



# Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING  
1501 WEST WASHINGTON STREET  
PHOENIX, ARIZONA 85007-3231

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NOËL K. DESSAINT  
CLERK OF THE COURT

KATHLEEN E. KEMPLEY  
CHIEF DEPUTY CLERK

September 27, 2005

**RE: RULE 63, ARIZONA RULES OF THE SUPREME COURT**  
Arizona Supreme Court No. R-05-0005

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 22, 2005, in regard to the above-referenced cause:

**ORDERED: Petition to Amend Rule 63, Arizona Rules of the Supreme Court = ADOPTED as modified, effective December 1, 2005.**

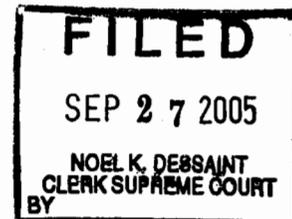
Noel K Dessaint, Clerk

TO:

Cynthia L Choate, James R Farley & Associates  
Robert B Van Wyck, Chief Counsel, State Bar of Arizona  
jr

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

Supreme Court No. R-05-0005

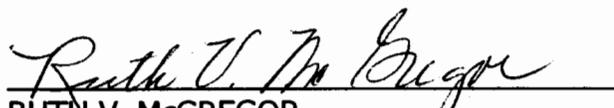


**ORDER AMENDING  
RULE 63, RULES OF THE SUPREME COURT**

IT IS ORDERED that Rule 63, Rules of the Supreme Court, be amended in accordance with the attachment hereto,\* effective as of December 1, 2005.

DATED in the City of Phoenix, Arizona at the Arizona Courts Building, this 27<sup>th</sup> day of September, 2005.

For the Court:

  
\_\_\_\_\_  
RUTH V. MCGREGOR  
Chief Justice

\* Changes or additions in text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

## RULES OF THE SUPREME COURT

\* \* \*

### Rule 63. Transfer to Disability Inactive Status

(a) **Purpose.** A lawyer whose physical or mental condition adversely affects the lawyer's ability to practice law shall be investigated, and where warranted, shall be the subject of formal proceedings to determine whether the lawyer shall be transferred to disability inactive status. Transfer to disability inactive status is not a form of discipline but is designed to ensure the protection of the public and rehabilitation of the lawyer. Orders of transfer may include conditions of conduct in the nature of probation, and consent orders shall be encouraged.

#### (b) Method of Transfer

~~(b)~~1. *Judicial Determinations of Incapacity.* If a lawyer has been judicially declared incompetent, incompetent to stand trial, or is voluntarily or involuntarily committed on the grounds of incompetency or other disability or incapacity in a court proceeding, this court, upon motion of bar counsel and proper proof of the fact, shall enter an order immediately transferring the lawyer to disability inactive status for an indefinite period until further order of this court. A copy of the order shall be personally served upon the lawyer, the lawyer's guardian and conservator, and the director of the institution to which the lawyer may have been committed.

~~(e)~~2. *Interim Order of Incapacity.* When it appears to the state bar, a hearing officer, or the commission that a lawyer may be incapacitated to the extent that the lawyer may be causing harm to the public, the legal profession or the administration of justice by reason of a mental or physical condition or because of addiction to drugs or intoxicants, a motion, setting forth facts to support a prima facie finding of incapacity and accompanied by verification or affidavit, may be filed with the disciplinary clerk, for an order temporarily transferring the lawyer to disability inactive status pending a hearing to determine incapacity as provided in this rule. The motion for an interim order of incapacity may be filed with the petition requesting transfer to disability inactive status. A response may be filed within five (5) days of service of the motion. The motion or response, if one is filed, will be personally served upon the lawyer alleged to be incapacitated and a notice of service will be filed with the disciplinary clerk. The chair, or in the absence of the chair, the vice chair of the commission may issue an order in the nature of a temporary restraining order and impose such conditions as necessary to protect the public. The interim order of incapacity shall be personally served on the lawyer alleged to be incapacitated and shall remain in effect until the hearing to determine incapacity is held. Within ten (10) days of being served with the interim order of incapacity, either party may file with the disciplinary clerk a notice of intent to file a petition for review by the court, pursuant to Rule 59.

3. *Finding of Incapacity to Discharge Duty.* If it is alleged by a lawyer or otherwise appears in the course of a discipline proceeding that the lawyer is incapacitated or impaired by reason of a mental or physical condition or because of addiction to drugs or intoxicants, and the lawyer lacks the capacity to adequately discharge the lawyer's duty to clients, the bar, the courts or the public,

a petition may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative or upon a recommendation of a hearing officer, or the lawyer alleged to be incapacitated.

4. *Finding of Incompetency to Assist in Defense.* If it is alleged by a lawyer or otherwise appears in the course of a discipline or disability proceeding that the lawyer is unable to understand the proceedings or assist in the lawyer's defense as a result of a mental or physical condition, the commission, upon motion of bar counsel or the recommendation of a hearing officer, shall immediately transfer the lawyer to disability inactive status on a temporary basis pending a determination of competency, and all pending discipline proceedings shall be temporarily stayed. When a lawyer files a petition requesting transfer to disability inactive status alleging incompetence to assist in the lawyer's defense, the petition shall be processed according to paragraph (c) of this rule.

**(d)(c) Proceedings to Determine Incapacity or Competence.**

1. *Petition.* A petition requesting transfer to disability inactive status may be filed with the disciplinary clerk by bar counsel, on bar counsel's own initiative or upon a recommendation of a hearing officer, or the lawyer alleged to be incapacitated. The petition shall be accompanied by affidavits, reports, or other documentation to support a prima facie finding of incapacity.

2. *Service.* Within seven (7) days of the filing of the petition, petitioner shall personally serve the petition and accompanying documentation on the parties and will provide notice of service to the disciplinary clerk. A response may be filed within ten (10) days of service of the petition. The disciplinary clerk shall assign the matter to a hearing officer and a hearing will be held within ~~thirty (30)~~ ninety (90) days of the filing of the ~~petition response or the time for filing the response.~~ The hearing officer may continue the hearing if additional time is needed to obtain necessary evaluations and reports and may request that the commission enter an interim order of incapacity, as set forth in subsection (b)(2) of this rule, pending the hearing upon stipulation of the parties.

3. *Appointment of Counsel.* The hearing officer may appoint counsel to represent the lawyer alleged to be incapacitated if the lawyer is without adequate representation and the hearing officer determines there is prima facie evidence of incapacity. The hearing officer shall appoint counsel to represent a lawyer who is without representation in proceedings to determine competency.

4. *Hearing.*

A. *Incapacity to Discharge Duty.* The hearing officer may take or direct whatever action it ~~deems~~ deems necessary or proper to determine whether the lawyer is incapacitated, including directing examination of the lawyer by qualified experts designated by the hearing officer at the expense of the state bar. The petitioner shall have the burden of proving by clear and convincing evidence, which shall include a relevant and recent medical, psychiatric or psychological evaluation, that, as a result of a mental or physical condition, the lawyer lacks the capacity to adequately discharge the

lawyer's duty to clients, the bar, the courts or the public. ~~The expense for the evaluation shall be paid by the petitioner, unless otherwise ordered by the hearing officer.~~

B. Competency to Assist in Defense. The hearing officer may take or direct whatever action deemed necessary or proper to determine whether the lawyer is competent, including directing examination of the lawyer by qualified experts. Upon the filing of a disability petition, the state bar may also direct a lawyer to submit to an independent medical or mental evaluation by a qualified expert chosen by the state bar. The mere presence of a mental illness, defect, or disability or physical incapacity is not grounds for finding a lawyer incompetent. The only issue to be determined is whether the lawyer is able to assist in the lawyer's own defense. To assist in the lawyer's own defense, the lawyer needs to understand the charges, be able to communicate with the lawyer's attorney about the charges and any defense to those charges, and be able to testify about relevant conduct in the disciplinary proceeding. The expense for the evaluation shall be paid by the petitioner, unless otherwise ordered by the hearing officer.

5. Report of Hearing Officer. Within thirty (30) days ~~of after~~ the ~~conclusion of the hearing~~ filing of the hearing transcript or stipulation, the hearing officer shall prepare and file with the disciplinary clerk, ~~and shall serve the Bar and cause the lawyer alleged to be incapacitated to be personally served a copy of a written report containing findings of fact and a recommendation regarding concerning transfer to disability inactive status, together with the record of the proceedings, which will be forwarded to the commission for review based on a determination of incapacity to discharge duty or competency to assist in defense.~~ The hearing officer shall also serve a copy of the report on the parties. Upon a recommendation of transfer to disability inactive status, the lawyer shall be provisionally transferred pending commission review.

6. Appeal. Either party may appeal the recommendations of the hearing officer within ten (10) days after service of the hearing officer's report by filing and serving a notice of appeal and request for oral argument, if desired, with the disciplinary clerk. Failure of a party to appeal within the time provided shall constitute consent to the recommendation of the hearing officer.

7. Commission Review. A transfer to disability inactive status shall only be imposed by order of the commission based upon its review of the hearing officer's report and the record, or by order of the court upon consideration of a party's petition for review pursuant to Rule 59 ~~based upon the recommendation of the commission.~~ The commission will prepare and file with the disciplinary clerk, and personally serve upon the ~~respondent parties, a written report and an order of transfer to disability inactive status and a written report,~~ where appropriate. If a party does not seek court review of the order of transfer by the commission ~~is not appealed,~~ the commission shall notify the court of same by memorandum, and the commission's decision shall be final.

78. Court Review. Within ten (10) days after service of the commission's report, the parties may file with the disciplinary clerk a notice of intent to file a petition for review, as set forth in Rule 59. If, upon review by the court of the commission's order, ~~recommendation by the commission~~ the court concludes that the lawyer is incapacitated from continuing to practice law,

or the lawyer is not competent to assist in the lawyer's own defense, the court shall enter an order transferring the lawyer to disability inactive status for an indefinite period and until further order of the court.

**(e)(d) Status of Pending Disciplinary Proceedings.**

1. Incapacity to Discharge Duty. Upon an order transferring a lawyer to disability inactive status all pending discipline proceedings against the lawyer shall be held in abeyance, except that An order transferring a lawyer to disability inactive status based on a finding that a lawyer is unable to discharge his or her duties to clients, the bar, the courts or the public does not affect any pending disciplinary proceedings, which shall continue, or if previously stayed, shall resume. Upon a showing of good cause, however, the commission or the court may order that all pending discipline proceedings be stayed. If pending discipline cases are stayed, any investigation may continue and testimony may be taken and other evidence preserved pending further proceedings. If information comes to the attention of bar counsel that good cause no longer supports the stay, the stay may be reviewed according to the procedure set forth for an order to show cause in paragraph (d)(3) of this rule.

(f)2. Competency to Assist in Defense. If the commission or this court determines a lawyer is not competent to assist in the lawyer's own defense, discipline proceedings shall be stayed, and the lawyer placed or retained on disability inactive status until an application for transfer to active status is filed and subsequently granted. If, after the filing of a petition for order to show cause pursuant to paragraph (d)(3) of this rule, a decision that the lawyer is competent to assist in the lawyer's own defense becomes final, the temporary order of transfer to disability status shall be vacated by the commission or the court and the discipline proceedings shall resume. If it is alleged by a respondent or otherwise appears in the course of a discipline or disability proceeding that the respondent is unable to understand the proceedings or assist in the respondent's defense as a result of a mental or physical condition, the commission, upon motion of bar counsel or the recommendation of a hearing officer shall immediately transfer the lawyer to disability inactive status pending a determination of competency.

1. Procedure. Proceedings to determine competency shall be conducted in the same manner as proceedings to determine incapacity, as set forth in subsection (d)(4) of this rule, except that:

A. The mere presence of a mental illness, defect, or disability or physical incapacity, is not grounds for finding a lawyer incompetent. The only issue to be determined is whether the presence of a mental or physical condition renders the lawyer unable to understand the proceedings or assist in the lawyer's own defense.

B. The hearing officer shall appoint counsel to represent a lawyer who is without representation.

2. Findings. If the commission or this court determines a lawyer is not competent to assist in the lawyer's own defense, discipline proceedings shall be stayed, and the lawyer placed or retained on disability inactive status until a motion for transfer to active status is filed and subsequently granted. If the commission or the court determines the lawyer is competent to assist

~~in the lawyer's own defense, the order of transfer to disability status shall be vacated by the commission or the court and the discipline proceedings shall resume.~~

3. Order to Show Cause.

A. Petition. In the case of a lawyer who has been transferred to disability inactive status, if information comes to the attention of the state bar indicating that good cause no longer exists to maintain a stay imposed pursuant to paragraph (d)(1) of this rule, or that the lawyer appears no longer to be incompetent and a stay imposed pursuant to paragraph (d)(2) of this rule is no longer appropriate, the state bar shall file with the disciplinary clerk a petition for order to show cause.

B. Hearing. The disciplinary clerk shall assign the matter to a hearing officer, who shall issue an order requiring the lawyer to show cause why an existing stay of pending discipline proceedings imposed upon a showing of good cause or upon a finding of incompetency should not be lifted. The only issue to be addressed at the hearing is whether such a stay should be lifted.

C. Report of Hearing Officer. The hearing officer shall, as soon as practicable, prepare and file with the disciplinary clerk a report containing findings of fact and a recommendation concerning whether the stay should be lifted. The hearing officer shall also serve a copy of the report on the parties. Upon a finding that an existing stay is no longer supported by good cause, or upon a finding that a lawyer is no longer incompetent, any stayed discipline proceedings shall resume, subject to commission review.

D. Appeal and Review. Appeal from the hearing officer's recommendation and review by the commission and the court shall be as set forth in paragraphs (c)(6), (c)(7), and (c)(8) of this rule. If the commission or the court accepts the hearing officer's finding that an existing stay is no longer supported by good cause or that a lawyer is no longer incompetent, any stayed discipline proceedings shall resume.

~~(g)(e)~~ **Confidentiality of Disability Proceedings.** Proceedings and records relating to transfer to or from disability inactive status, including determinations of competency, are confidential, except that orders transferring a lawyer to or from disability inactive status are public.

~~(h)(f)~~ **Assessment of Costs.** Costs and expenses of disability proceedings shall be determined, assessed, and enforced, at the discretion of the commission or the court, as provided for in ~~these rules~~ Rule 60(b).

~~(i)(g)~~ **Reinstatement to Active Status.**

1. ~~Motion~~ Application. An application ~~motion~~ for transfer from disability inactive status to active status shall be made pursuant to Rule 65 and will proceed as in other cases of reinstatement, except as may be provided in this rule. The ~~motion~~ application shall set forth the

information required in other cases of reinstatement so far as applicable, and a brief statement of the facts and circumstances surrounding the transfer of applicant to disability inactive status.

2. *Waiver of Doctor-Patient Privilege.* The filing of an application ~~motion~~ for transfer to active status by a lawyer transferred to disability inactive status shall constitute a waiver of any doctor-patient privilege with respect to any treatment of the lawyer during the period of disability. The lawyer shall be required to disclose the name of each psychiatrist, psychologist, physician or other health care provider, and hospital or other institution by whom or in which the lawyer has been examined or treated since the lawyer's transfer to disability inactive status. The lawyer shall furnish to the commission or this court written authorization to each health care provider and facility to release information and records relating to the disability if requested by the commission, this court or appointed medical experts.

3. *Reinstatement.* No lawyer transferred to disability inactive status may resume active status until reinstated by order of this court. A lawyer shall be entitled to apply for transfer to active status at any time at least one year after the lawyer's last application; or at such shorter intervals as the court or the commission may direct in the order transferring the lawyer to disability inactive status or any modification thereof. The ~~motion~~ application shall be granted upon a showing, by clear and convincing evidence, that the lawyer's mental or physical condition has been removed and the lawyer is fit to resume the practice of law. In its discretion, the commission or the court may direct that the lawyer establish proof of competence and learning in law, which proof may include certification by the bar examiners of the lawyer's successful completion of an examination for admission to practice, notwithstanding the lawyer was on inactive status less than five years. If a lawyer has been transferred to disability inactive status by an order in accordance with these rules and, thereafter, has been judicially declared to be no longer under disability, this court may dispense with further evidence that the disability has been removed and may direct the lawyer's reinstatement to active status upon such terms as are deemed appropriate.

4. *Pending Discipline.* If the commission or this court, upon considering the application ~~motion~~ for transfer to active status, determines the application ~~motion~~ shall be granted, it shall also reinstate any ~~determine the disposition of the stayed discipline proceedings, which shall be reinstated.~~