

Comment In Response to Petition R-24-0046

We write in opposition to the Rule change proposed in Petition R-24-0046.

It is important to the administration of justice and the Rule of Law as enforced through our judicial system that the legal profession remain relatively autonomous and self-regulating.

The duty of members of the State Bar of Arizona to report apparent ethical and professional misconduct by fellow attorneys is an important aspect of the legal profession's relative autonomy and self-regulation. Watering down and restricting this aspect of self-regulation of the Bar as proposed in Petition R-24-0046 is dangerous because the rule change it proposes would erode the already-declining confidence in Arizona lawyers and in our system of justice and thereby will take a bite out of the Rule of Law and the judicial branch of government of our Constitutional democracy.

The proposed new Rule 53(a) would limit standing to file Bar charges to an individual or entity that has "an attorney-client relationship with the respondent, direct and specific first-hand knowledge of the conduct described in the charge, or they became aware of the conduct in their role as a judicial officer." This would do harm to no good end.

Arizona Supreme Court Rule 42, Ethics Rule 8.3, entitled "Reporting Professional Misconduct" provides that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law."

The Comment to this Rule, at paragraph [1] notes that "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they *know* of a violation of the Rules of Professional Conduct....An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

The Comment at paragraph [3] notes that a lawyer is not obligated to report every violation, only "those offenses that a self-regulating profession must vigorously endeavor to prevent. ... The term '*substantial*' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

These qualifiers are sufficient to deter lawyers from presenting frivolous charges of alleged misconduct by their fellow lawyers. Lawyers who submit frivolous charges themselves can be subject to discipline. Such discipline is the means by which to prevent the speculative suggestion in the Petition that the disciplinary process could become "weaponized by partisans." Moreover, concern about the appearance of that occurring could be addressed by publicizing the ability to discipline lawyers who file frivolous Bar charges and by actually imposing discipline if and when warranted. No restriction on standing is necessary or appropriate.

The fact that there has been, in recent years, an unusually high volume of reports of misconduct by lawyers practicing law in Arizona - both by those who are members of the State

Bar of Arizona, and those appearing *pro hac vice* in Arizona - is not a reason to dilute this rule by adding a new standing provision to Rule 53. Indeed, this is precisely the reason *not* to dilute it.

If non-lawyers or those not subject to regulation under the Arizona State Bar are filing a high number of complaints, either those complaints have validity because of the failure of the State Bar to take appropriate action against lawyer misconduct, in which case the complaints should be filed, or organized and/or political groups are seeking to “weaponize” the system against political philosophies they don’t agree with. If the latter is the case, the solution is not to punish those filing valid complaints but may not know how to investigate beyond news reports (nor is that their duty) but to reject those efforts to attack the Rule of Law. The State Bar could do so by expeditiously dismissing non-meritorious complaints filed for political purposes, and by communicating to the public via the news media the fact that certain individuals or groups are misusing the Bar complaint process improperly for political purposes. It is after all the duty of lawyers to protect the Rule of Law without which we do not have a democracy or a republic or even a profession.

Beginning in November of 2020, the undersigned attorneys complied with our duty under ER 8.3 to report alleged misconduct and violations of the Ethics Rules in Rule 42 and the Professionalism Rule in Rule 41 that we initially came to be aware of via news reports, and that we later verified by reviewing pleadings and other court records, including court orders, as well as transcripts of statements made in open court. That alleged misconduct was committed by attorneys representing candidates for political office who engaged in frivolous litigation without any factual or legal basis, including some frivolous litigation that allegedly was part of a conspiracy associated with the insurrection that occurred on January 6, 2021 which some view as an attempted coup to overturn the results of a free and fair democratic election for President of the United States. We are informed and believe that a number of other similar charges were submitted to the State Bar of Arizona by others relating to the same or related serious misconduct. We do not know whether judicial officers reported this misconduct to the State Bar, nor do we have any way of knowing that.

Because one of us was a member of the Board of Governors of the State Bar of Arizona, the charges we submitted were referred to Independent Bar Counsel. Some of the charges were investigated and dismissed. Others resulted in discipline. We understand from the Administrative Office of the Courts that the remainder of these investigations have been closed, though we have not been provided information as to why.

We have been informed by the State Bar of Arizona and by the Director of the Administrative Office of the Courts himself that the reason the investigations took several years is that there were insufficient resources for Independent Bar Counsel. The Director criticized the attorneys who presented the charges for this problem, complaining that one of us is a member of the Board of Governors which necessitated hiring Independent Bar Counsel. This criticism is misplaced. Far from being considered a problem, it should be considered refreshing and appropriate that a leader of the State Bar is complying with his obligation to report attorney misconduct.

The solution to the problem of inadequate resources is for the Director of the Administrative Office of the Courts to adequately staff the office of Independent Bar Counsel so that it is able to conduct investigations expeditiously and appropriately, not to restrict attorneys and others

from filing Bar charges. The failure to do so has resulted in the disappointing, indeed frightening, appearance that the Director himself has put his thumb on the scales of justice to deter appropriate investigation and accountability for serious violations of the Ethics Rules committed by partisan attorneys for political purposes.

As just one example of an unfortunate consequence that would result from the Director's proposed change to the Rule to impose a standing restriction to file Bar charges, if it is adopted, it is likely that a lawyer engaging in an inappropriate sexual relationship with a client - particularly a vulnerable client such as a victim of domestic violence who is being represented in a divorce proceeding - will be more likely to go unreported. The client herself may too greatly fear retaliation to make a report to the State Bar, and no one else will be authorized to do so. So, the State Bar will be unaware of the misconduct and have no ability to intervene to address it, thus allowing it to continue with respect to the current victim and also enabling future misconduct of the same type. The same could occur with an attorney representing an elderly client, especially one with beginning dementia, with estate planning. The client would never know of or complain about the misconduct but a relative or another attorney might. There are myriad other examples of situations in which this proposed change to the Rule to limit standing to file Bar charges will deter reporting that should be encouraged.

Adopting this rule would be akin to the state adopting a policy prohibiting people from reporting to law enforcement detectives any crime they did not personally witness or suffer as a victim, as a means to reduce a high volume of criminal cases. A parent told by a child that she had been the victim of sexual assault under that scenario would be prohibited from reporting the alleged crime to have it investigated by law enforcement.

We also oppose the other aspect of the Petition, which is to restrict the limited transparency that already exists with regards to Bar charges. The Director of the Administrative Office of the Courts seeks to substitute the State Bar itself as complainant in order to remove the duty and responsibility of the State Bar or Independent Bar Counsel to provide the true complainant with a copy of the respondent's initial response to the charge and the resolution of the charge.

There already is a provision by which a protective order can be entered in specific cases, where there is appropriate justification. There is absolutely no need for a blanket protective rule to be issued covering all cases.

Lack of transparency undermines faith in the process and thereby undermines faith in lawyers, the judicial system generally, and thus our Constitutional democracy. We believe there already is unduly restricted transparency; there should be more transparency, not less.

In conclusion, we urge the Court to reject this dangerous Petition that would restrict standing to file Bar charges and would reduce the limited transparency that exists with regards to the response to Bar charges.

Additionally, we urge the Court to evaluate the circumstances underlying this Petition brought by the Director of the Administrative Office of the Courts and that the Court assert supervisory authority with respect to appropriate staffing of the Office of Independent Bar Counsel and of the State Bar of Arizona so that both can expeditiously complete investigations of the current volume of Bar charges and can address misconduct appropriately to preserve the integrity of

the legal profession, the Bar, and the judicial system that is so vital to our Constitutional democracy.

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