



INFORMATION PAPER

TO: Attorney Regulation Advisory Committee

SUBJECT: Schedule of Administrative Expenses assessed in Lawyer Discipline, Disability and Reinstatement cases.

PURPOSE: On May 4, 2011, the Supreme Court issued Administrative Order No. 2011-44 establishing the Attorney Regulation Advisory Committee and the appointment of members. As the first order of business, the Committee is to consider the current administrative expenses assessed in lawyer discipline cases and the philosophical basis for setting and assessing these expenses. The Committee shall recommend an expense schedule to the Supreme Court by December 31, 2011. This information paper provides a comprehensive overview of the history and background regarding the current cost structure.

BACKGROUND: In 1998, the State Bar of Arizona's Discipline Oversight Committee ("DOC") considered adopting a schedule of administrative expenses to be imposed in lawyer discipline cases. The Supreme Court rules did not specify any amount to be assessed and it was unknown whether the Board had ever exercised any role in determining amounts to be assessed. At the time, the State Bar's Lawyer Regulation department assessed \$150 as an overall fee plus an additional \$130 per discipline file. It appears that consideration of this issue was the result of Chief Bar Counsel reporting to the DOC on comments from membership that disciplined attorneys should pay a greater share of the costs of the system and that a cost system should be adopted that assessed costs based on the point where a proceeding terminates.

The model for this concept was a new system adopted by the State Bar of California. In February 1996, the Executive Director of the California Bar appointed a Task Force to review their system of cost assessments and recovery to ensure that the Bar was collecting the costs in accord with its current expenses. The California Task Force considered whether an appropriate formula would be to assess costs on an actual costs basis. Under that model, the Bar would determine the actual time spent on a specific case and assess costs based on the actual salary and overhead costs. The Task Force concluded that such a procedure would be operationally unworkable as a cumbersome and time-consuming process coupled with the concern that such a procedure may be the catalyst for unnecessary litigation.

The California Task Force used a three-step process for the costs model. It included a random review of cases resulting in discipline. The review covered a statistically

significant number of cases. The cases varied in the nature of the disciplinary proceeding and analyzed the tasks typically performed in the various types of disciplinary cases. The Task Force conducted various studies on how long specific tasks took to complete and then hired a firm to review their methodology, examine their data and calculate an appropriate component for overhead, ultimately creating the final formula that was proposed and adopted by their Board. Under the proposed formula, the amount of costs was dependent upon four factors: the stage at which the matter was completed; the type of proceeding involved; the number of complaints involved; and the amount of out-of-pocket costs incurred. The result was a cost assessment model that California believed accurately and fairly reflected the recoverable costs incurred by the Bar in disciplinary proceedings and could be readily updated in the future to reflect changes in salary and overhead costs.

Based on the California model, in 1998, the Chief Bar Counsel for the State Bar of Arizona proposed to the DOC that it recommend to the Board of Governors a similar model. The DOC was presented with a proposed assessment based on the factors utilized by California. The philosophy of creating an administrative cost structure based on the termination point of the case had a great deal of legitimacy. The work that is required in cases resulting in informal sanction or sanctions after a formal proceeding could be roughly calculated. Therefore an administrative fee structure that included items such as bar counsel time, staff time, paralegals and assistants, postage, telephone costs and general office overhead would form the basis for the administrative fee imposed. The proposal offered a low, moderate and high assessment for the various termination points of a discipline case. Although the DOC minutes do not reflect the specific discussion, it is clear that discussion occurred because the DOC ultimately selected and recommended to the Board some low, some moderate and some high assessments. In February 1999, the Board voted unanimously to adopt the proposal. That schedule is attached hereto as Exhibit A. That schedule was implemented and remained unchanged until November 2008.

In mid-2008, the DOC again considered the fee structure that was adopted in 1999. With the assistance of the Chief Financial Officer, Tom Johnson, the DOC examined the increase in personnel and other related costs. In 1998, the cost of operating Lawyer Regulation was \$1,368,808 compared to budgeted expenses for 2008 of \$2,912,501, an increase of \$1,543,693 or 112.8%. Based on the increased costs over the decade between 1998 and 2008, it was reasonable to propose that all identified fees be increased. DOC recommended to the Board that the fees be increased by 100% based on the factors that had been used to determine costs in 1998, as well as on the increase in the budgetary cost for Lawyer Regulation.

On November 21, 2008, the Board approved an increase in the assessment schedule. On December 18, 2008, the President of the State Bar sent a letter to Chief Justice McGregor asking the Court to adopt the new fee schedule. The Board's view, which was that disciplined lawyers, rather than the general bar membership, should bear a greater responsibility for the costs and expenses incurred in the operation of the regulatory system, a philosophy previously expressed by the Court, was set forth in that letter:

By 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. *In re Shannon*, 179 Ariz. 52, 79, 876 P.2d 548, 577 (1994) (footnote and citation omitted).

On February 25, 2009, the Supreme Court issued Administrative Order 2009-26, citing to *Shannon* and adopting the fees increase as proposed by the Board. The order is attached hereto as Exhibit B. Shortly thereafter, counsel for respondent lawyers expressed concerns regarding the increase. In November 2010 a memo from a group of respondent's counsel was sent to the Board articulating the concerns. The memo is attached hereto as Exhibit C. This information was conveyed to the Court as well. On January 31, 2011, the Court issued Administrative Order 2011-17 to accommodate the new procedural rules that were effective January 1, 2011. That order did not in any way change the substance of the fee schedule in effect. The Court has now directed the Attorney Regulation Advisory Committee to consider this issue and make recommendations to the Court.

CONSIDERATIONS: There are many factors that may be analyzed to determine whether the current cost model employed by the State Bar is a fair and effective model. It has been suggested that the Committee review the cost models used by other states; the actual costs incurred in cases resulting both in informal discipline and those that are litigated through the formal disciplinary process; and the views of the membership concerning who should bear the costs of operating and maintaining the lawyer regulatory system.

JURISDICTIONAL DIFFERENCES: In consideration of the issue of the cost structure, bar staff made inquiries to all 50 states and asked a comprehensive set of questions concerning costs assessed in disciplinary cases; administrative cost structures; whether the jurisdiction was or was not a mandatory bar; how regulation was funded and what percentage of the budget was recovered through assessments collected in lawyer discipline cases. All but nine jurisdictions responded to the inquiry. Attached as Exhibit D is a chart referencing all jurisdictions that responded to the inquiry.

Review of the chart demonstrates vast differences in how jurisdictions deal with costs or fees associated with lawyer discipline. Many states indicate that they only assess costs, but the definition of costs sometimes includes actual attorney's fees in addition to other standard out of pocket costs. Three states can impose fines in addition to collecting costs. Seven states assess actual attorney's fees in lawyer discipline cases. Sixteen states, like Arizona, have a an administrative fee structure or a flat administrative fee structure along with the opportunity to recover costs and twenty states only recover costs. The

responses demonstrate that there are many methods being used to assess costs and fees through the disciplinary process.

ACTUAL COSTS: The current administrative schedule applies to various types of cases. Most often the assessments are related to those cases that result in a sanction imposed by the Attorney Discipline Probable Cause Committee or as a result of a consent, default or contested hearing through the formal disciplinary process. As part of the evaluation process, it is useful to consider the actual costs involved in the processing of cases.

In determining the actual costs, several senior bar counsel evaluated each type of case and produced a list of minimum required tasks involved in the investigation and prosecution of each. Once the list of tasks was set bar counsel discussed an average amount of time necessary to complete each task and assigned that amount accordingly. Attached as Exhibit E are model billing schedules for each of the four types of cases which are subject to the assessment of administrative fees: a case resulting in a sanction ordered by the Attorney Discipline Probable Cause Committee; a consent agreement; a default case; and, a case going through a contested hearing. The billing schedules reflect the minimum number of required tasks associated with each type of case. The billing schedules do not reflect any time for research, interviews, general correspondence, or telephone calls. Often times many more tasks are required for each but for purposes of this process it seemed most appropriate to use a billing schedule that reflected the absolute minimum number of tasks required for each type of case. In addition, each task reflects an extremely conservative estimate of the time necessary for completion of the task. In each instance, the model billing schedules are for a basic case and do not account for the complexity of the case or the volume.

The model billing schedules show a minimum number of hours for each case type. To complete the costs analysis, it was necessary to determine an hourly rate for bar counsel.¹ Customarily a lawyer will include the cost for secretarial support and overhead as part of the lawyer's hourly fee. The average hourly cost per bar counsel was \$85.76 and the average cost for legal secretaries was \$38.99 for a total average hourly rate of \$124.75. The chart below uses the various figures to demonstrate the range of costs involved with each type of case versus the administrative fee currently assessed.

¹ Using salaries, benefits and overhead costs, the State Bar's Chief Financial Officer calculated a per employee amount which is represented.

Hourly Rate for Bar Counsel Only

Type of Case	Hours Charged	Total Cost	Administrative Fee
Sanction imposed by ADPCC	10.9 @ \$85.76	\$934.78	\$600.00
Consent Agreement	35.3 @ \$85.76	\$3,027.33	\$1,200.00
Default Case	24.8 @ \$85.76	\$2,126.85	\$2,000.00
Contested Hearing No Appeal	68.5 @ \$85.76	\$5,874.56	\$4,000.00
Contested Hearing through Appeal	98.1 @ \$85.76	\$8,413.05	\$6,000.00

Hourly Rate with Combined Bar Counsel and Legal Secretary

Type of Case	Hours Charged	Total Cost	Administrative Fee
Sanction imposed by ADPCC	10.9 @ \$124.75	\$1,359.78	\$600.00
Consent Agreement	35.3 @ 124.75	\$4,403.68	\$1,200.00
Default Case	24.8 @ \$124.75	\$3,093.80	\$2,000.00
Contested Hearing No Appeal	68.5 @ \$124.75	\$8,545.38	\$4,000.00
Contested Hearing through Appeal	98.1 @ \$124.75	\$12,237.98	\$6,000.00

Using only the most basic case with the minimum number of tasks at a conservative estimate of the time necessary to perform those tasks, the actual cost when using either hourly rate would demonstrate that the actual costs are much higher than the administrative fees currently assessed.²

² When considering actual costs versus the administrative fee, it could be useful to evaluate respondent counsel's billing with respect to the various types of cases to better assess the cost of defense in relation to the costs assessed to disciplined lawyers pursuant to the administrative fee schedule. It would also provide another source to demonstrate the time necessary to process the various types of cases. The Committee may want to consider whether this would present a more comprehensive picture of the fairness or inequity of the current fee schedule.

MEMBERSHIP SURVEY: In early 2011, the State Bar, with the aid of a consultant, created a membership survey to query members on many different aspects of the Bar. Pursuant to a request from the Court, the member survey included three questions related to member views about the existing cost structure in lawyer disciplinary matters. Only two of the three questions were directly related to the issue of the cost structure and the responsibility of those lawyers being sanctioned to bear those costs. The two questions were as follows:

1. In 2010, the median assessed fee in formal disciplinary cases was \$2,028. Based on this information, to what extent should attorneys who are disciplined under the system pay the costs and expenses for investigating and prosecuting their unethical violations? The possible answers were pay nothing, pay less, pay the same, pay more, pay substantially more or no opinion.
2. The current cost structure in a formal disciplinary case where misconduct is found is as follows: A lawyer will be assessed \$1,200 for a consent agreement for discipline; \$4,000 after a contested hearing with no appeal; \$6,000 for a contested hearing and appeal to the Supreme Court. Is the current cost structure too low, fair, and too high or no opinion.

The survey was sent to 21,457 members. About 20% of the membership or 4,019 members participated in the survey. Only 2,907 members answered question one. In response to question one, 35.4% responded that lawyers should pay the same; 13.5% thought lawyers should pay more and another 9.1% thought that lawyers should pay substantially more. In total, 58% of members thought that lawyers should pay the same or more than is currently assessed; 13.7% thought that lawyers should pay less or nothing at all; 28.2% of members who answered the question responded by checking that they had no opinion.

About the same number of members, 2,893 answered question two. In response to question two, 35.4% of the members thought that the current cost structure was fair; another 9.4% thought it was too low; 25.1% thought that the current cost structure was too high; and 30.1% of the members who answered the question responded by checking that they had no opinion. Overall, 44.8% of members thought the existing structure was fair or too low.

The results showed that the majority of members responding believe that the current cost structure is fair and that disciplined lawyers should pay the same or more.

OTHER CONSIDERATIONS: Based on the existing fee structure, for the year ending December 31, 2010, the State Bar collected \$125,913 in Judgment Receipts which represented 2.3% of the total cost (including overhead) to administer the Lawyer Regulation process. The State Bar has not raised member dues since 2005 and as part of the State Bar's Five-Year Vision, a stated objective is to maintain bar dues at current levels through 2014.

CONCERNS: In their letter to the Board (Exhibit C), Respondent Counsel cited two main concerns: the cost structure is so costly that lawyers are forced to accept discipline because they cannot afford to exercise their rights pursuant to the rules, thereby making the fees punitive in nature and that the current fee schedule inappropriately includes significant components other than “costs,” contrary to “well-established ABA policy.” Current Schedule of Costs is attached as Exhibit B.

With the Court’s philosophy as a backdrop, the issue can be evaluated by reviewing the models used in other jurisdictions, the actual cost to process cases, and the views of the membership. The Committee will have to consider this issue with that as the setting.

Additionally, Respondent’s counsel referenced the ABA Model Rules for Lawyer Disciplinary Enforcement (MRDE). In 1989, the ABA House of Delegates adopted the MRDE. The MRDE offers a proposed system of lawyer regulation and includes in Rule 10 the imposition of costs as part of any order imposing discipline. Costs are set out in the rule as the cost of the investigation, service of process, witness fees and court reporter’s services. The commentary to Rule 10 also includes that sanctioned lawyers should be required to reimburse the agency for all costs of the proceedings, other than attorney’s fees. The argument followed that because the administrative fee structure in Arizona included bar counsel time that it is an “attorney fee” that is not *recommended* by the MDRE.

In the traditional sense, attorney fees represent the hourly rate, set within a range that represents the customary fees for the community, considering other factors such as the experience of the lawyer, reputation in the community and the particular skills and abilities to perform the service. Those fees represent the actual cost to the client based on the time in providing the service. The administrative fee structure that currently exists does not include “attorney’s fees.” Bar counsel time is listed as one item in the overall administrative fee along with paralegal time, legal assistant time, secretaries, typists, file clerks, messengers, postage charges, telephone charges, normal office supplies and office overhead. Bar counsel time is not assessed based on the specific factors used to establish the attorney’s fee nor does it represent the lawyer’s time in performing a service. The administrative fee represents a nominal amount based on the actual time expended on cases.³

³ The MDRE is certainly a useful tool and many aspects of the recommended lawyer disciplinary structure have been accepted in Arizona. Notably, many have not been adopted such as the recommendation that the system of lawyer regulation be controlled and managed exclusively by the state’s highest court and not by a state bar association, that an admonition remain private, a decision the Court rejected in 1996 when making all sanctions public, or that the system requires a fee dispute arbitration system that is *mandatory* for all lawyers.

CONCLUSION: The court has directed that the Attorney Regulation Advisory Committee is to consider the current administrative expenses assessed in lawyer discipline, disability, and reinstatement cases and the philosophical basis for setting and assessing those expenses and recommend an expense schedule to the Supreme Court by December 31, 2011.