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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the matter of:

Supreme Court No. R-22-0036

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

COMMENT OF THE PIMA COUNTY
BAR ASSOCIATION OPPOSING THE
PETITION

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17 Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association
18 respectfully submits the following comment in opposition to Petition R-22-0036 filed by
19 the State Bar of Arizona (“State Bar”). The State Bar doesn’t just bury the lede, it omits
20 it entirely from the body of its Petition. To be clear, the proposed rule change would
21 allow the State Bar to recover attorneys’ fees from lawyers whom it disciplines. If
22 adopted, it would allow the State Bar to heap yet another punishment onto its members
23 and thereby tilt the balance of power even more in its favor, and at our collective
24 expense. This Petition should be rejected.

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1 **I. Existing sanctions are more than adequate to deter and punish violators.**

2 As they stand, existing sanctions for violating the Rules of Professional Conduct
3 are stiff. Separate and apart from the powerful stigma of even being summoned to a
4 disciplinary hearing, respondent attorneys are responsible for “general administrative
5 expenses.” Despite this anodyne bureaucratese, these expenses are hardly nominal for
6 the respondent. Indeed, many exceed the maximum fine for the most serious of
7 misdemeanor offenses. Our Supreme Court has mandated the following expense
8 schedule, in relevant part:

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|----|--|------------|
| 10 | • Matter settled with consent agreement <i>without a contested hearing</i> | \$1,200.00 |
| 11 | • Summary suspension | \$1,200.00 |
| 12 | • Interim suspension | \$1,200.00 |
| 13 | • Matter settled after default in answering a formal complaint | \$2,000.00 |
| 14 | • Matter settled after contested hearing with no appeal | \$4,000.00 |
| 15 | • Appeal to Arizona Supreme Court | \$6,000.00 |

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17 Administrative Order No. 2011-17 (emphasis added). It is noteworthy that, just to settle
18 a matter costs a respondent more than a thousand dollars. The six-thousand-dollar price
19 of Supreme Court review is equally noteworthy. For respondent attorneys, this does not
20 include the price of legal representation at each stage, which could easily run into five
21 figures.

22 Compounded by the lasting embarrassment of a sanction, these existing penalties
23 are more than enough to ensure compliance. And for those who would violate anyway, it
24 is vanishingly unlikely that the added threat of attorneys’ fees would alter their moral or
25 financial calculus any more than an ethics CLE would deter Slippin’ Jimmy McGill.
26 This rule change is not plausibly about deterrence. At best, it is raw retribution. At

1 worst, it is yet another way for the State Bar to claw money from its members who are
2 already paying in excess of five hundred dollars every year, which raises the question,
3 shouldn't our dues be sufficient to pay for the disciplinary process, Bar counsel and all?
4 If they are, then this rule change is unnecessary, and it is solely about retribution. If they
5 are not, then it is incumbent on the State Bar to be better stewards of their—*our*—money.

6 **II. Adopting the English Rule for attorney disciplinary proceedings would**
7 **deter lawyers from seeking due process.**

8 The State Bar is suggesting a change that is analogous to the English Rule, i.e., the
9 custom in Great Britain and the Commonwealth to award attorneys' fees to the prevailing
10 party in a civil action. There are many reasons we do not follow suit in the United States,
11 among them that we have long equated due process with access to justice—or more
12 simply, the notion that everyone is entitled to their day in court.¹ There is no reason to
13 dispense with this principle in the context of lawyer discipline. In fact, the opposite is
14 true given that the stakes could hardly be higher for the respondent attorney.² This rule
15 change would further tilt an already unbalanced process against respondent attorneys and
16 give them pause as to whether to insist on their day in court, as it were. That is not a
17 tenable position for respondent attorneys. Neither is it an acceptable balance of power
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20 1. Our Supreme Court evidently takes this notion quite seriously considering that
21 it established a commission—the Arizona Commission on Access to Justice—whose sole
22 purpose is to expand access to the courts. *See*
23 <https://www.azcourts.gov/cscommittees/arizona-commission-on-access-to-justice#:~:text=The%20Arizona%20Commission%20on%20Access,justice%20for%20Arizona's%20civil%20litigants.>

24 2. We would note that the loss of one's bar license is functionally worse than
25 many criminal penalties. Making a disbarred lawyer pay the State Bar's attorneys' fees is
26 akin to forcing a convicted criminal defendant to pay for their own prosecutor. The
absurdity is compounded when one considers that the State Bar's members already pay
yearly dues that are supposed to pay for the disciplinary process.

1 between the Bar and its members. We should take no comfort in the knowledge that
2 most of us will never find ourselves at a disciplinary hearing. It is in the nature of due
3 process that we afford it to the worst offenders for the sake of all of us.

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5 **CONCLUSION**

6 Regulating our profession and vindicating the time-honored rules of ethics and
7 conduct on which it rests are a weighty business, and not just for the State Bar. We
8 would hazard that most of us read the Arizona Attorney magazine—that is, if we read it
9 at all—for the sole reason of skimming its Lawyer Regulation section. We rubberneck at
10 the ethical trainwrecks on display and cringe at the worst offenders while silently
11 nodding in approval at a righteous suspension or disbarment. Nevertheless, we should
12 resist the urge to give the State Bar a Sword of Damocles to dangle over all our heads.
13 Heaping the State Bar’s attorneys’ fees on top of a respondent’s own attorneys’ fees,
14 administrative expenses, and lasting professional humiliation is such a sword. It is a
15 sharp reminder of just how much it costs for us to demand due process should we find
16 ourselves on the wrong side of the Bar. More to the point, the proposed change is
17 gratuitous, and it is little more than the State Bar insisting on its pound of flesh and taking
18 even more money from its members.

19 As the title character in Shakespeare’s *Henry V* admonished his soldiers, “when
20 lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner.” *Henry*
21 *V*, act III, scene vi. So too should we take a more measured path. This Petition should be
22 rejected.

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RESPECTFULLY SUBMITTED this 3rd day of October 2022.

PIMA COUNTY BAR ASSOCIATION

By s/James W. Rappaport
James W. Rappaport
Rules Committee Chair

By s/Joseph A. Ezzo
Joseph A. Ezzo
President