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ARIZONA SUPREME COURT

In the Matter of	)	
	)	
PETITION TO AMEND RULE 53, RULES OF THE ARIZONA SUPREME COURT	)	Supreme Court No. R-24-0046
	)	
	)	REPLY
_____	)	

David K. Byers, Administrative Director, Administrative Office of the Courts, replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona and this Court's Order dated April 29, 2024.

I. Procedural History

On April 25, 2024, Petitioner filed a petition to amend Rule 53, Rules of the Supreme Court of Arizona, to establish a standing requirement to be considered a complainant in discipline proceedings. In recent years, there has been an increase in charges being submitted by individuals based on second-hand information concerning the alleged misconduct, such as news reports. The proposed amendment seeks to reserve procedural protections for those more directly involved. Petitioner files this reply to address the comments received.

II. Discussion

A. Use of Term "Standing" Unnecessary.

Several commenters interpret use of the term "standing" in the proposed amendment as precluding those without "standing" from reporting allegations of attorney misconduct. *See e.g.,* Dianne Post at 1. The point is well taken, as that is not the intent of the proposed amendment. To address those concerns, in part, Petitioner proposes that use of the term "standing" be deleted. Instead, Petitioner asks that Rule 53 be amended to include the following provision:

> **(a) Complainant.** An individual or entity will be a complainant regarding a charge made against a lawyer if they (1) have or had an attorney-client relationship with the respondent, (2) have direct and specific first-hand knowledge of the conduct described in the charge, or (3) became aware of the conduct in their role as a judicial officer. In the absence of an individual or entity meeting one of these criteria, the state bar will be the complainant if it determines the allegations are of sanctionable misconduct, incapacity, overdraft of a trust account, or a criminal conviction.

The exchange of "sanctionable" in place of "serious" addresses a critique concerning application of the amendment. The State Bar already evaluates whether an act or omission is "sanctionable misconduct" with reference to the American Bar Association's *Standards for Imposing Lawyer Sanctions. See In re Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996) ("Although not mandatory, the ABA *Standards* are persuasive as to appropriate sanctions and provide a 'useful tool' in deciding the sanction to be applied," citing *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990)).

Petitioner recognizes that the proposed change does not address all concerns raised in the comments. It does, however, alleviate the perception inherent in use of the term "standing" that a barrier was being established concerning the submission of information for investigation.

B. Bar Counsel Responsible to Evaluate Information from Any Source.

Nothing in the proposed amendment to Rule 53 alters the responsibility to evaluate all information alleging misconduct from whatever source. "Bar counsel shall evaluate all information coming to its attention, in any form, by charge or otherwise, alleging unprofessional conduct, misconduct or incapacity." Rule 55(a).[1]

Apparently reading the proposed amendment to Rule 53 in isolation, one commenter suggested that there would be a negative impact to the reporting of inappropriate sexual relationships or an attorney taking advantage of an elderly client. Dianne Post's comment at 3. Bar counsel would remain obligated to evaluate such reports in accordance with Rule 55 just as obligated to do so today. It is difficult to fathom that an individual with knowledge of an inappropriate sexual relationship or of an attorney taking advantage of an elderly client would be swayed as to whether

[1] Authorities responsible for investigating misconduct across the country consider information brought to their attention from whatever source. Not every source, however, is a named complainant. *See e.g.,* Texas Rules of Disciplinary Procedure, 1.06(G)(2) listing who may submit a complaint, including a catch-all provision reading, "any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the Grievance."

to report their knowledge by the proposed amendment to Rule 53. As explained in the petition and elsewhere in this reply, the proposed amendment merely seeks to reserve procedural protections concerning notice and request for review for those more directly involved with the misconduct.

C. Lawyers Have a Duty to Report Misconduct.

Commenters point out that a lawyer is required to report the professional misconduct of another lawyer. Ethical Rule 8.3. Petitioner is not seeking any change to that requirement. If Rule 53 is amended as proposed, Ethical Rule 8.3 will still provide 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 suggestion by some commenters that this duty would be undermined is not supported.

One commenter mis-interprets the proposed amendment as a mechanism for discouraging frivolous charges and punishing those reporting misconduct. She comments that there are "qualifiers . . . sufficient to deter lawyers from presenting frivolous charges of alleged misconduct by their fellow lawyers." Dianne Post at 1. While discouraging frivolous charges is admirable, that is not the purpose of the proposed amendment. As explained in the petition, the proposed amendment seeks

to balance any positive impact of increased scrutiny of attorney conduct generated by charges submitted by individuals based on second-hand information while properly reserving procedural protections for those more directly involved. Ms. Post does not suggest in her comment any reason as to why an individual reporting misconduct concerning events with which they were not involved and only learned about through news reports should be provided the same procedural protections as those in an attorney-client relationship or having direct and specific first-hand knowledge of the lawyer's conduct as described in the charge.

Another commenter asserts that an individual who reports misconduct based on second-hand information would be deprived "of the rights that they would otherwise have as complainants under the rules" if the amendment is adopted. Regina Nassen at 1. No explanation is offered as to why such an individual should have such "rights." An individual reporting misconduct based on news reports is not similarly situated to an individual personally involved with the misconduct. They should not be treated identically as the current rule requires.

Among the commenters, Phoenix Newspapers, Inc. (PNI) expresses that the proposed amendment would leave a lawyer without first-hand knowledge of the alleged misconduct in the dark about the outcome and unable to challenge it. Given its caveat that the informing lawyer does not have first-hand knowledge of the alleged misconduct, PNI does not provide any basis as to why the informing lawyer

would need to know the outcome or challenge it. The informing lawyer properly will have met their reporting obligation under Rule 8.3. Nothing in that rule requires the informing lawyer to challenge the outcome of a disciplinary proceeding or even monitor its outcome.

Referencing the investigation of former Deputy County Attorney Juan Martinez, commenter Ralph Adams points out that an individual without direct involvement with the alleged misconduct would be unable to seek further review if the state bar dismisses a charge. The concern is legitimate, but he references a poor example. More than one individual asserted charges concerning Mr. Martinez's many actions, and Mr. Martinez consented to disbarment. It is at best debatable whether he would still be practicing law if the proposed amendment had been in place. Nonetheless, a complainant's ability to object to a dismissal as provided in Rule 55(b)(2)(A)(ii) serves a purpose,[2] and Petitioner is not seeking to change it. The proposed amendment to Rule 53 would reserve that process to a complainant who had an attorney-client relationship with the respondent, had direct and specific first-hand knowledge of the conduct described in the charge, or became aware of the conduct in their role as a judicial officer.

[2] In 2023, complainants appealed the dismissal of charges in 21 matters. The committee denied the appeal in 20 and granted the appeal in 1, which was subsequently resolved through a diversion agreement.

Under the current rules, an informing lawyer naturally may be reluctant to comply with the reporting requirement under Ethical Rule 8.3 in the absence of first-hand knowledge. After all, they would then be identified as the complainant against the respondent lawyer, which carries the indicia of an adversarial relationship. If the Court adopts the proposed amendment, a lawyer who gains knowledge, albeit not first-hand knowledge, remains obligated under Ethical Rule 8.3 to inform the professional authority that another lawyer has committed a violation of the Rules of Professional Conduct. The state bar, which remains obligated to investigate in accordance with Rule 55, will be the complainant under the proposed amendment if it determines that the allegations are of sanctionable misconduct, incapacity, overdraft of a trust account, or a criminal conviction. The informing lawyer who does not have first-hand knowledge would not be required to take on the adversarial mantle of complainant. Contrary to the concerns raised by certain commenters, the proposed amendment may encourage fulfillment of Ethical Rule 8.3 by avoidance of that adversarial label.

D. Rule Governing Access to Information Is Unchanged.

The Court provides in Rule 70 for public access to information concerning disciplinary proceedings. Petitioner is not seeking any change to that rule. Nonetheless, Ms. Post expresses concern for transparency, and PNI commented that the proposed amendment to Rule 53 "would dramatically diminish the public's

access to information about attorney discipline. . . ." Understanding PNI's concerns highlights how the current process is subject to abuse and merits amendment.

A complainant is not prohibited from "disclosing the existence of proceedings . . . or from disclosing any documents or correspondence served on or provided" to them, unless otherwise ordered. Rule 70(d). The same goes for a respondent or witness. *Id.* Whether an individual chooses to publicly disclose information concerning disciplinary proceedings generally should be left up to the individual with first-hand knowledge. After all, they are the ones involved as an aggrieved client, responding attorney, or witness to events. Unless there is a basis for ordering them to do otherwise through issuance of a protective order, these individuals should be free to disclose information as they see fit concerning events in their lives. Treating individuals who do not have first-hand knowledge identically to those that do, however, provides an incentive for individuals to seek out the role of complainant under the current rule to gain access to information.

Complainants are provided with the respondent's initial response, various notifications concerning the proceedings, and settlement of a charge. Complainants, even those without first-hand knowledge, may "be valuable sources of information about the disciplinary process for the news media" as PNI points out in their comment. Public disclosure of such information concerning disciplinary proceedings is often appropriate and should be made available through the

mechanisms provide in Rule 70. It is not appropriate, however, to incentivize individuals to become complainants to obtain such information. The proposed amendment to Rule 53 remedies that while leaving an individual without first-hand knowledge free to communicate publicly about the information they possess.

Commenter Ralph Adams provides background information concerning the adoption of Rule 70. He notes that the State Bar is restricted with respect to the information it may provide to the public, and he emphasizes that the First Amendment protects complainants' free speech rights so that similar restrictions are not placed on them. Mr. Adams does not mention in his comment, however, that the current rule requires that the State Bar provide information to individuals currently defined as a complainant, which then allows them to disclose that information publicly. The proposed amendment would only change that dynamic by specifying that a complainant entitled to receive information, such as a copy of the respondent's initial response to the charge, would have an attorney-client relationship with the respondent, have direct and specific first-hand knowledge of the conduct described in the charge, or have become aware of the conduct in their role as a judicial officer. As under the current rule, once the information is provided to the complainant, they would be free to disseminate it as they see fit, absent a protective order.

Under appropriate circumstances, protective orders, as suggested by Amelia Craig Cramer and Regina Nassen in their comments, may be requested and are

available under the current rules. Resort to seeking protective orders would be limited, however, if the proposed amendments are adopted. Individuals with an attorney-client relationship or that have direct and specific first-hand knowledge of the conduct described in the charge would routinely be provided the procedural protections afforded complainants in the rules. Individuals who do not have such direct involvement would be afforded access to the disciplinary proceedings along with other members of the public in accordance with Rule 70.

E. Maintain Proper Focus of Disciplinary Proceedings.

The focus of bar disciplinary proceedings should properly be maintained on the alleged misconduct of the respondent attorney. As mentioned in the petition, election-related litigation during recent election cycles has generated disciplinary proceedings concerning the lawyers involved in those actions, and, given some of the outcomes, those disciplinary proceedings have been warranted. Contrary to the assertion of some commenters, Petitioner is not seeking to limit the pursuit of disciplinary proceedings concerning election-related litigation in the future. If attorney misconduct arises in the context of election-related litigation, it should be investigated through the disciplinary process just as it should be investigated if misconduct arises in other contexts. It is appropriate, however, to adopt the proposed amendment to Rule 53 so that bar disciplinary proceedings are not used for political purposes or given the appearance of being weaponized.

PNI asks in its comment that disciplinary proceedings concerning alleged misconduct in election-related litigation "be provided with the same careful consideration, investigation, deliberation and due-process protections as all other complaints." I concur. Unfortunately, the media focus on this subset of cases has made that difficult to accomplish. To be clear, I am not faulting the media, as "[e]lection-related litigation is a matter of the highest public concern," and warrants the media's attention. To maintain the proper focus of disciplinary proceedings on the conduct of the respondent attorney, steps are needed to avoid the perceived weaponization of the disciplinary process.

The perception that the disciplinary process is being weaponized, in part, lead to proposed legislation. S.B. 1471, SB1471 - 562R - S Ver (azleg.gov). As explained in Senator Peterson's comment, that bill require that individuals filing complaints "have an attorney-client relationship with the subject of the complaint or another substantial nexus to the alleged misconduct."

F. Independent Bar Counsel Investigated Charge from Board Member.

In her comment, Ms. Post references perceived criticism by the Petitioner concerning a member of the Board of Governors having submitted a charge. Similarly, Amelia Craig Cramer comments that additional resources should have been sought to fund the work of the Independent Bar Counsel.

It is unfortunate that the statements concerning the necessity of expending resources to involve an Independent Bar Counsel have been interpreted in that way. It was necessary and appropriate to expend resources to involve Independent Bar Counsel to investigate charges submitted by a member of the Board of Governors, and those resources were marshalled as quickly as possible. The necessary involvement of an Independent Bar Counsel did impact how quickly the alleged misconduct could be investigated. A recitation of those facts was not meant to convey criticism of a member of the Board of Governors. Instead, it was meant simply to convey those facts. In any event, the perceived slight, while unfortunate, does not weigh on the merits of the proposed amendment. Individuals in an attorney-client relationship or that have first-hand knowledge of conduct described in a charge should be afforded greater procedural protections in disciplinary proceedings than those afforded to individuals reporting alleged misconduct based on news reports.

III. Expedited Consideration Appropriate

Commenters Regina Nassen and Ralph Adams seek to delay the Court's consideration of the petition. While delaying consideration would be preferable to maintaining the status quo in perpetuity, no rationale is presented for doing so. The Court has received ample comment to consider the petition on its merits. If the Court does decide to adopt an amendment on an emergency basis, public comment will be reopened. Moreover, by acting in August, the Court will be in a better position to

gauge the effect of any change during its December Rules Agenda or thereafter.

RESPECTFULLY SUBMITTED this 17th day of June, 2024.

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