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IN THE ARIZONA SUPREME COURT

In the Matter of:

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

Supreme Court No. R-22-0036

**Comment Opposing Petition to
Amend Rule 60, Ariz. R. Sup. Ct.**

Pursuant to Rule 28, Ariz. R. Sup. Ct., we respectfully submit this comment opposing rule-change petition R-22-0036, which proposes a significant and substantial change to attorney discipline proceedings: authorizing the State Bar of Arizona, under certain circumstances, to obtain an explicit award of attorney's fees against a respondent lawyer in a discipline proceeding, over and above (and in

addition to) the standard costs currently imposed on disciplined lawyers. The petition goes far beyond merely implementing new A.R.S. § 12-353, which provides for a *respondent lawyer* to obtain attorney’s fees from the State Bar.

Because this rule-change petition proposes a such a significant and substantial change to the existing discipline system, it should not be considered – let alone adopted – on an emergency basis. This proposal requires adequate disclosure to and vetting by State Bar members and interested members of the public.

This petition follows on the heels of the enactment of new A.R.S. § 12-353¹, which provides that the State Bar “is responsible” to an attorney who “prevails” on a discipline matter for any attorney’s fees and court costs. Neither the legislation as introduced nor any fact sheet produced during the legislative process² mentions the State Bar being able to seek attorney’s fees against a respondent lawyer. The focus of the proposed legislation was always on a *respondent lawyer* being able to obtain from the State Bar an award of attorney’s fees in a discipline proceeding in which the *respondent lawyer* prevails.

And yet, even though new A.R.S. § 12-353 says nothing about the *State Bar* being allowed to seek attorney’s fees against a lawyer who is a respondent in a discipline matter, that is exactly what the State Bar proposes in its revised Rule 60,

¹ Attached as Appendix 1.

² See <https://apps.azleg.gov/BillStatus/BillOverview/77548>.

although its petition's explanation never says so.

In fact, the petition describes the rule changes as proposing a “process in which a respondent may be entitled to seek costs and fees in a disciplinary matter.” [State Bar petition at 2, lines 5-6] But a transparent description of the State Bar's proposal would be: a “process in which a respondent lawyer may be entitled to seek costs and fees in a disciplinary matter *as well as, for the first time, authorizing the State Bar to seek a separate award of attorney's fees against the respondent lawyer.*”

Proposed revised Rule 60(d), as the State Bar requests, would provide:

(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.

(Proposed revisions underlined; emphasis in italics added.)

And proposed revised Rule 60(d)(2)(A)(i) provides, in pertinent part:

(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...

(Proposed revisions underlined; emphasis in italics added.)

Authorizing the State Bar to seek a standalone order of attorney's fees against a respondent lawyer would be a major change to Arizona's lawyer-discipline process. Nothing in the current disciplinary process authorizes the State Bar to seek an award of attorney's fees against an individual respondent lawyer. Instead, the only costs authorized are those this Court outlined in its Administrative Order 2011-17 for imposed discipline.

Even more perplexing and unexplained is that the rule-change proposal authorizes the State Bar not only to seek attorney's fees, but to seek attorney's fees *in addition to* the costs Administrative Order 2011-17 already imposes. Those costs were crafted to include compensation for time bar counsel and administrative staff spend to handle the bar charge and formal proceeding. The flat fees imposed obviated the need for bar counsel to keep time records for each matter. Obviously that lack of time keeping would need to change if the Court allows the State Bar to seek and be awarded fees. The hourly rate to be charged for bar counsel also would need to be determined and established.

The alleged "extraordinary circumstances" under which the State Bar could seek attorney's fees against a respondent lawyer include "respondent's failure to

cooperate in the discipline investigation or formal process” as well as “otherwise for good cause.” [Proposed revised Rule 60, proposed new comment [3]] A respondent lawyer who fails to cooperate is already assessed the costs of a deposition (if bar counsel determines to set one for failure to respond) and the failure to respond or cooperate in the State Bar’s investigation already is a separate ground for the imposition of a discipline sanction. Assessing attorney’s fees would be punitive, something the Court has repeatedly stated is not the purpose of lawyer discipline.

Although procedures to implement new A.R.S. § 12-353 – which takes effect September 24, 2022³ – are needed, the State Bar’s significant changes cannot and should not be considered (let alone made) on such a rushed basis, and without sufficient notice to and input from Arizona lawyers and interested members of the public.

The State Bar filed this petition on July 15, 2022, asking for “expedited consideration.” On July 18, 2022, this Court granted the State Bar’s request for expedited consideration and, in its order, indicated it would consider this petition at its August rules conference, which the Court will hold August 23, 2022.

We happened to discover this rule-change petition and the Court’s order on the Court’s rules-forum website on August 15, 2022, just a week before the Court is scheduled to hold its rules conference. On August 16, 2022, Ms. Greenlee, who is

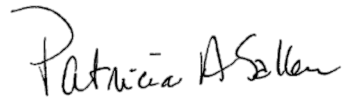
³ See azleg.gov/general-effective-dates/.

chair of the State Bar's Ethics Advisory Group, objected to the State Bar that this petition had not been circulated nor had State Bar members even been alerted that it had been filed. Within hours of her objection, the State Bar sent out a notice to a limited circle of members (those who are on a list of "rules stakeholders") advising of the petition and attaching the petition and order, but not drawing attention to the substance of either nor that the Court would be considering the proposal a mere week later.

While the effort to establish rules to coincide with new A.R.S. § 12-353 taking effect is, from an administrative standpoint, commendable, proposed Rule 60 raises many issues that need to be explored and considered in far more detail. The overriding issue is, of course, whether the State Bar should even be able to seek an award of attorney's fees against a respondent lawyer, considering that State Bar members already pay for the discipline system as part of their licensing fees and disciplined lawyers already pay assessments intended to compensate the State Bar pursuant to the administrative order. Other issues include whether any award should be *in addition* to the current assessments provided for in the administrative order; the specific circumstances under which the State Bar could obtain an award of attorney's fees against a respondent lawyer; and particulars such as bar counsel hourly billing rates if the rules are changed to authorize the State Bar to seek an award.

We request that the Court reject the State Bar's proposal and, at the very least, allow for sufficient consideration by and input from Arizona lawyers through the comment period the Court already has set for this fall.

Respectfully submitted August 18, 2022.



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