

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-06-0035
PETITION TO AMEND RULES 43, 44,)
46-48, 53-58, 60, 61, 64, 70-72,)
75, RULES OF THE SUPREME COURT)
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**ORDER AMENDING
RULES 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, and 75
RULES OF THE SUPREME COURT**

A petition to address concerns regarding delay in the lawyer discipline process having been filed and comments having been received, and upon consideration,

IT IS ORDERED that Rules 43, 44, 46-48, 53-58, 60, 61, 64, 70-72, and 75, Rules of the Supreme Court, be amended in accordance with the attachment hereto, effective January 1, 2009.

DATED this _____ day of September, 2008.

RUTH V. MCGREGOR
Chief Justice

TO:
Rule 28 Distribution

ATTACHMENT*

RULES OF THE SUPREME COURT

Rule 43. Trust Accounts ~~Verification~~

(a) ~~Duty as to client property; records~~ Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer. ~~Every active member of the bar shall maintain complete records of the handling, maintenance and disposition of all funds, securities and other assets of a client that have at any time come into the member's possession. These records shall cover the entire time from receipt to the time of final disposition by the lawyer of all such funds, securities and other assets. Said funds shall be maintained in a trust account, labeled as such, which shall be kept separate and apart from the lawyer's personal and business accounts. The lawyer shall preserve these records for a period of five years after final disposition by him of said funds, securities and other assets. Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer's personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. The location of the trust account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer or law firm shall be deposited into a trust account established pursuant to this rule except as follows:~~

1. Funds to pay service or other charges or fees imposed by the financial institution, but only in an amount reasonably estimated to be necessary for that purpose may be deposited therein.

2. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm must be withdrawn when due and legally available from the financial institution, or within a reasonable time thereafter, unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the lawyer shall comply with ER 1.15(e).

(b) Trust Account Requirements.

1. Standards of Performance.

A. Due professional care must be exercised in the performance of the lawyer's duties under this rule.

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

B. Employees and others assisting the attorneys in the performance of such duties must be competent and properly trained and supervised.

C. Internal controls within the lawyer's office must be adequate under the circumstances to safeguard funds or other property held in trust.

2. Trust Account Records.

A. Every active member of the state bar shall maintain, on a current basis, complete records of the handling, maintenance and disposition of all funds, securities and other property belonging in whole or in part to a client or third person in connection with a representation. These records shall include the records required by ER 1.15 and cover the entire time from receipt to the time of final disposition by the lawyer of all such funds, securities and other property. The lawyer shall preserve these records for a period of five years after termination of the representation.

B. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for which funds have been received in trust, showing:

(i) the date, amount and payor of each receipt of funds;

(ii) the date, amount and payee of each disbursement; and

(iii) any unexpended balance.

C. A lawyer shall make or cause to be made a monthly three-way reconciliation of the client ledgers, trust account general ledger or register, and the trust account bank statement.

D. A lawyer shall retain, in accordance with this rule, all trust account bank statements, cancelled pre-numbered checks (unless recorded on microfilm or stored electronically by a bank or other financial institution that maintains such records for the length of time required by this rule), other evidence of disbursements, duplicate deposit slips or the equivalent (which shall be sufficiently detailed to identify each item), client ledgers, trust account general ledger or register, and reports to clients.

E. A record shall be maintained showing all property, other than cash, held for clients or third persons in connection with a representation, including the date received, where located and when returned or otherwise distributed.

3. Disbursement Against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled by the issuer's bank, and credited without recourse to the lawyer's trust account.

A. Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances, if the lawyer has other sources of funds, other than client or third party funds, available at the time of disbursement to replace any uncollected funds:

(i) when the deposit is made by certified check or cashier's check;

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Arizona, or any agency or political subdivision of the State of Arizona; or

(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Arizona.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of professional misconduct based upon the disbursement of uncollected funds.

B. A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

4. *Methods of Disbursement.* All trust account disbursements shall be made by pre-numbered check or by electronic transfer, provided the lawyer maintains a record of such disbursements in accordance with the requirements of this rule. All instruments of disbursement shall be identified as a disbursement from a trust account.

(bc) Certificate of Compliance. Every active member of the state bar shall on or before February 1 of each year file with the board a certificate certifying compliance with the provisions of this rule and ER 1.15 of the Arizona Rules of Professional Conduct, or that he or she is exempt from the provisions of this rule and ER 1.15. The certificate of compliance ~~which~~ shall state as follows:

Annual Certificate of Compliance

I have read Rule 43, Rules of the Supreme Court, and ER 1.15, Arizona Rules of Professional Conduct, and certify that I am in compliance with the provisions thereof, or am exempt from such provisions as therein provided.

Dated: _____

Signature: _____

Type or print name: _____

As an alternative to filing a written certificate, the board may allow certification to be filed electronically in a method and form as approved by the board.

(ed) Trust ~~audit~~ Account Examination; Random Examination.

1. Authority. ~~This court may order the audit of a member's trust account based on information received by the board that ER 1.15 of the Arizona Rules of Professional Conduct may have been violated. No such audit shall be conducted until approval has been granted by a justice of the court after a petition is presented by the board. Good cause shall be shown before approval to conduct such audit is granted.~~ The state bar shall evaluate all information coming to its attention by charge or otherwise indicating a possible violation of the trust account rules, and such information shall be treated and processed as is any other charge against a lawyer. In addition to trust account examinations that shall be conducted based upon information coming to the bar's attention, the state bar may also conduct random trust account examinations of any member's trust account(s), in accordance with Guidelines developed by the Board of Governors and approved by the supreme court.

2. Scope of Examination. ~~Such approval shall authorize a representative of the board to audit and~~ The state bar may verify all funds, securities and other assets property held in trust by the member, and all related accounts, safe deposit boxes, and any other form of maintaining trust assets and funds, securities or property, together with deposit slips, cancelled checks, and all other records pertaining to transactions concerning such assets trust funds, securities and property.

3. Rebuttable Presumption. If a lawyer fails to maintain trust account records required by this rule or ER 1.15, or fails to provide trust account records to the state bar upon request or as ordered by a panelist, a hearing officer, the commission or the court, there is a rebuttable presumption that the lawyer failed to properly safeguard client or third person's funds or property, as required by this rule and ER 1.15.

34. Limited Exception for Out-of-State Members. ~~This section (c) does not apply to any member of the bar whose entire compensation derived from the practice of law during the preceding year was received in the member's capacity as an employee handling legal matters of a corporation, other than a professional corporation, or of any agency of the federal, state, or local government. Client trust funds and property~~ All funds, securities and other property of clients and

third persons held by an Arizona-licensed lawyer whose law office is situated in another state shall not be subject to investigation, ~~audit examination~~ or verification except to the extent such funds and property are related to matters affecting Arizona clients.

5. Trust Account Examination and Verification Expenses. A member whose trust account has been examined or verified pursuant to this rule shall not be responsible for the costs and expenses related to the examination or verification, unless such costs and expenses are imposed pursuant to an order of diversion as set forth in Rule 55(a) or in conjunction with imposition of a disciplinary sanction as set forth in Rule 54(b) or Rule 60(b).

~~(d) Trust account requirements.~~ The following requirements are to ensure that each member is in compliance with the provisions of ER 1.15, Arizona Rules of Professional Conduct:

~~1. Standards of Performance.~~

~~A. Due professional care must be exercised in the performance of the lawyer's duties under this Rule.~~

~~B. Employees and others assisting the attorneys in the performance of such duties must be competent and properly supervised.~~

~~C. Internal controls within the lawyer's office must be adequate under the circumstances to safeguard funds or other property held in trust.~~

~~D. All transactions must be recorded promptly and completely.~~

~~E. Every lawyer engaged in the private practice of law in the State of Arizona must maintain, on a current basis, records complying with ER 1.15 and this Rule and such records shall be preserved for at least five years following final disbursement of the funds.~~

~~2. Requirements for Reporting to Clients and Records Maintenance.~~

~~A. Upon request by the client, a lawyer shall provide timely written reports to the client, which shall disclose the status of any trust assets held for the client, including any final distribution of such assets.~~

~~B. Unearned funds or funds to which the lawyer has no claim shall be deposited in an account designated as a trust account. Earned funds shall not be deposited in an account designated as a trust account, except as permitted by ER 1.15(b). Funds belonging in part to the lawyer and in part to a client or third party shall be initially deposited in an account designated as a trust account, but the portion belonging to the lawyer shall be withdrawn when earned by the lawyer. See Rule 44(a)2, Ariz.R.S.Ct. A duplicate deposit slip or the equivalent shall be retained for each such deposit, which shall be sufficiently detailed to identify each item.~~

~~C. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for whom monies have been received in trust, showing the date and amount of each receipt and disbursement, and any unexpended balance.~~

~~D. A lawyer shall make or cause to be made a monthly three-way reconciliation of the client ledgers, trust account general ledger or register, and trust account bank statement.~~

~~E. A lawyer shall retain, in accordance with this Rule, all trust account statements, cancelled pre-numbered checks (unless recorded on microfilm by a bank or other financial institution), other evidence of disbursements, duplicate deposit slips, client ledgers, trust account general ledger or register, and reports to clients.~~

~~F. A record shall be maintained showing all property, other than cash, held for clients or others, including the date received, where located and when returned or otherwise distributed.~~

~~3. *Disbursement Against Uncollected Funds.* A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account.~~

~~A. Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances, if the lawyer has other sources of funds, other than client or third party funds, available at the time of disbursement to replace any uncollected funds:~~

~~(i) when the deposit is made by certified check or cashier's check;~~

~~(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;~~

~~(iii) when the deposit is made by a check issued by the United States, the State of Arizona, or any agency or political subdivision of the State of Arizona; or~~

~~(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Arizona.~~

~~In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of professional misconduct based upon the disbursement of uncollected funds.~~

~~B. A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.~~

~~4. *Methods of Disbursement.* All trust account disbursements shall be made by pre-numbered check or by electronic transfer, provided the lawyer maintains a record of such disbursements in accordance with the requirements of this Rule.~~

~~(e) **Confidentiality.** All information received by any representative of the board who conducts a trust account verification or audit shall be kept strictly confidential, and shall not be released to any person or persons, except to the supreme court, the board, executive director and chief bar counsel in instances where evidence is found indicating a possible violation of the Arizona Rules of Professional Conduct. After such information is received by the board, it may refer such information to bar counsel for appropriate action. No person referred to in this section who receives confidential information as the result of the audit or verification of the trust account of a member of the bar may subpoena such information except in a disciplinary proceeding based upon such audit or verification. The provisions of Rule 70(b) of these rules shall apply to records acquired during examinations conducted pursuant to this rule. In those instances where the state bar conducts a random examination of a member's trust account(s) that does not result in a disciplinary charge, all information received as a result of that examination shall be kept strictly confidential and shall not be released to any person(s).~~

~~(f) **Audit expenses-Pooled Trust Account; Separate Client Trust Account.**-The board, with the approval of the court, may order the cost of the audit to be paid in whole or in part by any party to the proceeding; provided that the cost of the audit or of the proceeding or any part thereof shall not be assessed against the lawyer in any case where the audit fails to disclose any material irregularity.~~

~~1. Each trust account shall be at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation and, at the direction of the lawyer, invested to the extent practicable in the higher earning return of either:~~

~~A. An interest-bearing account insured by an agency of the United States government; or~~

~~B. United States Treasury obligations and repurchase agreements fully collateralized by such obligations, in the form of securities of, or other interests in, any no-load, open-end, management-type investment company, the shares of which may be redeemed on demand or~~

readily sold, that is registered under the provisions of the Investment Company Act of 1940, as amended (54 Stat. 789; 15 U.S.C. § 80a-1 through 80a-64), that is rated in either of the highest two rating categories of a nationally recognized statistical rating organization, and that operates as a money market fund pursuant to the Investment Company Regulation § 270.2a-7, as amended, through a regulated financial institution's pooled agency account if appropriate, if both of the following are true:

(i) The portfolio of the investment company is limited to United States Treasury obligations and repurchase agreements fully collateralized by United States Treasury obligations.

(ii) The investment company takes delivery of the collateral for any repurchase agreement either directly or through an authorized custodian.

A trust account shall be invested in a money market fund as described in subsection 1.B. above only if the dividend rate, net of all reasonable fees, exceeds the interest, net of all reasonable fees, that could be earned in an account described under subsection 1.A., as above.

2. A lawyer or law firm receiving client funds shall maintain a pooled interest-bearing or dividend-earning trust account for deposit of client funds unless the funds are expected to earn net income for the client in excess of the costs incurred to secure such income. The interest or dividends accruing on this account, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, shall be paid by the financial institution or investment company to the Arizona Foundation for Legal Services and Education, and shall be used solely for the following purposes: to pay the actual administrative costs of this interest or earnings on lawyers' trust accounts (IOLTA) program; to fund programs designed to assist in the delivery of legal services to the poor; to support law-related education programs designed to teach young people, educators and other adults about the law, the legal process and the legal system; to fund studies or programs designed to improve the administration of justice; and to maintain a reasonable reserve therefor.

3. All client funds shall be deposited in an account as specified in subsection 2 above unless they are deposited in:

A. A separate interest-bearing or dividend-earning trust account for the particular client or client's matter on which the interest or dividends, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, will be paid to the client; or

B. A pooled interest-bearing or dividend-earning trust account, with subaccounting provided by the lawyer or the law firm, which will provide for computation of interest or dividends earned by each client's funds and the payment thereof, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, to the client.

4. In determining whether to use an account as specified in subsection 2 or an account as specified in subsection 3, a lawyer or law firm shall take into consideration the following factors:

A. the amount of funds to be deposited;

B. the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

C. the rates of interest or yield at financial institutions where the funds are to be deposited;

D. the cost of establishing and administering a separate non-IOLTA account for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

E. the capability of financial institutions to calculate and pay income to individual clients;
and

F. any other circumstances that affect the ability of the client's funds to earn a net return for the client.

No disciplinary matter shall be pursued by the state bar against any lawyer or law firm solely by reason of the making of a good faith determination of the appropriate account in which to deposit or invest client funds.

5. Lawyers or law firms depositing client funds in accounts as specified in subsection 2 above shall direct the depository institution or investment company:

A. To remit interest or dividends, net of any reasonable service or other charges or fees imposed by the institution or company in connection with the account, as computed in accordance with the institution's or company's standard accounting practice, at least quarterly, to the Arizona Foundation for Legal Services and Education, such institution or company being permitted to remit the interest and dividends on all such accounts to the Arizona Foundation for Legal Services and Education in one payment; and

B. To transmit with each remittance to the Arizona Foundation for Legal Services and Education a statement showing the name of the lawyer or law firm on whose account the remittance is sent, the rate of interest applied or the dividends earned, and any service or other charges and fees imposed, with a copy of such statement to be transmitted to the lawyer or law firm. The manner of statement shall be determined by the Foundation.

(g) Authorized Financial Institutions. The State Bar and the Foundation shall establish regulations governing approval and termination of approval status for financial institutions, and shall annually publish a list of approved financial institutions. A financial institution shall be approved as a depository for lawyer or law firm trust accounts only if the institution annually files with the State Bar, on the provided form, an agreement to comply with the rules and regulations. The agreement shall include

the duty of the institution to report to the chief bar counsel in the event that any properly payable instrument is presented against a lawyer trust account containing insufficient funds, regardless of whether the instrument is honored or not. The manner of report shall be determined by the State Bar. No lawyer or law firm trust account shall be maintained in a financial institution in Arizona that does not agree to make such reports. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days advance written notice to the State Bar.

1. All lawyers admitted to practice in this state shall, as a condition thereof, consent to the reporting and production requirements set forth in this rule.

2. Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(gh) Suspension of Member. Any active member who fails to comply with requirements of this rule sections (a), (b), (c) or (f) above shall be suspended summarily by order of the board upon notice by the state bar pursuant to Rule 62(a)(4), provided that a notice by certified, return receipt mail of such non-compliance shall have been sent to the member, mailed to the member's last address of record in the state bar office at least thirty days prior to such suspension.

(hi) Reinstatement of Member. A lawyer who has been suspended for failure to comply with this rule sections (a), (b), (c) or (f) above may be reinstated by compliance with those provisions and notice to the board by the state bar of such compliance.

(j) Applicability of Rule. Every lawyer admitted to practice law in Arizona shall comply with the provisions of this rule regarding funds received, disbursed or held in Arizona, and funds received, disbursed or held on behalf of an Arizona client or a third person in connection with the representation of an Arizona client.

Notes to 2008 Amendments

This rule replaces former Rule 43 and 44 and authorizes the state bar to conduct random examinations of a member's trust account, in accordance with guidelines approved by the supreme court.

Rule 44. [Reserved]Trust Accounts; Interest Thereon

[Text of current Rule 44, subsections (a)-(d), and comment thereto, are deleted.]

* * * *

Rule 46. Jurisdiction in Discipline and Disability Matters; Definitions

(a)-(e) [No change in text.]

(f) Definitions. Where the context so requires, the following definitions shall apply to the interpretation of these rules relating to discipline, disability and reinstatement of lawyers:

1.-2. [No change in text.]

3. "Charge" means any allegation or other information of misconduct or incapacity ~~brought to the attention of the state bar~~ that comes to the attention of the state bar.

4. – 20. [No change]

21. "State bar file" means the original of every document, recording and transcript of testimony or exhibit created or received by the state bar in relation to a discipline, disability or reinstatement proceeding, but shall not include work product of bar counsel, ~~and~~ working files of state bar staff, or information protected by any legally recognized privilege in Arizona.

Rule 47. Rules of Procedure

(a) Pleadings. There may be a complaint, an answer, an amended complaint, and an answer to an amended complaint. ~~and~~ No other pleadings may be filed unless as permitted by these rules or otherwise permitted by the hearing officer, the commission, or the court.

1. - 2. [No change in text.]

(b) Amendment of Pleadings.

1. *To Conform To Evidence.* At any time prior to the conclusion of a hearing on the merits, ~~the state bar counsel~~ or the respondent may move to amend the complaint or answer to conform to the proof. If an amendment to the complaint is made, respondent shall be given reasonable time to answer the amendment, to produce evidence and to respond to the charges.

2. ~~*Additional Charges-Pre-Hearing Amendments.*~~ Bar counsel may file an amended complaint, without leave of the hearing officer, any time prior to the time an answer is filed. Prior to the commencement of a hearing on the merits, the complaint may be amended with leave of the assigned hearing officer, who may permit the inclusion of ~~to include~~ additional charges. The respondent may file a response within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period is longer. In the discretion of the hearing officer, the hearing date may be continued to provide the respondent with adequate time to meet the factual allegations and alleged ethical violations first presented in the amended pleading.

(c) Service. Service of the complaint, pleadings and subpoenas shall be effectuated as provided in the rules of civil procedure, except that service of the complaint in any discipline or disability

proceeding may also be made by certified mail/delivery restricted to addressee in addition to regular first class mail, sent to the last address provided by respondent to the state bar's membership records department pursuant to Rule 32(c)(3). Personal service of complaints and subpoenas may be made by staff examiners employed by the state bar. When service of the complaint is made by mail, the state bar counsel shall file a notice of service with the disciplinary clerk, indicating the date and manner of mailing, and service shall be deemed complete five (5) days after the date of mailing.

(d) Motions. Procedural or substantive motions may be filed and must comply with the requirements of Rule 7.1(a), Rule 12(b), (c), (e) and (f), and Rule 56, Ariz. R. Civ. P., as may be applicable to these proceedings. Motions for sanctions are governed by Rule 57(f)3. All motion practice shall be subject to the provisions of Rule 7.1(b), Ariz.R.Civ.P.

(e) Discovery. Discovery shall be governed as set forth in Rule 57(e) and (f) by Rule 26 and Rules 29 through 37, Ariz. R. Civ. P., to the extent applicable in these proceedings, except that the parties shall allow sufficient time to complete responses to all discovery at least thirty (30) days prior to the hearing on the merits, unless otherwise ordered. Failure of a respondent to comply with discovery requests and disclosure requirements may be construed as failure to cooperate under Rule 53(f).

(f) [No change in text.]

(g) Transcript of Hearings. The disciplinary clerk shall cause a record to be made, by stenographic or electronic means, of all evidentiary hearings and oral arguments or upon request of the hearing officer or the parties. Testimony recorded by electronic means is admissible for the same purposes as transcripts provided by court reporters. After the conclusion of each evidentiary hearing or oral argument in a contested case, the disciplinary clerk shall obtain and file one (1) copy of the written transcript of the hearing and serve a copy on the state bar ~~counsel~~ and respondent. A written transcript of an evidentiary hearing before a hearing officer that involves a tender of admissions and agreement for discipline by consent may be secured and filed by the disciplinary clerk only upon the request of the hearing officer, the respondent or the state bar ~~counsel~~, the commission or the court. The disciplinary clerk may also cause a record to be made of meetings and oral arguments before the commission. The costs to the disciplinary clerk of the services of a court reporter and transcripts may be included in the costs of adjudication that are assessed against the respondent pursuant to Rule 60(b).

(h) Subpoena Power. Except as otherwise provided, all hearing officers shall have the power to issue subpoenas.

1. *Investigative Subpoenas.* During the course of an investigation and prior to the filing of a complaint, the state bar ~~counsel~~ may obtain issuance of a subpoena by filing a written request with the probable cause panelist or the panelist's designee, containing a statement of facts to support the requested subpoena. A copy of the request shall be provided to respondent or respondent's counsel, if represented. If approved, the subpoena may compel the attendance of witnesses and the production of pertinent books, papers and documents, and answers to written interrogatories.

2. *Hearing Subpoenas.* After filing of a complaint, subpoenas shall be issued by a hearing

officer upon written request of the state bar counsel, respondent or respondent's counsel, as provided above.

3. [No change in text.]

4. *Contempt.* When a person subpoenaed to appear and give testimony, to produce books, papers or documents as required by the subpoena, refuses to appear or testify, or to answer any relevant or proper questions, the person shall be deemed in contempt of court, and the state bar counsel shall report such fact to the superior court of the county in which the investigation, trial or hearing is being held. The court shall issue an attachment in the form usual in the court, directed to the sheriff of any county in the state, commanding the sheriff to attach such person and bring him or her before the court. Upon return of the attachment and production of the person attached, the court shall have jurisdiction of the matter, and the person charged may purge himself or herself of the contempt in the same way, and the same proceeding shall be held, and the same penalties may be imposed, as in the case of a witness subpoenaed to appear and give evidence on the trial of a civil action before a superior court.

5. – 7. [No change in text.]

(i) [No change in text.]

(j) Informal Request for Information. When a lawyer has failed to comply with any request for information made pursuant to these rules for more than twenty (20) days, the state bar counsel may notify the lawyer that failure to so comply within ten (10) days may necessitate the taking of the deposition of the lawyer pursuant to subpoena.

1. [No change in text.]

2. *Imposition of Costs.* When a lawyer's failure to cooperate results in a deposition being conducted pursuant to the preceding subsection (h) (1), the lawyer shall be liable for the actual costs of conducting the deposition, including but not limited to service fees, court reporter fees, travel expenses and the cost of transcribing the deposition, regardless of the ultimate disposition of the discipline proceeding. Upon application of chief bar counsel to a panelist, itemizing the costs and setting forth the reasons necessitating the deposition, and after giving the lawyer ten (10) days to respond, the panelist shall, by order, assess such costs as appear appropriate against the lawyer. Commission review of an order assessing costs under this rule may be had.

3. [No change in text.]

(k) Power to Enter, Amend or Vacate. Unless prohibited elsewhere in these rules, for good cause shown and in the interest of justice any order or judgment may be entered, or may be amended or vacated, by the officer or body that entered it or by a superior body.

(l) [No change in text.]

(m) Appearances of Counsel; Withdrawal of Counsel.

1. Prior to Filing of Formal Complaint. An attorney who wishes to file or submit papers, or otherwise appear, on behalf of a respondent in any discipline, disability or reinstatement matter prior to the filing of a formal complaint shall notify the bar counsel assigned to the matter in writing of the representation.

2. After Filing of Formal Complaint. No attorney shall appear in any discipline, disability or reinstatement proceeding, or file anything in any such proceeding, without first appearing as counsel of record. Bar counsel who files a formal complaint shall be deemed counsel of record for the state bar, and a notice of appearance is not required. An attorney who files an answer on behalf of a respondent shall be deemed counsel of record for the respondent and no notice of appearance shall be required. An attorney who wishes to appear or file anything on behalf of the state bar after a complaint is filed, or on behalf of a respondent after an answer is filed, must file a formal notice of appearance with the Disciplinary Clerk of the Supreme Court, and serve a copy on the other party. An attorney who is not counsel of record may not appear or file anything unless there has been a motion for substitution, or notice of association of counsel, approved by the assigned hearing officer, the Commission or the Court.

3. Withdrawals and Substitutions of Counsel. No attorney shall be permitted to withdraw, or be substituted, as attorney of record in any discipline, disability or reinstatement proceeding until a motion for withdrawal or substitution of counsel has been filed and approved by the assigned hearing officer, the commission or the court.

Rule 48. Rules of Construction

(a)-(c) [No change in text.]

(d) Standard of Proof. Allegations in a complaint, applications for reinstatement, petitions for transfer to and from disability inactive status and competency determinations shall be established by clear and convincing evidence. In discipline proceedings that include allegations of trust account violations, there shall be a rebuttable presumption that any lawyer who fails to maintain trust account records as required by ER 1.15 or Rule 43, Ariz.R.S.Ct., or who fails to provide trust account records to the state bar upon request or as ordered by a panelist, a hearing officer, the commission or the court, has failed to properly safeguard client or third-party funds or property, as required by the provisions of ER 1.15 or Rule 43, Ariz.R.S.Ct.

(e)-(i) [No change in text.]

(j) Disqualification. Board, commission, hearing officers, ~~and~~ panelists, and appeal panel members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain.

(k) Effect of Dismissal, Diversion, Mediation, and Prior Discipline.

1. A dismissal by the state bar counsel following a screening investigation, or a dismissal by a panelist, or a hearing officer before a hearing on the merits, based upon a determination that no probable cause exists, shall not be a bar to further action based upon the same facts.

2. [No change in text.]

3. Prior discipline imposed on respondent, with or without respondent's consent, ~~may~~ shall be considered by the panelist, hearing officer, the commission and this court in recommending or imposing discipline.

4. Successful completion of diversion pursuant to these rules, by order of the panelist, a hearing officer, the commission, or the court, shall be a bar to further proceedings based upon the same facts before the panelist, a hearing officer, the commission, or the court.

5. [No change]

(l) Immunity from Civil Suit. Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the client protection fund, the peer review committee, the fee arbitration program, the ~~ethics committee~~ on the Rules of Professional Conduct, monitors of the ~~Membership Assistance or Law Office Management Assistance Programs,~~ probable cause panelists or ~~state bar counsel~~ and staff relating to lawyer misconduct, lack of professionalism or disability, and testimony given in the proceedings shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, client protection fund trustees and staff, fee arbitration committee arbitrators and staff, the ethics committee, monitors of the ~~Membership Assistance or Law Office Management Assistance Programs,~~ probable cause panelists, ~~state bar counsel~~ and staff shall be immune from suit for any conduct in the course of their official duties.

(m) Immunity from Disciplinary Complaint. Members of the ~~B~~board, the ~~D~~disciplinary Commission, ~~H~~hearing Officers, ~~B~~bar Counsel or attorneys acting under the direction or authority of such persons or the court are immune from any charge or discipline complaint alleging ethical misconduct that arises out of an administrative act performed in the exercise of discretion under the authority granted under these rules. No charge or disciplinary complaint against such persons may be docketed for filing by the ~~S~~tate Bar of Arizona or be a part of any person's disciplinary history absent a finding by ~~Chief Bar Counsel~~ the panelist or the panelist's designee that the charge or complaint alleges one or more violations of the Rules of Professional Conduct. In the event such a finding is made, the matter shall be docketed but may be stayed by order of the ~~C~~chair of the Disciplinary ~~C~~ommission upon application and a showing of good cause.

* * *

Rule 53. Grounds for Discipline

Grounds for discipline of members and non-members include the following:

(a)-(b) [No change in text.]

(c) ~~Willful~~ **Knowing violation of any rule or any order of the court of a state, tribe, territory or district of the United States, including child support orders.**

(d)-(g) [No change in text.]

(h) **Conviction of a Crime.** A lawyer shall be disciplined as the facts warrant upon conviction of a misdemeanor involving a serious crime or of any felony. "Serious crime" means any crime, a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, theft or moral turpitude. A conspiracy, a solicitation of another or any attempt to commit a serious crime, is a serious crime.

1. *Procedure.* Upon conviction of a lawyer of any crime, the clerk of the court in which the conviction is entered shall, within twenty (20) days thereafter, transmit to this court and to the state bar a certified copy of the judgment of conviction, ~~and the convicted lawyer shall,~~ within twenty (20) days after entry of judgment of conviction of a misdemeanor involving a serious crime or of any felony , provide the following information to chief bar counsel: (a) name, bar number and address of record with the state bar, and a current address if different from the address of record; (b) the name of the court in which the judgment of conviction was entered; (c) the case or file number in which the judgment of conviction was entered; and (c) the date the judgment of conviction was entered. Receipt by the state bar of a certified copy of the judgment of conviction, or other information of conviction of a lawyer, shall be treated and processed as is any other charge against a lawyer, except that the sole issue to be determined shall be the extent of the discipline to be imposed. Proof of conviction shall be conclusive evidence of guilt of the crime for which convicted in any discipline proceeding based on the conviction.

2. *Interim Suspension.* A suspension imposed pursuant to this rule shall not be in excess of five (5) years pending further order of this court.

A. [No change in text.]

B. **Serious Misdemeanor Conviction.** A lawyer convicted of a serious crime other than a felony may be suspended, upon motion of the state bar, pending final disposition of a disciplinary proceeding predicated upon the conviction. Within ten (10) days of the state bar counsel ~~counsel~~ filing a motion, respondent may file with this court a verified response showing good cause why respondent should not be suspended. The court may permit respondent to present oral argument in support of the respondent's response and shall promptly grant or deny the motion. If the motion is granted, the lawyer shall be suspended as of the date of such order.

3.-4. [No change in text.]

(i) [No change in text.]

Rule 54. Investigation; Initiation of Proceedings

(a) [No change in text.]

(b) **Initial Proceedings.** Upon the commencement of a discipline proceeding against a respondent, the matter shall first proceed as provided in this section:

1. *Screening.* ~~The state Bar counsel~~ shall evaluate all information coming to ~~bar-counsel's~~ its attention by charge or otherwise alleging lack of professionalism, misconduct or incapacity. ~~The state Bar-counsel:~~

A. [No change]

B. Shall close the matter if the allegations would not constitute misconduct or incapacity under these rules, even if found to be true. ~~The state Bar counsel~~ may refer such matters to the peer review or fee arbitration committee;

C.-D. [No change in text.]

E. May refer for fee arbitration any charge that, in the state bar's opinion, primarily involves a fee dispute, provided both the respondent and complainant agree to participate in fee arbitration.

2. *Investigation and Recommendation.* All investigations shall be conducted or supervised by ~~staff bar counsel or staff examiners.~~ Following a screening investigation, ~~the state bar counsel~~ may recommend one or more of the following: dismissal, diversion, a stay, informal reprimand, probation, restitution, assessment of costs and expenses, or the filing of a complaint, or a petition for transfer to disability inactive status or, with the consent of the respondent, any other sanction. No disposition adverse to the respondent shall be recommended by ~~the state bar counsel~~ until the respondent has been afforded an opportunity to respond in writing to the charge.

3. *Dismissal by ~~the State Bar-Counsel.~~* After conducting a screening investigation, if there is no probable cause to believe that misconduct or incapacity under these rules exists, ~~the state bar counsel may shall~~ dismiss a discipline proceeding by filing a notice of dismissal with the Records Manager of the Lawyer Regulation Office of the state bar.

4. *Probable Cause Review.* ~~Bar counsel's recommended~~ Any recommendation by the state bar for a disposition other than dismissal, shall be reviewed by the panelist or the panelist's designee. The panelist or designee may approve, disapprove or modify the recommendation and shall file the decision with the Records Manager of the Lawyer Regulation Office of the state bar. ~~The state Bar counsel~~ may appeal a decision to disapprove or modify ~~its bar-counsel's~~ recommendation to an appeal panel composed of three members of the board of governors, who shall either approve the state bar's counsel's recommendation, approve the action of the ~~first reviewing member panelist,~~ or require any other action that might could have been recommended by ~~the state bar-counsel.~~

5. *Disposition Prior to Formal Complaint.*

A. Subject to the terms of this subsection, a decision of the panelist, or in the event of an appeal by the state bar counsel, a decision of the appeal panel, shall be final with respect to dismissal, diversion, stay, informal reprimand, assessment of costs and expenses, probation, restitution, and the filing of formal discipline or disability proceedings. Orders of diversion, stay, informal reprimand, probation, restitution, and assessment of costs and expenses shall be signed by the panelist~~(s)~~ or appeal panel.

B. Within ten (10) days of service of an order of diversion, stay, informal reprimand, probation, restitution, or assessment of costs and expenses entered by a panelist or an appeal panel, respondent has the right to demand that a formal proceeding be instituted appeal pursuant to subsection (c) of this rule, ~~whereupon such order shall be vacated and the matter disposed of in the same manner as any other matter instituted before a hearing officer.~~

C. A recommendation of any sanction that is consented to by respondent, pursuant to Rule 56, before or while the matter is pending before the panelist, other than those made final by decision of the panelist or appeal panel, shall be submitted directly to a hearing officer for review.

6. *Referral to Peer Review Committee, Fee Arbitration, or Mediation.* The state Bbar counsel may refer a matter to the peer review committee, the fee arbitration committee, or to mediation after ~~the probable cause panelist has dismissed the discipline proceeding~~ dismissal of a charge.

7. [No change in text.]

(c) Appeal from a Panelist's Order of Diversion, Stay, Probation, Restitution, or Assessment of Costs and Expenses. When a respondent appeals from a panelist or appeal panel's order of diversion, stay, probation, restitution, or assessment of costs and expenses, a panelist other than the issuing panelist shall be appointed to consider the appeal. The standard of review shall be *de novo*. Within five days of service of an appeal, the state bar and the respondent shall submit to the reviewing panelist a position statement that shall not exceed three pages. The reviewing panelist shall hold a hearing within thirty (30) days of the date the appeal was filed to determine whether the issuing panelist's order should be affirmed or modified, or the matter dismissed. If the conduct warrants the imposition of a censure, suspension or disbarment, the reviewing panelist may enter an order of probable cause. The panelist shall provide the parties with fifteen (15) days advance notice of the hearing. The venue requirements of Rule 57(i)(2) shall not apply in these proceedings, but the parties and witnesses (if any) may appear telephonically at the hearing. The hearing shall be limited to two (2) hours in length and shall consist of oral argument only, unless the reviewing panelist determines that exceptional circumstances warrant a lengthier hearing and/or the receipt of evidence. Following a hearing, the reviewing panelist shall either affirm the issuing panelist's order or enter any other order permitted by Rule 54(b). The costs and expenses of the appeal shall be included in any order that includes imposition of a disciplinary sanction. The reviewing panelist's decision shall be final and no further appeal shall be permitted.

Rule 55. Diversion

(a) [No change in text.]

(b) **Recommendation for Diversion.** ~~The state bar counsel~~ may recommend diversion, based upon the ~~State Bar of Arizona~~ Diversion Guidelines adopted by the board, if ~~bar counsel~~ it concludes that:

1.-2. [No change]

3. The cause or basis of the professional misconduct or incapacity is subject to remediation or resolution through alternative programs or mechanisms, including:

A.-D. [No change]

E. Any other program or corrective course of action agreed upon by the state bar counsel and respondent to address respondent's misconduct;

4.-5. [No change in text.]

(c) **Dismissal.** ~~Upon request of a respondent a~~After successful completion of diversion under these rules, the matter shall be dismissed by order of the panelist, a hearing officer, the commission, or the court. Dismissal under this rule shall not preclude the state bar from using the fact of an order of diversion and the facts of the underlying matter in other discipline proceedings.

Notes to 2008 Amendments

Diversion is intended to resolve charges without the imposition of sanctions while ensuring that lawyers address underlying problems to which minor ethical breaches can be linked. Diversion is not intended as a substitute for sanctions in cases involving dishonesty, self-dealing, breach of trust, lack of respect for the system, or like kinds of conduct. It is intended to be an alternative where relatively minor misconduct is attributable to problems in law office management, impairment, or negligent conduct.

Rule 56. Discipline by Consent

(a) [No change in text.]

(b) **Procedure.** A tender of admissions and agreement for discipline by consent (agreement), signed by respondent, respondent's counsel, if any, and bar counsel, shall be filed with the disciplinary clerk and served on the assigned hearing officer not less than three (3) days prior to the formal hearing on the merits, unless the form of discipline includes disbarment. If an agreement is reached during the course of the hearing on the merits, the formal agreement shall be filed by the parties within ten (10) days or the hearing shall commence not more than thirty (30) days thereafter. The hearing officer, in the hearing officer's discretion or upon request, may hold an evidentiary hearing within thirty (30) days of the filing of the agreement, to establish a factual basis for the agreement and may accept, reject, or order the agreement modified. All agreements must be accompanied by a joint memorandum in

support of agreement for discipline by consent (“~~J~~oint ~~M~~emorandum”), as set forth below. Exhibits, such as a record of criminal conviction, pre-sentence reports, medical records, public records, and any other records in support of the agreement or the sanction to be imposed shall be filed with the agreement and joint memorandum, in addition to a statement of costs and expenses on admitted counts. The agreement shall state that the agreement and joint memorandum have been approved as to form and content by the ~~C~~hief ~~B~~ar ~~C~~counsel or ~~C~~hief ~~B~~ar ~~C~~counsel’s designee.

(c)-(d) [No change in text.]

(e) Use of Standardized Documents. The Tender of Admissions and Joint Memorandum in Support of Agreement for Discipline by Consent may include standardized documents approved by chief bar counsel related to the terms of probation.

(e)(f) Hearing Officer Report. Within thirty (30) days of the submission of an agreement and joint memorandum or the conclusion of an ~~evidentiary~~ hearing, if one is held, and receipt of the transcript, the hearing officer shall file a report with the disciplinary clerk and serve a copy on the parties. The report shall recommend acceptance, rejection or modification of the proposed agreement and shall address the proportionality of the sanction to be imposed. The report may incorporate all or portions of the consent documents.

1.-3. [No change in text.]

(f)(g) Disbarment by Consent. The following provisions shall apply to admissions that constitute disbarment by consent:

1.-3. [No change in text.]

Notes to 2008 Amendments

The use of standardized documents, which may include check-off boxes for the terms of probation, is intended to simplify and expedite discipline by consent. The parties may provide additional or explanatory information to supplement a check-off box.

Rule 57. Formal proceedings

(a) Complaint. Formal discipline proceedings shall be instituted by the state bar filing a complaint or agreement for discipline by consent with the disciplinary clerk. The complaint shall be sufficiently clear and specific to inform a respondent of the alleged misconduct. The existence of prior sanctions or a prior course of conduct may be stated in the complaint if the existence of the prior sanction or course of conduct is necessary to prove the conduct alleged in the complaint. ~~Otherwise, bar counsel shall inform respondent or respondent’s counsel that bar counsel intends to introduce evidence of prior discipline at the time the initial disclosure statement is served. If discipline is imposed subsequent to the filing of the initial disclosure statement, bar counsel shall serve a notice of intent to introduce evidence of prior discipline no later than twenty (20) days prior to the hearing on the merits and shall provide respondent or respondent’s counsel with all documents bar counsel intends to~~

~~introduce. All evidence of prior discipline alleged by bar counsel shall be filed with the disciplinary clerk and provided to the hearing officer. After a decision on the merits, the record of prior discipline proceedings against respondent and similar evidence may be considered by the hearing officer on the issue of sanctions to be imposed.~~

1.-2. [No change in text.]

(b) Answer. Respondent shall file an answer with the disciplinary clerk and serve copies upon bar counsel of record and the hearing officer within twenty (20) days after service of the complaint, unless, upon written request by respondent, the time is extended by the hearing officer. The hearing officer may grant one extension of time, not to exceed thirty (30) days. Respondent shall provide a current address in his or her answer, and confirm that the address given is the address reported to the state bar pursuant to Rule 32(c)(3). A respondent's answer must comply with Rule 8(b), Ariz.R.Civ.P.

(c) Initial Case Management Conference. Within ten (10) days after the time for filing an answer has expired, the hearing officer shall contact the parties and hold a mandatory case management conference for purposes of establishing the discovery schedule, as well as scheduling the hearing on the merits and all other prehearing conferences. Bar counsel and respondent, and respondent's attorney, if any, shall appear for the initial case management conference, which may be telephonic.

(d) Default Procedure; Aggravation/Mitigation Hearing. If respondent fails to answer within the prescribed time, the disciplinary clerk shall, within ten (10) days thereafter, file and serve a copy of the notice of default upon respondent and bar counsel. A default shall not be entered if the respondent files an answer or otherwise defends prior to the expiration of ten (10) days from the service of the notice of default. Otherwise, a default shall be entered by the disciplinary clerk ten (10) days after the notice of default is filed and served and the allegations in the complaint shall be deemed admitted. Entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c), Ariz.R.Civ.P. Upon written request of the state bar or respondent, filed within ten (10) days of the entry of default, or at the discretion of the hearing officer, shall schedule an aggravation/mitigation hearing, which shall be held within thirty (30) days of the request entry of default.

(e) Initial Disclosure Statements. ~~The state bar counsel, at filing of the complaint within twenty (20) days after the answer has been filed, and respondent, within thirty (30) days after filing the answer has been filed, shall each serve upon the other an initial disclosure statement and shall file a notice of service with the disciplinary clerk.~~ The initial disclosure statement shall include the following:

1.-4. [No change in text.]

5. The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at the hearing, including documentation of prior discipline the state bar counsel may seek to introduce.

6. [No change in text.]

7. The existence of prior discipline or a prior course of conduct if not disclosed in the complaint, pursuant to Rule 57(a).

8. Evidence in aggravation or mitigation that may be presented at hearing.

9. The factual and legal bases upon which the respondent may rely at hearing to contest the allegations in the complaint.

(f) Discovery.

1. Time limits. Unless extended by agreement of the parties or otherwise ordered at the case management conference, all initial discovery requests must be made within forty (40) days of the date an initial answer is filed, except that additional discovery requests may be filed within thirty (30) days of the date an answer is filed to an amended complaint. Discovery requests based upon an amended complaint shall be limited to new allegations. Discovery shall be governed by Rules 26(a) through (f) and Rules 29 through 36, Ariz. R. Civ. P., to the extent not inconsistent with these rules.

2. Response time. Unless extended by agreement of the parties, answers to discovery requests, including interrogatories, requests for admission, and requests for production of documents or things, shall be provided within thirty (30) days of the date of service of the discovery request. Failure of a respondent to comply with discovery requests and disclosure requirements may be construed as failure to cooperate under Rule 53(f).

3. Sanctions for failure to make disclosure or discovery. Following a good faith effort to resolve a discovery issue, either party may file a notice of failure to comply with discovery rules, which shall include a statement that an attempt to resolve the issue. A hearing, which may be telephonic, shall be held within five (5) days of the date the notice is filed. Evidence of compliance and non-compliance may be produced at the hearing. The hearing officer shall enter appropriate orders at the conclusion of the hearing, which are limited to the sanctions set forth in sub-sections (A) and (B) of this rule.

(A) Willful violation of the disclosure or discovery rules. Evidence that is not disclosed as required by these rules shall not be admitted at hearing by the non-compliant party if the hearing officer concludes that non-compliance was willful. In making findings of fact about the allegations of misconduct, the hearing officer shall conclude that responses to specific interrogatories and requests for admissions and production would have been adverse to the non-compliant party.

(B) Other violations of the disclosure or discovery rules. The hearing officer may utilize any of the following sanctions for non-willful violations of the disclosure or discovery rules:

(i) An order refusing to allow the non-compliant party to support or oppose designated allegations, claims or defenses, or prohibiting that party from introducing designated matter in evidence;

(ii) An order striking out pleadings or parts thereof, or staying further proceedings until the disclosure or discovery rules or hearing officer order is obeyed, or dismissing designated allegations in the complaint or defenses thereto, or rendering a judgment by default against the non-compliant party.

(C) Evasive or incomplete disclosure, answer, or response. An evasive or incomplete disclosure, answer, or response by a respondent may be construed as a failure to cooperate under Rule 53(f).

(fg) Settlement Conference. [No change in text.]

(gh) Prehearing Conference. At the discretion of the hearing officer, or upon request of either party, one or more prehearing conferences may be held before the assigned hearing officer for the purpose of determining case status, establishing a ~~trial~~ hearing schedule, disposing of outstanding procedural matters or otherwise narrowing the issues to be presented at the hearing on the merits. If the hearing officer intends to hear oral argument or otherwise rule on substantive motions, the parties shall be so advised in advance of the hearing.

~~**(hj) Final Disclosure Joint Prehearing Statements.** At least ten (10) days prior to the hearing on the merits, each party shall serve upon the other a final list of witnesses and exhibits the party will introduce at the hearing. Service by mail shall be accomplished fifteen (15) days prior to the hearing on the merits. Either party may request an order directing the filing of a joint prehearing statement. The hearing officer shall order the parties to file a joint prehearing statement if requested by either party, and may do so *sua sponte*. A party shall file a unilateral prehearing statement if the opposing party is not cooperating in good faith to prepare a joint prehearing statement.~~

(ij) Hearing.

1. *Time Limits.* The hearing officer shall hold and complete the hearing on the merits within one hundred and fifty (150) days of the filing of the complaint unless the chair of the commission, or the chair's designee, upon motion by one of the parties or the hearing officer, designates the case as a complex case that, in the interests of justice, cannot be heard within one hundred and fifty (150) days of the filing of the complaint. The hearing shall be held on consecutive days, except in extraordinary circumstances. The hearing date may be continued by the hearing officer upon request or stipulation of the parties, or upon the hearing officer's own motion, for good cause shown. Continuances may be granted for no more than thirty (30) days at a time, and may not extend the hearing on the merits beyond one hundred and fifty (150) days from the filing of the complaint. Upon a showing of extraordinary circumstances, the chair of the commission, or the chair's designee, may authorize additional time, up to thirty (30) days, to hold and complete the hearing upon motion of the parties or the hearing officer. If it appears to the chair of the commission, or to the chair's designee, that the hearing cannot reasonably be held and completed within the stated time limits, the chair

or designee shall notify the court and request that additional time be granted.

2.-4. [No change in text.]

5. *Telephonic testimony.* Telephonic witness testimony should normally be permitted if the offering party provides evidence that the witness is unavailable to testify in-person.

6. *Evidence of prior sanctions.* The existence of prior sanctions, including those that are imposed subsequent to the filing of the complaint, may be presented to the hearing officer during the hearing on the merits of the complaint, to the extent permitted by the Rules of Evidence, or as a factor in aggravation. When determining an appropriate sanction, the hearing officer shall consider in aggravation prior sanctions that were final at the time of hearing.

(jk) Report. Within thirty (30) days after receiving the transcript, the hearing officer shall prepare and file with the disciplinary clerk a written report containing findings of fact, conclusions of law and recommendations regarding discipline, together with a record of the proceedings. The hearing officer shall serve a copy of the report on respondent and on bar counsel of record. For good cause shown, a hearing officer may request that the chair of the commission, or the chair's designee, grant an extension of time within which to file the report. If no appeal is timely filed, the decision of the hearing officer is final as to any dismissal, diversion, informal reprimand, assessment of costs and expenses, probation and restitution, if not part of a sanction which includes disbarment, suspension or censure.

(kl) Appeal. [No change in text.]

Rule 58. Review ~~B~~by the Commission

(a)-(c) [No change in text.]

(d) Briefs.

1. [No change in text.]

2. *Form of Brief.* Opening and answering briefs shall comply with the provisions of Rules 6(c) and 14(a)(1) and (b), Ariz. R. Civ. App. P. not exceed thirty five (35) pages, exclusive of appendices, unless leave is granted by the commission chair upon a showing of good cause, and shall otherwise conform to the requirements set forth in Rule 14, Ariz. R. Civ. App. P., as applicable. Appendices may contain excerpts from the transcript of the hearings, pleadings, orders, and authority that counsel wishes to bring to the attention of the commission but shall not contain arguments of law or fact properly included in the body of the brief. If the party appeals an order modifying or rejecting an agreement, a copy of the tender of admissions and joint memorandum shall be included in the appendix.

3. [No change in text.]

(e) Commission Report. Within thirty (30) days after final submission of the ~~matter~~ oral argument or consideration of the matter in executive session, the commission shall prepare and file a written report, affirming, reversing or modifying the findings of fact, conclusions of law or recommendation(s) before it, remanding the matter for further proceedings before the hearing officer, or dismissing the charge or complaint. If the report cannot be timely filed, the commission may file with the clerk of the supreme court an original notice and six copies stating the reasons for the delay. The notice must state the date by which the report will be filed. The commission shall submit a copy of the notice and include a certificate of service on respondent, respondent's counsel, if any, and bar counsel of record. A copy of the commission report and any order shall be served upon the hearing officer from which referred, respondent, respondent's counsel, if any, and bar counsel of record. The decision of the commission shall be final as to dismissal, diversion, remand, probation, reprimand, restitution, assessment, and a censure that is not reviewed by the court, if not part of a sanction which includes disbarment or suspension.

(f) Commission Recommendation for Disbarment; Interim Suspension. Upon a recommendation by the commission that respondent be disbarred, the state bar may file a motion with the court for interim suspension of the respondent for the remainder of the proceedings, not in excess of five (5) years, pending further order of this court. Suspension under this subsection shall occur unless the respondent makes an affirmative showing that the respondent's continuation of the practice of law will not be detrimental to the integrity and standing of the state bar and the administration of justice, or be contrary to the public interest. If discretionary review of the decision of the commission is not sought and the decision becomes final, such motion need not be filed, or if filed may be withdrawn.

1.-2. [No change in text.]

3. *Response to Motion.* The respondent may respond to the motion and the response may be supported by documents or affidavits. The response and any attachments shall be filed with the court and copies provided to the disciplinary clerk and served upon bar counsel of record at least three (3) days before the scheduled show cause hearing. Failure to respond shall not result in default or waive respondent's right to appear at the show cause hearing.

4. [No change in text.]

* * *

Rule 60. Disciplinary Sanctions

(a) Types and Forms of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

1. [No change]

2. *Suspension by the Court.* Suspension may be imposed by the court for an appropriate fixed period of time not in excess of five (5) years, by judgment entered in this court or, if not before the court ~~sua sponte~~ sua sponte or on discretionary review of the commission's recommendation, then by judgment signed and entered by the clerk of the court. Suspended

members shall remain suspended until the court enters an order reinstating the member to the practice of law in Arizona. The form of judgment signed and entered by the clerk shall be:

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision and no discretionary or ~~sua sponte~~ sua sponte review occurring. . . . [No further changes in text.]

3.-4. [No change in text.]

5. *Probation.* Probation may be imposed by order of the panelist, the hearing officer, the commission or this court as follows:

A.-B. [No change in text.]

C. The state Bar counsel shall be responsible for monitoring and supervising the respondent during the probationary period. ~~The state Bar counsel~~ shall report material violations of the terms of probation to the imposing entity, which may hold a hearing within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. In a probation violation hearing, a violation must be proven by ~~clear and convincing a preponderance of the~~ clear and convincing a preponderance of the evidence. At the end of the probation term, bar counsel shall prepare and forward a ~~report notice~~ report notice to the imposing entity. ~~This report shall provide information~~ regarding the respondent's completion or non-completion of the imposed terms.

6. *Restitution.* Restitution may be imposed by order of the panelist or appeal panel, the hearing officer, the commission or this court to persons financially injured, including reimbursement to the state bar client security fund. If constituting all or part of discipline imposed by the court, restitution shall be imposed in the judgment; otherwise, it shall be imposed by order. Restitution and the amount thereof must be proven by ~~clear and convincing a preponderance of the~~ clear and convincing a preponderance of the evidence.

(b) Assessment of the Costs and Expenses. An assessment of costs and expenses related to disciplinary proceedings shall be imposed upon a respondent by the hearing officer, the commission or the court, as appropriate, in addition to any other sanction imposed. An assessment may be imposed upon a respondent in a disability proceeding, in the discretion of the commission or the court. An assessment of costs and expenses of proceedings, imposed by order of a panelist, shall be based upon a similar statement of costs and expenses prepared by the state bar.

1. [No change]

2. *Procedure.*

A. Upon Final Order of Hearing Officer. If the disciplinary sanction recommended by the hearing officer is not appealed and does not include a recommendation of censure, suspension or disbarment, the state bar shall file a final statement of costs and expenses with

the hearing officer and disciplinary clerk within twenty (20) days after the time to appeal has expired. The respondent shall file any objections to the statement of costs and expenses within ten days of service. The hearing officer, after considering the statement of costs and expenses and any objections filed by the respondent, or respondent's counsel, if any, shall prepare a report and order assessing costs and expenses and shall file the same with the disciplinary clerk and serve a copy on the bar counsel of record and respondent. The respondent or state bar may contest the assessment of costs and expenses by filing a petition for review pursuant to Rule 23, ~~ARCAP~~ Ariz. R. Civ. App. P. The commission shall affirm or modify the assessment of costs and expenses, without further argument unless specifically requested by the commission, and shall enter an order of costs and expenses to be filed with the disciplinary clerk and served on the parties. The respondent or state bar may appeal the assessment of costs and expenses by the commission by filing a petition for review with the court, pursuant to Rule 21, Ariz. R. Civ. App. P.

B.-C. [No change in text.]

(c) [No change in text.]

Rule 61. Interim Suspension by the Court

(a)-(b) [No change in text.]

(c) **Procedure.**

1.-2. [No change in text.]

3. *Service of Motion on Respondent; Response.* Upon filing of the motion, the court shall issue an order requiring the state bar to serve the motion and the court's order upon respondent, as appropriate under Rule 47(c), including service by certified mail/delivery restricted to addressee in addition to regular first class mail, sent to the last address provided by respondent to the state bar's membership records department pursuant to Rule 32(c)(3), within seven (7) days and requiring respondent to file a response to the motion within ten (10) days of service of the motion. After receiving the response, the court may rule on the motion, set oral argument on the motion, or direct the disciplinary clerk to assign the matter to a hearing officer to conduct an evidentiary hearing.

4.-5. [No change in text.]

(d) [No change in text.]

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Rule 64. Reinstatement; Eligibility

(a)-(d) [No change in text.]

(e) Reinstatement After Suspension ~~B~~by the Court.

1.-2. [No change in text]

3. Suspended members shall remain suspended until an order is entered by the Supreme Court reinstating the member to the active practice of law. This provision shall not apply to members who are summarily suspended by the board pursuant to Rule 62 of these rules.

(f) Reinstatement After Summary Suspension by the Board of Governors; Resignation in Lieu of Reinstatement.

1. Reinstatement After summary Suspension. The application of a member summarily suspended shall be filed within two years from the effective date of the suspension and be accompanied by proof of cure of the grounds upon which the suspension order was entered and by payment equal to the amount of fees, assessments, and administrative costs, if any, the applicant would have been required to pay had the applicant remained an active member to the date of the application, plus the one hundred dollar (\$100.00) reinstatement fee and any applicable delinquency or late fees. A timely filed application shall be addressed to and be considered by the board. Upon verification of compliance the board shall enter an order of reinstatement. If an application is not filed within two years from the effective date of suspension, the reinstatement procedure set forth in Rule 65 shall apply.

2. Resignation in Lieu of Reinstatement. Notwithstanding the provisions of Rule 32(c)(10) of these Rules, a member who has been summarily suspended by the board may resign from membership, in lieu of seeking reinstatement. Such a resignation shall become effective when filed in the office of the state bar, accepted by the board, and approved by this court. Such resignation shall not be accepted if there is a disciplinary charge or complaint pending against the member. After the resignation is approved by this court, such member shall be known as a “resigned member” and shall not represent to any other jurisdiction that such member resigned while in good standing. Such a resignation shall not be a bar to the institution of subsequent discipline proceedings for any conduct of the resigned member occurring prior to the resignation. In the event such resigned member thereafter is disbarred, suspended or censured, the resigned member’s status shall be changed from “resigned member” to that of a person so disciplined. A summarily suspended member who resigned in lieu of seeking reinstatement shall not be eligible for reinstatement, but may be readmitted to membership through the application procedures set forth in Rule 34 of these rules.

* * *

Rule 70. Public Access to Information

(a) Availability of i[n]formation. Except as otherwise provided in these rules, the state bar file maintained by the state bar, the record maintained by the disciplinary clerk and all proceedings shall be open to the public upon:

1.-2. [No change in text.]

3. in screening cases dismissed by the state bar counsel, the mailing of notice of dismissal to complainant;

4.-7. [No change in text.]

(b) – (f) [No change]

(g) Sealing the Record/Protective Orders. Upon ~~motion~~ request by a party or by a person from whom the information or evidence was obtained, and for good cause shown, the panelist, a hearing officer, the commission or this court may make an order, in a matter pending before them, sealing a portion of the record and/or state bar file and taking other measures to assure the confidentiality of the sealed information. Material sealed shall remain confidential notwithstanding the remaining record in the matter is made public. Sealed material shall be opened and viewed only by an order of the panelist, the hearing officer, commission, board or court for use by such body and the parties in proceedings then pending before it, and otherwise only upon notice to and an opportunity to be heard by the parties and the witness or other person furnishing the information.

(h) [No change]

Rule 71. Expungement of State Bar Records

(a) [No change in text.]

(b) Expungement. All records relating to a charge or complaint terminated by dismissal, or a random trust account examination, may be expunged from the files of the state bar after three (3) years have elapsed from the date of dismissal or the completion of the examination.

(c)-(e) [No change in text.]

Rule 72. Notice to Clients, Adverse Parties and Other Counsel

(a)-(d) [No change in text.]

(e) Affidavit Filed with Commission and Court. Within ten (10) days after the effective date of the judgment of disbarment or suspension, transfer to disability inactive status, or resignation, respondent shall file with the commission and with the court an affidavit showing:

1.-3. [No change in text.]

4. Respondent has served a copy of such affidavit upon bar counsel, the chief judge of every federal circuit court of appeals in which respondent is admitted, the chief judge and chief deputy clerk of every United States district court in which respondent is admitted, the chief bankruptcy judge and the divisional manager of every bankruptcy court in which respondent is admitted, and the presiding judge and clerk of the court for every county in Arizona.

(f) Duty to Maintain Records. A disbarred or suspended lawyer, or a lawyer on disability status to the extent able, or the conservator shall keep and maintain records constituting proof of compliance with this rule. Proof of compliance, which shall include copies of notice sent pursuant to subsection (a) of this rule and signed returned receipts, shall be provided to chief bar counsel. Proof of compliance is a condition precedent to any application for reinstatement.

(g) [No change in text.]

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Rule 75. Jurisdiction; Definitions

(a) Jurisdiction. This court has jurisdiction over any person engaged in the unauthorized practice of law pursuant to Rule 31(a) of these rules. Proceedings against non-members may also be instituted pursuant to Rules 47 through 60, and such proceedings may be concurrent with proceedings under this rule and Rules 76 through 80, Ariz.R.S.Ct.

(b) [No change]

Notes to the 2008 Amendments

“Non-member” is defined in Rule 46(f)(15), Ariz.R.S.Ct., as “a person licensed to practice law in a state or possession of the United States or a non-lawyer permitted to appear in such capacity, but who is not a member of the state bar.”