ATTORNEY REGULATION ADIVSORY COMMITTEE

REPORT REGARDING ADMINISTRATIVE EXPENSE SCHEDULE

December 28, 2011

On May 4, 2011, the Court established the Attorney Regulation Advisory Committee (ARC) to assist the Court in the attorney admissions and discipline system. Attachment 1, Administrative Order No. 2011-44. As its first order of business, ARC was directed to "consider the current administrative expenses assessed in lawyer discipline, disability, and reinstatement cases, and the philosophical basis for setting and assessing these expenses, and recommend an expense schedule to the Supreme Court by December 31, 2011." The following report summarizes ARC's examination and analysis of this issue.

Summary of ARC's conclusions

1. In 1994, the Court determined that there is a philosophic basis for the assessment of administrative expenses in lawyer discipline cases. That determination is still valid today.

2. There is a rational basis for the current administrative fee schedule.

3. In the assessment of costs and expenses in a case, the rules provide discretion to reduce, defer or waive the assessment upon a showing of good cause.

4. Any future increases or changes to the administrative fee schedule should be examined by the Board of Governors and ARC before implementation.

Report

During the first meeting of ARC, a Costs subcommittee[1] was formed to examine the basis for imposing expenses in lawyer discipline matters, the supporting data for the amounts assessed, and what would constitute "good cause" for waiving or reducing an assessment of expenses in a particular case. A brief background of the genesis of the current expense schedule helps explain the controversy surrounding this issue.

The legal principles of the current costs and expense structure derives from *Matter of Shannon*, 179 Ariz. 52, 78-80, 876 P.2d 548, 574-76 (1994). *Shannon* found that because one of the sanctions required "is the imposition of costs and expenses for disciplined attorneys," assessment of such "costs and expenses incurred by the State Bar . . . is necessary to effectively carry out our constitutional duties." *Id*. Furthermore,

> [b]y shifting some of the financial burden of disciplinary procedures to those who are directly responsible for the costs, we insure the ability of the State Bar to continue its efforts in this area without having to ask the State Bar's members to further subsidize the Bar's disciplinary efforts. Not only is the assessment of costs against an attorney who committed misconduct a more equitable means of financing the disciplinary process, but the imposition of costs and expenses serves the additional function of deterring other lawyers from engaging in unprofessional conduct. Moreover, as with restitution, we consider the imposition of costs and fees to be part of the rehabilitative process of our disciplinary proceeding.

Id. at 79, 876 P.2d at 575 (footnote and citation omitted).

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[1] The members of the Costs subcommittee were: Pamela Treadwell-Rubin, Goering, Roberts, Rubin, Brogna, Enos & Treadwell-Rubin, P.C., Chair; Alan Bayham, Bayham & Jerman; James Drake, Jr., Secretary of State's Office; Emily Johnston, Public Member; J. Scott Rhodes, Jennings Strouss & Salmon, PLC; George Riemer, Arizona Commission on Judicial Conduct; Justice Michael D. Ryan (Retired); and Maret Vessella, State Bar of Arizona.

A history of the evolution to the present expense schedule for lawyer discipline, disability and reinstatement matters is fully explained in the State Bar Information Paper. *See* Attachment 2. In short, the model for the concept came from a system adopted by the California State Bar. In 1999, the Arizona State Bar Board of Governors approved a recommendation of the Bar's Discipline Oversight Committee that "a system that assesses costs based on the point where a proceeding terminates." *See id.* at Exhibit A. This schedule was used until 2008, when the Board of Governors approved an increase of 100% in the assessment schedule based upon an internal audit by the Bar's chief financial officer. *See* Attachment 2 at pp. 2-3. After approval by the Board of Governors, the President of the Bar sent a letter to then Chief Justice McGregor asking that the Court adopt the new fee schedule. On February 25, 2009, the Supreme Court issued Administrative Order 2009-26, citing *Shannon* and adopting the fees increase as proposed by the Board. *See* Attachment 2 at Exhibit B. It is this fee schedule that the subcommittee investigated and reported its findings to the entire ARC.[2]

Preliminary, understanding the difference between the terms "costs" and "expenses" is important for a clear view of the controversy that led the Court to order this review of expenses imposed for lawyer discipline cases.

Current Arizona Supreme Court Rule 46(f)(8) defines "costs" as "all sums taxable as such in a civil action." Subsection (f)(13) defines "expenses" as

> all obligations in money, other than costs, necessarily incurred by the state bar, the committee, the hearing panel, the disciplinary clerk's and the presiding disciplinary judge's offices in the performance of their duties under these rules. Expenses shall include, but are not limited to, administrative expenses, necessary expenses of committee members, hearing panel members, bar counsel or staff, charges of expert witnesses, charges of certified court reporters and all other direct, provable expenses.

[2] On January 31, 2011, the Court adopted the 2009 fee schedule, with modifications required by the change in the Discipline rules. *See* Administrative Order 2011-17.

The majority of respondents' counsel has no objection to the imposition of costs as defined by Rule 46(f)(8). The dispute concerns the imposition and the amount of expenses, particularly for proceedings that result in hearings and appeals.

The subcommittee conducted several meetings, most of which representatives of respondents' counsel attended. The subcommittee reviewed data regarding the imposition of fees from the State Bar, reports from other professional boards, such as the Board of Medical Examiners, a survey of the other states' practices, and comments from respondents' counsel.

The subcommittee initially decided unanimously that the principles expressed in *Shannon* still applied on whether expenses could be imposed as a sanction for a violation of the ethical rules. The subcommittee then focused on the basis for the current administrative fee schedule, and whether that basis was rational. In examining the State Bar's Information Paper on costs and fees, Attachment 2, the subcommittee recognized that it is the responsibility of all lawyers to pay for the initial screening process, as part of the bar's mandatory regulatory function. That screening winnows out baseless or lesser complaints that do not justify litigation. With the focal point of the administrative fee schedule system on the litigation process, the subcommittee believed that the Supreme Court's policy determination in *Shannon* is still relevant, as the impact of an assessment of expenses will be on the more serious cases.

In addition, the State Bar provided additional updated information pertaining to expenses of litigated cases compared to the fee schedule. *See* Attachment 3. After reviewing this data, the subcommittee found that it clearly established that actual costs on average in litigated cases exceed even the increased amount from the latest the 2009 Administrative Order. *See id.*[3] Moreover, regarding some cases in which trust account examiner costs were assessed as an "add-on" to other administrative fees, State Bar counsel advised the subcommittee of an internal policy decision going forward that the office will not seek those costs in the future, unless they were extraordinary, and then only requested as a taxable cost. Although the subcommittee recognized that the process by which that 2009 Administrative Order had been generated raised a legitimate inference of a lack of

[3] For example, a contested hearing incurs expenses to the State Bar ranging from approximately $8,000 to $19,000, yet the fee schedule has a set "administrative" fee of $4,000, less than half of the expenses of the State Bar. *See* Attachment 3, p.1.

rigorous analysis, once the subcommittee examined the State Bar's most recent data detailing expenses for each stage of the disciplinary process (although not every member agreed with the State Bar's methodology), the subcommittee unanimously agreed that a rational basis exists for the current fee schedule, especially when viewed in conjunction with the subcommittee's recommendation for greater discretion in assessing costs on a case-by-case basis under Rule 60(b).[4]

Nonetheless, the subcommittee strongly recommended that if any future increases in the fee schedule are considered, a vetting process be used before such a change. A parallel analysis by both the State Bar Board of Governors' Discipline Oversight Committee, and a Supreme Court body such as the Attorney Regulation Advisory Committee, with an opportunity for more public input, should be conducted before either the Bar, the Court, or both, recommend or make fee changes.

The subcommittee also considered background material on handling of costs and administrative fees from other states, *see* Attachment 2, Exhibits C and D, as well as in other related disciplinary settings. Information was provided by respondents' counsel, including letters, and statements at meetings of the subcommittee and the ARC. There were several concerns, including: whether the current structure of tying the administrative fee to the proceeding stage instead of the sanction, creates a due process violation; whether the fee structure is an impermissible fine; whether a prevailing party system or an offer of judgment structure, might be appropriate; and whether the current structure has disproportionate impact on certain segments of the bar, either by practice area, location of practice, or experience. For example, it was asserted that the current structure has a more significant chilling effect upon younger or public lawyers in determining whether to proceed to a later stage, because they may not have the assistance of their office to pay for any fee assessed.

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[4] The Rules subcommittee of ARC will recommend that Rule 60(b) be amended to include reduction and deferment in addition to waiver under the current rule for good cause. In addition, the Rules subcommittee will also recommend that a comment to the rule explaining what constitutes "good cause." The full ARC approved these amendments to Rule 60(b). A Rules petition recommending the above amendments, along with other clarifying and technical changes to the disciplinary rules will be filed January 10, 2012. *See* Attachment 1 (Administrative Order No. 2011-44).

With respect to due process, the subcommittee heard anecdotal evidence from respondent's counsel who stated that, in their experience, a lawyer's decision between accepting a sanction of admonition, as opposed to demanding a hearing, appeared to be the most significant decision point. Some of the speakers advocated a prevailing party system. Others believed that an administrative fee assessment was more in the nature of a fine, which the *American Association's Model Rules for Lawyer Disciplinary Enforcement*, disfavors any monetary sanction other than taxable costs.[5] Some speakers advocated no assessment of an administrative fee at all, given the mandatory nature of bar dues, and how costly Arizona's bar dues are compared to other states.

Although the positions advanced by respondents' counsel differed, the subcommittee carefully considered all comments. There was consensus among the speakers that introduction of discretion into the assessment process would be beneficial.

Following the subcommittee's consideration of the foregoing issues, although acknowledging that Arizona's fee structure is one of the highest in the country, it voted unanimously to treat the current system of administrative expenses as the presumption foundation going forward, both as to its current amounts, and its current basis of stage gradation. Mitigation or waiver under limited circumstances was recommended, after "good cause" which the Rules subcommittee will propose be further defined, could be shown. Finally, the subcommittee agreed to retain the schedule that assesses fees at the point the case terminates.

The subcommittee acknowledged that Arizona has one of the higher bar dues assessment in the nation and that the expense schedule is also one of the more costly compared to other jurisdictions. However, the subcommittee concluded that the present amounts for both are necessary to maintain a quality and efficient lawyer discipline system.

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[5] The commentary to Model Rule 10(A)(7) states in part the following: "Whenever a respondent is found to have engaged in misconduct warranting discipline, he or she should be required to reimburse the agency for the costs of the proceedings, other than attorney fees." The fee schedule at issue here includes a portion of bar counsel's salary, the amount depending upon what stage of the disciplinary process the case terminates.

CONCLUSION

Based upon the subcommittee's work, the ARC unanimously concluded that the current expense fee schedule has a rational basis. The amounts are tied to the stage of the proceeding and the expenses the bar litigation staff incurred. These amounts, however, are usually less than half of the actual expenses the bar incurs. The ARC also concluded that *Shannon* provided the philosophic foundation for assessing such fees. The holding in *Shannon* has been cited in subsequent cases for the principle of having the individual disciplined pay some of the expenses incurred in prosecuting the matter. *See e.g.*, *Matter of Nelson*, 207 Ariz. 318, 323 ¶ 19 n.4, 86 P.3d 374, 379 n.4 (2004) (noting that *Shannon* "rejected the argument that the power to assess costs in attorney disciplinary proceedings was limited to the costs that may be taxed in civil actions," and that "it is appropriate to shift the financial burden of disciplinary proceedings to those who are responsible for the costs.").

The ARC also believed that the proposed changes to Rule 60(b) and its comment will provide the necessary discretion as to whether expenses should be assessed, and if so, in what amount, to mitigate the financial impact in those cases which call for a reduction or waiver.

Finally, the ARC agreed that in the future, any request for an increase in expenses be vetted not only by the State Bar's Discipline Oversight Committee, but also by this Committee. Such a process would provide an opportunity for all stakeholders to express their views as to any increase in the expense schedule. The ARC believed that this process would provide the Court with a thorough basis upon which to make a decision on a request for any future increase in expenses for bar disciplinary proceedings.