

REPORT OF THE COSTS SUBCOMMITTEE

Chairperson: Pamela Treadwell-Rubin, Goering, Roberts, Rubin, Brogna, Enos & Treadwell-Rubin, P.C.

Members: 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)
Maret Vessella, State Bar of Arizona

Staff: Deann Barker
Kathleen Curry
Emily Holliday

Ex Officio: Hon. William J. O'Neil, Presiding Disciplinary Judge

Meetings: August 16, 2011, August 31, 2011, September 30, 2011 (with calls to the public); (working groups also met outside of regular subcommittee meetings to complete tasks including draft Rules change recommendations)

Charge to Subcommittee:

The Court's Administrative Order to the Attorney Regulation Advisory Committee (ARC), listed the subcommittee's portion of the charge as including: "... consider[ation of] 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."

Topics for Subcommittee's Review:

- I. What are underpinnings of cost system?

- a. Current structure/amounts recap (Rule 60 (b))
- b. Reason for costs
- c. Definition of costs/expenses (Rule 46 (f) (8, 13))
- d. Is *Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994) controlling on issue of whether costs can or should be imposed at all?
- e. Are there due process concerns?
- II. How do other legal groups or licensed/regulated professions handle costs?
 - a. Commission on Judicial Conduct
 - b. Commission on Legal Document Preparers
 - c. Other mandatory bar states
 - d. Other voluntary bar states
 - e. Other professions, including Board of Medical Examiners
- III. If costs assessed, who should decide?
 - a. Mandatory at stage of proceeding
 - b. Discretionary in all matters or only settled ones?
 - c. Panel, Presiding Disciplinary Judge (PDJ) or both?
 - d. Prevailing party system
 - i. Should it exist?
 - ii. How define?
- IV. What should fee levels be, if imposed?
 - a. Type vs. stage of proceeding
 - b. Flat fee only vs. discretionary only?
 - c. Should other investigative fees be added on, if a flat fee system is chosen?
 - d. Should late payers (shortly before reinstatement) be treated differently?
- V. Recovery of fees/costs (Added following discussion on 8/16/11)
 - a. If amount recovered is low, does that suggest system should be eliminated?
 - b. Are the current tools adequate to increase recovery amounts?

Executive Summary

After considering the legal underpinnings of the current costs structure, including *Matter of Shannon*, 179 Ariz. at 78-80, 876 P.2d at 574-76, the subcommittee unanimously adopted the following resolution at its first meeting:

Shannon is controlling law in Arizona for the principles it cited, namely that it is public policy to recover fees/costs as part of the discipline process. However, that still leaves open for consideration, the issues of what those fees should be or the procedure by which they might be assessed.

The subcommittee's attention then focused on what the basis for the current administrative fee structure was, and whether that basis was rational. 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 focus of the administrative fee/cost system being on the litigation process, the subcommittee was satisfied that the Supreme Court's policy determination in *Shannon* is satisfied, as the focus will be on the more substantial cases.

After reviewing State Bar data regarding some cases in which trust account examiner costs were assessed as an "add-on" to other administrative fees, the subcommittee learned of an internal policy decision going forward by bar counsel's office not to seek those costs in the future, unless they were extraordinary, and then only to be requested as a taxable cost. Additional data assembled by the State Bar clearly established that actual costs on average in litigated files well exceed even the increased amount from the latest Administrative Order 2009-26. Although the subcommittee recognized that the process by which that Administrative Order had been generated raised a legitimate inference of a lack of rigorous analysis, once the subcommittee performed its due diligence, although not every member agreed with the State Bar's methodology for determining the cost of litigated cases, the subcommittee was unanimously satisfied, that a rational basis exists for the current administrative fee schedule, especially when viewed in conjunction with the subcommittee's recommended allowance for greater discretion in assessing costs on a case-by-case basis.

Nonetheless, the subcommittee strongly recommends that if any further increases in the Administrative Order's fee schedule are to be considered, a vetting process be used before such 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 debate, should be conducted before either the Bar, the Court, or both, recommend or make fee changes.

The subcommittee considered background material on handling of costs and administrative fees from other states, as well as in other related disciplinary settings. Information was provided by respondents' counsel, including letters, and statements during calls to the public. 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 administrative 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, and/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 of the fact that they may not have the assistance of their office or practice, to pay for any administrative fee assessed.

With respect to due process, the subcommittee heard anecdotal evidence from respondent's counsel who offered that a lawyer's decision between accepting a sanction of admonition, as opposed to starting the hearing process, seemed to be the most significant decision point. Some of the speakers advocated a prevailing party system. Some believed that an administrative fee assessment was more in the nature of a fine, which is disfavored under the ABA Standards. Some speakers advocated no assessment of an administrative fee at all, given the mandatory nature of bar dues.

Although the positions advanced by respondents' counsel differed, the subcommittee endeavored to consider all comments as fully as possible. 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, it voted unanimously to treat the current system of administrative expenses as a presumption for application going forward, both as to its current amounts, and its current basis of stage gradation. Mitigation or waiver under limited circumstances was suggested, after "good cause" which the subcommittee further defined, could be shown. Finally, no change to the current system, to tie the administrative fee to the ultimate sanction, as done in other states, was recommended.

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Meeting of August 16, 2011: All members, including ex officio were in attendance.

Before this meeting, background was provided for the subcommittee's review, including discussion of two cases, *In the Matter of Nelson* and *Shannon*, as follows:

The administrative fee assessed lawyers in disciplinary proceedings is not based on costs and expenses. The Supreme Court has imposed

the fee pursuant to Rules 32(d) and (l). Costs and expenses are assessed pursuant to Rule 60(b). Both are recoverable.

As to costs in a judicial discipline case, the Supreme Court set the standards for those charges in *In the Matter of Nelson*, 207 Ariz. 318, 86 P.3d 374 (2004). Rule 18(e) of the Rules of the Commission on Judicial Conduct provides, in part, that the Commission may recommend assessing attorney fees and costs to the Supreme Court. *Nelson* allowed an assessment of costs that included one-way mileage reimbursement for material witnesses, costs of depositions taken in good faith, and the cost of the hearing transcript. The court distinguished the recovery of expenses in judicial discipline cases from lawyer discipline cases (and *Shannon*) in footnote four.

To expand a bit on *Nelson* the following quote was relevant to the discussion:

In *Shannon*, we 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. On this point, we distinguish *Shannon* from the present cases because *Shannon* was an attorney discipline case and this is a judicial conduct proceeding. The State Bar and the Commission are distinct bodies, which serve distinct purposes. For example, the State Bar is an arm of this court, while the Commission is a separate entity specifically created by Article 6.1 of the Arizona Constitution. As such, the State Bar receives no appropriation from the legislature. Consequently, the funding of the disciplinary proceedings must come from the members of the bar and those who are disciplined. For this reason, we concluded that it is appropriate to shift the financial burden of disciplinary proceedings to those who are responsible for the costs, thus ensuring ‘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.’ This conclusion is critical because attorney discipline is only one of the many functions of the State Bar.

207 Ariz. at 323 & 19 n.4, 86 P.3d at 323 n.4 (citations omitted).

Discussion began with the general nature of cost objections, previous and current. They included: cases in which settlement is offered and the same sanction is awarded after

hearing, that the parties offered to settle for; whether there is adequate itemization of costs; whether there are due process issues factoring into a decision to pursue the case to a further stage; the issue presented in *In re Peasley*, 208 Ariz. 27, 42-43 & 71, 90 P. 3d 764, 779-80 (2004), regarding proving fewer charges than had been filed; whether there is “double dipping”, through the use of an assessment for specific types of fees or costs, separate from the flat fee under the Administrative Order 2009-26, and whether the current structure allows for any discretion or waiver, specifically in the language of Rule 60(b), Ariz. R. Sup. Ct.

The subcommittee noted that the administrative fee schedule doubled costs and although the Bar communicated the proposed increase there was no detailed explanation about the basis for the change to the fee schedule. When other costs were assessed in addition to the administrative fee, there was further concern expressed by the respondents’ bar about whether respondents were actually paying twice for the same charges.

Concerns were raised specifically with regard to investigators, and trust account examiners. The subcommittee was advised that at the time of the first Administrative Order _____, such individuals were not Bar staff, but outside contractors retained if a case called for it. Now, they are State Bar employees, and it was unclear whether a salary equivalent for them was included in setting the flat fee contained in the Administrative Order 2009-06 schedule, and if so, why those charges were being added on top of the administrative fee in the Order.

The “double dipping” issue appeared to arise more in litigated cases, in which a trust account investigator has to recreate files, or perform other work that the affected lawyer should be doing in the first place. Although some subcommittee members recalled at least a limited time sheet analysis which was performed prior to issuance of the 1999 Administrative Order _____, to assess how much time Bar counsel staff was spending on various functions, no evidence could be located currently within the department, to verify that or what the actual results were, although it does appear in Discipline Oversight Committee minutes. The subcommittee was reminded that a study performed by the State Bar of California drove the decision in 1999, as that Bar had similar functions, and was able to provide much more detailed data, than the study performed here in Arizona.

Apparently more recently, a time sheet analysis was tried, but was not effective, as there were disparities between lawyers that knew how to keep time and those that did not.

However, the information gathered suggested that the value of total time spent was much higher than any of the flat administrative fees suggested. The subcommittee reviewed the State Bar's information paper (provided to the full ARC, specifically at page 5), in which the hourly rates for Bar counsel staff were detailed. Questions were answered regarding how salary and overhead including employee benefits are chargeable on a pro rata basis for each Department within the State Bar.

The subcommittee considered the issue of costs and expenses versus fines, which are disfavored under the ABA standard. If the administrative fee schedule operates as a deterrent, that has a potentially chilling effect more akin to a fine or punishment, and it is inconsistent with the overall purpose of the system. If, however, the administrative fees are intended to recoup costs to the entire system, that should not properly be borne by all lawyers, they may be appropriate to continue on a public policy basis.

The subcommittee also considered whether a system based on the type of sanction would make sense, which is what other states do. At this time, material was reviewed from the 50 state survey that had been submitted to the full ARC at its initial meeting. The subcommittee noted a wide range of approaches to this issue, both in voluntary and mandatory bar membership states, and also a disparity in the amounts charged, even among mandatory bar membership states alone.

The discussion next turned to the issues presented by the Arizona Supreme Court's opinion in *Shannon*. While the subcommittee felt that we were potentially free to make a recommendation that no administrative fee should be charged at all, it is clear that *Shannon* remains controlling law. The principle of *Shannon* makes sense on a public policy basis; namely, that it is more appropriate to charge the disciplined lawyers with any add-on costs that are generated by their conduct, separate and apart from the prescreening which all lawyers bear responsibility for as part of their mandatory dues.

The subcommittee reached a consensus for a hybrid approach that requires disciplined attorneys to pay an administrative fee and costs and expenses while also affording them the opportunity to seek the waiver, reduction or deferral of those assessments in certain unique circumstances. Mechanical issues were discussed, including whether both the probable cause panel and the presiding disciplinary judge should have authority to address the issue, and if so, under what circumstances. The subcommittee determined that it wanted to know what evidence existed to support the assertion that lawyers are precluded from exercising their rights under the rules given the potential financial risk of

going to a hearing, and more information including the costs assessed in trust account cases and an analysis of the actual costs of litigations.

At this point, respondents' counsel addressed the subcommittee, to note the history referenced above regarding outside employees at the time *Shannon* was decided. Mr. Adams advocated a broad interpretation of the Administrative Order 2009-26, as possibly supporting a prevailing party system, which could allow for recovery of respondents' counsel fees under certain circumstances. He encouraged the subcommittee to consider the issue of taxable costs versus expenses, which are both defined in the Rules and are separate.

At the conclusion of the meeting, there was unanimous support for the following resolution:

Shannon is controlling law in Arizona for the principles it cited, namely that it is public policy to recover fees/costs as part of the discipline process. However, that still leaves open for consideration, the issues of what those fees should be or the procedure by which they might be assessed.

The subcommittee by consensus added the enforcement topic referenced above (V), to its discussion list, and provided follow-up assignments as follows:

- 1) *Maret Vessella*—Caseload and budget data for her department as discussed by Scott Rhodes;
- 2) *Maret Vessella*—Information about the average costs of investigator and trust account examiner time (which could be subject to separate recovery);
- 3) *Scott Rhodes*—Data (anecdotal or objective, frequency and examples) about costs as a factor in client decisions about stage of proceeding, from any helpful source;
- 4) *Justice Ryan*—Whether the discipline system created for legal document preparers has a cost or expense recovery system; and whether FARE might be an enforcement option for administrative fees in discipline;
- 5) *George Riemer/Justice Ryan*—Any additional information about how the Commission on Judicial Conduct handles these issues;
- 6) *George Riemer*—Whether Board of Medical Examiners recovers costs/expenses in addition to the fines it can assess.

Meeting of August 31, 2011: All regular members attended.

Prior to this meeting, the subcommittee received and considered the material contained in Attachment A, from: the Arizona Association of Defense Counsel; respondents' counsel Mark Harrison; examples regarding fee assessment in particular cases as illustrations; and additional information regarding handling of fines or other regulatory enforcement, in other states and disciplinary settings. In addition, we were provided with cost data in follow-up from the State Bar, contained in Attachment B. Further discussion regarding costs in Washington State is contained in Attachment C.

In addition, background was provided for the subcommittee's review, regarding the Arizona Medical Board's ("Board") authority to impose costs on a licensee in enforcement proceedings. Board staff advised:

Under A.R.S. section 32-1451(M), the "board may charges the costs of formal hearings [conducted at the Office of Administrative Hearings] to the licensee who it finds to be in violation of this chapter." The Board usually does impose costs in every formal hearing in which there is a finding that the licensee has violated the Medical Practices Act.

In a formal interview or formal hearing, the Board also has authority to impose civil penalties of not less than \$1000 and not more than \$10,000 for each statutory violation under A.R.S. section 32-1451(K).

As to whether the Arizona Medical Board had a definition of "costs," the subcommittee received this response:

The term "costs" is not defined in the Medical Practice Act. In effect, the Board relies on the Office of Administrative Hearings (OAH) to calculate the costs in each case and submit an invoice. That invoice, in turn, serves as the basis for the Board's order for costs.

Discussion began with Ms. Vessella's summary of the method for assembling statistical and cost information contained in Attachment B. In addition, Ms. Vessella also provided a spreadsheet containing eight cases which closed out in 2010 where trust account examiner time had been assessed in addition to the administrative fees. In past years, the investigators and trust account examiners employed by the State Bar kept track of their time on each case and that time was billed as a cost to respondents upon finding of misconduct. In the original fee schedule the investigator and trust account examiner

salaries were not considered as part of the administrative fee and this charge was expressly allowed by the language of the previous and current administrative order regarding costs for time spent on cases by its employed investigators. In 2011, however, the State Bar made an internal decision to stop requesting costs for time spent on cases by its employed investigators. This decision was partly based on the fact that the investigative department and procedures had changed and investigators are now assigned in virtually all matters. However, the trust account examiners still keep track of their hourly time and the Bar continues to bill their time as a cost in trust account matters. In addition, the cost of any outside investigators, examiners, or process servers, although used rarely, continues to be billed as a cost to respondents.

Ms. Vessella also indicated a willingness to clarify Administrative Order No. 2009-26, to either say that investigator expenses cannot be added on to the administrative fee, or conversely, that they are already included as part of the administrative fee contained in that schedule. Exhibit B's calculations focused on formal discipline and litigated cases to analyze the "additional" cost to the system created by lawyers going through formal discipline. After Ms. Vessella's presentation, Mr. Rhodes noted that he was satisfied that the schedule contained in the Administrative Order, had a rational basis.

The discussion then turned to whether a presumptive system would make sense to allow for discretion to waive or reduce costs and/or administrative fee expenses. It was thought that the term "good cause," which already exists in Rule 60(b), requires a definition, which the subcommittee should provide. The discretion needed for that process should apply equally to the Probable Cause Committee, as well as the Presiding Disciplinary Judge.

The subcommittee next heard from two respondents' counsel, as to the due process issue of whether decisions about proceeding to a subsequent stage are based upon cost or fee issues. First to address the subcommittee was Denise Quinterri, who provided anecdotal information regarding two clients asserted to have decided not to go farther due to the level of costs and expenses at the next stage. One of the cases involved a criminal lawyer and raised a question of law that had to be decided at a higher level of the court system; and the other case involved someone who simply wanted to be heard, but ultimately settled.

Ms. Quinterri noted that the State Bar's Economics of Law Practice report shows that median income for all lawyers is significantly lower than it used to be, and that sole

practitioners and government or public lawyers may represent the lowest salary levels of the Bar currently. Many of her clients are simply negligent and not “bad” people and she remained concerned about whether the fees would interfere with a fair and full hearing. Although she believed that discretion in the new rule would be helpful, her position was that Bar dues already support the discipline system, so no administrative fee should be assessed, as it is a penalty. She does not have any issue with taxable costs being charged, however. She also raised the issue of whether there is a disproportionate effect of discipline on certain specialties, not an issue directly before the subcommittee.

Mr. Rhodes noted that the admonition versus hearing stages seem to be the biggest decision point in his experience, which Ms. Quinterri agreed with. She also noted that there are many states which do not impose fees at all, and that our fees are higher than almost every other state. She also noted the inequity of failing to provide fees to a respondent if the Bar loses. Right now, a complete dismissal is the only way to avoid an assessment, which is anomalous because all other civil systems use a prevailing party method. She was not clear why the ABA policy against fines exists, but noted that it could be a critical piece of information.

If fees or costs must be assessed, Ms. Quinterri recommended that it be assessed on the ultimate sanction, as opposed to at a stage of the proceeding. She recognized that such an approach could create a lower assessment for taking a higher sanction more quickly. She does believe that a presumptive system with more discretion would be better than what we have now. However, she did note that the time we are spending to address fees may not be worth it, if we are not collecting them at an appropriate rate.

Next, the subcommittee heard from respondents’ counsel Nancy Greenlee. She noted that right to counsel within the system is not questioned, but the administrative fee is an additional cost over attorneys’ fees, which is a significant burden. She would prefer that Bar dues only cover the discipline system. She recognizes that the reality is that some fees will be needed. She does favor a tie to the sanction, rather than the stage of proceeding. She also recommended a set amount for settlement agreements. Whether true or not, lawyers perceive that they are being penalized for going to hearing. She pointed out that Colorado, the state which inspired our changes, has a set amount regardless of the sanction level ultimately achieved.

In discussing the items in Exhibit A, Mr. Rhodes noted that there are mostly small firms in the Arizona Association of Defense Counsel. It was also noted that they sponsor a

program for pro bono representation of respondents at the initial stages of discipline. Mr. Rhodes noted his experience that there are other economic factors entering into decisions about whether and how far to proceed, including the impact of an office closure through a suspension, or a need to lay off or terminate staff. The conduct itself is rarely the issue which results in a hearing. Rather, concerns about whether a particular violation of specific Rules, and also what the lawyer's mental state was at the time of the alleged act creating discipline, are key.

The subcommittee next considered whether an offer of judgment system might be possible. Ms. Quinterri noted at this point that it does appear that system modifications in Arizona, at least so far, may be having the desired effect, resulting in increased use of diversion, and a decrease in formal discipline.

Because enforcement and enforcement tools are part of this analysis, the discussion turned to the Court's FARE Program which is used in the criminal system to enforce fees and fines. It operates like a collection agency with a percentage awarded for what is recovered. The subcommittee was unsure as to whether discipline fees or costs could go into that program.

There was unanimous support for treating the current system of administrative expenses as a presumption for application going forward, both as to its current amounts, and its current basis of stage gradation. Mitigation or waiver only under limited circumstances was suggested, after "good cause" which the subcommittee should define, could be shown. Ultimately, no motion was made for a change to the current system, to tie the administrative fee to the ultimate sanction, though that is done in other states.

A working group was formed including Mr. Rhodes, Mr. Riemer and Ms. Vessella, to look at amendments to Rule 60(b), and formulate a definition of "good cause" as it appears in that Rule, as well as creating the mechanics of the mitigation process.

Finally, the discussion turned to the fact that in the future requests for modifications to the current Administrative Order, or the administrative fee schedule in general, should be subject to a vetting process, to allow for more meaningful analysis. 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 debate, should be conducted before the Court, the Bar, or

both, make fee changes. With more input, there would be greater confidence in the fee schedule.

Although the subcommittee considered the establishment of guidelines for consideration of future recommendations for changes in the fee schedule, ultimately there was no motion made. It is the subcommittee's strong hope that similar data such as summarized above to consider the rational basis for the current system would again be used.

Meeting of September 30, 2011: James Drake, Jr. was the only regular committee member unable to attend.

Before the meeting, material regarding the FARE system was provided, as outlined in Exhibit D. The subcommittee reviewed the working group's draft of changes to Rules 59 and 60(b), to ultimately arrive at the draft contained in Exhibit E attached, and furnished to the full ARC on October 7, 2011.

The subcommittee first considered the working group's analysis of placing the "good cause" discussion in a comment versus the Rule itself. It was believed that a list of the "good cause" situation(s) was going to be illustrative anyway, and the use of a comment allowed for greater flexibility, and coupled with the phrase "including but not limited to."

The concept of financial hardship in the definition generated the most discussion both in the working group and at the subcommittee meeting. The goal was to convey what was *not* appropriate to include: financial hardship related to the discipline proceeding itself. A number of examples were given regarding circumstances that could and should result in a "good cause" determination. Some subcommittee members felt that financial hardship should not be included at all, because of the risk for raising it in every case. There was a strong feeling that there should be some verifiable proof of the financial hardship, no matter how it was defined. It was noted that there appeared to have been more objections for financial hardship made under the old system, rather than the current structure. Some subcommittee members noted that there should be a way to address whether client harm was actually caused by the charged conduct, and whether the pre-existing financial harm that may exist with most respondents could be distinguished.

Discussion then turned to matters of procedure, such as whether an offer of judgment system should exist, which became the portion of the comment regarding the respondent's offer to consent to discipline in writing prior to a hearing. The effect of the

Bar filing more or greater charges than it could prove was also addressed. Additional amendments to the working group's language were proposed at the subcommittee, resulting in the final draft appearing in Exhibit E.

Procedural issues were discussed regarding whether the Presiding Disciplinary Judge or the Hearing Panel or both, would be able to assess costs or administrative fee expenses, and under what circumstances. Additional language for Rule 59(c) was included in Attachment E, to address which portions of the Hearing Panel's ruling would be stayed, if there was an appeal of costs and expenses.

The discussion then turned to enforcement issues. It was not felt after greater analysis of the FARE system, as outlined in Exhibit D, that it was appropriate for use in this setting. It was further noted that enforcement issues were not part of the original charge, though they do have some relationship to the overall effectiveness of the system. It was ultimately felt that the tools that the State Bar currently possesses are probably sufficient in the new system as well, if used more consistently. Ultimately, it was too early following the discipline system changes, for there to be a consensus on the subcommittee as to adding or changing those tools.

Follow Up based on ARC Meeting of October 7, 2011:

Conducted via email

Following discussion at the full ARC on October 7th, the subcommittee was given two additional tasks. First was to revisit its comment to Rule 60(b), to determine whether it could be subsumed into the Rule itself, given the Court's current preference to eliminate comments wherever possible. Ultimately, the consensus was that there was benefit to the discussion in the comment regarding "good cause," which was not amenable to handling in a black-letter Rule format.

The subcommittee also considered whether the following two circumstances should be added to the definition of "good cause:"

- 1) a young or inexperienced practitioner without reasonable access to mentorship to avoid the charged discipline; and
- 2) a public sector employee without reasonable prospect of employer reimbursement for costs or fees.

Ultimately, the consensus was not to make those additions. As a result of the above two decisions, no changes to the October 7, 2011 Rules change draft were recommended.

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