

Notes
Meeting of Attorney Regulation Committee
1/31/3013

Following initial meeting of subcommittee formed to evaluate the C&F component of the admissions process, the Chair sent an email on September 6, of last year to members and interested observers in which he posed a number of very thoughtful and prescient questions.

I qualify as an “interested observer” – I asked my secretary, Joni, of more than 20 years to access the list of “character & fitness” cases in which I have represented applicants and while I knew I had been doing this for a long time, was nonetheless surprised to learn that I have represented nearly 100 applicants over a period starting as far back as 1981! As I reviewed that list of former clients, I could not help but reflect on changes that occurred in the character and fitness process over the past 30 years and conclude that many of the changes have not improved the process.

More to the point, in response to the questions posed in the Chair’s email, I sent a memo dated September 25 to the Chair, Ms. Holliday, members of the subcommittee and others who were at the initial meeting in which I focused on the problems in the present system which I believe impair its efficacy and more important, cause it to be less than a consistently fair process and equally troubling, contribute to the perception on the part of more than a few applicants and their counsel that it is less than a fair process. Since my views are set forth in my September 25 memo, I will try to summarize them today without imposing unduly on the time of the subcommittee and other speakers.

1) Anecdotal evidence and the experience of counsel raise a number of serious questions about the fairness and perception of fairness of the current structure. For that reason, I think it important, if possible, for the subcommittee to focus first on the problems implicated by the current structure. I will describe, in shorthand, the problems inherent in the current structure that adversely affect the process:

- (a) The rules should be applied consistently and in accordance with generally accepted principles governing the burden of proof and presentation of evidence. In C&F proceedings, the applicant has the burden of proof and should be permitted to testify on direct before being questioned by the committee’s representative and members of the committee.
- (b) No member of the C&F Committee who will participate in discussions about whether an applicant should be admitted should also be permitted to serve as the “reviewing member” for the applicant. It is my view, shared by other

experienced counsel, that the reviewing member, who is required to thoroughly familiarize himself or herself with the applicant's file and then lead the cross-examination of the applicant, becomes a prosecutor by default and cannot fairly and objectively assess the applicant's fitness to practice.

- (c) Despite the amendment to the rules last year which provide for some discovery prior to a hearing, the lack of pre-hearing disclosure by the committee about its precise concerns about the applicant contributes to the notion that the hearing is a "star chamber" proceeding. If the committee has specific concerns which it believes necessitates an informal or formal hearing, is there any legitimate reason not to share with the applicant and her counsel the specific factual basis for the concern? Most lawyers view that level of disclosure essential to assure due process.
- (d) The Committee acknowledges that in accordance with case law, it cannot decide the fate of an applicant on the basis of confidential information which has not been disclosed to the applicant. However, the current use of confidential information presents a "Catch-22" for the Committee. If information is received by the staff from a source which has requested confidentiality and the staff person believes the information is both pertinent and material to the applicant's fitness, the staff person should ask the source to waive confidentiality and explain that in the absence of a waiver, the information cannot be considered by the committee. If the source refuses to waive confidentiality, *the staff person should not provide the information to any member of the committee since it cannot be considered by the committee in deciding the applicant's fate.* As the saying goes "You can't unring the bell" and once a committee member has seen confidential information, it will almost certainly be considered by that member in assessing the applicant's fitness even though, as a matter of law, it should not be considered and the applicant is being assured that it won't be considered.
- (e) The involvement of volunteers as investigators, reviewing members and even as members of the committee should be carefully considered. The following problems arise from the use of volunteers:
 - (i) As noted above, when a committee member is assigned to serve as the "reviewing member", that member becomes a prosecutor by default and should not be permitted to participate in the discussion and/or decision affecting the committee's ultimate recommendation¹;
 - (ii) The reviewing member often has direct contact with witnesses who have offered evidence adverse to the applicant. The nature, frequency

¹ Before budgetary constraints necessitated a change in the system, the C&F Committee routinely retained the services of a highly-qualified outside counsel to investigate and present the case to the Committee if questions had been raised about a candidate's fitness for admission.

and substance of those pre-hearing contacts are not disclosed to the applicant or her counsel nor does the applicant know to what extent the results of those contacts have been shared with other members of the C&F Committee.

- (iii) **The size and geographical diversity of the C&F Committee and the need to achieve a quorum to make decisions frequently results in limited participation by some Committee members who either participate in hearings only by telephone or only by receiving and reviewing the transcript of the hearing after the fact but before a decision is reached by the Committee. Both of these limitations preclude those Committee members from fully and fairly assessing the demeanor of the applicant and witnesses who testify before the Committee. The demeanor of parties and witnesses is generally viewed as a factor essential to enable fact-finding adjudicators to evaluate credibility and reach a fair, fully-informed decision.²**

- (f) **In matters which go beyond one hearing session, the shifting composition of those members who are physically present causes applicants to justifiably wonder precisely who is actually participating fully in the potentially life-altering decision affecting his or her professional future?**

- (g) **The multiple roles imposed on current C&F members when they are required to serve concurrently as investigator, reviewer, presenter and adjudicator inevitably and unavoidably limit the role and the scope of participation, in individual cases, of some members and increases the role and influence of the member designated to serve as the reviewer/investigator/presenter/adjudicator. The experience of applicants and their counsel reveals that not infrequently, the reviewing member is the only member with an in-depth and detailed knowledge of the applicant's file and as a result, other members are less knowledgeable about potentially critical details and understandably more reliant on the reviewing member's characterization and recitation of those facts (and presumably on the reviewing member's recommendation regarding the action to be taken by the Committee).**

² E.g., *In re Estate of Hanscome*, 227 Ariz. 158, 254 P.3d 397 (Div. 1 2011), *White v. Greater Arizona Bicycling Assn*, 216 Ariz. 133, 163 P.3d 1083 (Div. 2 2007).

Recommendations:

Consider a wholly different structure – e.g., instead of a committee, a permanent hearing officer (cf. PDJ) perhaps supported by 1-2 lawyer members

That would eliminate the problems summarized above that are unavoidably encountered with a volunteer committee of 18 people

In the absence of a waiver from the source, preclude the circulation of confidential information to any member of the committee

Follow the rules governing burden of proof and the admission of testimony

Provide the applicant with meaningful notice prior to any hearing – notice which identifies and specifies with particularity the facts which necessitate the hearing – due process

Have the investigation and questioning of the applicant conducted by someone other than anyone involved in the decision-making process

If it is not feasible to implement a wholly different structure, consider significantly reducing the size of the committee and create panels within the committee which are given the authority to make final recommendations regarding admission – as presently occurs following informal hearings.