

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

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

9 In the Matter of:

10 **PETITION TO AMEND RULE 60**
11 **OF THE ARIZONA RULES OF**
12 **SUPREME COURT**

Supreme Court No. R-22-

PETITION

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby petitions the Court to amend Rule 60 of the
15 Rules of the Supreme Court of Arizona. The State Bar seeks expedited consideration
16 of this Petition.

17 Rule 60(d) provides for the assessment of costs and expenses against a
18 respondent in disciplinary proceedings. The former State Bar President recently
19 convened a Working Group to discuss respondents’ entitlement to recovery of fees
20 and costs in lawyer discipline cases. This Working Group was composed of State
21 Bar staff, respondents counsel, and representation from this Court. The Working
22 Group studied whether and how the disciplinary system should similarly provide a
23 mechanism for respondents in disciplinary cases to seek fees and costs from the State
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1 Bar in matters in which the respondent is deemed to have prevailed. This Petition is
2 the product of that Working Group's collective input.

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4 Given the Court's inherent authority over the practice of law, the State Bar
5 submits this Petition for the Court's consideration of a process in which a respondent
6 may be entitled to seek costs and fees in a disciplinary matter. Attached for the
7 Court's consideration is the Working Group's proposed amended Rule 60, as set
8 forth in the appendix to this Petition.

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10 If the Court adopts the amendments proposed in this Petition, or a different
11 iteration of those proposed, the State Bar requests the Court's order reflect that the
12 amended rule applies only to discipline complaints filed after the effective date of
13 the amended rule, leaving pending cases undisturbed in this respect.

14 **CONCLUSION**

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16 The State Bar of Arizona respectfully requests that the Court adopt the
17 attached rule change proposed by the Working Group and order that the amended
18 rule applies to disciplinary complaints filed after the effective date of the amended
19 rule.
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21
22 RESPECTFULLY SUBMITTED this 15th day of July, 2022.

23
24 */s/ Lisa M. Panahi*

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Lisa M. Panahi
General Counsel

1 Electronic copy filed with the
2 Clerk of the Supreme Court of Arizona
3 this 15th day of July, 2022.

4 by: PSequin

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Appendix

(Deletions are reflected by ~~strikethrough~~ and additions by underline.)

Rules of the Supreme Court Regulation of Law Practice

(Effective January 1, 2022, unless otherwise noted)

I. Sanctions

Rule 60. Sanctions

(a) Types and Forms of Sanctions, Attorneys. Misconduct by an attorney, individually or in concert with others, shall be grounds for imposition of one or more of the following sanctions:

1. *Disbarment.* Disbarment may be imposed by judgment and order entered by the court, a hearing panel, or the presiding disciplinary judge.

2. *Suspension.* Suspension may be imposed by judgment and order entered by the court, a hearing panel, or the presiding disciplinary judge for an appropriate fixed period of time not in excess of five (5) years. Suspended members shall remain suspended until the court enters an order reinstating the member to the practice of law in Arizona or upon order of the presiding disciplinary judge pursuant to Rule 64(e)(2)(B).

3. *Reprimand.* A reprimand may be imposed by judgment and order entered by the court, a hearing panel, or the presiding disciplinary judge.

4. *Admonition.* An admonition may be imposed by judgment and order of the court, a hearing panel, the presiding disciplinary judge, or the committee.

5. *Probation.* Probation may be imposed by order of the court, a hearing panel, the presiding disciplinary judge, or the committee as follows:

A. Probation shall be imposed for a specified period not in excess of two (2) years, but may be renewed for an additional two (2) year period.

B. Probation may be imposed only in those cases in which there is little likelihood that the respondent will harm the public during the period of probation, and the conditions of probation can be adequately supervised. The conditions of probation shall be stated in writing, shall be specific, understandable and enforceable, and may include restitution and assessment of costs and expenses.

C. The state bar shall be responsible for monitoring and supervising the respondent during the probationary period. Bar counsel shall report material violations of the terms of probation to the presiding disciplinary judge by filing a notice of noncompliance with the disciplinary clerk and serving respondent with a copy of the notice. The notice of noncompliance shall include a verification or separate affidavit upon personal knowledge stating sufficient facts to support the allegations of material violations of the terms of probation. Respondent shall have ten days after service of the notice to file a response. Upon filing the notice of noncompliance, the presiding disciplinary judge may i) issue an order declining to proceed with the notice; ii) issue an order setting the matter for status conference; or iii) issue an order setting 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, the state bar must prove a violation by a preponderance of the evidence. At the end of the probation term, bar counsel shall prepare and forward a notice to the presiding disciplinary judge regarding the respondent's completion or non-completion of the imposed terms.

6. *Restitution.* Restitution may be imposed by order of the committee, the presiding disciplinary judge, the hearing panel, or this court to persons financially injured, including reimbursement to the state bar client security fund. Restitution and the amount thereof must be proven by a preponderance of the evidence.

(b) Types and Forms of Sanctions, Alternative Business Structures. Misconduct by an ABS shall be grounds for imposition of one or more of the sanctions provided for in these rules and ACJA § 7-209.

(c) Types and Forms of Sanctions, Legal Paraprofessional. Misconduct by a legal paraprofessional shall be grounds for imposition of one or more of the sanctions provided for in these rules and ACJA § 7-210.

(d) Assessment of the Costs and Expenses. An assessment of costs and expenses related to disciplinary proceedings shall be imposed upon a respondent by the committee, the presiding disciplinary judge, the hearing panel, or the court, as appropriate, in addition to any other sanction imposed. Upon a showing of good cause, all or a portion of the costs and expenses may be reduced, deferred, or waived. After final disposition of a formal complaint following a contested hearing, the presiding disciplinary judge may, in their discretion, award attorney's fees and costs to a prevailing respondent. A respondent is considered to be a prevailing party only if the state bar's position was not substantially justified and the respondent prevails as to the most significant issue or set of issues, unless the reason that the respondent prevailed is due to an intervening change in the law. An award of

attorney's fees shall be reasonable and may not exceed an amount paid or agreed to be paid by respondent. In appropriate cases, the state bar may also seek attorney's fees beyond the administrative fee allowed by Administrative Order 2011-17.

1. Statement of Costs and Expenses; Request for Attorney's Fees and Costs; Objections. At the conclusion of the disciplinary proceedings or the entry of a disciplinary sanction or dismissal by the presiding disciplinary judge or the hearing panel, ~~bar counsel~~ a party seeking attorney's fees, costs, or expenses shall file an itemized statement of costs and expenses or an itemized statement of attorney's fees supported by affidavit on proven, or admitted or dismissed counts and include argument about why attorney's fees should be awarded. shall serve a copy on respondent and the disciplinary clerk. A copy shall be served on the opposing party and the disciplinary clerk.

2. Procedure.

A. Upon Final Order of the Presiding Disciplinary Judge or the Hearing Panel.

(i) State Bar Attorney's Fees, Costs and Expenses. If the disciplinary sanction ordered by the presiding disciplinary judge or the hearing panel is not appealed, bar counsel shall file a final statement of costs and expenses with the disciplinary clerk within five (5) days after the time to appeal has expired. The state bar may also request attorney's fees. At the same time, the disciplinary clerk shall file a statement reflecting the costs and expenses of that office in connection with the proceeding. The respondent shall file any objections to the statements of costs and expenses within ten (10) days of service. Bar counsel may file a response within five (5) days of service of the objection. Unless otherwise ordered, objections shall be determined on the pleadings without oral argument or an evidentiary hearing. The presiding disciplinary judge or the hearing panel shall rule on any objections to costs and expenses, enter an appropriate order, file the same with the disciplinary clerk, and serve a copy on the bar counsel of record and respondent or respondent's counsel. The respondent or state bar may appeal a decision on the assessment of costs and expenses as set forth in Rule 59.

(ii) Respondent's Attorney's Fees and Costs. If the respondent is the prevailing party as determined by the presiding disciplinary judge, the respondent may file a request for attorney's fees and costs with the disciplinary clerk within five (5) days after the time to appeal has expired. Bar counsel shall file any objections to the request for attorney's fees and costs within ten (10) days of service. The respondent may file a response within five (5) days of service of the objection. Unless otherwise ordered, objections shall be determined on the pleadings without oral argument or an evidentiary hearing. The presiding disciplinary judge or the panel shall rule on any

objections to attorney fees and costs, enter an appropriate order, file the same with the disciplinary clerk, and serve a copy on bar counsel of record and respondent or respondent's counsel. The respondent or the state bar may appeal a decision on the assessment of costs and expenses as set forth in Rule 59.

B. Upon Final Order of the Court.

(i) Upon final order of the court affirming or imposing any disciplinary sanction, bar counsel shall file a final statement of costs and expenses with the clerk of the court within five (5) days after the clerk has given notice that a decision has been rendered. At the same time, the disciplinary clerk shall file a statement reflecting the costs and expenses of that office in connection with the proceeding. Respondent may file an objection to the statement of costs and expenses within ten (10) days of service. Bar counsel may file a response within five (5) days of service of the objection. If respondent objects, the court may remand the matter to the presiding disciplinary judge or the hearing panel for determination as provided in subparagraph (2)(A)(1) of this rule.

(ii) Upon final order of the court, a prevailing respondent may file a request for attorney's fees and costs with the clerk of the court within five (5) days after the clerk has given notice that a decision has been rendered. Bar counsel may file an objection to the respondent's request for attorney's fees and costs within ten (10) days of service. Respondent may file a response within five (5) days of service of the objection. If bar counsel objects, the court may remand the matter to the presiding disciplinary judge or the hearing panel for determination as provided in this rule.

(e) Enforcement. Execution and other post-judgment remedies may issue out of and proceed before the superior court as in civil cases for the enforcement of any judgment entered in this court under these rules. Such matters shall be docketed in the superior court without filing fee as though the complaint had originally been filed in that court.

Credits

Added June 9, 2003, effective Dec. 1, 2003. Amended Sept. 16, 2008, effective Jan. 1, 2009; June 30, 2010, effective Jan. 1, 2011; Aug. 30, 2012, effective Jan. 1, 2013; Sept. 2, 2014, effective Jan. 1, 2015; Aug. 28, 2018, effective Jan. 1, 2019; Aug. 27, 2020, effective Jan. 1, 2021.

COMMENT TO 2012 AMENDMENT

[1] It is presumed that costs and expenses will be imposed. Factors that may be considered in determining “good cause” for a reduction, deferral, or waiver may include, but are not limited to: evidence that respondent offered in writing to consent, prior to hearing on the merits, to the same or a greater sanction for the same rule violations he or she was found to have violated after that hearing; disparity between the gravity of the charges filed and the violations found; and extreme financial hardship. It is presumed that many lawyers who find themselves in the discipline process will be subject to some degree of financial hardship. However, “extreme financial hardship” is not intended to encompass the financial hardship of the proceeding or imposed sanction but rather is intended to refer to circumstances that occurred independently of the misconduct. A claim of extreme financial hardship should be supported by financial information (which may be offered with a request for protective order or in camera review). Deferment may be appropriate, for example, in situations involving a substantial order of restitution.

[2] An award of attorney’s fees and costs shall be reasonable. It is presumed that an award of attorney’s fees and costs shall be imposed where a respondent is completely exonerated. Diversion imposed at the conclusion of a contested proceeding is not complete exoneration. Factors that may be considered in determining whether an award of attorney’s fees and costs is appropriate may include, but are not limited to: whether respondent prevailed with respect to all the relief sought; novelty of the legal question presented and whether such a claim or defense had been adjudicated in this jurisdiction; whether the award in any particular case would discourage the state bar from litigating legitimate issues for fear of incurring liability for substantial amounts of attorney’s fees; whether an award would negatively impact the protection of the public; and the course of settlement negotiations and their relationship to outcome. An award may be denied if during the course of the proceeding the respondent unduly and unreasonably protracted the final resolution of the matter. Costs that may be recovered are limited to those taxable costs defined in Rule 46.

[3] The state bar may only seek attorney’s fees under extraordinary circumstances, which include but are not limited to: respondent’s failure to cooperate in the disciplinary investigation or formal process; respondent’s bad faith participation in the discipline case or commission of additional violations during the proceedings; dishonesty during the discipline process and otherwise for good cause.