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

10 PETITION TO AMEND ETHICAL  
11 RULE 1.5, RULE 42, ARIZONA  
12 RULES OF THE SUPREME COURT

Supreme Court No.  
\_\_\_\_\_

**Petition to Amend Ethical  
Rule 1.5, Rule 42, Arizona Rules  
of the Supreme Court**

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14 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions  
15 the Court to amend Ethical Rule (ER) 1.5, Arizona Rules of Professional Conduct,  
16 contained in Rule 42, Ariz. R. Sup. Ct., as set forth in the attached Appendix A.

17 ER 1.5(b) requires a lawyer to confirm the scope and terms of representation  
18 of a client “in writing,” both at the beginning of representation and then during the  
19 representation when changing the rate or basis of the fee and expenses. This  
20 petition proposes detailing in the rule when lawyers must notify clients of changes  
21 in writing.

22 **DISCUSSION**

23 ER 1.5(b) currently requires that:

24 [t]he scope of the representation and the basis or rate of the fee and  
25 expenses for which the client will be responsible shall be  
26 communicated to the client in writing, before or within a reasonable  
time after commencing the representation, except when the lawyer will

1 charge a regularly represented client on the same basis or rate. Any  
2 changes in the basis or rate of the fee or expenses shall also be  
3 communicated in writing.<sup>1</sup>

4 This provision was adopted as part of this Court's major Ethical Rules revision that  
5 took effect on December 1, 2003.

6 While ER 1.5(b) requires that lawyers communicate in writing any changes  
7 in the basis or rate of the fee, it does not incorporate a time element for doing so.  
8 The rule's first sentence requires that fees and expenses be communicated to the  
9 client "before or within a reasonable time after commencing the representation."  
10 ER 1.5(b)'s last sentence, which addresses changes, does not indicate *when* changes  
11 to the basis or rate of the fee or expenses need to be communicated in writing to the  
12 client.

13 At least one lawyer already has been disciplined for, among other  
14 misconduct, failing to provide advance written notice to clients when he increased  
15 his hourly fee. *In re Peskind*, SB-09-0080-D (2009). The lawyer provided in his  
16 fee agreement that his hourly fee would be subject to periodic increases. Twice  
17 during the representation, he increased his fee but did not provide prior written  
18 notice to the clients before he began billing them at the new rate. Finding a  
19 violation of ER 1.5, the hearing officer concluded:

20 Respondent also violated his duty to his client in that, although he  
21 contends that he notified his clients of the fee changes orally, the  
22 clients, without having been provided prior written notice, did not have  
23 a meaningful opportunity to object or terminate the Respondent's  
24 representation until after they received statements on which the new  
rates had been applied.

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25 <sup>1</sup> ER 1.5(b) differs from the American Bar Association Model Rule (MR) 1.5(b), which states that  
26 the communication to the client about fees be "preferably" in writing, before or within a  
reasonable time of commencing the representation. MR 1.5(b) also does not require that changes  
in the basis or rate of the fee or expenses be communicated in writing.

1 The Disciplinary Commission adopted the hearing officer's findings and  
2 conclusions, and this Court subsequently issued its judgment and order without  
3 comment. The lawyer received a censure and was placed on probation.<sup>2</sup>

4 Connecticut, whose version of ER 1.5 is substantially the same as Arizona's,  
5 has clarified its version of the rule by adding a time element. Rule 1.5(b),  
6 Connecticut Rules of Professional Conduct, states that "[a]ny changes in the basis  
7 or rate of the fee or expenses shall also be communicated to the client in writing  
8 *before the fees or expenses to be billed at higher rates are actually incurred.*"  
9 (Emphasis added.)

10 Adopting this language would result in the following amendment to  
11 ER 1.5(b):

12 The scope of the representation and the basis or rate of the fee and  
13 expenses for which the client will be responsible shall be  
14 communicated to the client in writing, before or within a reasonable  
15 time after commencing the representation, except when the lawyer will  
16 charge a regularly represented client on the same basis or rate. Any  
17 changes in the basis or rate of the fee or expenses shall also be  
18 communicated in writing: before the fees or expenses to be billed at  
19 higher rates are actually incurred.

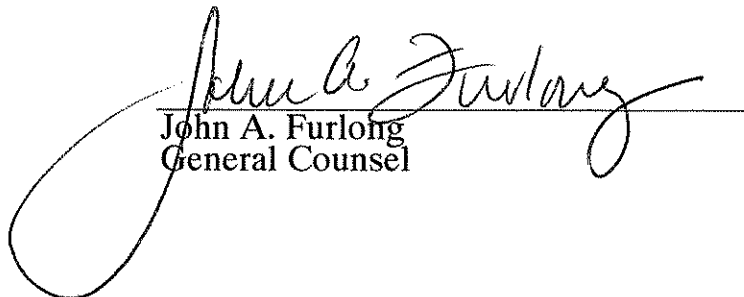
20 The State Bar urges the Court to adopt this addition. Comment 2 to ER 1.5  
21 states that the writing requirement "reduces the possibility of misunderstanding."  
22 Detailing a time element in the rule simply gives lawyers more explicit direction to  
23 reduce the possibility of misunderstanding on their part, and also comports with this  
24 Court's decision in a recent discipline case.

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25 <sup>2</sup> The lawyer also was found to have violated ER 7.4(a) because he indicated he was a specialist  
26 after having lost his specialization certification; Rule 53(e), Ariz.R.Sup.Ct., for violating a  
condition of a previously imposed probation; and Rule 53(f), Ariz.R.Sup.Ct., for failing to furnish  
information to the State Bar.

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RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of January, 2011.

  
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John A. Furlong  
General Counsel

Electronic copy filed with the Clerk  
of the Supreme Court of Arizona this  
5<sup>th</sup> day of January, 2011.

By: Kathleen A. Lundgren

## **APPENDIX A**

**ER 1.5. Fees**

(a) [no change in text]

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing: before the fees or expenses to be billed at higher rates are actually incurred.

(c) – (e) [no change in text]

**COMMENT**

[no change in text]