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BEFORE THE PRESIDING DISCIPLINARY JUDGE

In the Matter of a Member of
the State Bar of Arizona,

DAVID S. GINGRAS,
Bar No. 021097,

Respondent.

PDJ 2026-9010

**STATE BAR'S BRIEF ADDRESSING
THE APPLICABILITY OF A.R.S.
§ 12-751 TO LAWYER DISCIPLINE
PROCEEDINGS**

[State Bar Nos. 24-1692, 24-1826, 24-
2483, 24-2819, 24-3080 and 25-1230]

The State Bar of Arizona, by undersigned bar counsel, hereby submits this brief addressing the applicability of A.R.S. § 12-751 (Arizona's anti-SLAPP statute) to lawyer discipline proceedings.¹

Introduction

To determine whether the anti-SLAPP statute applies in lawyer discipline cases, one must first consider the Arizona Supreme Court's jurisdiction over lawyer discipline and the underlying purposes of the Rules of Professional Conduct.

Arizona Supreme Court's Jurisdiction re: Lawyer Discipline

The Arizona Supreme Court noted its authority over the practice of law as

¹ This brief addresses only the issue set forth in the PDJ's order dated April 30, 2026 ("whether the Court's supremacy precludes . . . application of A.R.S. § 12-751 in discipline proceedings"); it does not address the procedures or requirements set forth in the statute.

follows:

[T]he practice of law is a matter *exclusively* within the authority of the Judiciary. . . . The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court.

Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980) (emphasis added).

The Supreme Court's authority to regulate the practice of law is found in articles 3 and 6 of the Arizona Constitution. Article 3 states:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Article 6, § 1 vests "judicial power" in "an integrated judicial department," while article 6, § 5(5) states that the Arizona Supreme Court has the "[p]ower to make rules relative to all procedural matters in any court."

Based on the Arizona Supreme Court's constitutional authority over the courts and the practice of law, application of the anti-SLAPP statute to lawyer disciplinary proceedings could interfere with the Court's exercise of its ultimate authority over the practice of law. For example, the resolution of charges of misconduct may be delayed and otherwise adversely affected if the state's anti-SLAPP statute applies in lawyer discipline proceedings. If the statute applies in discipline proceedings, the Presiding Disciplinary Judge (PDJ) must conduct an evidentiary hearing or consider the parties' pleadings upon receipt of a motion to dismiss premised on the statute, during which all discovery proceedings must be stayed if *prima facie* evidence is found. A.R.S. § 12-751(E). The

PDJ may, however, grant a motion for discovery for good cause shown. *Id.* The delay in conducting discovery and the burden associated with the possible presentation of the same evidence at two distinct hearings (one based on an anti-SLAPP motion to dismiss, and the other a hearing on the allegations of misconduct if the respondent-lawyer's motion to dismiss is denied).

The State Bar investigates and prosecutes charges that lawyers have made disparaging or otherwise inappropriate comments about judges and others. Although lawyers retain First Amendment rights, their free speech right and right to petition the government are restricted (*i.e.*, lawyers do not always enjoy the same rights that nonlawyers enjoy, at least in the context of the practice of law). *See In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984) (“a lawyer is held to a narrower standard of free speech than a non-lawyer when discussing the judiciary”), *In re Ziman*, SB-12-0037-AP/PDJ 2011-9067 (appeal denied Dec. 4, 2012) (hearing panel found misconduct based in part on speech), *In re Ziman*, 174 Ariz. 61, 847 P.2d 106 (1993) (misconduct found based in part on a profane and insulting remark), *In re Levy*, SB-21-0085-AP (October 26, 2022) (dec. order) (Rule 41(g), now Rule 42(b)(7), is not merely aspirational), *In re Martinez*, 248 Ariz. 458, 465, ¶ 22 (2020) (an objective standard is used to determine if demeaning language constitutes unprofessional conduct), and *In re Gagic*, SB-22-0085-AP (May 3, 2023) (dec. order) (misconduct found based in part on unsubstantiated contentions about judges).

Statutory Construction

“A basic tenet of statutory construction is that statutes should be construed so as to

be constitutional whenever possible.” *In re Shannon*, 179 Ariz. 52, 78, 876 P.2d 548, 574 (1994) (citation omitted). The Supreme Court, however, “consistently ha[s] held that the legislature does not have the power ‘to enact laws that would make it impossible, or even unreasonably difficult’ for the judicial department to perform its constitutional function.” *Id.* at 79, 876 P.2d at 575 (citation omitted).

Generally, both the legislature and the Arizona Supreme Court have constitutional authority to create substantive and procedural legal rights, subject to limitations established by the constitution’s separation of powers; the legislature is generally responsible for establishing substantive rights, whereas the Supreme Court is generally responsible for establishing procedural rights. *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶¶ 26-27, 203 P.3d 483, 490 (2009).

To determine whether a statute invades the authority of the Supreme Court, one must first determine whether it creates a substantive right or a procedural right. *Seisinger v. Siebel*, 220 Ariz. 85, 91 ¶ 24, 203 P.3d 483, 489 (2009). If the statute is “substantive,” the statute (generally) prevails. *Id.* at 92 ¶ 26, 203 P.3d at 490. If a statute is procedural, but conflicts with a court rule, the rule prevails. *Id.* at 89 ¶ 8, 203 P.3d 487.

“[I]t is generally agreed that a substantive law creates, defines, and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress.” *Carson v. Gentry in and for County of Maricopa*, ___ Ariz. ___, ¶ 77, 574 P.3d 205, 221 (2025) (quoting *Allen v. Fisher*, 118 Ariz. 95, 96, 574 P.2d 1314, 1315 (App. 1977)). Determining whether a statute is procedural or substantive, however, is not always simple. “A ‘state procedural rule, though undeniably procedural in the ordinary

sense of the term,’ may exist to ‘influence substantive outcomes,’ and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.” *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416-17, 419-20, 130 S.Ct. 1431, 1450, 176 L.Ed.2d 311, ___ (2010) (Stevens, J., concurring in the judgment) (internal citation marks omitted).

In addressing that issue, the Arizona Court of Appeals has stated:

That a statute creates a procedural rule does not automatically render it invalid as a violation of the separation of powers provision. As our Supreme Court noted in *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984), the legislature may enact procedural rules so long as they merely supplement, but do not contradict, existing court-made rules. It is the role of the courts to review a legislatively created rule to determine whether it meets the test enunciated in *Seidel* or, conversely, impermissibly infringes on the constitutional power vested in our Supreme Court. *Id.*

Encinas v. Pompa, 189 Ariz. 157, 159, 939 P.2d 435, 437 (App. 1997).

Arizona’s Anti-SLAPP Statute, A.R.S. § 12-751

Arizona’s anti-SLAPP statute establishes a procedure to promptly address whether a legal action is “*substantially* motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right.” A.R.S. § 12-751(A) and (B) (Emphasis added). The procedure will ultimately result in a finding whether a legal action was brought for an improper purpose. Although the two branches of government have (generally) distinct purposes, even if that statute were to be found to be exclusively procedural, the Supreme Court will enforce it if it is reasonable and workable, and does not conflict with Court rules. *State v. Reed*, 248 Ariz. 72, 76, 456 P.3d 453, 457 (2020)

("[W]e will recognize 'reasonable and workable' procedural laws if they supplement rather than conflict with court procedures") (citation omitted).

The Arizona Supreme Court could, alternatively, determine that the anti-SLAPP statute provides substantive rights to litigants. For example, the Arizona Supreme Court may defer to legislation regarding procedural matters that promote substantive goals of public policy. *See Readenour v. Marion Power Shovel*, 149 Ariz. 442, 446, 719 P.2d 1058, 1062 (1986) (Supreme Court deferred to legislation pertaining to relevant evidence that "promote[d] substantive goals of public policy such as accident prevention"). The statute's inclusion of language authorizing the recovery of costs and reasonable attorney fees may also be deemed to create a substantive right. Furthermore, the statute may also create a substantive right because it provides a procedure for citizens to promptly prevent forced litigation of a non-meritorious case, which could result in the expenditure of time and money.

When determining whether a statute is procedural or substantive, the Supreme Court looks at "the true function of the statute" at issue rather than relying on labels. *Seisinger*, 220 Ariz. at 93 ¶ 31, 203 P.3d at 491. At least one court has found that an anti-SLAPP statute was a "hybrid procedural/substantive law." *Diamond Ranch Acad., Inc. v. Filer*, 117 F.Supp.3d 1313, 1318 (D. Utah 2015).

The public policy underlying the anti-SLAPP statute is simple: Ensuring that citizens and residents may assert their Constitutional rights without the fear of retaliation through the courts. The question becomes whether the Arizona anti-SLAPP statute usurps

the Court's rulemaking authority and violates the separation of powers doctrine if it were to be applied in lawyer discipline cases.

Other Jurisdictions' Determinations Whether Anti-SLAPP
Laws create Procedural or Substantive Rights

There is a lack of consensus among courts whether anti-SLAPP laws are primarily procedural, substantive or a combination of both. While courts have split in determining whether anti-SLAPP laws primarily provide substantive rights or procedural rights, all have at least some procedural elements establishing an expedited procedure to resolve whether a lawsuit was filed primarily in an effort to quash a defendant's Constitutional rights. The Second Circuit Court of Appeals has found that a state's anti-SLAPP statute provided *substantive* protections,² the Tenth Circuit has found that a state's anti-SLAPP statute was procedural and, therefore, conflicted with the Federal Rules of Civil Procedure,³ and other Circuits and the D.C. Court of Appeals have found that anti-SLAPP statutes include substantive and/or procedural rights, depending on the law under review.⁴

² See, e.g., *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (holding that Nevada's anti-SLAPP law provided substantive rights).

³ See, e.g., *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 662 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 591 (2018) ("The plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a procedural mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights."); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (noting that the D.C. Court of Appeals found that its statute "establishe[d] a new 'procedural mechanism' for dismissing certain cases before trial").

⁴ See, e.g., *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) (finding before Maine's statute was repealed, it had "both substantive and procedural aspects"); *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019), *as revised* (Aug. 29, 2019) (finding that Texas' anti-

There is also a lack of consensus among state courts whether anti-SLAPP laws primarily establish substantive or procedural rights. Kentucky⁵ and Maine⁶ have held that anti-SLAPP statutes provide procedural rights, whereas Connecticut⁷ and Oklahoma⁸ have held that their state’s anti-SLAPP statute created substantive rights. Georgia, on the other hand, has determined that its anti-SLAPP law is both procedural and substantive in nature.⁹

SLAPP statute was procedural); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018) (finding Georgia’s anti-SLAPP statute procedural, and created no substantive rights); *Banks v. Hoffman*, 346 A.3d 665 (D.C. 2025) (holding that the District of Columbia’s statute provided substantive rights, and stating that the substantive/procedural distinction was of minimal relevance (although it previously found the statute provided a “procedural mechanism”), and did not conflict with the District’s summary judgment rule, and was, therefore, lawfully enacted).

⁵ *Davenport Extreme Pools and Spas, Inc. v. Mulflur*, 698 S.W.3d 140, 151 (Kentucky App. 2024) (“Kentucky’s [anti-SLAPP] statutes fall squarely in the procedural category; they provide procedures that permit expedited consideration of already-existing substantive protections.”).

⁶ *Thurlow v. Nelson*, 263 A.3d 494 n.7, 397 Ed. Law Rep. 656, 2021 ME 58 (2021) (“Maine’s anti-SLAPP statute is a procedural mechanism to screen meritless cases and does not change common law regarding the underlying claim of defamation.”).

⁷ *Smith v. Supple*, 346 Conn. 928, 949, 293 A.3d 851, 864 (2023) (“The anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits that can be costly and burdensome”).

⁸ *Steidley v. Community Newspaper Holdings, Inc.*, 383 P.3d 780 (Okla.Civ.App. 2016) (“While there is no doubt that such mechanisms are procedural, they affect substantive rights.” (footnote omitted)).

⁹ *Atlanta Humane Society v. Harkins*, 278 Ga. 451, 454, 603 S.E.2d 289, 293 (2004) (“[T]he verification requirement of the anti-SLAPP statute is procedural in nature in that verifications must contain certain assertions and must be filed within a certain time, but is *also* substantive in nature in that to determine whether the requirements of the statute have been met, the court must take a substantive look at the verification offered to ensure that the underlying lawsuit has not been initiated for an improper purpose.” (quoting

Conclusion

It is unclear whether Arizona's anti-SLAPP statute is simply procedural, or also substantive. However, any application of the statute to lawyer discipline proceedings would be inappropriate because it invades the authority of the Supreme Court and may be prejudicial to the Court's administration of the practice of law and enforcement of the Rules of Professional Conduct (due to possible delay and the duplication of hearings). Also, A.R.S. § 12-751 applies only to a person's *lawful* exercise of the rights of free speech and petition. As noted above, the Arizona Supreme Court has, at least indirectly, found that lawyers have a limited right to free speech. As a result, Respondent may not now argue that he was exercising a *lawful* free speech right.

Although the PDJ could decide whether Arizona's anti-SLAPP statute applies in lawyer discipline cases, the PDJ could avoid addressing that issue by assuming the statute applies but that Respondent has not provided *prima facie* proof that the State Bar's complaint against him was "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right."¹⁰

Harkins v. Atlanta Humane Society, 264 Ga.App. 356, 360(1), 590 S.E.2d 737, 740 (2003) (emphasis added)).

¹⁰ See *In the Matter of the Discipline of an Attorney*, 2004 WL 5214977 (Mass. 2004), the Massachusetts Supreme Court avoided resolving whether its statute applied to lawyer discipline proceedings, stating, "Assuming without deciding both that the respondent's conduct was protected petitioning activity within the meaning of the statute, and that the anti-SLAPP statute applies to bar discipline cases, we nevertheless conclude that the respondent has failed to show that bar counsel lacked a 'substantial basis other than or in addition to the petitioning activit[y]' for bringing this action." The Court further stated in a footnote: "We decline to construe this [anti-SLAPP] right so as to immunize every written or oral statement made by an attorney in connection with an issue being litigated

DATED this 15th day of May, 2026.

STATE BAR OF ARIZONA

/s/ James D. Lee

James D. Lee

Senior Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 15th day of May, 2026.

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in a civil suit because such a broad reading would preclude enforcement of many attorney conduct rules.”