

Hon. Lawrence F. Winthrop
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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	
)	Supreme Court No. R-__-____
PETITION TO AMEND)	
RULES 46(c) and (d),)	
Rules of the Supreme Court)	Petition to Amend Rules 46(c) and
)	(d), Rules of the Supreme Court
)	
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_____)	

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 46(c) and (d), Rules of the Supreme Court, governing Former Judges and Incumbent Judges, as proposed below.

I. Background and Purpose of the Proposed Rule Amendments

The Attorney Regulation Advisory Committee proposes that Rules 46(c) and (d) of the Rules of the Supreme Court be amended to clarify three specific points: (1) that the State Bar of Arizona and Commission on Judicial Conduct have concurrent jurisdiction over judges for alleged misconduct as lawyers before becoming judges; (2) that the State Bar has jurisdiction over former judges who return to the practice of law who engaged in conduct while serving as a judge that

would constitute grounds for lawyer discipline; and (3) that the State Bar has the discretion to pursue lawyer discipline against a former judge who has been removed, resigns or retires as a result of judicial discipline proceedings when the underlying conduct also constitute grounds for lawyer discipline. The Arizona Commission on Judicial Conduct has reviewed these proposed changes and supports them.

Current Rule 46(c) has proven problematic as an unduly restrictive limitation on the authority of the State Bar to take appropriate action concerning the alleged misconduct of a judge who resigned as a result of judicial discipline proceedings and resumed the practice of law. The case of former Judge Michael C. Nelson is demonstrative. He resigned in the face of charges of judicial misconduct. The Supreme Court entered a final judgment that the former judge owed the Commission on Judicial Conduct certain costs. *In re Nelson*, 207 Ariz. 318, 86 P.3d 374 (2004). The court later determined that the State Bar could not pursue charges of misconduct against Nelson as a lawyer because the misconduct was the subject of a judicial discipline proceeding as to which there had been a final determination by the court (the costs judgment).

The court explained the operation of current Rule 46(c) in *In the Matter of Dean*, 212 Ariz. 221, 129 P.3d 943 (2006), as follows:

Rule 46(c), however, contains an important caveat. The State Bar has jurisdiction to seek sanctions against a former judge for conduct while on the bench only if “the misconduct was not the subject of a

judicial discipline proceeding as to which there has been a final determination by the court.” Ariz. R. Sup. Ct. 46(c).

Because we had declined sua sponte review of the Commission’s recommendation that Nelson be removed from office, at the time we denied the State Bar’s motion for clarification we assumed that there had not been a “final determination by the court” with respect to Nelson’s judicial discipline proceeding. We now realize that we were in error in that assumption.

The term “final determination” is explained in Commission on Judicial Conduct Rule 29(h) as follows:

(h) Final determination. The judgment of the supreme court dismissing the case or imposing a sanction shall be regarded as final and shall be effective on the date the judgment or opinion is filed with the clerk of the court.

In turn, Commission on Judicial Conduct Rule 18(e) describes “the assessment of . . . costs” after a formal hearing as a formal sanction.

As we have noted above, the Commission sought the assessment of certain costs against Nelson. In our prior opinion, we specifically found certain costs taxable against Nelson. *Nelson*, 207 Ariz. at 323-25 ¶¶ 21-29, 86 P.3d at 379-81. We then issued an order requiring Nelson to pay a specific sum by a specific date.

The Commission on Judicial Conduct’s recommendation in this case (of which we granted sua sponte review) expressly suggested that Nelson be taxed these costs pursuant to Commission Rule 18(e), and both our order granting sua sponte review and our opinion refer expressly to Rule 18(e). It therefore now seems evident that our award of costs constituted an imposition of a sanction pursuant to Rule 18(e). Moreover, although our order that Nelson pay certain costs is not formally denominated as a judgment, it was for all intents and purposes a judgment and was subsequently treated as such by this Court and the Commission.

We have therefore reluctantly concluded that the State Bar cannot pursue lawyer discipline against Nelson under Supreme Court Rule 46(c) because, under Commission Rule 29(h), there has been a “final determination” in the judicial discipline [proceeding] “imposing a sanction” by virtue of our taxation of costs. Our previous assumption

that the State Bar was free to pursue lawyer discipline against Nelson was therefore in error. (Footnotes omitted)

129 P.3d at 946-947.

The recent case of *In the Matter of Abrams*, 227 Ariz. 248, 257 P.3d 167 (2011) brought the application of Rule 46(c) again to the fore. In *Abrams* the court allowed the State Bar to make a recommendation pursuant to Rule 46(d) that Abrams be disciplined as a lawyer based on the record in the Commission's judicial discipline proceeding against him. *Id.* at ¶ 3, 257 P.3d at 168. The court imposed a two year suspension of Abrams' license to practice law based on that record. Unfortunately, the State Bar did not have the opportunity to investigate Abram's conduct on its own and additional lawyer discipline charges might well have been brought against Abrams had the State Bar been able to do so.

The proposed changes to Rules 46(c) and (d) clarify that the State Bar and the Commission have concurrent jurisdiction over the conduct of a judge for alleged misconduct as a lawyer before becoming a judge (the State Bar has jurisdiction to consider alleged violations of the rules of professional conduct and other applicable rules concerning lawyers and the Commission has jurisdiction to consider alleged violations of the Code of Judicial Conduct and other applicable rules concerning judges). For example, the State Bar could pursue lawyer disciplinary charges against a sitting judge for misconduct as a lawyer that did not surface until after the lawyer became a judge. And the Commission could pursue judicial discipline charges

against a sitting judge for misconduct as a lawyer that implicates the judge's fitness to serve as a judge that did not surface until after the lawyer became a judge.¹

The proposed changes also clarify that when a judge resumes the status of lawyer, the State Bar has the ability to seek lawyer discipline for misconduct that occurred while acting as judge that could serve as grounds for lawyer discipline irrespective of whether that misconduct was the subject of a judicial discipline proceeding where there was a final determination. It also clarifies that upon notice from the Commission that a judge has resigned, retired or been removed as a result of a judicial discipline proceeding, the State Bar can either recommend lawyer discipline to the court based on the record in that judicial discipline proceeding or, in the alternative, notify the court that it intends to proceed to review the matter under Rule 55, Rules of the Arizona Supreme Court (Initiation of proceedings; investigation). In the latter instance, the State Bar will be able to investigate and act on the matter in the same manner as any other investigation of a lawyer's conduct. It will no longer be constrained by the restriction in current Rule 46(d) that only allows for an opportunity to submit to the court a recommendation on lawyer discipline based on the record in the judicial discipline proceeding.

¹ *See also* Rule 2 of the Rules of the Commission on Judicial Conduct which provides, in part, as follows: "The commission has jurisdiction over judges and former judges concerning allegations of misconduct occurring prior to or during service as a judge and allegations of incapacity during service as a judge."

II. Contents of the Proposed Rule Amendment

Rule 46. Jurisdiction in Discipline and Disability matters; Definitions

* * *

~~(c) **Former Judges.** A former judge who has resumed the status of a lawyer is subject to the jurisdiction of the state bar and the court not only for that person's conduct as a lawyer, but also for misconduct that occurred while serving as a judge that would have been grounds for lawyer discipline, provided that the misconduct was not the subject of a judicial discipline proceeding as to which there has been a final determination by the court.~~

(c) Conduct Prior to Assumption of Judicial Office.

The state bar and commission on judicial conduct have concurrent jurisdiction over judges for misconduct as lawyers before becoming judicial officers.

~~(d) **Incumbent Judges.** Upon removal or resignation from office of an incumbent judge as the result of a judicial discipline or disability proceeding, the court shall afford the state bar and the judge an opportunity to submit to the court a recommendation whether lawyer discipline or disability status should be imposed based on the record in the judicial proceeding, and if so, the extent thereof.~~

(d) Former Judges.

A former judge is subject to the jurisdiction of the state bar and the court not only for that person's conduct as a lawyer, but also for conduct while serving as a judge that may constitute grounds for lawyer discipline. If a judge is removed, retires or resigns from office as a result of a judicial discipline or disability proceeding, the state bar shall have the discretion to recommend to the court whether lawyer discipline or disability status should be imposed based on the record of the judicial discipline or disability proceeding, or, in the alternative, proceed under Rule 55, Ariz. R. Sup. Ct. The commission on judicial conduct shall provide written notice to the state bar within ten business days of the effective date of such a removal, retirement or resignation and the state

bar shall have thirty days from the date of that notice to inform the court in writing of its intent. Should the state bar notify the court of its intent to recommend lawyer discipline or disability status based on the record of the judicial discipline or disability proceeding, the court shall by order set the due date for the state bar's recommendation.

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RESPECTFULLY SUBMITTED this 3rd day of December, 2015.

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