

Hon. William J. O'Neil, Bar No. 005571
Presiding Disciplinary Judge
Arizona Supreme Court
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IN THE SUPREME COURT OF ARIZONA

In the Matter Of)	No. R-12-0019
)	
RULE 61, RULES OF THE)	FIRST AMENDED PETITION
)	TO AMEND RULE 61, <i>RULES</i>
SUPREME COURT OF ARIZONA)	<i>RULES OF THE ARIZONA</i>
)	<i>SUPREME COURT</i>
)	

Pursuant to Rule 28, Rules of the Supreme Court, the Honorable William J. O'Neil, Presiding Disciplinary Judge of the Supreme Court of Arizona, and Chair of the Attorney Regulation Committee (ARC) amends his prior petition to this court to amend the *Rules of the Supreme Court of Arizona* as reflected in the accompanying Appendix A.

I. INTRODUCTION

Effective January 1, 2011, this Court adopted changes to the attorney discipline system, including the establishment of the Office of the Presiding Disciplinary Judge. The Presiding Disciplinary Judge (PDJ) presides over attorney discipline and disability proceedings, and also issues orders and opinions as part of a three member hearing panel. These orders and opinions are typically final orders that may be appealed to this Court.

Rule 61 outlines the procedure for interim suspension. Minor modifications to this rule occurred as part of the establishment of the Office of the Presiding Disciplinary Judge. Presently the rule authorizes the PDJ to "issue an order in the nature of a temporary restraining order, with such notice as the judge may prescribe, imposing temporary conditions of probation on the lawyer, or temporarily

suspending the lawyer, or both.” Rule 61(c)(2)(A). The rule offers little procedural guidance for an emergent process that holds an enormous potential for the protection of the public and profession, while simultaneously holding enormous potential for practical harm to the attorney. The proposed rule better outlines this important process.

Attorney discipline and disability proceedings are *sui generis* or unique unto itself. See Rule 48 of the Rules of the Supreme Court. As a result the Office of the Presiding Disciplinary Judge is primarily guided by the disciplinary rules set forth within the Rules of the Arizona Supreme Court or other rules incorporated into those rules (See Rule 47) and case law. Clarity and direction for this process are critical. The interest of the public and the profession would be served by amending this rule expeditiously.

II. THE AMENDMENT IS BASED UPON A REVIEW BY THE RULES SUBCOMMITTEE OF THE ATTORNEY REGULATION COMMITTEE.

When the original petition was filed, it was requested of this Court that it refer the Petition to ARC for its debate and analysis. That was occurred. ARC referred the Petition to its Rule subcommittee which drafted the proposed amendment which is attached as Exhibit A. As anticipated the discussion of the varied membership of the subcommittee was generally approved by ARC and it is anticipated that a favorable formal comment will be obtained from ARC. Due to time constrains those comments are not yet available. However, ARC will comment formally on these proposed changes.

III. SUMMARY OF THE PROPOSED AMENDMENT

The amended petition better defines the conduct that give rise to a request for interim suspension. It requires that such a petition would be filed with the disciplinary clerk rather than this Court. The procedure for interim suspension is streamlined for suspension based upon a conviction of a crime. Such suspension would be considered and ruled upon by the presiding disciplinary judge, subject to review.

An order to appear procedure is proposed that more closely follows the process outlined in the Arizona Rules of Civil Procedure. The requirement of notice and service of the motion are both better defined. The extraordinary instances when orders might be required without notice mirrors the civil rule

requirements. The amendment requires that hearings on these important petitions be mandatory regardless of whether the respondent attorney answers or appears. The procedural process of the hearing is better clarified. Interim probation as an alternative to interim suspension is outlined and the requirement for compliance with those terms is better detailed. Findings of fact and conclusions of law are mandated regardless of whether relief is granted to better aid this Court's review. Review by the Court, including the time frames for requesting that appellate reviews are explained in detail.

IV. REQUESTED TIME LINE FOR COMMENT AND REFERRAL TO A.R.C.

It is requested that initial comments be received by June 11, 2012 and final reply to those comments by July 9, 2012.

V. CONCLUSION

The approval of this procedural amendment offers clarity, greater consistency, and procedural guidance to the temporary suspension process. It is offered with the intent to better protect the public we serve, the profession, and the respondent attorneys who appear before the PDJ. This proposed amendment will better assure all involved of an effective, uniform and timely resolution of temporary suspension requests.

DATED this 18th day of May 2012.

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona

ORIGINAL filed with the Clerk
of the Arizona Supreme Court
this 18th day of May 2012:

APPENDIX A

Rule 61. Interim Suspension ~~by the Court~~

(a) Grounds for Interim Suspension. An interim suspension may be entered upon a showing of probable cause that a lawyer ~~appears to be misappropriating funds, engaging in conduct the continuation of which will result in substantial harm, loss or damage to the public, the legal profession or the administration of justice,~~ has been convicted of any designated felony or misdemeanor involving a serious crime ~~or a felony~~, as defined in Rule 54(g), or is ~~subject to another ground stated in these rules,~~ engaging in conduct that has caused or is likely to cause immediate and substantial harm to clients, the public, or the administration of justice.

(b) Period of Interim Suspension. A lawyer may be suspended from the practice of law for an indeterminate interim period ~~not in excess of five (5) years~~ pending further order of the presiding disciplinary judge or ~~this~~ the court.

(c) Procedure.

1. ~~Upon Conviction of a Crime.~~ Upon conviction of a lawyer of any crime, the clerk of the court in which the conviction is entered shall, within twenty (20) days thereafter, transmit to ~~this court~~ the disciplinary clerk and to the state bar a certified copy of the judgment of conviction, and the convicted lawyer shall, within twenty (20) days after entry of judgment of conviction of a misdemeanor involving a serious crime or of any felony, provide the following information to chief bar counsel: (a) name, bar number and address of record with the state bar, and a current address if different from the address of record; (b) the name of the court in which the judgment of conviction was entered; (c) the case or file number in which the judgment of conviction was entered; and (d) the date the judgment of conviction was entered.

A. *Felony Conviction:* A lawyer shall be suspended after the disciplinary clerk's court's receipt of proof of the lawyer's conviction of a designated felony under either state or federal law, regardless of the pendency of post conviction motions or an appeal, unless within ten (10) days of the clerk's receipt of proof of the conviction the member files with the presiding disciplinary judge court a verified motion showing good cause why the suspension should not be entered. The presiding disciplinary judge court may permit the lawyer to present oral argument in support of the lawyer's motion and shall promptly grant or deny it. If the motion is denied, the lawyer shall be suspended as of the date the motion is denied. If the motion is granted, the lawyer shall not be suspended pending completion of a disciplinary proceeding based on such conviction.

B. *Serious Misdemeanor Conviction:* A lawyer convicted of a serious crime other than a felony may be suspended, upon motion of the state bar, pending final disposition of a disciplinary proceeding predicated upon the conviction. Within ten (10) days of the state bar filing a motion, respondent may file with ~~the~~ presiding disciplinary judge court a verified response showing good cause why respondent should not be suspended. The presiding disciplinary judge court may permit respondent to present oral argument in support of the respondent's response and shall promptly grant or deny the motion. If the motion is granted, the lawyer shall be suspended as of the date of such order.

C. *Reinstatement.* If a lawyer suspended solely under the provisions of sections (A) or (B) demonstrates that the underlying conviction has been reversed or vacated, the order for interim suspension shall be vacated and the lawyer placed on active status. The vacating of the interim suspension will not automatically terminate any proceeding then pending against the lawyer, the disposition of which shall be determined on the basis of the available evidence.

2. *All Other Grounds for Interim Suspension.* The state bar may file a motion for interim suspension with the presiding disciplinary judge. The motion shall be accompanied by verification or separate affidavit upon personal knowledge stating sufficient facts to support the requested suspension, and shall include a copy of any related hearing panel report.

~~(A) Temporary Restraining Order. Upon verified application in or with the motion, or upon its own motion, the presiding disciplinary judge may issue an order in the nature of a temporary restraining order, with such notice as the judge may prescribe, imposing temporary conditions of probation on the lawyer, or temporarily suspending the lawyer, or both. Any order issued under this provision shall become effective as ordered by the presiding disciplinary judge and remain in effect unless modified or dissolved as necessary after a hearing as prescribed in subpart D.~~

~~(B)(A) Service of Motion on Respondent. Upon filing of the motion, the presiding disciplinary judge shall issue an order requiring [the state bar shall to serve the motion, within five seven (57) days, the motion and the presiding disciplinary judge's order upon respondent, as appropriate under Rule 47(c), including service by certified mail/delivery restricted to addressee in addition to regular first class mail, sent to the last address provided by membership records department pursuant to Rule 32(c)(3).~~

~~(C)(B) Response. Respondent shall file a response to the motion within ten (10) days of service of the motion. After receiving the response or after the time for filing a response has passed, the presiding disciplinary judge shall promptly rule on the motion or conduct an evidentiary hearing unless the parties have stipulated to the entry of an order of interim suspension.~~

~~(E)(C) Hearing. A hearing if an evidentiary hearing is ordered, it shall be held within ten (10) days of the response or after the time for filing a response has passed. order. The State Bar shall have the burden of proof to establish by probable cause the basis for the requested relief. The presiding disciplinary judge is not bound by common law or rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice. Respondent shall have the right to present evidence and cross-examine witnesses and may be represented by counsel. In the event the presiding disciplinary judge determines that respondent's rights will not be protected without representation, and respondent is unable to retain counsel, the presiding disciplinary judge may appoint counsel to represent respondent. Within five (5) days after the matter is deemed submitted or a hearing is held, the presiding disciplinary judge shall issue and file a report in this court containing findings of fact, conclusions of law and an order. The presiding disciplinary judge may order interim probation terms in lieu of or in addition to interim suspension. recommendation. After receiving the presiding disciplinary judge's report, the court shall consider the matter and issue an order or decision forthwith.~~

~~(D) Status Review. After the entry of an order of interim suspension or interim probation, the State Bar must expeditiously proceed with any related disciplinary investigation and proceeding. The presiding disciplinary judge may order any necessary measures including but not limited to setting deadlines and holding regular status reviews to ensure the State Bar's compliance with this provision.~~

~~(E) Interim Probation Compliance. The State Bar shall be responsible for monitoring the respondent's compliance with any order of interim probation entered under these rules. In the event of a material violation, the State Bar may file with the presiding disciplinary judge a motion supported by affidavit setting forth sufficient grounds for a finding of a material violation. The State Bar shall have the burden of proving by a preponderance of the evidence a material violation of the terms of probation. The presiding disciplinary judge may hold a hearing promptly to determine whether a violation occurred, and whether the interim probation should be reaffirmed, modified, or revoked, or whether interim suspension should be imposed.~~

~~(d) Effect of Order. An order of interim suspension or interim probation decision on the motion shall be effective when entered unless otherwise specified by the court, and shall continue in force until final disposition of all pending proceedings against the lawyer, unless vacated or modified. The disciplinary clerk of the court shall serve a copy of any resulting order entered in this court on the disciplinary clerk, the respondent, and the state bar. An order of interim suspension shall preclude the~~

lawyer from accepting any new cases but shall not preclude him or her from continuing to represent existing clients until the effective date of the order. Any fees tendered to the lawyer after the order issues but prior to its effective date shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the court. Any order that restricts a lawyer maintaining a trust account shall when served on any bank maintaining an account against which the lawyer may make withdrawals, serve as an injunction to prevent the bank from making further payment from the account or accounts on any obligation except in accordance with restrictions imposed by the court. Unless otherwise specified by the presiding disciplinary judge court, the provisions of Rule 72 relating to suspended lawyers shall apply.

(e) Review by the Court. Either party may seek review of the presiding disciplinary judge's decision.

1. **Appeal.** Within five (5) days after service of a report and order of the presiding disciplinary judge, respondent or the state bar may appeal by filing an opening brief with the disciplinary clerk. An answering brief may be filed with the disciplinary clerk no later than five (5) days after service of the opening brief. Briefs shall conform to the requirements of Rule 6(c), Ariz. R. Civ. App. P. Briefs shall not exceed ten (10) pages and shall not be bound. The content of the briefs shall conform to Rule 13, Ariz. R. Civ. App. P. After the time for filing the appellate briefs has expired, the disciplinary clerk shall transmit the entire record, including any transcripts and the parties' briefs, to the clerk of the court.
2. **Stay Pending Appeal.** Within five (5) days after service of a report and order of the presiding disciplinary judge, a respondent may seek a stay of the decision. The state bar may respond within five (5) days after service of the application for stay. The application for stay shall not be granted unless good cause is shown.
3. **Standard of Review.** The court shall review questions of law de novo. In reviewing findings of fact, the court shall apply a clearly erroneous standard.
4. **Form of Decision.** The court may resolve any matter before it by opinion, memorandum decision, or order, as the court may determine in its discretion.

[Comment: An undesignated class six felony is not considered a felony conviction for purposes of this rule. *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1994).]