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

9 In the Matter of:

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

Supreme Court No. R-19-0030

PROPOSED COMMENT OF
13 **THE**
14 **STATE BAR OF ARIZONA**

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

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

- 19 • Add definitions to the Rule that are unnecessary;
- 20 • Change the current record keeping requirements by expanding the types
21 of records that must be maintained to evidence deposits and
22 disbursements, thereby making the tracing of the source of deposits and
23 the recipient of disbursements difficult, if not impossible;
- 24
- 25

1 amendments to subsections (i) and (ii) are unnecessary, but if deemed desirable, are
2 better suited to a comment. The proposed amendment to subsection (iii), however,
3 removes the requirement to maintain a running balance of funds on deposit in each
4 ledger. This proposal would create opportunity for error, increase the likelihood of
5 conversion and make reconstruction of account activity difficult.
6

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.
23
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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.
5

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 almost any
13 conceivable electronic disbursement method. This includes a number of options that
14 are not secure and not properly documented. Virtually all of Petitioner's proposed
15 means of disbursement, including ATM transactions, ACH, debit cards and mobile
16 devices are insecure, insufficiently documented, and inadequately verifiable. They
17 do not generate the type of audit trail that the rules contemplate. The current process
18 required in disbursing by check or electronic transfer – checking the balance
19 available, notating the client, amount and purpose of the disbursement – is
20 eliminated by use of these methods and compromise the existence of a verifiable
21 audit trail. This presents the same risks as a lawyer writing a check payable to
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1 “Cash,” and does not sufficiently protect the public.

2 **CONCLUSION**

3
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. It is antithetical to the
7 necessary level of accountability and responsibility to adopt rule amendments that
8 decrease transparency in a lawyer’s management of their client’s funds.
9

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

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

13
14 RESPECTFULLY SUBMITTED this ____day of _____, 2018.

15
16
17 _____
18 Lisa M. Panahi
19 General Counsel

20 Electronic copy filed with the
21 Clerk of the Supreme Court of Arizona
22 this ____ day of _____, 2019.

23 by: _____
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**BOG'S RULES REVIEW COMMITTEE
Reporting Form**

Please begin typing in the shaded box.

NAME: _____ PHONE: _____

EMAIL ADDRESS: _____

REPRESENTING: _____

WHO WILL APPEAR BEFORE THE COMMITTEE? _____

SUBJECT: _____

BACKGROUND OF ISSUE:

ISSUE(S) *(please be specific)*:

DISCUSSION/ANALYSIS:

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

BOG's Rules Review Committee

Reporting Form

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VOTE OF THE COMMITTEE/SECTION (if applicable):

WAS A QUORUM PRESENT FOR THE VOTE? _____ YES _____ NO
VOTE WAS: _____ UNANIMOUS _____ TO _____

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

_____ YES _____ NO

DOES THIS ISSUE RELATE TO (check any that apply):

_____ REGULATING THE PROFESSION

_____ IMPROVING THE QUALITY OF LEGAL SERVICES

_____ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

_____ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

_____ REGULATION OF TRUST ACCOUNTS

_____ EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)