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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In the Matter of a PETITION TO AMEND RULES 47, 48, 50, 56, 57, 65 and 72, ARIZONA RULES OF THE SUPREME COURT [Administrative Office of the Courts] - AND - In the Matter of a PETITION TO AMEND RULE 50 and INCLUDE 50.1 [State Bar of Arizona]	**Supreme Court Nos.** **R-09-0003 and R-09-0011** **Comments on Proposed Rule Change Petitions**

Pursuant to Rule 28, Ariz.R.Sup.Ct., the undersigned attorneys provide the following comments to the above-referenced Petitions, filed with the Arizona Supreme Court on January 9, 2009, by the Administrative Office of the Courts ("AOC"), and filed on January 12, 2009, by the State Bar of Arizona.

I. Introduction:

We are a group of lawyers with significant experience in the discipline system. Presently, our practices include or are devoted primarily to the representation of respondents in State Bar discipline matters. Previously, certain of us have served as volunteer or staff Bar counsel, Bar

ethics counsel, a member of the Board of Governors, a President of the State Bar of Arizona, and a member (and Chair) of the Disciplinary Commission.

We believe that any review and/or attempt to improve the Arizona disciplinary system is a worthy effort, but also believe that any such effort should include the perspective of practicing lawyers who may be directly subject to and affected by the system. Because there is no organized means for individual attorneys who have been respondents in the disciplinary system to have a voice in shaping it, and because these lawyers are unlikely to come forward to review and/or comment on proposed rule changes, we take this opportunity to do so. For this reason, we collaborated last year in the submission of comments on Supreme Court No. R-06-0035, *In the Matter of the State Bar's Petition to Amend Rules 43, 44, 46-48, 53 58, 60, 61, 64, 70-72, and 75*, and we join together now to comment on these most recent petitions for amendments.[1]

II. Comment on Proposed Changes:

We address our comments in the order they appear in the AOC's petition.

A. Rule 47

1. Rule 47(g)

We disagree with this proposed change. The State Bar recently doubled the costs assessed against disciplined attorneys, and also doubled

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[1] Two additional lawyers, both former bar counsel, have joined in this comment. Because a great deal of scrutiny is focused on the disciplinary system, resulting in a series of proposed rule changes, we take this opportunity to respectfully request that the State Bar, the AOC and the Supreme Court consider inviting us to discuss these and any further proposed changes to the discipline system. The impact of new rules that took effect January 1, 2009, is yet to be determined. We would encourage allowing those changes to take effect before adopting any additional changes affecting the timeframe governing the discipline process, and would welcome the opportunity to participate in a dialogue concerning new rules before more changes are proposed.

the fees charged to lawyers who participate in the State Bar's Law Office Management Assistance Programs (LOMAP) and Membership Assistance Programs (MAP), whether voluntarily, or by virtue of an order resulting from a disciplinary authority. These fees were doubled across the board *with no input from its members.*

We are extremely concerned about the impact these increased costs imposed on respondents will have on the discipline system. Realistically, the State Bar has made these increased fees punitive. The new costs are excessive, and appear to be aimed at generating revenue for the Bar, rather than reflecting the actual costs and expenses in processing discipline cases.[2] When faced with these exorbitant costs, the average lawyer charged with ethics violations will be forced to settle and accept the discipline offered by the Bar, simply to avoid the prohibitive cost of going to hearing, or appealing his or her case to the Disciplinary Commission or Supreme Court after hearing.

With regard to the new LOMAP/MAP fees, the recent increase in charges in these economically challenging times is contrary to the prophylactic and remedial purposes of the program - encouraging lawyers to seek assistance. LOMAP and MAP were never intended to be a profit-center for the State Bar - they provide a member service, designed ultimately to enhance and assure the protection of the public.

With regard to the costs of transcripts, we believe that no changes are needed to the language of the current rule, which states that costs "may" be assessed against a respondent lawyer pursuant to Rule 60(b). Under the current rules, respondents already face a significant monetary incentive to

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[2] The State Bar's Lawyer Regulation Department receives $4,857,000 annually, or 62.8% of the total member dues paid, according to its most recent dues statement.

accept a sanction that may be unwarranted, simply in order to avoid the costs of hearing.

The Supreme Court rules do not allow respondents to recover attorneys' fees when they prevail at hearing against the State Bar. Moreover, there is no "offer of judgment" rule comparable to Rule 68, Ariz. R. Civ. P. Thus, if the State Bar insists on pursuing a matter to a formal hearing and then loses, the respondent cannot recover the increased costs of a formal hearing even if, before the hearing, she offered to accept the sanction ultimately imposed by the Commission or the Court. It is true that in a few cases respondents represented by experienced counsel have successfully persuaded the Disciplinary Commission or the Court to disallow the increased costs associated with the State Bar's appeal, but this has happened only rarely; unrepresented respondents are unlikely to be aware that this option is available to them.

In sum, the "costs" assessed against respondents have become excessive and punitive. There is no demonstrated reason why the power to order the cost of transcribing a hearing should not be based on the reasoned, fact-specific determination of the Hearing Officer and Commission.

2. Rule 47(h)

Generally, we do not object to the proposed change to Rule 47(h), which would allow the disciplinary clerk to issue hearing subpoenas. However, if this change is adopted, we recommend that Rule 47(h)(3) also be amended, to clarify that, whether the subpoena is issued by the Disciplinary Clerk or a Hearing Officer, objections should be ruled on by the Hearing Officer assigned to conduct the hearing in the case.

It is rare for objections to be made concerning the issuance of subpoenas. However, when issues do arise, they should be heard by the

Hearing Officer assigned to the case, who is most familiar with the facts and is in the best position to rule on any objections concerning subpoenaed witnesses. This is especially true when the disciplinary clerk, who may or may not be an attorney, has been given the power to issue subpoenas.

3. Rule 47(i)

We do not object to the changes proposed to subsection (i).

4. Rule 47(j)

The proposal changes the term "court reporter" to "certified reporter." We do not object to this change.

B. Rule 48

We generally agree with this proposal, which adds "supreme court staff" to the immunity provision.

C. Rule 50

1. Rule 50 (a) through (d)

We do not object to the rule change contained in the AOC's proposal that would codify the current practice of using both paid and volunteer Hearing Officers in disciplinary cases. However, because we, like the Pima County Bar Association, support the continued use of volunteer lawyers serving as hearing officers, we oppose the State Bar's Petition both to amend Rule 50 and add Rule 50.1.

The State Bar seeks to use paid hearing officers exclusively, which it claims would more likely result in greater efficiency, consistency and fairness in the process. We respectfully disagree with the State Bar's analysis, and offer the following comments on specific points raised by the two pending Petitions:

a. Rule 50(a)

The Bar proposes limiting the total number of hearing officers to five. This proposal is unnecessarily restrictive and inflexible, as the Bar has not demonstrated nor explained the calculation it used for establishing a specific number of hearing officers by Supreme Court rule. It is best left to the discretion of the Supreme Court to decide how many paid hearing officers are needed at any given point in time based on a number of factors, including caseload and available resources to fund the positions.

Adding a significant number of paid hearing officers will involve considerable expense. The AOC's proposal, which continues the use of volunteer hearing officers, allows flexibility to assign cases to volunteers while the costs associated with adding paid hearing officers become certain and revenues to pay these costs are secured. We support the AOC's proposal.

We disagree with the State Bar's comment that "by establishing the paid hearing officer position for the administration of the adjudicatory process, the Court will professionalize the hearing officer function." The State Bar has been well served for years by volunteer hearing officers – practicing attorneys who have given freely of their service for years. They are dedicated and professional lawyers who are to be commended for the role they have played in our self-regulated profession.

The State Bar is correct that at times and in complex cases it is difficult for volunteer hearing officers to devote full-time attention to State Bar matters. However, the change proposed by the AOC, allowing the Court

to employ paid hearing officers as needed, sufficiently addresses this concern.[3]

We also offer comments related to: (1) the exclusive use of retired judges as paid hearing officers and; (2) the assignment of retired judges to serve as hearing officers in cases where the bar charges against a lawyer were filed by a sitting judge.

(1) In a discipline system involving self-regulated professionals, we believe that practicing lawyers should play an integral role in the process. The discipline system is well served by having attorneys who actually practice law for a living serve as hearing officers: fellow practitioners who share the burdens and stresses of practice on a current basis. In most cases, retired judges will have been on the bench and divorced from the vicissitudes of private or governmental practice for many years. We believe that the pool of potential hearing officers should always include lawyers in private or government practice as well as retired judges, so that respondent lawyers (or their counsel) can request a hearing officer who is currently a practicing lawyer.

(2) This is especially true in discipline cases where a judge is the complaining party. While a hearing officer who has served as a judge will not consciously accord undue weight or deference to the complaint of a judge, human nature suggests that such a risk exists, and that respondent lawyers will reasonably question the ability of the hearing officer to impartially evaluate and resolve charges filed by a judge who may have been a friend or colleague of the complainant on the bench. Therefore, since discretion is vested in the Disciplinary Clerk to assign hearing officers, we

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[3] At this time, there are three paid hearing officers, who are all retired judges from Maricopa County. Under the AOC's proposal, retired (but active) lawyers or judges could serve as volunteer hearing officers, at a significant cost savings to the system.

recommend that in all cases involving charges emanating from sitting judges, the Disciplinary Clerk assign the matter to a hearing officer who is not a retired judge. Otherwise, it is likely that respondent lawyers may be unfairly forced to exercise a peremptory "strike" whenever the charges have been initiated by a sitting judge and the assigned hearing officer is a retired judge.

b. Rule 50(a)(3)

The State Bar's proposal would exclude any lawyer who has been the subject of a bar charge – even one resolved with a dismissal in the investigation stage – from ever serving as a paid hearing officer. This proposal is unnecessarily overbroad and offensive to the countless lawyers who have been vindicated in the discipline process. Any limitation regarding past discipline should apply only to lawyers who have been sanctioned after formal proceedings in which they have been accorded their right to due process and have had the right to defend themselves at hearing.

Subsection 50(a)(3) of the State Bar's petition appears to exclude respondents' counsel from ever serving as paid hearing officers. If this is not the intent, then the wording needs to be clarified to make clear that respondents' counsel are prohibited from serving as paid hearing officers only if they practiced as respondents' counsel in the twelve months prior to appointment.

If the intent is to exclude respondent's counsel from ever serving as paid hearing officers, whereas bar counsel are allowed to do so, then we strenuously object to this proposal which is fundamentally unfair and without any factual or legal basis.

c. 50(a)(4) (Bar Petition)

This subsection of the State Bar proposed amendments is both ambiguous, confusing and unnecessary. It appears to be a poorly worded attempt to exclude from service as hearing officers those whose service would implicate some violation of the rules of professional conduct. Presumably, prospective hearing officers will know whether their service would violate ethical rules and for that reason would decline the appointment. Moreover, the Court has discretion to both appoint hearing officers who are qualified, and remove them if their service is inappropriate for any reason.

2. Rule 50(e)

We do not object to the AOC's proposal concerning changing hearing officers "for cause." However, we do not agree with the AOC's proposal concerning "change as a matter of right," We agree with the State Bar that this addition appears unwarranted, and we are similarly unaware of any abuse of the current process. Further, we strongly believe that both respondents and bar counsel should be entitled to one change as a matter of right without the need for an avowal that the request was made in good faith. The lawyer community is very small. The odds of knowing a hearing officer or friend of a hearing officer or having appeared against or before any hearing officer in another unrelated matter are high. The system is well served by allowing one change of hearing officer as a matter of right. Moreover, the current system is virtually identical to the procedure prescribed by Rule 42(f)(A), Ariz. R. Civ. P. which has worked well for many years.

3. Rule 50.1

Our comments set forth above concerning the State Bar's proposals for amendments to Rule 50(a) and its subsections apply and are incorporated herein by reference to the State Bar's proposed new Rule 50.1(a) and its subsections.

We also object to the State Bar's proposal that its "Appointments Committee" recommend individuals for appointment as settlement officers. We are aware that the State Bar and the Court are currently considering ways in which the discipline process can be further separated and politically insulated from the State Bar and its Board of Governors. Having the Board's Appointments Committee as the entity that recommends Settlement Officers appears to us to be a step in the wrong direction and in order to neutralize any suggestion that politics affects the disciplinary process, the responsibility for appointing settlement officers should remain with the Commission or if necessary, involve the Court. For these reasons, we support the AOC's proposal concerning the appointment of hearing and settlement officers.

D. Rule 56

The AOC's proposes a change to Rule 56 that would require hearing officers to hold an evidentiary hearing in connection with every consent agreement. We are opposed to this change. In order to fairly consider the proposal, one must consider the context – Consent Agreements -- in which the proposed rule is intended to apply. Consent Agreements are typically the result of serious negotiation between the State Bar and the respondent lawyer. Consent Agreements reflect a realization by both parties that some allegations can be proved by clear and convincing evidence and some cannot.

Similarly, the Consent Agreement evidences a recognition by the respondent that some of the allegations of the Complaint are provable and that, therefore, the negotiated sanction reflected in the Consent Agreement is preferable to the uncertainty of the sanction that may be recommended by the Hearing Officer. In addition to the uncertainties inherent in any hearing, both the State Bar and the respondent are willing to enter into a Consent Agreement in order to avoid the time and expense of a hearing. The proposed amendment to Rule 56 will undoubtedly impact the parties' incentive to settle the matter because in its present form, the "hearing" incident to the Hearing Officer's acceptance of the proposed Consent Agreement contains no limitations.

Rule 52(b)(3), Rules of the Supreme Court, provides for notice to the complainant of the submission of a Consent Agreement but does not, by its terms, permit the complainants to participate in the proposed Rule 56 "hearing". Under the proposed procedure, it is uncertain whether hearing officers will allow complainants to be heard on Consent Agreements, and if so, whether respondents will be given the opportunity to rebut such testimony. If the proposed "hearing" is permitted to become a full-blown evidentiary hearing, it is obvious that the legitimate incentives that lead to most Consent Agreements will be negated with a resulting increase in formal hearings or at a minimum, *de facto* hearings when the Consent Agreements are presented to the Hearing Officer for acceptance.

The existing rule provides the transparency necessary to assure public confidence in the integrity of the lawyer regulation system – notice to the complainant and if the complainant is motivated to attend, an opportunity to observe what occurs at the hearing. The "notice" specified in the current rule should not be expanded to a mandatory "evidentiary hearing" as proposed in

the amendment, especially since the current rule gives hearing officers the *discretion* to hold an evidentiary if and when necessary to justify the proposed Consent Agreement. If, however, the Court believes an evidentiary hearing is warranted in connection with every proposed Consent Agreement, the amendment should prescribe specific limits about what "evidence" will be allowed and considered by the Hearing Officer. In our opinion, it would be unwise to permit such a hearing to include the testimony of complainants because evidence of that kind is likely to negate both the purpose of and incentive for the parties to resolve the charges with a Consent Agreement. Finally, it is obvious that including unlimited evidentiary hearings in connection with every proposed Consent Agreement will substantially increase the expense to both the respondent and system and that, in turn, will serve as a disincentive to resolve disciplinary matters informally by consent.

E. Rule 57

1. Rule 57(a)

We generally support the AOC's proposal to require the State Bar to file complaints within 60 days of the issuance of a probable cause order. We are aware of cases where many months - or even years - have passed between the issuance of a probable cause order and the State Bar filing a formal complaint.[4]

However, we agree with those comments of the State Bar that the proposed changes could have unintended negative consequences. In cases involving multiple files and multiple probable cause orders, the State Bar may be forced to file a formal complaint involving some charges while other

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[4] If the current proposal is adopted, it should include a sanction for a failure to file in timely fashion.

charges against the same respondent are still being investigated. With continued pressure on the State Bar to comply with ever increasing requirements to accelerate the discipline process, this could make it harder (and consequently more expensive) to negotiate inclusive, global settlement agreements that resolve multiple charges against a lawyer. Thus, in such situations, the proposed rule should be further amended to enable the State Bar, for good cause, to ask the probable cause panelist for an extension of the prescribed time in which a formal complaint must otherwise be filed.

2. Rule 57(a)(2)

We agree with the AOC's proposed requirement that the State Bar accomplish service within five days of filing a complaint. However, the current time limit for processing cases is measured from the date a complaint is filed, as opposed to the date on which it is served. We urge that the time for processing a case be measured from the date service is completed, or from the date for filing an answer. The time frame for processing discipline cases is already unduly compressed and any appreciable delay in the service of the complaint artificially compresses the time further and often impacts the ability of the respondent to properly defend herself.

3. Rule 57(c)

We have no objection to the AOC's proposed changes.

4. Rule 57(d)

We have no objection to the AOC's proposed changes.

5. Rule 57(h)

We have no objection to the AOC's proposed changes. However, we are concerned that the proposal does not provide for a telephonic conference, as proposed in Rule 56(b). If this proposal amendment is adopted, we

request that it be modified to enable the hearing officer to conduct the prehearing conference telephonically.

6. Rule 57(j)(1)

We strongly oppose the proposal to shorten the time to complete a hearing to 120 days, from the current provision which allows 150 days. We agree wholeheartedly with the comments submitted by the State Bar concerning this proposed change.

Continued efforts to shorten the time period for completing hearings in discipline cases threatens to undermine the fundamental fairness of the proceeding. As noted above, this current proposal is but one in a series of rule changes designed to speed up the discipline process. While the rationale underlying the proposals is understandable – that justice should be swift – these ongoing efforts to focus on assuring that the process is swift threatens to completely overwhelm another equally valid concern – that the process be fair.

In many instances, respondent lawyers have exercised their right to take their case to hearing because the sanction offered by the State Bar is unreasonable. Often, the eventual outcome of the case validates the respondent's position. However, if respondents are denied the minimum time necessary to investigate and fully develop and present their cases, they will have been effectively denied a meaningful opportunity for the system to validate their position.

We wish to point out exactly what the proposed time line involves. The first 30 days of the proposed 120 day period will be consumed by accomplishing service and filing an answer. That leaves just 90 days - only three months – for investigation, discovery, a settlement conference or conferences, any applicable motion practice – and the ***conclusion*** of a

hearing. These deadlines are not realistically and fairly achievable, and are not necessary. Of equal concern, these time constraints often either force a respondent to inappropriately accept a sanction or preclude the time necessary for both the respondent and the State Bar to evaluate the case and negotiate an acceptable settlement. We respectfully but strenuously urge the Court to allow recent developments – including the rule changes recently adopted by the Court, as well as the current practice of employing three (and potentially more) dedicated paid hearing officers – to take effect before enacting any other time constraints on the resolution of formal charges.

7. Rule 57(j)(2)

We have no objection to the AOC's proposed changes.

8. Rule 57(j)(3)

We disagree with the proposed change to require that all discipline hearings take place in Maricopa County, absent a showing of good cause. We concur with the comments submitted by the Pima County Bar Association, as well as the State Bar, concerning this proposal.

Moving all hearings to Maricopa County will make it impossible for volunteer "out-county" hearing officers to serve: they will simply be unable to take the time out of their practice to travel to Phoenix for hearings. Similarly, it is unlikely that "out-county" lawyers will apply to be paid hearing officers. This will result in hearing officers who are exclusively from Maricopa County – most likely Phoenix. This will have severe negative consequences; both in the perception of members who reside in other counties, as well as in the substantive effect on formal proceedings.

In cases originating in other counties, all the players in the proceeding - the respondent lawyer, their counsel, the witnesses, and the complainant – could reside elsewhere, but all must travel to Phoenix for any live hearing:

where the hearing officer resides. This is fundamentally unfair. If timeliness in processing cases is a paramount concern, then we submit that this proposed change is likely to result in delay, as hearings will have to be scheduled to accommodate calendars that must be cleared for a full day's round trip travel to Phoenix – whereas the time actually necessary for the hearing or testimony is far less.

We share the Bar's concern that this will decrease the number of live witnesses who are able to testify at disciplinary hearings – including complainants and other State Bar witnesses, in addition to witnesses necessary for a respondent lawyer to refute the Bar's charges. Additional delay will be caused as the parties are forced to litigate over motions to allow telephonic testimony, which may have to be filed on witnesses whose live testimony is both necessary and otherwise warranted.

The proposal to require all hearings to take place in Maricopa County will also result in astronomically increased costs for respondent lawyers. They will either be forced to hire exclusively Phoenix lawyers to represent them, and lose the benefits of representation by local counsel, or they will be forced to pay the additional costs involved in having the local lawyer of their choice travel to Phoenix. Either result is fundamentally unfair to out-county respondents, and results in an unintended benefit to Phoenix lawyers exclusively.[5]

Allowing for a "good cause" showing to justify moving the hearing out-county does not adequately address or ameliorate these concerns. It is both unwise and unfair to leave it to the hearing officer's discretion whether to grant a motion to move the hearing to an out-county, when the rule will

[5] It has been suggested that if all hearings were required to take place in Maricopa County, lawyers residing out of Maricopa County would, because of the substantially increased costs, be justified in asserting a denial of equal protection.

likely lead to a cadre of hearing officers all of whom reside in Maricopa County, and who, therefore, will be motivated to keep all cases in Maricopa County.

We join in the comments submitted by the Pima County Bar Association and State Bar concerning the proposal, and urge that it be rejected.

F. Rule 65

We have two concerns with regard to the AOC's proposed changes. The first concerns subsection B and the issue of continuances. If the State Bar is requesting the continuance, the desire to limit the amount of time by which a reinstatement proceeding can be extended is understandable. Generally, the applicant has every incentive to have the case progress to a result as soon as possible. If, on the other hand, it is the applicant who is requesting the continuance, there appears no valid reason why the extension should not be granted. There is no prejudice to the public if a reinstatement proceeding does not move quickly; the status quo is maintained, and the lawyer will not be practicing. The concept of moving a reinstatement case along as quickly as possible inures to the benefit of the applicant. Thus, should the Court agree with the proposed amendment regarding continuances, we urge the Court to alter the amendment to reflect that continuances by the respondent shall be liberally granted.

The other concern relates to subsection 4 of the proposed amendment. If the matter involves a summary suspension by the Board of Governors pursuant to Rule 64(f), we believe that the suspension should be lifted by the Board of Governors without the requirement of Commission intervention. Such matters are usually cured relatively easily and it is burdensome to the

lawyer and the discipline system in general to have the process of reinstatement delayed pending Commission review.

G. Rule 72

We have no objections to the AOC's proposed changes.

III. Conclusion:

We respectfully urge the Court to consider our comments concerning the Petitions filed by the AOC and State Bar. We also renew our offer to meet with the State Bar, the Commission and the Court to participate in a constructive dialogue concerning the matters raised in the petitions.

RESPECTFULLY SUBMITTED this 20th day of May, 2009.

Mark I. Harrison for

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By: Jean J. Jarrett-Mahon