Pima County Bar Association
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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULES 47, 48, 50, 56, 57, 65 AND 72, ARIZONA RULES OF SUPREME COURT	Supreme Court No. R-09-

Pursuant to Arizona Supreme Court Rule 28, the Pima County Bar Association respectfully provides the following comments on the referenced Petition.

I. Introduction.

Once again, a set of rule changes have been submitted that have as their purpose "improv[ing] the attorney discipline system through the efficient, timely and fair resolution of complaints." The Pima County Bar Association argues not at all with the concept of resolving complaints in an efficient, timely and fair manner. That said, the devil is in the details. Here, several proposals do improve the process, but some make the process less fair and others make the process no more efficient.

The Pima County Bar Association's primary objection relates to the proposed change to the venue rule located at Rule 57(j). The Petition provides no explanation for the change; presumably, "administrative convenience" justifies the proposal. For the reason set forth herein, this proposed change lacks merit and should not be adopted.

The other significant proposed change relates to time frames which are, yet again, to be shortened. Again, for the reasons set forth below, the Pima County Bar Association believes no justification exists for such changes and that they represent bad policy.

The Pima County Bar Association provides comments on all of the proposed rule changes. Comments are submitted "rule by rule" for the sake of clarity.

II. Rules 47 and 48.

The Pima County Bar Association does not object to the technical changes set forth in Rule 47. The Pima County Bar Association also does not object to adding "Supreme Court staff" to those classes of people who are immune from civil lawsuits pursuant to Rule 48.

III. Rule 50.

The Pima County Bar Association does not object to the rule change that contemplates making permanent the discipline system's use of paid Hearing Officers. Because the State Bar of Arizona has recommended against continuing the process of using volunteer Hearing Officers, however, the Pima County Bar Association expresses its preference for the "Mixed" proposal offered in the Petition. Certainly, volunteer Hearing Officers can contribute to delay in the resolution of complaints; however, the fact that someone gets paid does not, necessarily, mean he or she will be diligent in resolving matters. Judges at all levels of the federal and state court systems, in Arizona and elsewhere, do not always resolve all matters promptly, even though all of these judges are paid to resolve matters, and to resolve them

promptly. The Petition and the State Bar's comment–which argues for an "all paid" set of Hearing Officers offer no evidence that the use of paid Hearing Officers has improved the process or that using volunteers creates substantial problems, and neither memorandum addresses the value associated with using volunteers.

The Pima County Bar Association believes the system benefits greatly from the use of volunteer Hearing Officers. Volunteers are, in the main, experienced lawyers who decide cases diligently and with great care. They also bring to each case a set of fresh experiences that relate to the practice of law. Paid Hearing Officers, on the other hand, are removed from the practice of law for at least as long as they have been serving as paid Hearing Officers. To date, the experimental process has involved retired judges and, thus, these individuals are even more removed from issues that lawyers face, daily, in the practice of law.

Using volunteer Hearing Officers also adds another intangible benefit to the discipline system by giving lawyers an "ownership" interest in the system. If all of the decision makers are paid, that fact detracts from the concept of self-regulation, an important, positive aspect of the discipline system in Arizona. (We recognize the fact that six of the nine members of the Disciplinary Commission are lawyers; however, the "trial judges" in the system are deciding the facts and making the initial decisions about what is and is not permissible conduct.)

Frankly, while the Pima County Bar Association recognizes the fact that the use of paid Hearing Officers has helped successfully resolve many cases, we prefer a return to a

system in which all Hearing Officers are volunteers. Recognizing the fact that that outcome is not likely, we urge the Court to adopt the recommendation set forth in the Petition.

The Pima County Bar Association supports the "Change for Cause" proposals set forth in the Petition. The Pima County Bar Association does not, however, support the proposed changes associated with a "Change as a Matter of Right." The Pima County Bar Association is unaware of any abuses associated with changes as a matter of right and sees no need for the proposed changes. The Petition claims "[a]buses of this right can significantly impact the efficient processing of the complaint." Petition, P. 3. That may be true, although the State Bar's observation that a change must occur within the first ten days after the Hearing Officer is assigned and does not extend the time for the resolution of the case suggests that "delay" abuse is not possible. Further, the Petition provides no evidence that abuse has occurred, how it has occurred, why an affidavit requirement will prevent abuse, etc. This proposal appears to be a solution in search of a problem![1]

IV. Rule 56.

The Pima County Bar Association does not believe a mandatory evidentiary hearing should be conducted in every case involving an agreement for discipline by consent. In many instances a respondent will agree to be disciplined for financial reasons. The discipline

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[1]The proposed comment change to Rule 50 notes the fact that the "Change as a Matter of Right" language tracks Rule 10.2, Arizona Rules of Criminal Procedure. The discipline system, pursuant to Rule 48(a), Rules of the Supreme Court, is *sui generis*. Further, the Court has emphasized for decades that the system is not designed to punish lawyers, and that it is designed to protect the public and ensure that lawyers do not engage in wrongful conduct in the future. References to the Arizona Rules of Criminal Procedure undermine these goals.

system can be very, very expensive for a lawyer and, unfortunately, in too many instances financial considerations force a lawyer to agree to be disciplined and accept the sanction demanded by the State Bar of Arizona. That the system suffers from this infirmity is not, necessarily, a problem. Litigants in civil matters face the same issues and often make decisions based on financial factors. That said, there ought to be significant factual support for the concern about not having evidentiary hearings before the court imposes a mandatory requirement for an evidentiary hearing in every case. Having the hearing imposes on Hearing Officers, Bar counsel and, most significantly, forces a represented respondent to pay counsel to participate in a "trial" after the respondent has agreed to "settle" the case. The Petition does not provide that factual basis and the State Bar of Arizona's comment offers a contrary basis. Whether an evidentiary hearing is or is not conducted ought to be left to the sound discretion of the Hearing Officer, who can also seek input from the parties with a vested interest in resolving the case.

There is also no need for a mandate that, before any evidentiary hearing in a settled case, lawyers meet–whether in person or by telephone–to "to the extent possible, reduce the volume of exhibits and witnesses and agree to those exhibits that can be admitted by stipulation." Once again there is no offer of evidence that a problem exists and more mandates about mandatory meetings for this or that purpose add nothing to the efficiency of the process and provide traps for unwary practitioners, *i.e.*, did you all conduct your mandatory Rule 56 (b) meeting to, "to the extent possible, reduce the volume of exhibits and

witnesses and agree to those exhibits that can be admitted by stipulation," and if you did, why am I seeing X or Y, or hearing from or Z?

The Pima County Bar Association does not agree with the "duration" change offered in Rule 56(f)(2). It appears to make it impossible to modify an agreement for discipline by consent after 120 days after the filing of the complaint. Giving the very limited amount of time that is available to defend a case–where the State Bar may have had months to get its case ready before the complaint is filed–this proposed change simply makes it harder to settle a case and, thus, less like that any case will settle.

The Pima County Bar Association does not object to the proposed changes to Rule 56(g).

V. Rule 57.

The Pima County Bar Association supports the mandate that the State Bar file complaints within 60 days after a probable cause order issues. One of the authors of this comment has been involved as respondent's counsel in cases where many months or a year or more have passed between the issuance of the probable cause order and the filing of the complaint, and is aware of other situations where that practice has occurred. That said, the proposed language provides no sanction for a failure to file in timely fashion. A mandate without a sanction makes little sense and invites further litigation.

The Pima County Bar Association does support the five day requirement for serving the complaint, so long as a time limit for processing cases, measured from the date the

complaint is filed, continues. Unfortunately, because the time limit is measured from the date on which the complaint is filed, as opposed to the date on which it is served, an unrealistic deadline for completing service–five days, as opposed to ten–becomes necessary because the extra five days limits the amount of time a respondent has to defend himself or herself. A more sensible approach would measure the any "resolution" deadline from the completion of service or, perhaps, from the deadline for filing an answer. In that event a ten day requirement for completing service could remain in the rule, limiting substantially the number of instances where litigation will arise about why service was not completed within five days. Realistically, requiring that service be completed within five days will cause the system to bump up against human frailties, *e.g.*, a sick employee, a computer malfunction at the State Bar or the simple act of misplacing a document or mis-calendaring a deadline.

The Pima County Bar Association does not object to the proposed language changes in subparts (c) and (d) of Rule 57. As for the language change in subpart (h), the Pima County Bar Association repeats its concern about mandating a conference to prepare for a hearing. In addition to the absence of any need for a mandated conference for this purpose, the proposed language here does not provide for a telephonic conference, a provision that was included in the similar language proposal in Rule 56.

The Pima County Bar Association vigorously opposes the proposed change in Rule 57(j). The continued effort to shorten time periods creates a substantial disadvantage for respondents. Most respondents are practicing law. Their lawyers are practicing and, in many

instances, have a substantial number of discipline cases at any one time. In many instances the alleged rule violations do not relate to the respondent's fitness to practice or his or her honesty and, in many instances the need for formal proceedings relates solely to the fact that the State Bar has demanded a sanction which is unreasonable, leaving the respondent no choice but to defend himself or herself in formal proceedings. Under these circumstances, forcing a matter to be resolved in 120 days, where the first 30 days or so may be consumed by the service of the complaint, receipt of the complaint and the filing of an answer, is simply unreasonable. The result will be many, many cases in which the "complex" case designation will be sought, even though the only complexity associated with the case is the fact that getting it resolved within 120 days is unrealistic.

The Pima County Bar Association's strongest objection to the Petition involves the venue change in Rule 57(j)(3), which places all cases in Maricopa County, absent good cause. Once again, this change looks like a solution in search of a problem. If all cases are heard in Maricopa County, all witnesses will have to travel to Maricopa County or, in the alternative, Hearing Officers will lose the benefit associated with seeing live witnesses. Telephonic or deposition testimony can be appropriate in some instances, but designing a system that makes it highly likely that most testimony will not be received "live" harms the discipline system, for both respondents and complaining parties and other interested persons.

Additional problems are associated with a presumption that a matter will be heard in Maricopa County. The need for "out county" Hearing Officers will likely evaporate, as the

shortened time frames for hearing cases will not allow for a resolution of a venue matter and, thereafter, a transfer to a new Hearing Officer in the county in which the respondent resides. "Out county" respondents will, as well, need to hire counsel in the Phoenix area because, if they do not and they are unsuccessful in getting the venue changed to the county in which they do reside, they will find themselves paying for what may be substantial travel costs to have their counsel represent them in the matter in Maricopa County. Finally, making Maricopa County the default location for all discipline matters does, once again, further the perception among the "out county" membership of the State Bar that "if you don't live and work in Phoenix, you are a second class member of the State Bar of Arizona."

The Pima County Bar Association supports the remaining changes in Rule 57.

VI. Rule 65.

The Pima County Bar Association supports the proposed changes with regard to Rule 65.

VII. Rule 72.

The Pima County Bar Association supports the change with respect to Rule 72.

RESPECTFULLY SUBMITTED this 15 day of May, 2009.

By: _____

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