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11 **IN THE SUPREME COURT**  
12 **STATE OF ARIZONA**

13 In the Matter of:

Supreme Court No. R-23-0006

14 **PETITION TO AMEND RULE 42,**  
15 **ERs 1.15, 2.4 AND RULE 43 OF**  
16 **THE ARIZONA RULES OF**  
17 **SUPREME COURT**

**COMMENT**

18 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar  
19 of Arizona (the “State Bar”) hereby submits its comment in support of Petition R-  
20 23-0006 (the “Petition”), submitted by the Arizona Bar Foundation (the  
21 “Foundation”), with one proposed modification.

22 **I. The Petition**

23 Petition R-23-0006 identifies and addresses concerns that arise from certain  
24 limitations within Arizona’s rules on trust accounts. Specifically, the Petition  
25 correctly notes that:

ER 1.15(a) and Rule 43(a), Ariz. R. Sup. Ct., restrict the type of funds

1 that may be held in a client trust account to those ‘in connection with a  
2 representation.’ Lawyers who serve as third-party neutrals or expert  
3 witnesses do not provide those services ‘in connection with a  
4 representation’ because they are not representing anyone in those  
5 matters. Funds paid in advance to a lawyer serving as a third-party  
6 neutral or expert witness therefore do not technically qualify as  
7 appropriate funds to be held in a client trust account. . . . Regardless,  
8 both activities, when conducted by a lawyer, relate to the practice of  
9 law, and the lawyer remains subject to applicable Ethical Rules.

10 Petition at p.2 (citations omitted). Yet the “same societal and professional interests  
11 that apply to protecting unearned client-related funds also apply to advance fees a  
12 lawyer who serves as a third-party neutral or expert may receive”—including  
13 protecting the payor, mitigating the need for lawyers to maintain additional accounts  
14 for these funds, and generating additional IOLTA revenue. Petition at p.2-4.

15 To address these considerations, the Petition proposes that an additional  
16 paragraph be added to ER 1.15, as follows:

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

20 Petition at p.5.

21 The proposed new comment “advises that, if the lawyer chooses to place  
22 advance fees in the client trust account, the lawyer must treat those funds the same  
23 as any other funds belonging to clients or third parties,” as follows:

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

5 *Id.* Proposed changes to Rule 43(a) and ER 2.4 make similar modifications, in  
6 accordance with the above.

7 In effect, the proposed rule changes would extend trust account protections to  
8 funds paid by parties who are not clients, such as for mediation or service as an  
9 expert witness. This would obviate the need for lawyers to open separate bank  
10 accounts specifically for such funds and would allow interest on those funds to  
11 generate IOLTA revenue. The Petition goes on to note the almost nonexistent  
12 downside of this proposal, as the changes would merely permit—but not require—  
13 the use of trust accounts beyond what is currently allowed.

14  
15 The State Bar agrees with the various considerations set forth by the  
16 Foundation that give rise to the proposed amendments to the trust account rules. The  
17 State Bar also supports the Petition's stated aim to permit lawyers who serve as third-  
18 party neutrals or expert witnesses to hold unearned fees related to those services in  
19 their client trust accounts, provided they follow the applicable rules for those  
20 accounts.  
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23 The State Bar, however, proposes one small change to clarify the scope and  
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1 application of the proposed changes.

2 Specifically, the State Bar recommends clarifying the language of the  
3 proposed Comment to ER 1.15 to remove any ambiguity regarding when the trust  
4 account rules will apply. As currently stated, the proposed comment provides:  
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6 Paragraph (g) permits a lawyer who serves as a third-party neutral or as  
7 an expert witness to hold funds related to that service that have been  
8 paid in advance in the lawyer’s client trust account. **If the lawyer**  
9 serving as a third-party neutral or an expert witness **chooses to do so,**  
10 **all requirements related to client trust accounts apply to those**  
11 **funds.**

12 Of particular concern to the State Bar is the bolded language above: “[i]f the  
13 lawyer . . . **chooses to do so**, all requirements related to client trust accounts apply  
14 to those funds.” Although the impetus of the rule changes is clear—particularly  
15 when all of the proposed amendments are read in conjunction—the highlighted  
16 language can arguably be said to apply to the language that precedes it *or* follows it.  
17 In other words, this language, as written, can reasonably be read to state either,  
18 “when a lawyer chooses to hold funds in a client trust account . . . the trust account  
19 rules apply”; *or* “the requirements related to trust accounts will apply . . . when the  
20 lawyer chooses.” This ambiguity may lead to confusion, inconsistent application,  
21 and resultant harm, in both practice and with respect to lawyer discipline. *See, e.g.,*  
22 *Hayes v. Cont’l Ins. Co.*, 178 Ariz. 264, 872 P.2d 668 (1994) (“Ambiguity exists in  
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1 a statute if there is uncertainty about the meaning or interpretation of a statute's  
2 terms.”); *Ball v. Ball*, 250 Ariz. 273, 478 P.3d 704 (Ct. App. 2020) (a document  
3 is ambiguous when language can reasonably be construed to have more than one  
4 meaning).

5  
6 Rather than attempting to address inconsistent interpretations of this comment  
7 after the rule changes have been (potentially) implemented, the State Bar proposes  
8 that additional clarifying language be added to the proposed comment, as follows:  
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10 Paragraph (g) permits a lawyer who serves as a third-party neutral or as  
11 an expert witness to hold funds related to that service that have been  
12 paid in advance in the lawyer’s client trust account. If the lawyer  
13 serving as a third-party neutral or an expert witness chooses to ~~do so~~  
**deposit such funds into a client trust account**, all requirements  
14 related to client trust accounts apply to those funds.

15 To do so greatly reduces the risk—however small—that a lawyer will  
16 determine that trust account rules apply to trust funds only when he or she so  
17 “chooses,” to the possible detriment of parties, clients, and/or the lawyer’s  
18 professional standing.

## 19 CONCLUSION

20 The State Bar of Arizona fully supports the Foundation’s goal of removing  
21 barriers to the use of client trust accounts when merited, as is the case here. To  
22 further clarify and apply these changes in appropriate ways, though, and to reduce  
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1 the risk of potential confusion over the requirements applicable to the proposed  
2 rule changes, the State Bar respectfully requests that the Petition be adopted with  
3 modification, as set forth herein.  
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6 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of April, 2023.

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8 */s/ Lisa M. Panahi*

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9 Lisa M. Panahi  
10 General Counsel

11  
12 Electronic copy filed with the  
13 Clerk of the Supreme Court of Arizona  
14 this 27<sup>th</sup> day of April, 2023.

15 by: P Seguin  
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