

ATTORNEY REGULATION ADVISORY COMMITTEE

MINUTES

Wednesday, November 18, 2015
9:30 a.m. – 12:00 p.m.

State Courts Building, 1501 West Washington Street, Phoenix, Arizona
Conference Room 109

Present

Hon. William J. O'Neil
Whitney Cunningham
Edward Novak
George Reimer
Patricia Sallen
Maret Vessella

Telephonically Present

Emily Johnston
Pamela Treadwell-Rubin
Ronald Watson

Absent

Hon. Lawrence F. Winthrop
Ben Click
Mary Grier
Scott Rhodes

Staff

Kathleen Curry
Mark Wilson
Carol Mitchell
Cassandra Ramos

Regular Business

9:35 a.m. Call to Order and Introductions

Hon. William O'Neil

Business Items and Potential Action Items

No. 1 Review and Approve September 2015 ARC minutes

Motion: Approve the minutes from the September 2015 meeting and amend No. 5 by replacing the description of the discussion regarding the proposed changes to Rule 46 with language suggested by George Riemer.

Moved by: Whitney Cunningham

Second: Ed Novak

Carried: None opposed

No. 2 Update from Rules Subcommittee
Supreme Court Rule petition proposals

Judge O'Neil

1. Rule 48: Rules of construction

Rule 48 incorporates various civil rules into the discipline and disability rules. The Rules Subcommittee proposed the following changes:

a. Regarding time computation, delete reference to Civil Rule 6(a) and (e). There is no need to add time for mailing when most filings are served by email. Add new time computations as follows: when period of time is five days or less, do not count intermediate Saturdays and Sundays; when

period of time is six days or more, count intermediate Saturdays, Sundays and legal holidays. A concern was raised that these time computations would be different than those used in general civil matters with which attorneys were familiar; this has not presented a problem in discipline matters.

b. Regarding pre-answer motions, delete reference to Civil Rule 12(b) and (c). There is no need for a motion to dismiss under the new disciplinary system in light of the Probable Cause Committee. Further, these motions extend the time to file an answer, which then extends the discovery deadlines. It is important that these time frames not be unnecessarily extended in order to meet the 150 day time limits for discipline matters.

c. Regarding service of pleadings, require service by email.

Motion: Approve concept of changes to Rule 48, with wordsmithing to follow.

Moved by: Ed Novak

Second: Patricia Sallen

Carried: None opposed

2. Rule 51: Presiding disciplinary judge.

The PDJ recommends amending Rule 51(c) (4), to allow for the disciplinary judge to exercise discretion to impose a stay in certain cases. The stay helps to avoid the burden of attorneys in reinstatement proceedings who may have to withdraw and refile a petition. Judge O'Neil reinforced that stays are used rarely and when requests to stay a proceeding are granted, it does not change reporting time on annual reporting statistics submitted to the Administrative Office of the Courts. Maret Vessella suggests that the power already exists for a stay pre-complaint and this amendment should be moved to Rule 48. Judge O'Neil agreed with Maret Vessella's suggestion to include in Rule 48 that the presiding judge has the power to grant a stay for pre-complaint matters

Motion: Approve proposed change of Rule 51.

Moved by: Ed Novak

Second: Whitney Cunningham

Carried: None opposed

3. Rule 58: Default

As previously discussed regarding time periods, these changes reflect that a default is effective ten days after the entry of the default, instead of after service. This proposal was submitted in a previous rule petition, but was not accepted by the Court.

Motion: Approve proposed change of Rule 58.

Moved by: Ed Novak

Second: Whitney Cunningham

Carried: None opposed

4. Rule 59 (a): Review by the court [Effective until January 1, 2015]

This is a clerical change to reflect that a party files a notice of appeal from a "decision" rather than a "report." Kathleen Curry advised that the language change has already been approved and was effective January 1, 2015. The proposed amendment is unnecessary.

5. Rule 63: Transfer to disability inactive status

This Rule involves transfer of an attorney to disability inactive status. The Rule specifically states that consent orders should be encouraged, but does not provide a process for consent agreements. Consent agreements in disability matters could mirror the language required in agreements for

discipline by consent under Rule 57. Judge O’Neil suggests that requiring medical records, rather than doctor’s reports, would be simpler and would provide the same information. If all parties agree, then there is no need for an additional medical or psychological report.

Maret Vessella suggests that the agreement should contain a statement of how a lawyer can be removed from disability status, either voluntarily or involuntarily. She would prefer the more stringent requirements of reports from a medical expert; giving the PDJ the discretion to waive this requirement. She is wary of having a rule that does not include input from an expert in these types of cases. George Riemer also supported Maret’s suggested modification. Patricia Sallen notes there may be concerns about utilizing a consent agreement in a situation in which an attorney has mental health issues and is not represented by counsel.

Motion: Approve proposed change of Rule 63.

Moved by: Ed Novak

Second: Maret Vessella

Carried: None opposed

6. Rule 64: Reinstatements; eligibility.

Judge O’Neil reports that this year and last year there has been an excess number of reinstatement proceedings from summary suspensions that did not involve discipline. Rule 64 requires the summarily suspended attorney, who has never had any disciplinary actions, to identify the weakness and prove their rehabilitation from this weakness. Judge O’Neil has taken the position that this showing is unnecessary in cases in which the State has conducted an investigation and recommends reinstatement. This change would apply to an attorney who has been administratively suspended for failure to comply with MCLE or pay membership dues.

Motion: Approve proposed change of Rule 64.

Moved by: Ed Novak

Second: Whitney Cunningham

Carried: None opposed

7. Rule 65: Reinstatement

The suggested language change in subsection (a)(4) and (b)(5) would provide that an unsuccessful application for reinstatement would be “denied” rather than “dismissed.”

The more substantive change to the reinstatement proceedings is the proposal of the ARC Rules Subcommittee that the hearing panel’s decision regarding reinstatement be final, subject to the parties’ right to appeal. The current rules require the hearing panel’s recommendation regarding reinstatement to be forwarded to the Court for review and final order.

Maret Vessella shared her recollection that the subcommittee discussed even more changes to the process, including a consent procedure that would not require a formal hearing. Judge O’Neil thought that the hearing process should not be changed if the attorney had been on suspended status for more than two years. Judge O’Neil suggests further discussion with the Rules Subcommittee and potential revisions to be sent via email regarding additional changes.

Motion: Approve proposed change of Rule 65 – the amendment of the language is accepted.

Moved by: Ed Novak

Second: Whitney Cunningham

Carried: None opposed

At the August rules agenda, the Court continued consideration of the proposed changes to ER 1.6 in the Timmer Committee's rule petition, R-15-0018. Based on comments received regarding the proposed changes to ER 1.6, and input from various attorneys and the State Bar Ethics Committee, an alternative proposal to amend ER 1.6 was considered by the Rules Subcommittee. The Court sought input from ARC on the alternative proposal or whether any changes should be made to the confidentiality rule. Patricia Sallen reported that the Rules Subcommittee reviewed the alternative proposal and had many of the same objections that it voiced in its comment on the Timmer Committee's proposed changes to ER 1.6. Patricia Sallen and Scott Rhodes drafted the proposed comment to the alternative proposal, which will be sent to the Court in the form of a memo. Judge O'Neil reported that ARC Chair, Judge Larry Winthrop, has indicated his support of the proposed memorandum. One suggested edit to page 3 was to change "restruictions" to "restrictions." Whitney Cunningham requests that the minutes reflect that he abstain from the vote as he was a member of the Timmer Committee. He further explained that the goal of the Committee was to address the concern about where the practice of law meets reality. The current version of the Rule is not practical and is not being followed. He states there was a debate on the Timmer Committee over whether to preserve, in an academic sense, the notion of attorney-client privilege as it is embodied in the current Rule or to craft a Rule that gives lawyers actual guidance in modern, connected society.

Additional discussion about the language of what is "generally known or publically available" and how the vague language would be open to interpretation by both lawyers and clients and may fail to meet the intended impact. The memo should convey that this issue still needs more work and ARC does not support the proposed amendments to ER 1.6.

Motion: Approve language of draft comment - oppose all changes and keep Rule as is.

Moved by: George Reimer

Second: Ed Novak

Carried: Pamela Treadwell-Rubin opposed
Whitney Cunningham abstained from vote.

No. 4 Review proposed changes to Rule 46, Rules of Sup. Ct.

George Riemer,
Maret Vessella
Patricia Sallen

This is the latest version of a proposal that has been before ARC on several occasions. The proposal attempts to clarify the process to be used should a judge be removed, retire or resign as a result of a judicial discipline proceeding. In this situation, the proposed language would allow the State Bar to make a recommendation to the Court regarding lawyer discipline based on the record in the judicial discipline proceeding or, in the alternative, to proceed under the lawyer discipline process in Rule 55. George Riemer discussed this with the Commission on Judicial Conduct and there was no objection to the proposal.

Motion: Approve proposed changes to Rule 46.

Moved by: Whitney Cunningham

Second: Patricia Sallen

Carried: None opposed.

Ed Novak was not present.

No. 5 Review proposed changes to Rule 35(d) and 36(h)(3), Rules of Sup. Ct.

Mark Wilson

Mark Wilson, Certification and Licensing Division Director, proposed revisions to the rules that would clarify what Admissions records remain confidential after the records are filed in the Supreme Court. The proposal provides that any documents filed in a petition for review from a decision of the Committee on Examinations or Committee on Character and Fitness, or transmitted for the Court's de novo review, would not be confidential, except that "reports and records written by a licensed medical or psychological professional" would remain confidential upon notice by the applicant or the Committee. Medical and psychological reports are generally treated as confidential by the Court and ordered sealed upon motion by a party. This proposal would avoid the need for a formal motion to seal.

There was a discussion about whether a party could contest the scope of a notice if the party believed the notice sought to seal documents other than medical reports. It was believed that a party could contest the scope of a notice and the issue could be resolved by the Clerk's Office or the Court. Kathleen Curry suggests that it should be the burden of the applicant or Committee to identify the documents to be sealed. In that way, the Clerk of the Court would not be burdened with deciding whether the filing contained records or reports that should be sealed. George Riemer suggest removing the word, "any," from, "any reports and records."

Motion: Approve proposed changes to Rule 35(d) and 36(h)(3), with the removal of the word "any".

Moved by: George Reimer

Second: Patricia Sallen

Carried: None opposed.

Ed Novak was not present.

No. 6 Call to Public

None.

Meeting Adjourned: 10:43 a.m.