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**IN THE ARIZONA SUPREME COURT**

In the Matter of:

**PETITION TO AMEND ETHICAL  
RULES 1.15 AND 2.4, RULE 42,  
AND RULE 43, ARIZ. R. SUP. CT.**

Supreme Court No. R-23-\_\_\_\_\_

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Arizona Bar Foundation petitions the Supreme Court to amend Ethical Rule (ER) 1.15 and ER 2.4, Rule 42, Ariz. R. Sup. Ct., and Rule 43(a), Ariz. R. Sup. Ct., to allow lawyers who serve as third-party neutrals or expert witnesses to hold unearned fees related to those services in their client trust accounts.

The same societal and professional interests that apply to protecting unearned client-related funds also apply to advance fees a lawyer who serves as a third-party neutral or expert may receive. As with unearned client-related funds, these funds do not belong to the lawyer until earned. For the protection of the paying party, a lawyer should have the option of safeguarding those funds in the lawyer's client trust

account.

But both ER 1.15(a) and Rule 43(a) restrict the type of funds that may be held in a client trust account to those “in connection with a representation.” Lawyers who serve as third-party neutrals or expert witnesses do not provide those services “in connection with a representation” because they are not representing anyone in those matters. Funds paid in advance to a lawyer serving as a third-party neutral or expert witness therefore do not technically qualify as appropriate funds to be held in a client trust account. *See* State Bar of Arizona Ethics Op. 03-07<sup>1</sup> (December 2003) (services provided by a lawyer as third-party neutral are not provided “in connection with a representation”); American Bar Association Formal Ethics Op. 97-407 (May 13, 1997) (“a lawyer serving solely as a testifying expert witness on behalf of another law firm’s client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify....”). Regardless, both activities, when conducted by a lawyer, *relate* to the practice of law, and the lawyer remains subject to applicable Ethical Rules.

The technical solution is for a lawyer who serves as a third-party neutral or expert witness to have, in addition to operating and client trust accounts, a third account for advance fees related to those activities. Although acknowledging one is not required, State Bar Op. 03-07 suggested that it “would be wise practice” for a lawyer who serves as a third-party neutral to maintain a separate account for advance fees.

Allowing lawyers to put these types of funds into their client trust accounts would obviate the need for an additional bank account. Because the permission would be narrowly drawn and limited only to lawyers who serve as third-party

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<sup>1</sup> Available at <https://www.azbar.org/for-lawyers/ethics/ethics-opinions/>

neutrals and expert witnesses, it would not open the door to lawyers using client trust accounts for impermissible reasons, such as to hold funds not related to their work as lawyers.

At least one other jurisdiction requires that advance fees related to serving as an arbitrator or mediator (or in related roles, such as court-appointed special master) be deposited into a client trust account. State Bar of Oregon Op. 2005-135<sup>2</sup> (August 2005). Oregon’s version of ER 1.15<sup>3</sup>, however, does not include the limiting phrase “in connection with a representation.” That opinion, nonetheless, recognizes that funds related to serving as an arbitrator or mediator received in advance belong to third persons, not to the lawyer, and therefore should be protected in a trust account.

In addition to Oregon, some other jurisdictions do not limit the character of funds required to be deposited into client trust accounts to be “in connection with a representation.” For example, the relevant part of California’s Rule 1.15(a) provides that “[a]ll funds received or held ... for the benefit of a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses,” must be held in the lawyer’s trust account.<sup>4</sup> Until the California Supreme Court changed it in late 2018, the rule had applied only to funds “received or held for the benefit of clients....” A commission tasked with studying and proposing revisions to the California rule changes recommended expanding the rule from “for the benefit of clients” to encompass funds and property

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<sup>2</sup> Available at [https://www.osbar.org/\\_docs/ethics/2005-135.pdf](https://www.osbar.org/_docs/ethics/2005-135.pdf).

<sup>3</sup> Oregon Rule 1.15-1(a): “A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate ‘Lawyer Trust Account’ maintained in the jurisdiction where the lawyer's office is situated....” Rule available at [https://www.osbar.org/\\_docs/rulesregs/orpc.pdf](https://www.osbar.org/_docs/rulesregs/orpc.pdf).

<sup>4</sup> Rule available at <https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf>.

entrusted by non-clients.<sup>5</sup> Such a change would encompass advance fees a lawyer holds when the lawyer serves as a third-party neutral or expert witness.

Following approaches like those taken by Oregon and California, allowing lawyers who serve as third-party neutrals and expert witnesses to hold advance fees related to those areas in their client trust accounts would resolve what is no doubt a conundrum for many. Lawyers are conditioned to know that fees paid in advance and that they have not earned should not be placed in their operating or other business accounts; those are funds that belong to someone other than the lawyer.

Short of surveying all lawyers who serve as third-party neutrals or expert witnesses, it is impossible to know how many hold advance fees in their client trust accounts compared to the number who deposit advance fees in their operating accounts or maintain separate, non-client-trust accounts for that work. However, according to the State Bar, more than 4,200 State Bar members who have client trust accounts also indicate that their practices include mediation and/or arbitration. Among those no doubt would be many who serve as mediators and arbitrators and who unwittingly may be violating ER 1.15(a) because they (prudently) hold advance fees relating to their third-party service in their client trust accounts.

In addition to resolving this issue for lawyers, allowing additional funds to be deposited in client trust accounts would mean additional IOLTA revenue.

Petitioner, therefore, proposes amending ER 1.15 and Rule 43 to specifically encompass these types of advance fees that are not “in connection with a representation.” A new paragraph (g) would be added to ER 1.15:

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<sup>5</sup> The executive summary of the rule, which includes the California commission’s explanations for the proposed changes, is available at [https://www.calbar.ca.gov/Portals/0/documents/rules/Rule\\_1.15-Exec\\_Summary-Redline.pdf](https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.15-Exec_Summary-Redline.pdf).

A lawyer who serves as a third-party neutral or as an expert witness may hold funds related to that service that have been paid in advance as provided for in this rule.

A comment would be added that advises that, if the lawyer chooses to place advance fees in the client trust account, the lawyer must treat those funds the same as any other funds belonging to clients or third parties:

Paragraph (g) permits a lawyer who serves as a third-party neutral or as an expert witness to hold funds related to that service that have been paid in advance in the lawyer's client trust account. If the lawyer serving as a third-party neutral or an expert witness chooses to do so, all requirements related to client trust accounts apply to those funds.

In addition, Rule 43(a) would be amended:

**Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer or Legal Paraprofessional.** Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer's or legal paraprofessional's personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. A lawyer serving as a third-party neutral or as an expert witness may treat funds belonging in whole or in part to a third person in connection with that service in accordance with this rule. The location of the trust account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer, legal paraprofessional, or firm shall be deposited into a trust account established pursuant to this rule except as follows....

Finally, Petitioner proposes that ER 2.4, which specifically addresses lawyers serving as third-party neutrals, be amended to include a new paragraph (c):

A lawyer serving as a third-party neutral may choose to hold advance

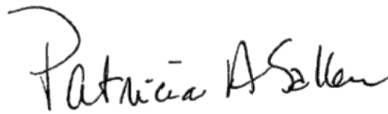
fees related to service as a third-party neutral in the lawyer's client trust account in compliance with ER 1.15 and Rule 43.

These rule changes would not require that lawyers who serve as third-party neutrals or expert witnesses deposit advance fees into their trust accounts but would give them the option to do so.

### **Conclusion**

Petitioner requests that the Court adopt the proposed rule amendments as attached in Appendices A (ER 1.15), B (Rule 43(a)), and C (ER 2.4).

Respectfully submitted January 4, 2023.



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