

SUPREME COURT OF ARIZONA

In the Matter of a Member of the) Arizona Supreme Court
State Bar of Arizona) No. SB-16-0050-AP
)
W. MICHAEL WALZ,) Office of the Presiding
Attorney No. 11345) Disciplinary Judge
) No. PDJ20169039
Respondent.)
) **FILED 4/20/2017**
_____)

DECISION ORDER

Pursuant to Rule 59, Rules of the Arizona Supreme Court, Respondent W. Michael Walz appealed the hearing panel's imposition of a reprimand and two-year term of probation. Respondent argues that the panel erred in *sua sponte* amending the complaint to add new charges after the hearing had concluded. The Court has considered the parties' briefs and the record in this matter. We review the panel's decision to amend the complaint for an abuse of discretion. The Court concludes that the panel erred in amending the complaint and finding new, uncharged ethical violations.

In pre-hearing proceedings, after an evidentiary hearing, the presiding disciplinary judge (PDJ) imposed sanctions on Respondent for his failure to prepare and serve an initial disclosure statement and to participate in preparing a joint pre-hearing statement. See Rule 58(e), (i). The State Bar did not move to amend the complaint to add charges relating to that conduct. Following the subsequent hearing on the merits, the panel found that the State Bar failed to carry its burden of proving the allegations in its complaint. The

panel, however, found that Respondent's prior non-compliance with pre-hearing procedures violated Rule 54(c) and (d). Citing Rule 47(b)(1), the panel amended the complaint to include these new charges and imposed discipline for those violations. Decision and Order Imposing Sanctions, pp. 2, 11-12. Rule 47(b)(1), however, does not authorize a panel to amend a complaint *sua sponte*. The panel therefore erred in doing so.

Rule 47 covers general procedural matters in discipline cases. Subsection (b)(1) deals with amendment of pleadings:

(b) Amendment of Pleadings.

1. *To Conform To Evidence*. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, but failure so to amend does not affect the result of the hearing on these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the hearing panel may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the hearing panel that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The hearing panel may grant a continuance to enable the objecting party to meet such evidence.

The panel found that the evidentiary hearing concerning Respondent's non-compliance with pre-hearing procedural requirements involved "issues not raised by the pleadings" that nonetheless should be treated "as if they had been raised in the pleadings." Decision and Order Imposing Sanctions, p. 2. But Respondent neither expressly

nor impliedly consented to that. And the second sentence of Rule 47(b)(1) provides that such an amendment to the pleadings may be made "upon motion of any party." (Emphasis added.) Thus, the rule anticipates that it is up to the parties to propose changes to the pleadings. The rule does not permit the panel or PDJ to initiate the amendment of the pleadings.

Similarly, Rule 47(b)(2) relates specifically to pre-hearing amendments and permits bar counsel to amend the complaint. It too does not permit the panel or PDJ to initiate an amendment of the complaint. Reserving the right to seek amendment of the pleadings to the parties is appropriate because the hearing panel acts as the objective, independent trier of fact and should not be assuming the role of prosecutor and deciding what charges to bring. Rule 47(b) does not authorize the panel to amend the pleadings *sua sponte*.

In addition, amending a complaint to add new charges after a hearing has concluded raises due process concerns. A lawyer has the right to procedural due process in attorney disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Due process in such proceedings "[i]ncludes fair notice of the charges made and an opportunity for the accused to provide an explanation and present a defense." *In re Peasley*, 208 Ariz. 27, 34 ¶ 26 (2004) (alterations omitted) (citing *In re Walker*, 200 Ariz. 155, 158 ¶ 13 (2001)). A respondent may not be charged with one ethical violation and then, without opportunity for a hearing or presentation of evidence, be

disciplined for another. *In re Owens*, 182 Ariz. 121, 124 (1995); *In re Meyers*, 164 Ariz. 558, 561-62 (1990). In Respondent's proceeding, he had no notice that the panel planned to amend the complaint to add new discipline charges and had no opportunity to respond. Sanctioning an attorney under these circumstances violates due process.

The panel and bar counsel attempt to distinguish this case from *In re Owens* and *In re Meyers* by arguing that the procedural rules are different now and Respondent admitted his non-compliance at the earlier evidentiary hearing. As noted above, however, the current rules do not authorize the panel to amend the pleadings *sua sponte*. Further, the panel's analysis does not address the due process problem. The first time Respondent learned about the amendment was when the panel issued its Decision and Order Imposing Sanctions. Respondent was not on notice that the complaint would be amended to add charges and had no opportunity to respond to the amended charges. Respondent may have accepted the pre-hearing sanctions for his non-compliance with procedural requirements; but the additional, amended charges (regarding the same procedural omissions for which the PDJ had previously imposed sanctions) raised the prospect of new sanctions, and Respondent was improperly deprived of his right to challenge any additional sanctions. Therefore,

IT IS ORDERED granting Respondent's appeal.

IT IS FURTHER ORDERED reversing the decision of the panel

finding additional violations of Rule 54(c) and (d) and vacating the order imposing a reprimand and probation.

Chief Justice Bales did not participate in the determination of this matter.

DATED this 20th day of April, 2017.

_____/s/_____
JOHN PELANDER
Vice Chief Justice

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