

Memorandum

To: ARC

From: Pat Sallen, Scott Rhodes, Jim Belanger

Date: March 6, 2018

RE: Proposed petition regarding discipline information

We propose that ARC file a petition to amend Rule 49, Ariz. R. Sup. Ct., to define the information about individual lawyer discipline that is published in *Arizona Attorney*, and part of the lawyer's disciplinary history contained on the State Bar's website.

Current Rule 49(a)(2)(C) charges the chief bar counsel – an employee of the State Bar who supervises disciplinary prosecutions – with “caus[ing] notices” of disciplinary action to be published in *Arizona Attorney* magazine or “other usual publication” of the State Bar as well as sending “notices” to courts and newspapers of general circulation in each county.

The rule does not define “notice.” The “notices” that the lawyer regulation office produces for publication in *Arizona Attorney* (and which also are used on the State Bar's website) are not simply “notices” that a lawyer has been disbarred, suspended, or the like with a link to actual court orders or source documents.

Rather, these “notices” are paraphrased and often lengthy, detailed descriptions of the disciplinary cases. The amount of detail included about individual

cases is inconsistent. Attached, for example, are two “notices” published in the October 2017 *Arizona Attorney* and available on the State Bar’s website. The differences are striking, and not just because the lawyer with the longer “notice” had seven counts of misconduct while the other had four.

In all cases, the office and personnel that acted as prosecuting adversaries in the disciplinary case unilaterally decides which facts are published in *Arizona Attorney*, the magazine that every Arizona lawyer on active status (and others) receives. That office and personnel also determine how those facts are characterized. This means than the adversarial prosecutor unilaterally decides how a completed discipline case is described to every other lawyer in this state and to members of the public who research lawyer discipline history.

A more neutral procedure would be to have “notices” consist of the rules violated and the sanctions imposed, and then the link to operative judicial documents, which would provide the actual information about the case. We propose defining “notice” as “reference to the rule(s) violated, the discipline imposed, and links to the final orders issued by the Presiding Disciplinary Judge’s office and the Supreme Court.”

Such a definition would eliminate subjectivity in the language, detail, and overall tone of information produced about a particular lawyer. It also would improve the consistency of information distributed about lawyers.

With this approach, lawyers and members of the public would be able to read the actual language used in discipline judgments, orders, and opinions rather than have it filtered through the prosecutor's office.

Barry Glen Nelson
Bar No. 006746
File Nos. 16-2136, 16-2798, 16-2229, and 17-0119
PDJ 2017-9069

By final judgement and order dated June 26, 2017, the presiding disciplinary judge accepted an Agreement for Discipline by Consent by which Barry Glen Nelson, Tucson, was suspended for six months and placed on probation for two years upon reinstatement. Mr. Nelson shall participate in the State Bar's Member Assistance Program as a term of his probation. Prior to reinstatement Nelson must pay \$2,443.00 in restitution, initiate fee arbitration with one client, and pay the costs of the disciplinary proceedings totaling \$1,200.00.

In one count, Mr. Nelson failed to adequately communicate with and diligently represent his client by failing to comply with requests for discovery and respond to a motion for summary judgement. In three counts, Nelson accepted advance fees but was unable to complete the cases due to unforeseen medical issues. He failed to safekeep client property and return the unearned fees.

The lone aggravating factor was prior disciplinary offenses. Mitigating factors were personal or emotional problems, full and free disclosure to the bar, and remorse.

Mr. Nelson's conduct violated Rule 42, Ariz. R. Sup. Ct., ERs 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, and 8.4(d).

Respondent's Name: Joseph P. Palmisano

Bar No. 012839

State Bar File Nos.: 15-1753, 15-2362, 15-2394, 15-2949, 12-3190, 13-3041, and 13-3189

File No. PDJ-2016-9098

By final judgment and order dated May 8, 2017, the presiding disciplinary judge accepted an agreement for discipline by consent by which Joseph P. Palmisano, Mesa and Tucson, was suspended for six months and placed on probation for two years upon reinstatement. The terms of probation will require Mr. Palmisano to participate in the Law Office Management Assistance Program and Member Assistance Program.

In count one, Mr. Palmisano was hired to file a petition to modify terms of probation requiring an out-of-state client to serve a period of deferred jail time. Despite repeated calls from the client, Palmisano failed to respond for ten months and filed nothing with the court. When the client requested a written accounting of the prepaid legal fees, Palmisano provided only a verbal description of the services performed. Approximately one month later, Palmisano filed a Notice of Appearance and shortly thereafter received a petition from the probation officer waiving the deferred jail time.

In count two, Mr. Palmisano represented multiple clients in the Tucson Municipal Court. He missed multiple hearings which frequently forced his clients to appear alone. The court ordered Palmisano to appear personally in one of the cases to explain his failures to appear.

In count three, Mr. Palmisano was hired to represent a client in a Pima County traffic case. During the initial consultation, the client asked Palmisano to obtain video footage of the intersection. Palmisano failed to obtain the video as requested. Months later, less than a week before trial, Palmisano asked a Tucson attorney to handle the trial and notify the client. Palmisano handled the subsequent appeal of the case without charge but lost.

In count four, Mr. Palmisano was scheduled to appear in two Pima County Superior Court cases at the same time. He did not timely file a motion to continue or notice of conflict in either matter. Palmisano's office contacted the court the day before the scheduled court date. The judicial assistant asked Palmisano's secretary to e-mail to her a motion to continue. Upon receiving a motion in one of the Pima County cases, the judicial assistant noticed that it was captioned in Justice Court with the wrong case number. Also, Palmisano inaccurately stated in the motion that he had to be in a Maricopa County Superior Court trial the same day he was supposed to be in Pima County Superior Court for the two cases when, in fact, the scheduled event in Maricopa County was merely to select a trial date.

In count five, a client's grandparents paid Mr. Palmisano \$10,000.00 to represent their granddaughter. In a separate case, the same grandparents paid Palmisano

\$6,000.00 to represent their daughter in a matter that completely resolved very shortly after the representation began. Palmisano refused to refund any of the prepaid fees from the daughter's case and applied the entire unearned amount to the granddaughter's case without client approval.

In count six, Mr. Palmisano represented Paul who stabbed his brother, John. Shortly after the case concluded Palmisano represented John for shooting Paul. The court removed Palmisano over his non-waivable conflict of interest. Palmisano argued that he obtained no "attorney-client" privileged information while representing Paul, despite telling detectives in John's case that Paul had been a drug user.

In count seven, Mr. Palmisano was hired to represent a client in a criminal case. The Court found that Palmisano failed to comply with his disclosure obligation and entered the appropriate orders. Despite the State moving to determine counsel based on Palmisano's indictment in the Maricopa County Superior Court case of State v. Palmisano, the Court permitted Palmisano to continue as attorney of record. Later, the Court twice found that Palmisano failed to comply with his court-ordered disclosure obligations and sanctioned him \$250.00. Palmisano avowed that he paid the sanction but the Court discovered that he had not. The Court scheduled an order to show cause hearing and sanctioned Palmisano an additional \$250.00.

There were four aggravating factors: prior disciplinary offenses, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. There were no mitigating factors. Mr. Palmisano violated Rule 41(g), Ariz. R. Sup. Ct.; Rule 42, Ariz. R. Sup. Ct., ERs 1.2, 1.3, 1.4, 1.5, 1.6, 1.9(a), 1.9(c), 1.16, 3.2, 3.4(c), 3.4(d), 5.1, and 8.4(d); and Rule 54(c), Ariz. R. Sup. Ct. Palmisano was also ordered to pay costs and expenses of the proceedings totaling \$1,680.00.

Rule 49. Bar Counsel

(a) Powers and Duties of Chief Bar Counsel. Acting under the authority of the board, and under the direction and by appointment of the executive director, chief bar counsel shall have the following powers and duties:

1. *Prosecutorial Oversight.* Chief bar counsel shall maintain and supervise a central office for the filing of requests for investigation relating to conduct by a member or non-member and for the coordination of such investigations; employ and supervise staff needed for the performance of all discipline functions within the responsibility of the state bar, overseeing and directing the investigation and prosecution of discipline cases and the administration of disability, reinstatement matters, and contempt proceedings, and compiling statistics regarding the processing of cases by the state bar.

2. *Dissemination of Discipline and Disability Information.*

A. Notice to Disciplinary Agencies. Chief bar counsel shall transmit notice of discipline, transfers to or from disability inactive status, reinstatements and judgments of conviction to the disciplinary enforcement agency of any other jurisdiction in which the respondent is known to be admitted. Respondent shall identify each such jurisdiction in writing addressed to the chief bar counsel.

B. Disclosure to National Discipline Data Bank. Chief bar counsel shall transmit notice of all public discipline imposed against a respondent, transfers to or from disability inactive status, reinstatements, and certified copies of any criminal conviction to the National Discipline Data Bank maintained by the American Bar Association's National Lawyer Regulatory Data Bank.

C. Public Notice of Discipline Imposed. Chief bar counsel shall cause notices of orders or judgments of reprimand, suspension, disbarment, transfers to and from disability status and reinstatement to be published in the Arizona Attorney or another usual periodic publication of the state bar, and shall send such notices to a newspaper of general circulation in each county where the lawyer maintained an office for the practice of law. Notices of sanctions or orders shall be posted on the state bar's website as follows:

(i) Disbarment, suspension, interim suspension, reprimand, and reinstatement shall be posted for an indefinite period of time.

(ii) Probation (including admonition with probation), restitution and costs shall be posted for five (5) years from the effective date of the sanction or until completion, whichever is later; the posting shall indicate whether or not the terms of the order have been satisfied.

(iii) A finding of contempt of a supreme court order shall be posted for five (5) years from the effective date of the order or until the contempt is purged, whichever is later; the posting shall indicate whether or not the terms of the order have been satisfied.

- (iv) A transfer to disability inactive status shall be posted while the order is in effect.
- (v) An administrative or summary suspension shall be posted while the suspension is in effect.

D. Notice to Courts. Chief bar counsel shall promptly advise all courts in this state of orders or judgments of suspension, disbarment, reinstatement and transfers to or from disability inactive status. In addition, chief bar counsel shall petition the appropriate court to take such action as may be indicated in order to protect the interests of the public, respondent and respondent's clients.

E. Any notice required to be transmitted under this rule shall consist of personally identifying information about the lawyer, reference to the rule(s) violated and the discipline imposed, and links to the final orders issued by the Presiding Disciplinary Judge's office and the Supreme Court.

(b) Powers and Duties of Bar Counsel. Bar counsel shall:

1. Review all information coming to the attention of the state bar. Bar counsel shall exercise discretion in initiating investigations when allegations, if true, would be grounds for discipline or transfer to disability inactive status. Bar counsel may request one or more staff examiners to aid in conducting investigations. Staff examiners shall work under the supervision of staff bar counsel. Staff examiners may be, but need not be members of the state bar and may be selected from the regular employees of the state bar.
2. Recommend dispositions prior to formal proceedings, and, if deemed advisable, recommend any discipline in formal proceedings.
3. In appropriate cases, negotiate dispositions of pending matters as authorized in Rule 57(a) or 58.
4. Promptly notify the complainant and respondent of the disposition of each matter.
5. Represent the state bar in and prosecute discipline and reinstatement proceedings and proceedings for transfer to or from disability inactive status before the presiding disciplinary judge, hearing panels, the committee and this court, and prosecute contempt proceedings in the appropriate forum.
6. Dismiss proceedings if, after conducting a screening investigation, there is no probable cause to believe misconduct or incapacity exists pursuant to these rules.
7. Monitor and supervise respondents during a probationary or diversionary term and, as appropriate, report material violations of the terms of probation or diversion to the presiding disciplinary judge and prepare and forward a report to the imposing entity regarding the respondent's completion of the imposed terms.
8. Monitor and supervise conditional admittees during the conditional admission period, pursuant to Rule 36(a)(2)(C)(ii); and
9. Perform such other duties as the court may direct.