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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-19-0030

10 **PETITION TO AMEND RULE 43**
11 **OR THE ARIZONA RULES OF**
12 **SUPREME COURT**

COMMENT OF THE
STATE BAR OF ARIZONA

13 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the "State Bar") hereby submits the following as its Comment to the
15 above-captioned Petition.

16 The Petition requests several amendments to Rule 43 that would:

- 17 • Add definitions to the Rule that are unnecessary;
- 18 • Change the current record keeping requirements by expanding the types
19 of records that must be maintained to evidence deposits and
20 disbursements, thereby making the tracing of the source of deposits and
21 the recipient of disbursements difficult, if not impossible;
- 22 • Add a new requirement that attorneys maintain a three-way
23 reconciliation report that is not currently required by the Rule;
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- 1 • Add an unnecessary amendment to the chargeback provisions; and
- 2 • Radically expand the approved methods of disbursement to allow
- 3 methods that fail to safeguard client funds.
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5 The proposal makes unnecessary changes and additions to the Rule and
6 weakens the existing safeguards in the Rule. The State Bar believes that a more
7 comprehensive review is required before any changes to the trust account rules are
8 made. Therefore, the State Bar requests that the Petition be denied.

10 **DISCUSSION**

11 Rule 43 creates reasonable and strong measures of accountability to which
12 lawyers holding the funds of clients and third parties or persons must adhere.
13 Because the lawyer is entrusted with funds belonging to others, the lawyer must be
14 scrupulous in the management of those funds. This includes implementing and
15 following adequate internal controls, best accounting principles and creating
16 verifiable audit trails. Petitioner has suggested amendments to the Rule that benefit
17 lawyers and banks rather than ensuring protection of the public. In addition,
18 Petitioner suggests other amendments to explain terminology that are simply
19 unnecessary or better suited to comments rather than rule changes.

20 1. Proposed amendments to required trust account records in Rule 43(b)(2):

21 a. Rule 43(b)(2)(B)(i), (ii), and (iii). The definitions provided in the
22 proposed amendments to subsections (i), (ii), and (iii) are unnecessary, but if deemed
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1 desirable, are better suited to a comment. Additionally, the proposed amendment to
2 subsection (iii), adds ambiguity on the requirement to maintain a running balance of
3 funds on deposit in each ledger. This proposal would create opportunity for error,
4 increase the likelihood of conversion, and make reconstruction of account activity
5 difficult.
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7 2. Proposed amendment to recordkeeping requirements in Rule 43(b)(2)(D):

8 a. Currently, lawyers are required to maintain records of disbursement and
9 deposit that are specific, detailed and sufficiently evidence the source of deposit
10 funds or the payee of disbursements. The proposed language would allow lawyers
11 to, instead, maintain records of deposit and disbursement that would show the source
12 and/or payee of funds as “codes” rather than easily identifiable individuals. This
13 change creates a record keeping system that inadequately protects the public and
14 makes examination of a lawyer’s trust account difficult.
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17 b. Petitioner erroneously contends that the current Rule 43(b)(2)(D) requires
18 lawyers to retain a report of their monthly three-way reconciliation. However, while
19 lawyers are required to conduct a monthly three-way reconciliation, the current Rule
20 does not actually require that a particular record of that reconciliation be produced
21 or maintained. Such a requirement is unnecessary for an adequate examination of
22 the trust account.
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25 3. Proposed amendment to Rule 43(b)(3)(B):

1 The language of this proposed amendment alters the current language
2 regarding remedial steps to be taken in the event of a chargeback. The proposed
3 language is confusing and unnecessarily limits the circumstances in which a lawyer
4 must replace funds compromised by a charge back from a credit card transaction.
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6 4. Proposed amendment to Rule 43(b)(5):

7 a. Currently, lawyers are required to make all disbursements from the
8 trust account by pre-numbered check or electronic transfer. The Rule requires
9 lawyers to maintain a record of such disbursements in accordance with the other
10 requirements of the Rule, including that the instrument of disbursement identifies
11 the disbursement as being from a trust account. Petitioner seeks to strike this last
12 requirement and expand the definition of electronic transfer to include any electronic
13 disbursement method. This includes a number of options that are not secure and not
14 properly documented. Virtually all of Petitioner's proposed means of disbursement,
15 including ATM transactions, ACH, debit cards and mobile devices are insecure,
16 insufficiently documented, and inadequately verifiable. They do not generate the
17 type of audit trail that the rules contemplate. The current process required in
18 disbursing by check or electronic transfer – checking the balance available, notating
19 the client, amount and purpose of the disbursement – is eliminated by use of these
20 methods and compromise the existence of a verifiable audit trail. This presents the
21 same risks as a lawyer writing a check payable to "Cash," and does not sufficiently
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1 protect the public.

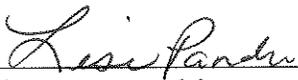
2 **CONCLUSION**

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4 Lawyers hold a position of trust, not only with their clients but also with the
5 Court, with third parties with whom they interact, and with the public in general.
6 With that trust comes responsibility and accountability, and an appropriate
7 expectation of full transparency in a lawyer's management of their client's funds.

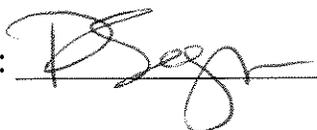
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9 Petitioner's proposal decreases accountability, blurs or eliminates verifiable
10 audit trails, and exposes client funds held in trust by the lawyer to unnecessary risk.

11 The State Bar of Arizona respectfully requests that the petition be denied.

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13 RESPECTFULLY SUBMITTED this 1st day of May, 2019.

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16 
17 Lisa M. Panahi
18 General Counsel

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20 Electronic copy filed with the
21 Clerk of the Supreme Court of Arizona
22 this 1st day of May, 2019.

23 by: 
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