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Petitioner

IN THE SUPREME COURT  
STATE OF ARIZONA  
PETITION TO AMEND ER 1.15 OR COMMENT 4 TO ER 1.15  
OR TO ADD A NEW COMMENT TO ER 1.15, RULE  
42, RULES OF THE ARIZONA  
SUPREME COURT.

Petition No. \_\_\_\_\_

In accordance with Arizona Supreme Court Rule 28, Petitioner respectfully asks the Court to amend ER 1.15 (“Safekeeping Property”) of Rule 42, Arizona Rules of the Supreme Court, or Comment No. 4 to ER 1.15, or add a new Comment (No. 8) to ER 1.15, as suits the Court.

The proposed amendment asks the Court to adopt and/or codify in ER 1.15 or a Comment to ER 1.15 the existing but little known Arizona requirement<sup>1</sup> that a lawyer has an ethical duty to his/her client to make reasonable effort(s) to equitably reduce and compromise third party (a.k.a. “lien”) claims against the lawyer’s trust account funds which fail or may possibly fail to qualify as “a matured legal or equitable claim”<sup>2</sup> in order to increase the client’s net recovery.

Scope of Proposal. The amendment will apply whenever a third party claims an interest in property in the lawyer’s possession. The proposed ER 1.15 or Comment amendment or addition seeks to inform lawyers, especially those retained under a contingent fee, that the lawyer’s duty to the client is not for purposes the duty to a client ended when the recovery is made (such as in a personal injury or wrongful death negligence claim), at which time the amount of

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<sup>1</sup> See *Matter of Swartz*, 141 Ariz. 266 at 274-276, 686 P.2d 1236 (1984).

<sup>2</sup> Quoting from the existing language in Comment 4 to E.R. 1.15, Rule 42, Rules of the Supreme Court.

the contingent/percentage fee for the lawyer is established, but rather the lawyer's duty to the client extends beyond the point of recovery to include the process of obtaining the facts, determining the applicable law and evaluating the merits of third party claims for the purpose of obtaining fair resolution of any third party claim, either by payment, compromise or avoidance. The evaluation of said claim(s) depend on such things as whether it is a legitimate and lawfully perfected claim, an unperfected lien claim,<sup>3</sup> a lien claim with disputed or uncertain validity,<sup>4</sup> a lien claim that is otherwise valid but is simply overstated in dollar amount,<sup>5</sup> etc.

Existing Arizona Law. *Matter of Swartz* is the only Arizona case law known to Petitioner which indicates that a lawyer has the duty to reasonably seek to compromise a third party lien claim against the client's recovery. *Swartz* is familiar to most Arizona lawyers as a decision applying limitations of reasonableness to contingent legal fees pursuant to E.R. 1.5, rather than in connection with the *Swartz* decision's analysis of "The Failure to Attempt a Compromise" ["the finding was that respondent manipulated the system by deliberately ignoring an opportunity to benefit his client"<sup>6</sup> to increase the lawyer's fee] Please note that the *Swartz* ruling relating to the third party claim issue was based on DR 1-102(A)(5), "conduct prejudicial to the administration of justice," so finding this now-obscure part of Arizona jurisprudence is more challenging with each passing year for even a diligent and ethical lawyer.

Practical Issue. The simple rationale for this proposal is that many lawyers involved in representing clients for contingent fees (usually involving personal injury and wrongful death claims but often other types of claims permitted by the

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<sup>3</sup> For example those statutory liens requiring recording within a certain time period, but which are recorded after the recording deadline.

<sup>4</sup> Such as a lien against recovery claim asserted by the third party as an extension or modification of existing law.

<sup>5</sup> Such as a hospital lien claim timely recorded under A.R.S. Section 33-931 which includes charges for treatment of traumatic injuries permitted under the statute as well as other charges not related to the traumatic event, such as the flu, that are not permitted under the statute.

<sup>6</sup> Respondent Swartz was charged with "conduct prejudicial to the administration of justice" under then DR 1-102(A)(5) for failing to seek a worker's compensation lien claim compromise (of approx.. \$90,000) reduction from the State Compensation Fund ("Fund") when such reduction was likely available due to hardship circumstances (injured client Sarge obtained a recovery via Swartz' representation of \$150,000 on a third party auto injury claim, with no dispute as to liability or the amount of the recovery. Swartz' 1/3 contingent fee was \$50,000 (plus 15% of the workers compensation benefits received by Sarge), costs were \$83,20, net proceeds before the Fund's lien came to \$99,917, with a net result that the Fund got \$100,000 (the \$90,000 lien and another \$10,000 for "excess" funds credited against future medical expenses, etc.

The evidence was that Swartz spent 2- to 30 hours on the Sarge case, and the Fund likely would have required Swartz to reduce his legal fees if the Fund reduced its lien claim. Swartz never asked for the Fund to compromise its lien. Sarge got zero.

Ethics Rules) do not fully understand or believe as a practical matter that Arizona law requires much “due diligence” as to lien claim resolution after the recovery.

The perceived problem is that many lawyers simply do not consider the resolution of third party claims against the client’s recovery to be much more than a discretionary burden, rather than an important and necessary duty as well as an opportunity to obtain more of a net recovery for the injured or otherwise damaged client. Many would do a better job if they only knew how (both the methodology and applicable law), but this area of the law usually gets little attention from publishers and Continuing Legal Education providers,<sup>7</sup> presumably because lawyers generally do not charge any [additional] legal fee for time spent on third party (lien) claim resolution in contingent fee cases, and clients are generally opposed to hourly legal fees for something they assume is “part of the job.” Without any specific and commonly known rule requiring lawyers to evaluate and resolve diligently and competently third party (lien) claims against their client’s portion of the recovery, some lawyers should not be expected to spend time and money to learn about third party lien resolution, a non-profitable activity.

The proposed ER 1.15 or ER 1.15 Comment change is:

The requirements of ER 1.1 (Competence), ER1.3 (Diligence) and ER 1.4 (Communication) apply to a lawyer involved in the process of resolving third party claims against funds held by a lawyer which would otherwise belong to the client. A lawyer shall make reasonable efforts for the benefit of the client to (1) identify matured legal and equitable claims against funds held by the lawyer, (2) determine the fact and legal bases for any such claim as to amount and validity, (3) promptly pay undisputed claims, (4) seek to reduce questionable claims by compromise and/or (5) try reasonably to avoid payment of claims that fail to have sufficient supporting facts and/or fail to meet the requirements of law.

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<sup>7</sup> The Arizona Association for Justice a.k.a. Arizona Trial Lawyer’s Assn. holds a Personal Injury Liens seminar in January each year, and has published AZ PI Lien Law, 2<sup>nd</sup> Ed. (2007). The State Bar of Arizona presented a seminar at the State Bar of Arizona Convention, June 10, 2010, titled: “Resolving Personal Injury Recovery Liens: Law, Duties and Ethics.” Petitioner has been involved in each of these in varying degrees.

A lawyer shall seek to resolve all claims against the lawyer's trust funds otherwise owing to the client promptly and reasonably, with notice to the client and to any third party claimant, by either payment in a mutually acceptable amount or by communicating the lawyer's evaluation of the legitimate amount of and/or the validity of any disputed third party claim(s) against the lawyer's trust funds, if any, to the claimant, so as to encourage resolution by agreement of third party claim disputes.

See attached Exhibit 1, a copy of this proposal to modify ER 1.15 or Comment 4 or add a new Comment (No. 8).

Conclusion. Since there is no specific Court rule requiring lawyers involved in contingent fee cases to meet the requirements of ER 1.1 (Competence), ER1.3 (Diligence) and ER 1.4 (Communication) as to third party claim (lien) resolution for the benefit of their clients, clients often receive less net recovery. Many lawyers (having already earned their fee, as they see it, by obtaining the dollar amount of gross recovery from which the contingent/percentage fee is calculated) may not spend sufficient time learning about and evaluating third party (lien) claims against the client's recovery generated by the lawyer's efforts. The client can suffer financial loss as a result by way of a reduced (or prevented) net recovery. The lawyer's duty of loyalty to the client should mean more than that, as indicated in the *Swartz* decision.

DATED this 12th day of January, 2013.

JENSEN LAW FIRM, P.C.  
/s/ Christopher Jensen, Esq.

Certificate of Service

On the above date, Petitioner undersigned electronically filed the original of this document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court.

JENSEN LAW FIRM, P.C.  
/s/ Christopher Jensen, Esq.

## Exhibit 1

Proposal to modify ER 1.15, Rule 42, Rules of the Supreme Court,  
or Comment 4, or to add to ER 1.15's Comments.

The requirements of ER 1.1 (Competence), ER1.3 (Diligence) and ER 1.4 (Communication) apply to a lawyer involved in the process of resolving third party claims against funds held by a lawyer which would otherwise belong to the client. A lawyer shall make reasonable efforts for the benefit of the client to (1) identify matured legal and equitable claims against funds held by the lawyer, (2) determine the fact and legal bases for any such claim as to amount and validity, (3) promptly pay undisputed claims, (4) seek to reduce questionable claims by compromise and/or (5) try reasonably to avoid payment of claims that fail to have sufficient supporting facts and/or fail to meet the requirements of law.

A lawyer shall seek to resolve all claims against trust funds otherwise owing to the client promptly and reasonably, with notice to the client and to any third party claimant, by either payment in a mutually acceptable amount or by communicating the lawyer's evaluation of the legitimate amount of and/or the validity of any disputed third party claim(s) against the lawyer's trust funds, if any, to the claimant, so as to encourage resolution by agreement of third party claim disputes.