

Patricia A. Sallen  
Ethics at Law PLLC  
3420 N. 42<sup>nd</sup> St.  
Phoenix, Arizona 85018  
480-290-4841  
psallen@ethicsatlaw.com  
Bar No. 012338

Nancy A. Greenlee  
Attorney and Counselor at Law  
821 East Fern Drive North  
Phoenix, Arizona 85014  
Telephone: (602) 264-8110  
Email: nancy@nancygreenlee.com  
Bar No. 010892

**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

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

Pursuant to Rule 28, Ariz. R. Sup. Ct., we respectfully submit this second comment on rule-change petition R-22-0036. We incorporate into this second comment the first comment we filed on August 18, 2022.

Our position on this proposal depends on what language the Court will consider at its December 2022 Rules Agenda, as explained below.

## Introduction

The State Bar of Arizona filed the original rule-change petition purportedly to implement new A.R.S. § 12-353, which authorizes a respondent lawyer to obtain attorney's fees from the State Bar. The rule-change proposal went far beyond merely implementing that new statute, however, and actually proposed a significant and substantial change to attorney discipline proceedings: authorizing the State Bar, under certain circumstances, to obtain an explicit award of attorney's fees *against* a respondent lawyer in a discipline proceeding, over and above (and/or in addition to) the standard costs currently imposed on disciplined lawyers.

In its August 29, 2022 order, this Court rejected virtually all of the State Bar's elaborate proposal. Instead, it adopted on an emergency basis only a version of one proposed sentence, thus making only a very simple addition to Rule 60(d):

**(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 award attorney's fees and costs to a prevailing respondent.

In its order, the Court further stated that it “will consider whether to adopt *these rule amendments* on a permanent basis during its December 2022 Rules Agenda.” (Emphasis added.)

**A. If the Court plans to consider only whether to make permanent the emergency Rule 60(d) amendment it has adopted**

If, at its December 2022 Rules Agenda, the Court will consider only whether to make permanent its emergency Rule 60(d) amendment, we suggest that the Court consider adding language (to the rule itself or, less ideally, as a comment) to flesh out the concept of when a respondent attorney is considered the prevailing party. New A.R.S. § 12-353(A) provides that “if an attorney ... prevails, in addition to any costs that are awarded by statute, the State Bar of Arizona is responsible to the attorney for any attorney fees and court costs.” What it means for a respondent attorney to prevail is a significant concept.

As in civil litigation, formal discipline complaints against attorneys may involve multiple counts and claims. A rule implementing new A.R.S. § 12-353(A) should define “prevails.” One option would be to link “prevails” to the concept of “successful party” in A.R.S. § 12-341.01, because a substantial body of caselaw already exists on that issue.

Regardless, the State Bar’s proposed definition should not be adopted. It proposes, as an addition to Rule 60(d), that a respondent attorney will be considered the 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.”

If the point of any Rule 60 amendment is to implement new A.R.S. § 12-

353(A), the State Bar’s proposed concept of “prevails” adds roadblocks not intended to be part of the new statute. The new statute says nothing about the State Bar’s position needing to be “not substantially justified” or that the respondent attorney must prevail only “as to the most significant issue or set of issues.”

**B. If the Court will consider the original State Bar proposal**

If, at its December Rules Agenda, the Court instead plans to consider the original State Bar proposal, we again urge the Court to reject it.

The original proposal would make a significant and substantial change to the existing discipline system that requires adequate disclosure to, and vetting, by State Bar members and interested members of the public.

As we pointed out in our first comment, neither the legislation as introduced nor any fact sheet produced during the legislative process<sup>1</sup> 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.

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. The only costs currently authorized are those this Court outlined in its

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<sup>1</sup> See <https://apps.azleg.gov/BillStatus/BillOverview/77548>.

Administrative Order 2011-17 for imposed discipline.

Even more perplexing and unexplained is that the State Bar's rule-change proposal seems to authorize it 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 handling the bar charge and formal proceeding – additional compensation over and above mandatory State Bar dues members already pay to support the State Bar and for the discipline system.

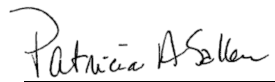
The alleged “extraordinary circumstances” under which the State Bar could seek attorney's fees against a respondent lawyer include “respondent's failure to cooperate in the discipline investigation or formal process” as well as “otherwise for good cause.” [Proposed revised Rule 60, proposed new comment [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 a discipline sanction. Assessing attorney's fees would be punitive, something the Court has repeatedly stated is not the purpose of lawyer discipline.


### **Conclusion**

The emergency amendment to Rule 60(d) attempts to implement new A.R.S. § 12-353, albeit in a very minimalistic way. While that amendment does not answer

what constitutes “prevails,” it hews closely to the intent of the new statute. The State Bar’s original proposal goes far beyond merely implementing the new statute, proposing a significant and substantial change to attorney discipline proceedings by allowing the State Bar to seek attorney’s fees against respondent lawyers. The Court should reject that proposal.

Respectfully submitted October 3, 2022.

  
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Patricia A. Sallen

  
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Nancy A. Greenlee