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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-22-0036
PETITION TO AMEND RULE 60, RULES OF THE SUPREME COURT OF ARIZONA	COMMENT ON PETITION TO AMEND RULE 60

Pursuant to Rule 28, Arizona Rules of the Supreme Court, undersigned counsel submits this comment regarding the above-referenced rule change petition (the "Petition). While clearly a rule change makes sense to implement the new statute (A.R.S. § 12-353— which does not even appear to be referenced in the Petition), the Petition does not fairly address the intent of the legislature or the express language of the statute. Further, the State Bar's Petition seeks to add something never contemplated by the statute—a mechanism for the State Bar to seek fees against respondent lawyers in discipline proceedings. Counsel joins her colleagues, Patricia Sallen and Nancy Greenlee, in firmly opposing the latter. Regarding the former, counsel agrees that a change to Rule 60 is needed, but firmly opposes the proposed language found in the State Bar's Appendix to its Petition.

I. The Language of the Proposed Rule Change is an Attempted End Run Around the Statute.

The statute says this:

> **A.** In an attorney discipline matter, if an attorney who is the subject of the charge 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. Court costs include the cost of all stages of the investigation and discipline process and, if applicable, any court litigation and appeal.
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> **B.** For the purposes of this section, "attorney discipline matter" means any charge that is not dismissed by the state bar of Arizona before final disposition of the complaint by the presiding disciplinary judge or the supreme court.

A.R.S. § 12-353 (emphasis added).

The Bar's proposed language, however, seeks to add the word "may" which is a significant departure from "is responsible." "Is responsible" sounds considerably more like "shall." There is nothing in the statute (which was argued/discussed through the legislative process for quite some time prior to enactment) that says anything about the award of fees being discretionary with the Presiding Disciplinary Judge.

Second, the Bar seeks to nullify the language in sub-part B. Instead of "any charge that is not dismissed," the Bar seeks a rule that only imposes fees where there is "complete exoneration." *See* proposed comment 2, Bar's Appendix. The Bar goes on to "presume" that a respondent who receives diversion at the end of a contested

proceeding has not been "completely exonerated" and therefore is not eligible for attorneys' fees.

Counsel strongly objects to this language. If the State Bar pursues a formal sanction and refuses to consider diversion, despite the respondent lawyer requesting diversion and agreeing to accept diversion, and the respondent then is forced to spend tens of thousands of dollars (in addition to stress and time missed from work) in litigating the matter and succeeds, the respondent has "prevailed" by any reasonable definition of that word. This, in fact, is the much more common situation then a complete dismissal. This situation has been raised by respondents' counsel multiple times in the past, and is the reason that the 2012 comment to current Rule 60 contains the following language:

> 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; [. . .]."

Rule 60, Ariz. R. Sup. Ct., Comment to 2012 Amendment (emphasis added).[1]

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[1] In Counsel's recollection, this language was included prior to the 2012 version as well, but Counsel unfortunately does not have a 2010 or 2011 rule book at hand. Counsel specifically recalls that following testimony by Counsel and Nancy Greenlee on the issue, Justice Michael D. Ryan instructed a Committee member (counsel believes it was Pamela Treadwell Rubin) to include language allowing for waiver in those circumstances. This took place during a Committee meeting on implementing the new disciplinary rules, which took place before 2012.

While it is certainly concerning that the Arizona legislature has taken steps here to involve itself in what has traditionally (and many would argue constitutionally) been the sole responsibility of this Court, one would be hard pressed to imagine that simply ignoring the plain language of the statute is the solution. In counsel's opinion, this would not only offend the legislature, but would likely offend many members of the Bar, who have expressed support for this statute as it seems on its face to be common sense. Counsel understands the issues behind the Bar's concerns but believes that any changes to the intent of the statute should be thoroughly discussed, explained and supported with analysis.

II. Adding A Second Method for the State Bar to Impose Costs on Respondents is Inappropriate for Multiple Reasons.

Here, Counsel echoes the objections raised by Ms. Greenlee and Ms. Sallen. This Court's Administrative Order 2011-17 already addresses costs. Counsel would add that (1) lawyers already pay significant dues in Arizona, which are meant to pay for discipline; and (2) the disciplinary costs imposed on respondents in Arizona are already among the highest in the nation. In 2020, renowned (and very much missed) respondent's counsel Mark I. Harrison submitted a memorandum to the Discipline System Oversight Committee and Justice John Lopez, articulating significant concerns about the costs, which included the point that they are a deterrent to the "fair and consensual resolution of pending bar complaints." Mr. Harrison circulated

his draft to multiple respondents' counsel and noted that there was general agreement.[2]

Most importantly, as noted by Greenlee/Sallen, such significant changes should not be made without sufficient notice to and input from Arizona lawyers and interested members of the public, which should take place in open meetings.

III. Conclusion

While this Court clearly has the authority to implement rule changes, it is counsel's opinion that there is considerable work to be done on the language of the proposed rule change to avoid an appearance that the wishes of the legislature are being ignored. It is also counsel's opinion that the Court should consider general fairness to lawyer-respondents. While counsel does understand the policy (including financial) concerns behind the State Bar's opposition to implementing the statute as it is, counsel at the same time believes that discouraging the Bar from pursuing overly punitive sanctions is not a bad thing.

Finally, it occurs to counsel that a possible way to deal with the concerns is to explore and define "prevailing party" and the following language of the statute: "for any attorney fees and court costs. Court costs include the cost of all stages of the

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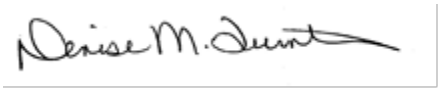
[2] Counsel has copies of a draft dated September 25, 2020, and also a pdf, but counsel is unsure if additional changes were made before Mr. Harrison submitted his final version.

investigation and discipline process and, if applicable, any court litigation and appeal." Actual costs are typically not that extensive. The issue of the attorneys' fees is the problem because those could be quite large. In that regard, perhaps language such as in the current footnote could be utilized—for instance, making the award turn on an affirmative offer in writing.

Respectfully submitted this 3rd day of October, 2022.



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