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6 **IN THE SUPREME COURT**
STATE OF ARIZONA

7
8 PETITION TO AMEND ETHICAL
9 RULES 1.5, 4.2, 4.3 and 6.5, RULE 42,
10 ARIZONA RULES OF THE SUPREME
11 COURT, and RULES 5.1 and 11,
ARIZONA RULES OF CIVIL
PROCEDURE

Supreme Court No. R-12-0027

**State Bar of Arizona's reply to
comment filed by Debbie Weecks**

12 Pursuant to Rule 28(D), Ariz. R. Sup. Ct., the State Bar of Arizona submits this
13 reply to the comment filed by attorney Debbie Weecks.

14 **Procedural Background**

15 On May 14, 2012, the State Bar filed the pending Petition, requesting certain
16 amendments to the Arizona Rules of Professional Conduct in Rule 42, Ariz. R. Sup. Ct.
17 ("ER"). On December 5, 2012, this Court granted a Motion for Expedited Consideration
18 of the Petition; amended, on an emergency basis, ERs 1.5, 4.2, 4.3 and 6.2 as well as
19 Rules 5.1 and 11 of the Ariz. R. Civ. P. and kept comments on the Petition open until
20 May 21, 2013. This Reply addresses Ms. Weecks' comment as it applies to ER 1.5 and
21 the suggestion that the Court embrace "ghost" writing.¹

22 **Summary of Comment Regarding ER 1.5**

23 ER 1.5(b) presently reads as follows:

24 ¹ **The Comment also recommends the Court amend the Arizona Rules of**
25 **Family Law Procedure to reflect the changes recommended in the Petition to**
Rule 11 of the Ariz. R. Civ. P. [Comment at 8] This Reply does not address
that aspect of the Comment.

1 (b) The scope of the representation and the basis or
2 rate of the fee and expenses for which the client will be
3 responsible shall be communicated to the client in writing,
4 before or within a reasonable time after commencing the
5 representation, except when the lawyer will charge a
6 regularly represented client on the same basis or rate. Any
7 changes in the basis or rate of the fee or expenses shall
8 also be communicated in writing before the fees or
9 expenses to be billed at higher rates are actually incurred.
10 The requirements of this subsection shall not apply to
11 court-appointed lawyers who are paid by a court or other
12 governmental entity.

13 The pending Petition proposes to exempt from the ER 1.5(b) written disclosure
14 requirement those lawyers who provide pro bono short-term limited legal services to a
15 client pursuant to ER 6.5. The Comment recommends that the Court go further and
16 exempt two categories of representations from this written disclosure requirement: (1)
17 “lawyers who provide pro bono legal services to a client” and (2) “lawyers who provide
18 short-term legal services.” For the reasons which follow, the State Bar is opposed to
19 expanding the exemption in that manner.

20 **The Disclosure Required by ER 1.5(b) is More Than a “Fee Agreement”**

21 Many persons informally refer to the written disclosure required by ER 1.5(b) as
22 the “fee agreement” between the client and the lawyer, but the rule goes beyond that.
23 The lawyer is not only obligated to inform the client in writing of “the basis or rate of the
24 fee and expenses for which the client will be responsible,” but also “[t]he scope of the
25 representation.” The fact that a lawyer may have agreed to perform legal services
without expectation of compensation should not relieve the lawyer of the duty of
defining the scope of the representation in writing.

Exemption Not Appropriate for All Pro Bono Services

ER 6.5 relates to a lawyer who is acting under the auspices of a program
sponsored by a nonprofit organization or court. In such a case, the nonprofit

1 organization or court typically has adopted written guidelines describing and defining
2 the scope of the representation to which the client is entitled or the limits of the
3 representation will be apparent from the context in which it is performed. That is not
4 necessarily true in other cases in which a lawyer has decided to act without
5 compensation. Even if the client is not obligated to pay the lawyer a fee, the client is
6 entitled to be informed of the scope of representation in writing, either before, or within
7 a reasonable time after, the representation has been commenced, so that the client will
8 know what is included in the pro bono representation, and, more importantly, what is
9 not. With such knowledge, the client will be better able to determine whether the pro
10 bono representation being offered to him or her is adequate and whether the client should
11 seek other or additional counsel to serve his or her legal needs.

12 **Definition of Scope Critical**
13 **in the Case of Limited Scope Representation**

14 Exempting all lawyers who perform limited scope representation from the ER
15 1.5(b) written disclosure requirement is also inadvisable. If a lawyer agrees to provide a
16 “limited scope representation” for a client, it is essential to define the scope of the
17 representation in writing either before, or within a reasonable time after, the
18 representation is commenced. Identifying the “limits” of the “limited scope
19 representation” in writing will assist the client, the lawyer, and the judiciary (if it is
20 called upon to resolve a dispute between the client and the lawyer) in determining the
21 nature of the “limited” obligations assumed by the lawyer and whether those obligations
22 have been fulfilled, and thereby avoid or at least minimize confusion and controversy
23 over such matters.

24 **Reasons Offered for Expansion of Exemption Unpersuasive**

25 The reasons offered in support of further expanding the ER 1.5(b) written
disclosure requirement are unpersuasive. The Comment suggests that the task of

1 preparing a limited scope engagement letter is “disproportionate” or “creates an
2 [unacceptable] extra file retention task,” or is “perceived [to be a] ministerial
3 distraction.” However, a client, no matter whether the scope of representation is limited
4 or “full” is entitled to the same professional representation. Moreover, a lawyer-client
5 relationship involving limited scope representation has an enhanced (not a diminished)
6 need of a clear explanation of the limits of the attorney’s responsibilities. Limited
7 representations, under the best of circumstances, can create confusion regarding scope,
8 particularly in hindsight in the event of an unwelcomed outcome and may lead to bar
9 complaints or malpractice litigation. *See, e.g.,* Dodge, “Eye on Ethics: Limited
10 Representation and Your Engagement Letter,” Arizona Attorney at 8 (November 2007).
11 The perception of a ministerial distraction and file retention issues (which would appear
12 to be present quite apart from the writing requirement for engagements) cannot properly
13 override the experience-based issues that justify the written limited engagement
14 requirement. Accordingly, the enhanced clarity required by the writing requirement is
15 particularly important where the representation is limited.

16 “Ghost” Writing

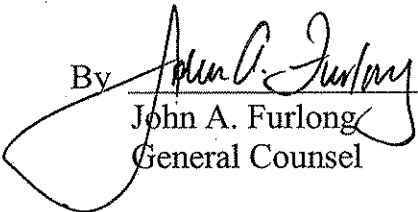
17 The Comment construes the Petition as requesting an amendment “to permit
18 attorneys to ghost-write” filings that may be signed and filed by others. With respect to
19 the propriety of “ghost writing,” the State Bar Committee on the Rules of Professional
20 Conduct, in Formal Opinion 05-06, found that an “attorney providing limited scope
21 representation is not required to disclose to the court or other tribunal that the attorney is
22 providing assistance to a client proceeding *in propria persona*.” That Formal Opinion
23 takes the position that “ghost writing” is not prohibited by the ERs as currently written.
24 Beyond noting that Formal Opinion, the State Bar expresses no opinion on whether
25 “ghost writing” should or should not be permitted or prohibited.

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Conclusion

The State Bar of Arizona opposes creating an exemption from the ER 1.5(b) disclosure requirement beyond that set forth in the pending Petition.

RESPECTFULLY SUBMITTED this 26th day of June
2013.

By 
John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
26th day of June, 2013.

By: 