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CLERK SUPREME COURT

Hon. Lawrence F. Winthrop

Chair, Arizona Supreme Court Attorney Regulation Advisory Committee

602-543-1430

lwinthrop@appeals.az.gov

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IN THE SUPREME COURT  
STATE OF ARIZONA

In the Matter of: )

Supreme Court No. R-\_\_ -\_\_

PETITION TO AMEND )

RULES 48(e), 58(d), 63(b), )

64(f)(1) and 65, )

Rules of the Supreme Court )

**Petition to Amend Rules 48(e), 58(d)  
63(b), 64(f)(1) and 65, Rules of the  
Supreme Court**

\_\_\_\_\_ )

Pursuant to Rule 28, Rules of the Supreme Court, Hon. Lawrence F. Winthrop respectfully petitions this Court, on behalf of the Attorney Regulation Advisory Committee, to adopt amendments to Rule 48(e), 58(d), 63(b), 64(f)(1) and 65, Rules of the Supreme Court, governing aspects of the attorney discipline, disability and reinstatement as proposed below.

**I. Background and Purpose of the Proposed Rule Amendments**

The Attorney Regulation Advisory Committee is charged with reviewing all aspects of the attorney regulation system including disability and reinstatement. The Committee proposes changes that will expedite the discipline process, clarify the disability process, and change the process of reinstatements from recommendations

by a hearing panel to decisions subject to appeal.

There is presently no authorization for the presiding disciplinary judge to issue a stay, other than a pre-complaint matter. There are multiple instances in which a stay may be warranted whether in attorney discipline, reinstatement or disability. The power of stay of a proceeding is typically inherent in a judicial officer. However, the powers of the presiding disciplinary judge are expressly contained within the Supreme Court Rules. For this reason a modification of Rule 48 is warranted to expressly grant that authority to the presiding disciplinary judge.

Unlike other litigation, a responding attorney in a discipline case has significant advance notice of the charges and an ability to participate in the investigation. This includes the opportunity to submit information to the attorney discipline probable cause committee. As a result, the process after a complaint is filed is expedited and under Rule 58(j) the hearing must be completed within one hundred fifty (150) days of the filing of the complaint.

Current Rule 58(d) extends the time for a default to be effective beyond the time frame of the civil rules where typically a public member is as informed of the litigation prior to the filing of suit. A respondent, desirous of delaying the proceedings, may effectively use as a delaying tactic the method of not filing an answer but to “otherwise defend.” Both the additional time caused by the language of Rule 48(d), which adds the unique requirement of time beginning to run after

service of the entry of default, instead of from the filing of that default and the ability to “otherwise defend” is an effective delaying tactic.

The filing of initial disclosure statements is predicated under Rule 58(e) on the filing of the answer. The Committee finds the significant potential for unwarranted delay warrants the proposed changes.

Rule 63 governs transfers to disability inactive status. Under Rule 63(a), “consent orders shall be encouraged.” However, there is no express authorization within the rule for such a consent order. The proposed modification mirrors the method of consent agreements under Supreme Court Rule 57.

The modifications proposed to Rule 64 and Rule 65 are significant. Presently an attorney who has been administratively suspended for more than two years must seek formal reinstatement under Rule 65. The proposed modification to Rule 64 enables the reinstatement of such a prior member provided the State Bar expressly finds there is no need for rehabilitation and there appear to be no discipline or disability issues. In such instance the applicant would only be required to prove compliance with all rules regarding fitness to practice and competence.

The changes to the attorney regulation system have been in place for five years. The Committee believes these system-wide changes have been highly effective and efficient. The proposed modifications to Rule 65 would make the hearing panel orders regarding reinstatement final, subject to appeal to the Supreme

Court. This would reduce the time for reinstatement for those attorneys for whom the hearing panel recommends reinstatement and relieve the court of such a review. There appears to be no instance in which the Court has reversed the recommendation for reinstatement by a hearing panel, although there have been rare instances of modification of those recommendations.

## **II. Contents of the Proposed Rule Amendment**

### **Rule 48. Rules of Construction**

\* \* \*

**(e) Stay and Related pending litigation.** The presiding disciplinary judge may stay a matter for good cause shown. However, the processing of a discipline matter shall not be delayed because of substantial similarity to the material allegations of pending criminal or civil litigation, unless the presiding disciplinary judge, in the exercise of discretion, authorizes a stay for good cause shown.

### **Rule 58. Formal Proceedings**

\* \* \*

**(d) Default Procedure; Aggravation/Mitigation Hearing.** If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, enter that party's default and serve a copy of the notice of default upon respondent and bar counsel. A default entered by the disciplinary clerk shall be effective ten (10) days after ~~notice of~~ service entry of the ~~notice of~~ default, upon which the allegations in the complaint shall be deemed admitted. A default shall not become effective if the respondent files an answer ~~or otherwise defends~~ within ten (10) days from the service entry of the ~~notice of~~ default. Entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c), Ariz. R. Civ. P. The presiding disciplinary judge shall schedule an aggravation/mitigation hearing before the hearing panel. Not less than fifteen (15) days before the date set for the aggravation/mitigation hearing, the presiding disciplinary judge shall serve notice of the hearing on the parties. The hearing shall be held not earlier

than fifteen (15) days nor later than thirty (30) days after the entry of default. The hearing panel shall prepare a report as provided in paragraph (k) of this rule.

### **Rule 63. Transfer to Disability Inactive Status**

\* \* \*

#### **(b) Method of Transfer**

5. By consent agreement. A consent for transfer to disability inactive status shall be signed by respondent, respondent's counsel, if any, and bar counsel. An agreement shall include the following:

A. General language. Agreements must include the following language, as applicable:

(i) a statement ~~that~~ describing the nature and extent of the respondent's physical or mental condition that adversely affects ~~the lawyer's~~ his or her ability to practice law warranting transfer to disability inactive status ~~and that the Order of transfer may include conditions of conduct in the nature of probation;~~

(ii) a statement that the order of transfer to disability inactive status may include conditions of conduct in the nature of probation;

~~(ii)~~ (iii) a statement that the respondent's consent to be transferred to disability inactive status is submitted freely and voluntarily and not as a result of coercion or intimidation;

~~(iii)~~ (iv) a statement that the respondent is represented by counsel, ~~or~~ has chosen not to seek the assistance of counsel, or is unable to secure representation by counsel, and voluntarily waives the right to an adjudicatory hearing on the transfer, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the transfer is approved;

~~(iv)~~ (v) a statement that respondent acknowledges the duty to comply with all rules pertaining to notification of clients, return of property and other rules

pertaining to suspension, including reinstatement;

~~(v)~~ (vi) a statement that outlines the possible consequences of any violation of the terms and conditions of probation conduct that are being imposed in the nature of probation or any other provision of the agreement;

~~(vi)~~ (vii) a statement that the agreement has been approved as to form and content by the chief bar counsel or chief bar counsel's designee; and

~~(vii)~~ (viii) a statement that any complainant has been informed of the consent for transfer to disability inactive status and that a copy of the complainant's objection, if any, has been provided to the presiding disciplinary judge.

B. The parties may attach to the consent agreement copies of true and accurate medical records or a report from a physician or psychological professional, if appropriate.

C. At the discretion of the presiding disciplinary judge, or upon request of either party, a hearing may be held before the presiding disciplinary judge for the purpose of addressing a consent agreement to transfer to disability inactive status.

D. Appeal. The parties may not appeal an order transferring a lawyer to disability inactive status that was based upon the submission of a consent agreement.

## **Rule 64. Reinstatement; Eligibility**

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### **(f) Reinstatement After Summary Suspension by the Board of Governors; Resignation in Lieu of Reinstatement.**

#### *1. Reinstatement After Summary Suspension.*

B. After Two (2) Years. If an application is not filed within two years from the effective date of suspension, the reinstatement procedure set forth in Rule 65 of these rules shall apply. In the event the State Bar finds there is no need for rehabilitation and there appear to be no discipline or disability issues, the applicant, under Rule 65(b)(2) need only prove compliance with all rules,

fitness to practice and competence. Notwithstanding this provision, a suspended member may apply for reinstatement under the provisions of paragraph (f)(1)(A) as set forth above by submitting proof that the suspended member:

### **Rule 65. Reinstatement; Application and Proceedings**

\* \* \*

#### **(a) Application for Reinstatement. [No change].**

~~4. *Successive Applications.* No application for reinstatement shall be filed within one (1) year following the denial dismissal of a request for reinstatement.~~

~~54. *Withdrawal of Application.* An applicant may withdraw an application any time before the filing of the hearing panel's report decision.~~

45. *Successive Applications.* No application for reinstatement shall be filed within one (1) year following the ~~denial~~ dismissal of an application request for reinstatement. This prohibition does not apply to an applicant who voluntarily withdraws an application for reinstatement prior to the filing of the hearing panel's decision.

#### **(b) Reinstatement Proceedings.**

3. *Hearing Panel's Report Decision.* Within thirty (30) days after completion of the formal hearing proceedings or receipt of the certified transcript, whichever is later, the hearing panel shall prepare and file a report with the ~~court~~ disciplinary clerk a written decision containing findings of fact, conclusions of law and a recommendation concerning an order regarding reinstatement, together with the record of the proceedings. The disciplinary clerk shall serve a copy of the report on the parties. The decision shall be signed by each member of the hearing panel. Two members are required to make a decision. A member of the hearing panel who dissents shall also sign the decision and indicate the basis of the dissent in the decision. The disciplinary clerk shall serve a copy of the decision on applicant and on bar counsel of record. The hearing panel shall notify the parties when the decision will be filed outside the time limits of this rule and shall state the reason for the delay. The decision of the hearing panel is final, subject to the parties' appeal rights as set forth in Rule 59.

~~4. *Court Review.* The court shall promptly review the report of the hearing~~

~~panel. The court may request additional briefing by the parties and may calendar the matter for argument before the court. If the court finds the lawyer failed to establish qualification for reinstatement, the application shall be dismissed. If the court finds the applicant is qualified to practice law, the court shall reinstate the lawyer, subject to any conditions deemed necessary.~~

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RESPECTFULLY SUBMITTED this 8 day of January, 2016.

By Lawrence F. Winthrop  
Hon. Lawrence F. Winthrop  
Chair, Attorney Regulation Advisory  
Committee