Response to emergency adoption of amendment to Supreme Court Rule 53, Rule Petition R-24-0046

To recap, the petitioner proposed restricting the rights afforded complainants under the rules to a limited set of individuals or entities (in an attorney-client relationship, with direct and specific first-hand knowledge of alleged misconduct, or judicial officers who become aware of alleged misconduct). Any other individual or entity will not be considered a complainant though the state bar can itself be considered a complainant if it decides to do so.

The rationale for the new rule (approved by the Court on an emergency basis) was that individuals and entities without an attorney-client relationship or direct and specific first-hand knowledge of alleged misconduct were apparently submitting complaints about lawyers involved in election proceedings solely for partisan reasons. " . . . submissions concerning election-related litigation create a risk of the disciplinary process being weaponized by partisans or the appearance of that occurring." Page 3 of original petition.

While the petitioner cited 40 election-related complaints submitted since November 2020, he provided no information about how any of them created a risk of the disciplinary process being weaponized by partisans or the appearance of that occurring. He provided no definition of who he considered to be a partisan or information as to when a complaint was being used as a weapon to do something nefarious or otherwise improper. And no mention is made that a person or entity that had direct and specific first-hand knowledge of alleged misconduct could be a partisan seeking to weaponize the disciplinary process against a lawyer in an election case. It makes no sense to deem a person or entity without direct and specific first-hand knowledge a partisan without the rights of a complainant while granting a partisan with direct and specific first-hand knowledge the rights of a complainant. Filing a complaint based on other than direct and specific first-hand knowledge does not make you a partisan; being partisan makes you a partisan. No effort is made to preclude all partisans from being deemed complainants under the rules. The new rule has created a category of partisans that has nothing to do with partisanship. It is especially concerning that this new rule's rationale is based on even an appearance of a risk of weaponization of the disciplinary process.

The petitioner provided no information from any other U.S. jurisdiction that supported the changes he advocated. His reference to Texas Rule of Disciplinary Procedure 1.06(G)(2) (footnote 1 on page 3 of his supplement) needs context. That rule sets forth a broad range of individuals and entities that are considered eligible

to be complainants with the rights afforded complainants under the Texas rules. That broad range includes prosecuting attorneys, defense attorneys, court staff members, or jurors in the legal matter that is the subject of the grievance and any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the grievance. Under the emergency rule adopted by the Court, none of these individuals or entities are considered complainants unless they have or had an attorney-client relationship with the respondent or direct and specific first-hand knowledge of the conduct described in the charge. Absent that relationship or direct and specific first-hand knowledge, they are deemed not to deserve the rights of complainants because of a predetermined fear of even an appearance that any complaint they file is from a partisan seeking to weaponize the disciplinary process against lawyers.

In my view, the Court has acceded to unsubstantiated claims of harassment of lawyers in election cases due to allegedly baseless allegations of professional misconduct. Alleged partisanship is a two-way street. If the Court is adopting rules based on appearances, this rule appears to be a sub silentio partisan device to prevent those with legitimate complaints from obtaining information about their disposition. The disciplinary process should be as open and neutral as possible to ensure public trust in it. This rule change is not warranted under the rationale and lack of evidence used to support it.

Other states have dealt with the issue of frivolous complaints by adopting vexatious grievant rules. Individuals or entities that are proven to have repeatedly filed frivolous complaints can, with due process, be precluded from filing additional complaints or having their rights as complainants restricted in other ways. See, for example, Washington Rule for Enforcement of Lawyer Conduct 5.1(e) and Rule of Procedure of the State Bar of California 2605. Petitioner makes no mention of this option in his petition or supplement. Rather than arbitrarily restricting the rights of "partisan" complainants, these rules address the issue of frivolous complaining on a case-by-case basis with due process before a person or entity is deemed a frivolous grievant.

In his supplement (page 5), petitioner asserts that no explanation has been provided for affording the rights of complainants to those with only second-hand knowledge of alleged lawyer misconduct. He fails to mention that the rule prior to this amendment provided exactly that. At one time the Court deemed it appropriate to do so. Petitioner's basis for eliminating what the prior rule allowed is an evidence-light "risk of the disciplinary process being weaponized by partisans or the appearance of that occurring." Page 3 of original petition.

As to the issue raised by petitioner that complainants will improperly disclose information that would otherwise to confidential (see original petition at page 3: "When [individuals not directly involved in the underlying case] are treated as complainants, they may be provided access to information that may otherwise be confidential until the conclusion of the investigation and then divulge it publicly before the discipline matter is finalized."). Supreme Court Rule 70(d) provides, "Unless otherwise ordered by the committee, the presiding disciplinary judge, a hearing panel, or this court, nothing in these rules shall prohibit the complainant, respondent, or any witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons." (emphasis added). No evidence has been provided that the state bar was unable to address by protective order the improper disclosure of confidential information under the prior version of Rule 53(a). If the rule change was approved to address the fact that those now excluded from complainant status were incentivized to seek out the role of complainant to gain access to otherwise confidential information under the former rule, where is the evidence to support it?

As the Court did in Rule Petition R-24-0028, this emergency rule should be referred to the Attorney Regulation Advisory Committee for further study and recommendation before the Court considers whether to adopt it on a permanent basis or whether other, fairer, options should be implemented. Lawyer regulation is for the protection of the public. The disciplinary process is fully capable of screening out frivolous complaints in as expeditious a way possible while ensuring transparency in how it does so.

George A. Riemer
Attorney at Law
State Bar of Arizona No. 017034
23206 N Pedregosa Drive
Sun City West, AZ 85375
623-238-5039
garpho@outlook.com