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ARIZONA SUPREME COURT

In the Matter of)	
)	
PETITION TO AMEND RULE 53,)	Supreme Court No. R-24-0046
RULES OF THE ARIZONA)	
SUPREME COURT)	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 August 23, 2024.

I. Procedural History

The Court amended Rule 53(a) to read:

(a) Standing. An individual or entity has standing to submit a charge if they have an attorney-client relationship with the respondent, 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. If a charge is submitted by an individual or entity that does not have standing, the state bar must determine if the allegations are of sanctionable misconduct, incapacity, overdraft of a trust account, or a criminal conviction. If such a determination is made, the state bar will be the named complainant and pursue the matter accordingly. Only an individual or entity with standing will be entitled to the rights provided to complainants in these rules.

Order filed August 23, 2024, as amended by Order filed August 28, 2024. The Court reopened the petition for comment and is to consider whether to adopt the rule amendment on a permanent basis during its December 2024 Rules Agenda.

II. Discussion

Several individuals submitted comments opposing adoption of the amendment on a permanent basis. Naturally, many of the comments include arguments previously addressed in the June 17, 2024, Reply.

A. Amended Rule Does Not Restrict Who May Report Misconduct

Commenters (mis)interpret the amended rule as precluding those without “standing” from reporting allegations of misconduct to the state bar. Brendan Mahoney summed up the confusion as follows:

As you can tell from all the comments received, the proposed rule is confusing and quite a few people believe it restricts who can complain based on “standing.” That this proposed rule has generated so much contention is a good indication that the language is not clear at all.

(October 3, 2024, e-mail from Mr. Mahoney attached as Appendix A so the comment and proposal may be viewed in the context provided by the author.)

Attorneys¹ submitted comments pointing to the perceived discrepancy between the ethical obligation lawyers have to report violations and the amended

¹ Dianne Post, Amelia Craig Cramer, Roxanna Bacon, Victor Aronow, Brendon Mahoney, and Gail Natale comment submitted 9/20/24; and Maureen Kane comment submitted 9/27/24.

rule. “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.” Ethical Rule 8.3(a). Non-lawyers² included in their comments identical concerns.

The commenters’ assessment that a lawyer no longer has an ethical duty to inform the state bar of violations in accordance with Ethical Rule 8.3 is not supported. Petitioner did not seek any change to that ethical rule or any part of the Arizona Rules of Professional Conduct. Moreover, even after the amendment to Rule 53, Ethical Rule 8.3 still 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.” There has been no change.

Likewise, there has been no change in the ability of non-lawyers to inform the state bar of violations. Nothing in the amendment to Rule 53 alters the responsibility of bar counsel to evaluate all information alleging misconduct from whatever source.

² Cynthia Couture comment submitted 9/27/24; and Rivko Knox comment submitted 10/2/24.

“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). In addition, Rule 49(d) requires that “Bar counsel shall . . . review all information coming to the attention of the state bar. Bar counsel shall exercise discretion in initiating investigations when allegations, if true, would be grounds for discipline or transfer to disability inactive status.”

B. Alternative Language to Address Perceived Confusion

The Court may wish to further amend Rule 53 to address the perceived confusion raised in the comments submitted in September and October. Mr. Mahoney suggests that a statement be added to Rule 53 to make clear that “the rule does not affect reporting duties under the Rules of Professional Conduct or limit anyone from filing a complaint,” and he offered proposed language. Appendix A.

Petitioner proposed alternative language avoiding use of the term “standing” in the reply filed June 17, 2024. Lack of standing results in dismissal of a claim in the context of civil litigation, so the term carries that connotation for lawyers. In the context of “discipline and disability proceedings [which] are neither civil nor criminal” (Rule 48(a)), use of the term “standing” may be a source for the confusion. Petitioner recognizes that the June proposal was not adopted and references it only to the extent the Court seeks alternative language to address concerns raised in the recent comments.

C. Bar Counsel Implemented Amended Rule

Bar counsel implemented the amended rule. An example of a letter sent to an individual who did not have standing is attached as an exhibit to the comment submitted 10/1/24 by George Papa. Mr. Papa also was informed that Bar Counsel determined that the allegations were not of sanctionable conduct and that further investigation was not warranted. As a result, the file concerning Mr. Papa's report of alleged professional misconduct by a current county attorney concerning a 2014 conviction based on a plea by defendant Samuel Phillip Chamberlain was closed.

Bar Counsel relayed that there have been instances where individuals who do not have standing have reported sanctionable conduct. In accordance with the amended rule, investigation of the matter proceeds with the state bar as the named complainant.

III. Adoption on a Permanent Basis Is Appropriate

Petitioner recommends that the amendment be adopted on a permanent basis. George Reimer recommends in his 9/30/24 comment that the petition be referred to the Attorney Regulation Advisory Committee for further study and recommendation prior to permanent adoption. To the extent the Court believes further study is appropriate, Petitioner recommends that the Court also direct that Bar Counsel report on implementation of the amended rule as part of that process. To the extent the Court is inclined to adopt the amendment on a permanent basis and would appreciate

more information concerning its implementation, the Court may direct Bar Counsel to provide information concerning any impact of the amendment in her report to the Chief Justice in accordance with Rule 49(c)(3).

RESPECTFULLY SUBMITTED this 11th day of October, 2024.

By /s/ David K. Byers
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Appendix A

Brendan N. Mahoney (017350, retired)
2617 N 8th Street
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602-690-4594

From: Brendan Mahoney <bnmlaw@gmail.com>
Sent: Thursday, October 3, 2024 1:33 PM
To: Morrow, Jim <jmorrow@courts.az.gov>
Cc: Post, Dianne <postdlpost@aol.com>; Robert J. McWhirter <bob@robertjmcwhirter.com>; Gail Natale <email@gainatale.com>; Roxie Bacon <roxie.bacon@gmail.com>; Victor Aronow <victoraronow@aol.com>; Cramer, Amelia <aamcramer@gmail.com>
Subject: Re: Arizona Judicial Branch Forums: RE: R-24-0046 PETITION TO AMEND RULE 53, RULES OF THE AZ SUPREME COURT

Dear Mr. Morrow —

I'm summarizing what we spoke about on the phone. The Court's stated concern is that complainants received sensitive information about an attorney involved in an inquiry or investigation and are free to disseminate the information. Of all the complaints filed surrounding election cases, there is no instance of that ever happening. As I mentioned, allegations included in a bar complaint are privileged from defamation claims. However, republishing the information to third parties or the press would expose the complainant to potential defamation claims should the allegations prove false on further investigation. Therefore, complainants are very careful to limit their reports to informing only the Bar.

You mentioned that the purpose of the rule is not to limit who can file a complaint, but only to limit access to bar proceedings after a complaint is filed. As you can tell from all the comments received, the proposed rule is confusing and quite a few people believe it restricts who can complain based on "standing." That this proposed rule has generated so much contention is a good indication that the language is not clear at all. Based on your comments about the goals of the revision, I would suggest a clear statement that the rule does not affect reporting duties under the Rules of Professional Conduct of limit anyone from filing a complaint. However, the proposed revision does intend to limit access to an investigation or proceeding as follows:

1. A party to a proceeding or an attorney in a proceeding with direct personal knowledge of an ethical violation by another attorney in that same proceeding who files a complaint will receive copies of the subject's response to the complaint and timely information about the procedural posture and disposition of the complaint as it works its way through the process.
2. An attorney not involved in a proceeding with the subject attorney will not receive copies of the subject's response or related documents, but will receive timely information about the procedural posture and disposition of the complaint as it works its way through the process.
3. A non-attorney who is not a percipient witness to the alleged violation will receive acknowledgment of receipt of a complaint and nothing more.

At least this format would clearly state what the you told me the Court desires to implement. The current proposed revision appears to go a good deal further than the stated intention.

Finally, I enjoyed our conversation this morning.

Best regards,

Brendan Mahoney
bnmlaw@gmail.com