

# ATTORNEY REGULATION ADVISORY COMMITTEE

## MINUTES

Wednesday, March 2, 2016  
9:30 a.m. – 12:00 p.m.

State Courts Building, 1501 West Washington Street, Phoenix, Arizona  
Conference Room 109

### **Present**

Hon. Lawrence F. Winthrop  
Ben Click  
Whitney Cunningham  
Mary Grier  
George Reimer  
Patricia Sallen  
Elaine Sweet  
Maret Vessella  
Ronald Watson

### **Telephonically Present**

Emily Johnston  
Scott Rhodes

### **Absent**

Hon. William J. O'Neil  
Pamela Treadwell-Rubin  
Edward Novak  
Kathleen Curry

### **Staff**

Mark Wilson  
Carol Mitchell  
Cassandra Ramos  
Brianna Farmer

### **Regular Business**

9:30 a.m. Call to Order and Introductions

Hon. Lawrence Winthrop

### **Business Items and Potential Action Items**

*No. 1* Review and Approve November 2015 ARC minutes

**Motion:** Approve the minutes from the November 2015 meeting

**Moved by:** Whitney Cunningham

**Second:** Patricia Sallen

**Carried:** None opposed

*No. 2* Review, Discussion and Possible Vote on Pending Rule Petitions

- a. **R-15-0041** (State Bar Discipline of Former Judge) – The following presented by Judge Winthrop, with the exception of D and E, which were presented by Carol Mitchell. George Reimer and Maret Vessella drafted the petition. ARC and the Commission on Judicial Conduct made the decision that the petition should be filed by ARC. The petition was filed by the Chairperson, Judge Winthrop, in early December. No comments have been submitted to date. No action by the Committee is deemed necessary.

b. **R-16-0012** (Supreme Court Supervision of Legal Specialization)

Retired Chief Justice Rebecca Berch filed the petition as a result of studies performed by the Task Force on Review of the Role and Governance Structure of the State Bar of Arizona. The Task Force had examined the State Bar's Board of Legal Specialization in light of the U.S. Supreme Court decision involving the Dental Regulatory Board of North Carolina. In the Dental Board case, the U.S. Supreme Court held there needed to be a state managed/supervised regulatory structure for a regulatory board to enjoy the State exemptions from the federal anti-trust laws. The petition proposes a new Rule 44, which clarifies the Arizona Supreme Court supervision and oversight over the member appointment process and the operation of the Board of Legal Specialization.

Discussion was also held concerning ER 7.4, which provides that a lawyer may only indicate a specialty if the lawyer is a Board certified specialist. If not certified, the word specialist may not be used. In Florida, a similar Rule has been challenged by a lawyer contending that the prohibition on the use of the term specialize was a violation of the lawyer's first amendment rights. The trial court agreed with the lawyer and the case is now on appeal. Maret Vessella states that the State Bar is keeping a watch on the case.

Judge Winthrop states that the new proposed Rule 44 includes language that says the purpose of the rule is not to restrict a lawyer's practice in an area that is covered by specialization, even if they are not specialized.

Whitney Cunningham commented that the State Bar is internally reviewing the State Bar's specialization process in light of the North Carolina case. Mr. Cunningham further commented that the petition language consistent with what the State Bar had internally determined. No action was taken by Committee.

c. **R-16-0013** (State Bar Mission and Governance)

The Supreme Court created the Task Force on Review of the Role and Governance Structure of the State Bar of Arizona to review the governance and the organization of the State Bar of Arizona and to make recommendations to the Supreme Court. The task force was chaired by retired Chief Justice Berch and it created a report that was submitted to the Court and disseminated for public comment. The State Bar Board of Governors reviewed the report and submitted its own response to the Supreme Court.

The Task Force also submitted this petition making specific recommendations to amend Rule 32 of the Arizona Supreme Court Rules. The amendments would synthesize and clarify the mission statement of the Board of Governors. The amendments would reduce the number of officers at State Bar from five to three and each of the positions held as officer will be a one year term.

The petition also modifies the makeup of the Board of Governors. The current Board has 30 members, 26 of whom are voting members, which include four public members and three at large members. Public members are appointed by the State Bar and at large members are appointed by the Supreme Court. There are also non-voting members, who are the deans of the three law schools. The elected members come from eight districts, Maricopa and Pima stand-alone but the rest of the counties are consolidated. The petition is recommending reducing the size of board to 18 voting members: 11 members would be elected, and 7 would be appointed. Appointed members would include law school deans and the immediate past President of the bar.

The Task Force recommendation proposes five election districts, Maricopa and Pima stand alone and to create northern and southern districts. Under the current rule, the Board itself appoints the public members and under the new proposal the Governing Board would nominate potential public members and the Court would appoint the members. In the Board of Governors proposal, they suggest a board of 26 voting members, including 4 public members appointed by the board instead of the Court, and would include three at large members appointed by Court.

Each member must also serve on one of seven standing Committees and serve as liaison to one of the State Bar's 28 sections of practice. The alternative proposal also eliminates the three law school deans and the immediate past President from serving on the board. The Committee discusses the pros and cons of having a voluntary bar. Elaine Sweet expressed concern about this affecting the public.

**Motion:** ARC takes no position in this petition.

**Moved by:** George Reimer

**Second:** Patricia Sallen

**Carried:** None opposed

d. **R-16-0014** (Confidentiality of Medical Records – Admission's Process)

When applicants for admission to the State Bar undergo an extensive background investigation. By Rule the investigation and its results are confidential. In the event that an applicant wishes to challenge the decision of the Committee on Examinations or the Committee on Character and Fitness, that challenge takes the form of a petition with the Supreme Court. In the event a petition is filed, there is no Rule provision mandating that certain medical information be filed under seal. This petition, if adopted, would amend the rules so certain medical or psychological reports would be filed under seal. The petition was filed by the Certification and Licensing Division and as of the meeting date, no public comments have been filed. Judge. Winthrop suggests that ARC file a short comment in support of this petition. J. Scott Rhodes expresses concern that the language could be interpreted to mean that the medical and psychological records are that the only eligible documents that can ever be sealed and there should be an opportunity to seal other records on a case by case basis. Although limiting those documents is not the intent of the petition, the lack of clarity is recognized. J. Scott Rhodes proposes filing a comment in support of the petition with recommended amended language. Judge Winthrop suggests ARC file a comment consistent with proposed language changes from Mary Grier and J. Scott Rhodes.

**Motion:** ARC supports this petition and encourages Supreme Court to accept changes in language.

**Moved by:** Mary Grier

**Second:** J. Scott Rhodes

**Carried:** None opposed

e. **R-16-0015** (Telephonic Participation in Inquiry Panel Hearings)

This petition was filed by CLD staff. CLD's goal was to further balance the current Rule direction that Character and Fitness inquiry panels be selected at random with practical concerns raised by Committee members concerning travel time related to hearings that are of single issue and of short duration.

This petition seeks to change the requirement that the three panel members must appear in person, allowing members to appear telephonically. Carol Mitchell shared Ed Novak's written suggestion (submitted by email prior to the meeting) to limit the telephonic appearance to one member for an informal inquiry or hearing panel. Judge Winthrop indicated his preference for appearance by video versus telephonic. Pat Sallen expresses concern about initial review and interacting with the applicant. J. Scott Rhodes shared his concern about the potential that an applicant could be in the hearing with no panel members physically present in the room. Staff is trying to keep these panels truly random but also considering the geographic location of the panel members.

**Motion:** ARC to provide a comment acknowledging the logistical problem of requiring all 3 members of inquiry panel to be present; however the Committee expressed concern with altering the process for due process purposes. It was suggested that alternative language be proposed for Supreme Court to consider. Ed Novak and Scott Rhodes are to draft proposed alternative language.

**Moved by:** J. Scott Rhodes

**Second:** Benny Click

**Carried:** None opposed

f. **R-16-0023** (Changes to the Discipline, Disability and Reinstatement Processes)

This petition was proposed by ARC and was previously presented to and approved by the Committee. Maret Vessella stated the petition contains a few errors in terms of a few of the internal referenced to other Rule provisions. Judge Winthrop suggests submitting a revised petition or the State Bar can file a comment pointing out the technical error. Mark Wilson suggests if it is a technical error that they may be able to work with the Staff Attorney's office.

g. **R-16-0027** (Ethical Issues Arising from Medical Marijuana Laws)

This petition addresses the issue that ER 1.2 provides that a lawyer can't assist a client in committing a crime. A particular problem arises when federal and state laws are inconsistent. An example of this situation is the state medical marijuana laws. Other jurisdictions have amended similar rules to address this issue. The petition would adopt language that Connecticut has already adopted and would provide that lawyers can't counsel or help clients engage in conduct that the lawyer knows is criminal or fraudulent and add an exception for counseling or assisting a client regarding conduct expressly permitted by Arizona law. The petition also adopts some concepts that were in the State Bar's ethics opinion that were also codified by Connecticut. George Reimer asks about the difference between illegal, criminal and fraudulent conduct. Scott Rhodes discusses the background concerning Arizona adopting medical marijuana.

**Motion:** ARC supports this petition.

**Moved by:** Whitney Cunningham

**Second:** George Reimer

**Carried:** None opposed

Pat Sallen abstained from vote.

h. **R-16-0029** (Oath of Admission-Lawyer's Creed)

This petition was submitted by the State Bar. This expands the Lawyer's Creed of Conduct to incorporate the current reality of practice, both in terms of litigation and scope of practice. The organization of the Creed has been altered to specifically, by topic, define a lawyer's obligations to a client, opposing parties and counsel, civility and professionalism, obligations of lawyers to other courts and tribunals, and a section concerning obligations to the public and the justice system. Pat Sallen addressed (b)(7), which adds that you may not threaten to file a motion for sanctions against someone without good faith. Whitney Cunningham provided background information regarding this petition.

**Motion:** ARC plans to file a comment in support of petition.

**Moved by:** Whitney Cunningham

**Second:** Benny Click

**Carried:** None opposed

*No. 3* Review, Discussion and Possible Vote on Pending Legislation

a. H2219 Supreme Court Attorney Licensing

This pending legislation includes the provision about the State Bar being voluntary by directing the Supreme Court to adopt Rules and licensing attorneys exclusively.

*No. 4* ARC Annual Report Assignments and Deadlines

The ARC Annual Report is due April 30, 2016. The report is to summarize the annual activity from 2015 and will solicit input from both chairs of the Committee on Examinations and Committee on Character and Fitness, along with Presiding Disciplinary Judge and the State Bar. It was suggested that the draft report be disseminated to ARC members with adequate review time prior to the next meeting. Judge Winthrop acknowledged the request and asked that data and narrative from designated members be submitted to him on or before March 18, 2016.

*No. 5* Review, Discussion and Possible Vote Regarding 2015 Rule Amendments and Future Studies and/or Reports Concerning the Impacts of the Amendments.

Ed Novak suggests that the Committee review the effect of last year's Rule changes, particularly those affecting the Character and Fitness process. Examples of the changes would be: hearing procedures, admission changes, and staff roles. Mark Wilson asks that Committee members consider any additional topics they would like to have studied. Judge. Winthrop also encouraged Judge William J. O'Neil, Mary Grier and Ed Novak to comment about these topics from their perspectives.

*No. 6* Call to Public

None.

Meeting Adjourned: 11:25 a.m.

**Next meeting date: Wednesday, April 13, 2016**