In examining other processes, the Rules of Civil Procedure do not contain any limitation on a party's right to a change of judge and there is no affidavit requirement.

The application of Criminal Rule 10.2 may not be the best method to apply to the disciplinary process as the disciplinary process is neither criminal nor civil in nature. Criminal Rule 10.2 applies to all criminal proceedings conducted in city, justice, and superior courts in Arizona. All judges in these courts are appointed or elected through a process in which the public participates. Moreover, justice and superior court judges are subject to removal through elections. The participants in any number of proceedings in city, justice and superior courts may be laypersons appearing on their own behalf. Under

those circumstances, the necessity of a sworn affidavit avowing that the change is not for any purpose articulated in the rules may be prudent. On the other hand, the participants in the disciplinary process are all officers of the court and are subject to other rules of professional conduct that would prohibit an abuse of the rule related to a change of hearing officer.

Given the distinct differences in the process of selection and appointment, and the obligations already incumbent on the participants, the Bar does not believe this change needs to be made. For these reasons, the State Bar objects to the recommended changes to Rule 50(d)(2), Ariz.R.Sup.Ct.[1]

III. Rule 56, Ariz.R.Sup.Ct., Consent Agreements

The petition also seeks to require hearing officers to hold a mandatory hearing in every case resolved by a consent agreement.[2] The basis for this change is that "[r]equiring a hearing in every case will result in substantiation of the factual basis for the Tender and reduce the necessity of the Disciplinary Commission remanding the Tender back to the hearing officer."

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[1] Alternatively, the State Bar has no objection to shortening the time deadline of the current Rule allowing for peremptory strikes from 10 days of service of notice of assignment to 5 days. *See* Rule 50(d)(2)(B).

[2] The proposed modification of Rule 56(b), Ariz.R.S.Ct., substitutes the word "may" for "shall." The rule would read, "...the hearing officer, in the hearing officer's discretion or upon request, shall hold an evidentiary hearing..." The suggested change would not make a hearing mandatory in each case. It would still be discretionary and would be contingent upon either the hearing officer or one of the parties requesting a hearing on the consent agreement.

In 2008, 71 formal cases were resolved by a consent agreement and closed. Only five of the 71 were rejected and remanded for further proceedings.[3] One of the five was remanded despite having a hearing on the agreement. Thus, statistically, requiring a mandatory hearing in each case resolved by agreement forces an overly broad change that is designed to affect a small number of cases remanded for lack of a record substantiating the agreement.[4] Imposing a potentially time-intensive proceeding on every case to resolve difficulties in a few cases is disproportionate to the result to be achieved. This change would not appear to have any positive impact on the efficiency with which formal disciplinary cases are being processed and resolved. Without significant support and justification that the change would have a positive result, the change should not be made.

In addition, the proposed change would force the parties to "meet and to the extent possible, reduce the volume of exhibits and witnesses and agree to those exhibits that can be admitted by stipulation." This requirement may not be necessary, as the vast majority of consent agreements do not include exhibits. Likewise, hearings on consent agreements rarely include witness testimony other than the respondent lawyer. Rule 56, Ariz.R.Sup.Ct., specifically states

[3] Of the five cases, four were remanded from the Disciplinary Commission and one remanded from the Supreme Court.

[4] Only 5.5% of cases resolved by consent agreement without a hearing were remanded at some stage of the process.

"[e]xhibits, such as a record of criminal conviction, pre-sentence reports, medical records, public records, and any other records in support of the agreement or the sanction to be imposed shall be filed with the agreement and joint memorandum..." The Rule and the practice of the Disciplinary Commission require sufficient supporting documentation along with the agreement itself in cases requiring such documentation.

The State Bar does not believe that it is necessary to include a specific provision that the parties reduce the volume of exhibits and witnesses in the context of a consent agreement. In almost all cases, the parties work together to determine what exhibits are necessary to support the agreement. Thus, the additional meeting is, therefore, unnecessary and may needlessly add time to the process, with no corresponding benefit.

If the Court believes that a specific provision is necessary, the State Bar requests that the language be modified by removing "the parties shall meet." It may not be necessary to meet in all cases if the parties can accomplish the goal – reducing the volume of exhibits and witnesses – by other means of communication such as a telephonic conference or e-mail discussions.

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IV. Rule 57, Ariz.R.Sup.Ct., Formal Proceedings

The petition also includes proposed changes affecting the time for processing probable cause orders and the time frame for completing the formal disciplinary hearing.

A. Deadline for filing the complaint

Proposed Rule 57(a), Ariz.R.Sup.Ct., would include that "[t]he state bar shall file the complaint or agreement within sixty (60) days from the probable cause order." Most formal cases either include multiple charges or have had multiple charges investigated prior to the filing of the formal complaint. The Court has made it abundantly clear that, if possible, discipline cases should not be tried in a piecemeal fashion:

> The bulk of the misconduct here also goes back to the time when respondent was in private practice. Unfortunately, this is the third time we have had to sift through facts arising out of the same basic set of circumstances. While we understand that the bar cannot consolidate multiple complaints until it has completed its investigation and found each to have a basis in fact, the piecemeal analysis of conduct occurring over an identifiable time period is difficult. We encourage the grouping together of similar complaints where possible because it provides us with a clearer picture of an attorney's problems and enables us to better assess the proper sanction.

Matter of Brown, 184 Ariz. 480, 482-483, 910 P.2d 631, 633-34 (1996). The State Bar makes every effort to consolidate most, if not all, pending charges to avoid multiple discipline proceedings for the respondent lawyer and to ensure

that all issues are addressed through one disciplinary proceeding. Furthermore, some cases require additional investigation prior to the filing of the complaint. Indeed, a respondent may provide additional information subsequent to the filing of the probable cause order that may negate the need for formal proceedings.

The petition suggests that requiring that a formal complaint be filed within 60 days of the probable cause order will "emphasize to the respondent the seriousness of the matter and that the complaint will be processed timely." By adhering to the philosophy that it is better to bring multiple charges in one single discipline proceeding, the rule could force the State Bar to hold back cases ready to be presented to the probable cause panelist because other related cases are still being investigated and not ready for a recommendation. The State Bar would need to conclude all pending investigations and seek probable cause orders on all appropriate cases at the same time.

This process may not serve to "emphasize" the seriousness of the matter to the respondent lawyer. It could be just as likely to appear to the respondent and the complaining individuals that the State Bar is not acting on certain cases when in fact the investigations have been completed but there are other charges in the process of investigation. In other words, the finding of probable cause on the oldest charges would be delayed because new charges are still being

investigated. Under the current system the State Bar makes a recommendation at the conclusion of the investigation, even though there could be other charges in the investigative process. The respondent lawyer receives notification of the issuance of a probable cause order upon completion of the investigation of the charge. Respondents do not have to wait until all charges have been investigated to learn of the recommendations on each charge. The actual timely receipt of the probable cause order is most likely to impress on a respondent the gravity of the situation.

This proposed change would have a detrimental impact on the processing of cases by forcing piecemeal litigation and creating confusion for both the respondent and the complaining individuals about the time that it took to complete the investigation of their charge. The State Bar is opposed to this change to Rule 57(a), Ariz.R.Sup.Ct.

B. Deadline for serving the complaint

Rule 57(a)(2), Ariz.R.Sup.Ct., sets forth the requirements for service of a formal complaint. The State Bar has no objection to the recommended modification. In the interest of promoting efficiency, however, the proposed modification would reduce the time for serving the complaint from 10 days to 5 days while simultaneously adding 10 days into the rule to allow for the disciplinary clerk to assign the case to a hearing officer after service of the

complaint. The current rule does not specify a deadline for the disciplinary clerk to assign the case to a hearing officer; allowing 10 days in the process for this routine administrative task might not be necessary. The State Bar recommends that a shorter period of time be assigned for that task.

C. Prehearing conferences

Rule 57(h), Ariz.R.Sup.Ct., seeks to require, as with consent agreements, that the parties meet to agree to reduce the volume of witnesses and exhibits. As with consent-agreement hearings, the State Bar has no objection to the parties engaging in some type of a process to reduce the number of exhibits and witnesses, but requiring a physical meeting between the parties for this purpose may not be the best option as the goals could be readily accomplished by other means.[5]

D. Reducing time for formal hearing process

One of the most significant recommendations is to reduce further the time to complete a formal disciplinary hearing. The State Bar opposes this change. Currently a formal disciplinary matter must be heard and completed within 150 days of the filing of the formal complaint. *See* Rule 57(j), Ariz.R.Sup.Ct. The Court established this deadline by rule that took effect in December 2003.

[5] A suggested modification is "Regardless of whether the hearing officer holds a prehearing conference, the parties shall make reasonable efforts to reduce the volume of exhibits and witnesses and agree to those exhibits that can be admitted by stipulation."

Under the current rule, the complaint must be filed and the hearing be completed within 150 days. In between those two events, the process is extensive, including: an answer; disclosure statements; ongoing discovery that allows for all civil discovery including interrogatories, depositions and, requests for production; full motion practice, including motions for summary judgment; and a mandatory settlement conference. This period, between complaint filing and hearing completion, is the most critical stage as it is the time that the parties create the record of the case. The current time frame of 150 days is not an extraordinary length of time for all of the activities that are allowed pursuant to the rules. The current time frame is also absolutely necessary in order to accommodate the complete due process that is afforded in our current system.

Before limiting this most crucial time frame, it may be a better option to first consider other stages in the process during which less significant actions take place.

In a disciplinary case a certain amount of administrative time is necessary to accommodate the meetings of the Disciplinary Commission and a party's opportunity to appeal a decision of the hearing officer or the Disciplinary Commission. A critical review of the administrative time involved in the process and consideration for solutions that may better manage the

administrative time is warranted.[6] Eliminating "dead" administrative time is more desirable than further compressing the time for holding a formal hearing and could have a much greater impact on the overall processing time frames for formal disciplinary cases.

For example, in 2008 there were 103 formal disciplinary cases closed out. Those cases represented contested, default and consent cases. Eighty-five of those cases were either resolved by consent agreement or default cases. On average, a default case took 59 days from the filing of the hearing officer report to review by the Disciplinary Commission. It took an additional 44 days from the filing of the Disciplinary Commission report to transmit the record to the Supreme Court for issuance of a final judgment and order. On average a consent case took 43 days for the Disciplinary Commission to review the matter and an additional 37 days to transmit the record to the Supreme Court for issuance of a final judgment and order. Default cases averaged 103 days waiting for Commission review and transmittal for final judgment and order. Consent cases averaged 80 days for review and transmittal.

If the Bar and the AOC could together develop methods to reduce some of the time involved with the subsequent administrative time and effort, it is

[6] As part of this review, consideration for modifications to the process itself, such as matters requiring review by the Disciplinary Commission and the right to appeal in certain circumstances could be part of a change to the disciplinary system that would bear an enormous impact on the time for processing of cases.

believed that a greater impact on reducing overall case processing times could be achieved.

E. Eliminating consecutive-day requirement

The petition also recommends eliminating the recently adopted rule that all formal disciplinary hearings "shall be held on consecutive days except in extraordinary circumstances." Rule 57(j)(1), Ariz.R.Sup.Ct. Requiring that hearings be held on consecutive days was originally considered for the positive impact on improving the efficiency of the formal process. For a multitude of reasons, it is also beneficial for both parties to have the hearing on consecutive days.

This rule has not yet been in effect for three months, thus there is no adequate basis to evaluate the proposed changes. This modification seems to be an effort to accommodate a volunteer hearing officer's possible scheduling restrictions. If volunteer hearing officers are to continue to be assigned the Bar certainly understands this need to accommodate their schedules. However, this issue is addressed in the State Bar's Rule 28 Petition setting out the distinct advantages of moving to a professionalized hearing officer position. If the Bar's Petition is granted (allowing for more paid hearing officers) then there would be no need to eliminate the requirement of consecutive hearing days. The Bar therefore opposes this change.

F. Complex-case designation

In the two plus years since the rules were amended to include a complex-case designation (Rule 57(j)(2)(D), Ariz.R.Sup.Ct.), one or both parties have requested such designation in only three proceedings. Only one of those three cases was designated as complex. With this in mind, there is not an onslaught of cases being designated as complex and therefore falling outside the stated time frames. However, if cases are designated as complex, the facts and circumstances of each case should dictate the time frames and deadlines for the case. The proposed rule change requires that the moving party "shall" suggest new time frames for conclusion of the hearing and the hearing officer report. The hearing officer then files a recommendation with the commission chair as to whether the case should be designated as complex and the suggested time frames for conclusion of the hearing and the hearing officer's report. If the commission chair decides that the hearing cannot reasonably be held and concluded within 180 days and a hearing officer report filed within 60 days, the chair shall notify the court to grant additional time.

Essentially, this rule already requires an onerous process to receive complex-case designation, one that is not sought regularly and is granted even less. If the proposal setting time frames is adopted, the commission is only authorized to grant an additional 30 days (any ordinary discipline case is

currently given 150 to complete the hearing and the commission can extend that time by 30 days) for completion of the hearing and 30 additional days for the filing of the hearing officer report. If a case is truly complex and warrants such a designation, the commission should be given the discretion to set the time frames as the case warrants and as recommended by the hearing officer recognizing the court's goal of timely and efficiently processing discipline cases.

The recommended change to the rule allowing for a complex-case designation would serve little purpose and would essentially provide no greater latitude than the current rules regulating any ordinary formal case that does not have a complex-case designation.

G. Venue

Rule 57(j)(3), Ariz.R.Sup.Ct., currently requires that the disciplinary hearing "shall be held in the county in which the respondent resides or maintains an office for the practice of law..." The recommended change would require that all hearings be held in Maricopa County. The State Bar opposes this change. A number of different issues are raised by such a change. Currently, hearings are held in the county where the lawyer practices. Usually, the witnesses in the case reside in the same county, as their proximity to the lawyer was a factor in retaining his/her services. If witnesses are forced to travel a

greater distance to Maricopa County, they may not be willing to do so. Although the rules allow for telephonic testimony of witnesses in most cases, telephonic testimony of critical witnesses may be insufficient when credibility of witnesses is at issue.

Moreover, the State Bar is aware that its out-of-county members have, at times, perceived (albeit wrongfully) that they do not receive the focus or benefits received by the members situated in Maricopa County. The proposed change would likely result in a negative perception of the members who have to travel to Maricopa County to participate in a disciplinary hearing.

The change may also create a negative perception with the affected public. Already skeptical of self-regulation, affected clients may believe that being allowed to testify only by telephone lessens their ability to have their "day in court" and be heard on a matter of great importance.

The basis for the change is cited as "assist in the timely processing of cases and ensure the disciplinary clerk's staff can provide the necessary support to the hearing officer." The recommended change and any benefit to be gained by it should be weighed carefully against the impact on the hearing process itself including, but not limited to, the need for the parties to file motions to request a change of venue back to the respondent lawyer's home county as well as the overall perception of the membership and the public.

V. Rule 65, Ariz.R.Sup.Ct. Reinstatement; Application and Proceedings

A. Rejection for failing to pay application fee

The AOC recommends adding a provision mandating that the disciplinary clerk reject reinstatement applications not accompanied by the filing fee. The rule itself already requires the filing fee, so the additional requirement is unnecessary. It may also have wider reaching ramifications.

The current rule reads, "The lawyer shall file with the disciplinary clerk an application for reinstatement, in the form of a motion, verified by the lawyer, and accompanied by the appropriate fees and proofs of payment required by paragraph (a)(3) of this rule." Rule 65(a)(1), Ariz.R.Sup.Ct. (emphasis added). There is no proposal to change this language.

The language to be included by the proposed change, however, is that the disciplinary clerk *shall* reject the application for filing if the filing fee required by paragraph (a)(3)(A) of the rule does not accompany the application. The fee required by (a)(3)(A) is the $100.00 application fee paid to the disciplinary clerk.

It is easy to see why it is advisable to have the clerk reject an application for reinstatement if the fee is not paid. It is equally reasonable and consistent with the proposed change to provide that the application should be rejected for failure to provide proof of payment of the other fees as set forth in (a)(3). Rule

65(a)(3), Ariz.R.Sup.Ct., includes the payment of investigative costs, any amount due to the Client Security Fund, membership fees and other charges.[7] The lawyer will be required to include as part of the reinstatement application the appropriate fees and proofs of payment required by paragraph (a)(3). The clerk would then reject the application if the applicant has not provided the fee or proof of payment of all fees set out in (a)(3).

More troubling is the recommended change to Rule 65(a)(3)(B), striking the language that, "[a]s a prerequisite to filing and before investigation of the application..." This change would allow the applicant to file the application without paying the estimated costs of investigation and would require the State Bar begin an investigation upon the filing of the application with no guarantee of payment.

The investigation of an application for reinstatement can derail all the other investigative work in the Lawyer Regulation Office. The investigation is a priority given the 120-day time frame for a hearing on the application. The staff investigators must devote their full attention to these extensive investigations at the expense of any other assignments on other disciplinary cases. If there are multiple applications received at one time, investigative work must be

[7] Additionally, the current rule requires that the cost of investigation be paid as a prerequisite to filing and before the State Bar will begin an investigation of the application.

reassigned to any available staff or, in the alternative, contract assistance is required.

Given the amount of work that is required to investigate an application for reinstatement it would be enormously problematic to strike the language of the rule that requires payment of the investigative costs prior to commencing an investigation of the application. The applicant should continue to be required to pay investigative costs up front and as a prerequisite to the State Bar expending enormous amounts of time and resources on the investigation of the application.

Additionally, the proposed change would reduce the chances that the State Bar would recover its costs for an investigation should the applicant decide to withdraw or abandon the process. There are times when an application is filed and the investigation produces information that would likely preclude the applicant from being readmitted. When confronted with such information, the applicant may withdraw the application. In those situations the State Bar would not likely recover the costs of the investigation if those costs were not paid with the application.

B. Motion to dismiss for incomplete application

The proposed rule change recommends a new subsection (a)(6), where the State Bar may file a motion to dismiss an application that is incomplete because it does not comply with the requirements of the rule. A motion to

dismiss could cover any number of areas relative to an applicant's failure to properly complete the application; however, when limiting the discussion to failure to pay or provide proof of payment of the fees set forth in (a)(3), it would be much more efficient and preserve valuable time and resources if the applicant were simply denied filing for failure to provide the necessary payment or proof of payment with their application.

The current rules require that "[u]pon receipt of the application, the disciplinary clerk shall promptly assign the matter and forward the application to a hearing officer and serve a copy on bar counsel." The petition changes "upon" to "within ten (10) days of receipt" the application will be assigned and forwarded to the hearing officer and bar counsel. Again, this particular change has the potential to enlarge time rather than reduce time. This petition recommends reducing the deadline for serving a formal complaint upon the respondent lawyer from 10 days to five days. It seems incongruent that, by contrast, an administrative task of assigning and providing the hearing officer and bar counsel with an application for reinstatement would be allowed 10 days for completion. It would seem inconsistent with the overall goal of improving efficiency to enlarge time for simple administrative tasks.

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Conclusion

Producing a set of rules that will significantly enhance the timeliness and efficiency of the process is a worthy goal. Some of the AOC's proposals make sense and are encouraged. Other proposed changes do not appear, upon closer examination, to serve ultimately to achieve this goal. Over the last six years, with a number of rule changes being made, there is little evidence that attempting to fine-tune the current rules will produce a significant change in timeliness or efficiency of the formal disciplinary process. Significantly changing the time to complete a disciplinary case may require modifications to the process itself and not compressing the time frames for the existing system.

The State Bar of Arizona respectfully requests that the Court grant those proposals that are unopposed and deny the petitioner's proposed amendments for which there is objection.

RESPECTFULLY SUBMITTED this 20th day of April 2009.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 20th day of April 2009.

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