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CLERK SUPREME COURT

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BY *[Signature]*

BEFORE THE ARIZONA SUPREME COURT

R-05-0025

Supreme Court No. R-0 -00

PETITION TO AMEND RULES 66,
67 AND 68 OF THE RULES OF
THE SUPREME COURT OF
ARIZONA PERTAINING TO
CONSERVATORSHIPS.

Pursuant to Rule 28 of the Rules of the Supreme Court, the State Bar of Arizona petitions the Arizona Supreme Court to modify Rules 66, 67 and 68 of the Rules of the Supreme Court of Arizona, as set forth in attached Appendix A.

I. INTRODUCTION

The State Bar of Arizona "or any other interested person" is charged with the handling of conservatorships of the affairs of a lawyer under Rule 66. These conservatorships serve the limited purposes of returning files and trust account monies to clients, if the lawyer's trust account still contains funds. A Rule 66 conservator does not wind up a practice, assume responsibility for a case, or handle any other aspect of the lawyer's cessation of his/her practice. Though limited in its ...

1 scope, the Rule 66 conservatorship is necessary to protect the public when an
2 Arizona lawyer dies, becomes disabled or abandons his practice.

3
4 Staff bar counsel and a subcommittee of the Discipline Oversight Committee
5 have identified five areas where minor changes would greatly assist and protect the
6 State Bar in managing future Rule 66 conservatorships:

- 7 1. A presumptive limit on payments to non-staff attorneys who may
8 be appointed as conservators;
- 9 2. A requirement that the State Bar be notified if and when someone
10 other than the State Bar files a Rule 66 conservatorship petition;
- 11 3. The adoption of policies concerning file storage and disposition;
- 12 4. A definition of what constitutes "written notice to clients"; and
13
- 14 5. A provision allowing for unused client trust account funds to be
15 transferred to the Client Protection Fund.

16 **II. ARGUMENT**

17 **A. A presumptive limit should be placed on payments to non-staff**
18 **attorneys that are appointed as conservators.**

19 The State Bar proposes to change Rule 68(d). The change contemplates
20 placing a \$10,000.00 cap on what is reasonable compensation for a non-State Bar-
21 staff attorney who may be appointed as a Rule 66 conservator. Currently, the rule
22 allows for a conservator to apply to the State Bar Board of Governors for payment
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1 or reimbursement of those expenses that have not been paid by the Respondent or
2 the Respondent's estate.

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4 The current rule is unclear as to the Board of Governors' discretion to
5 compensate non-staff conservators. The rule also has no safeguard to prevent a
6 non-staff appointed conservator from incurring expenses and costs that may be
7 excessive or unnecessary, especially with respect to a Rule 66 conservatorship,
8 which has only limited duties for the conservator. Thus, the proposed rule change
9 presumes sufficient a \$10,000.00 limit on any compensation for an appointed
10 conservator. The rule change would also allow for the Board of Governors to
11 compensate in excess of \$10,000.00 in the event exceptional or extraordinary
12 circumstances existed, thereby not entirely removing the ability to compensate
13 someone in excess of the newly proposed cap.
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16 Importantly, this cap would affect only the Rule 66 conservatorship wherein
17 the duties of the conservator are extremely limited. At least two other states,
18 Alaska and New Jersey, have such limitations. Alaska places a \$10,000.00
19 maximum limit on a lawyer's reasonable compensation as a non-staff conservator.
20 New Jersey, with a slightly different system, allows for volunteer trustees to
21 request up to \$2,000.00. The Alaska system is more similar to Arizona's. Thus,
22 the State Bar proposes the \$10,000.00 cap.
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1 **B. Notification to the State Bar should be required when someone**
2 **other than the State Bar files a Rule 66 conservatorship petition.**

3 Anyone other than the State Bar who files a Rule 66 conservatorship petition
4 should be required to notify the State Bar. Currently, Rule 66(a) provides for the
5 appointment of a conservator by the presiding judge of the Superior Court, and it
6 allows for the appointment of the State Bar “or any interested person.” Because the
7 language allows for someone other than the State Bar to become a Rule 66
8 conservator, the State Bar is not always made aware of the existence of an
9 appointment.
10 appointment.

11
12 This is especially important when one considers that the non-staff-appointed
13 conservator may ultimately apply to the State Bar’s Board of Governors for
14 payment.

15
16 The requested change to Rule 66(b) would require anyone filing a petition
17 for conservatorship to also serve the petition upon the Chief Bar Counsel for the
18 State Bar of Arizona. This notice requirement would provide the State Bar with
19 sufficient notice to assist the appointed conservator as well as intervene and/or
20 monitor outside conservatorships when needed.

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1 **C. The adoption of a rule reducing file storage and allowing for early**
2 **destruction or other disposition of old files is needed.**

3 Perhaps the most important and necessary rule change with respect to
4 administering the conservatorships is a new rule to help the State Bar manage file
5 storage.
6

7 When the State Bar becomes appointed as a Rule 66 conservator, it takes
8 possession of the lawyer's files, which often comprise hundreds of boxes if the
9 lawyer has been in practice for any substantial period of time. After returning files
10 to as many clients who can be contacted and who ask for their files, the State Bar
11 often is left with hundreds, if not thousands, of files.
12

13 The State Bar already has completely filled its new building's allotted
14 storage capacity. In addition, the State Bar rents two off-site leased commercial
15 buildings and at least one other commercial rental facility simply to store old
16 conservatorship files, at considerable expense to the Bar. These storage facilities
17 are also filled to capacity and will require the State Bar to seek even more storage.
18

19 Currently, Rule 67(c) provides that the "...files and papers of the
20 Respondent lawyer will be maintained after the discharge of the conservator by the
21 State Bar, *for as long as directed by the Court.*" [Emphasis added.] The presiding
22 judges have all varied on their position regarding the destruction of files that have
23 been recovered by Bar Counsel. Some presiding judges have allowed the State Bar
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...

1 to destroy files upon closing of the conservatorship. Others are reluctant to allow
2 the conservator to destroy any files, even if the files are closed and have been in
3 storage for twenty years, without explicit rule authority allowing for destruction.
4 Keeping these files indefinitely obviously increases both storage space and costs.
5

6 Some states have very generous disposition policies. Hawaii and Alaska
7 allow their State Bars to store files for one year only. (As a practical matter, Alaska
8 keeps these files for five years despite their one-year requirement.) After the one-
9 year time period, the files may then be destroyed.¹
10

11 The State Bar proposes to simply change the last line of Rule 67(c) to read
12 that "...the files and the papers of the Respondent will be maintained by the state
13 bar in accordance with the State Bar's file retention policy as approved by the
14 Board of Governors."
15

16 **D. The rule needs to define what constitutes "written notice to**
17 **clients."**

18 Currently, Rule 67(c) provides that a conservator shall send "written notice
19 to clients," but provides no detail as to the method of determining the client's
20 location or the method of the service of this written notice upon clients. The
21 recommended change would define this process by indicating that written notice
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25 ¹ Hawaii also required public notice for thirty days in a local publication.

1 “shall be by first class mail to the client’s last known address as ascertained by a
2 review of the client’s file.”

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4 **E. Unused client trust account monies should be transferred to the
5 Client Protection Fund.**

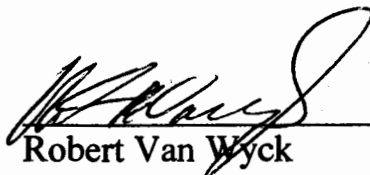
6 Finally, Rule 68(c) should be changed to direct that any and all client funds
7 remaining from the Respondent lawyer’s *trust account* (after all client funds have
8 been returned to the clients) be directed to the Client Protection Fund. Currently,
9 under Rule 68(c), when sufficient funds exist to return all client funds and to
10 reimburse the conservatorship and pay its expenses, the conservator shall then
11 permit the Respondent or the Respondent’s estate to take possession of any
12 remaining funds. This makes sense with respect to a Respondent’s operating
13 account, but not for the Respondent’s client trust account. This money has always
14 belonged to the clients or should have belonged solely to the clients. As a result,
15 the money should not be returned to the Respondent or his estate, but rather, would
16 be better directed to the Client Protection Fund. This would allow for any future
17 unknown clients to seek recovery from the Client Protection Fund. The vast
18 majority of the Respondents for whom these conservatorships have been created
19 have no money in either their operating or trust accounts upon their death,
20 disability, suspension or disbarment. Thus, the occasional surplus in the client
21 trust account would allow for some replenishment of the Client Protection Fund,
22 which often must pay these Respondents’ clients in any event.
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1 **III. CONCLUSION**

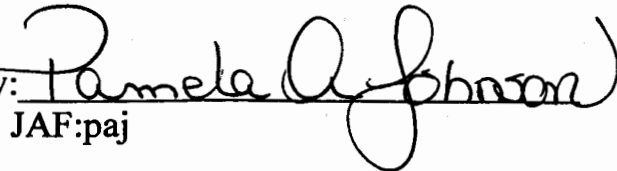
2 For all of the foregoing reasons, the State Bar of Arizona respectfully
3 petitions this Court to amend Rules 66, 67 and 68 of the Rules of the Supreme
4 Court of Arizona as set for in Appendix A.
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6 Respectfully submitted this 16th day of September 2005.

7 State Bar of Arizona

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9 
10 Robert Van Wyck
11 Chief Bar Counsel

12 Original and six (6) copies
13 filed with the Clerk of the Supreme
14 Court of Arizona this 16th day
15 of September 2005:

16 by: 
17 JAF:paj
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Appendix A

Rule 66. Appointment of Conservator to Protect Client Interests

(a) NO CHANGE

(b) **Service of Petition.** A copy of the petition and any related order to show cause shall be personally served upon the respondent lawyer, the chief bar counsel for the State Bar of Arizona, and upon other persons as provided in Rule 63 governing transfer to disability inactive status. Upon affidavit of petitioner or bar counsel that diligent efforts have failed to reveal the whereabouts of respondent, or that respondent is evading service, service shall be made upon the clerk of this court, who shall proceed as provided for in discipline proceedings, except that service shall be final when made.

(c)-(d) NO CHANGE

Rule 67 Duties of Conservator

(a) – (b) NO CHANGE

(c) **Written Notice to Clients of Conservatorship.** The conservator shall send written notice to all clients of the respondent of the fact of the appointment of a conservator, the grounds that required such appointment, and the possible need of the clients to obtain substitute counsel. Written notice shall be by first class mail to the clients last known address as ascertained from a review of the client's file. A file may be returned to a client upon the execution of a written receipt, or released to substitute counsel upon the request of the client and execution of a written receipt by such counsel. Upon the termination of the conservatorship, the conservator shall file all such receipts with the court. When six (6) consecutive months have passed without any activity, the conservator may apply to the court for an order discharging the conservator. Thereafter, the files and papers of the respondent will be maintained by the state bar in accordance with the state bar's file retention policy as approved by the Board of Governors.

(d)-(e) NO CHANGE

Rule 68. Conservator; Bank and Other Accounts

(a) – (b) NO CHANGE

(c) **Sufficient Funds.** Whenever it appears that sufficient funds are in the possession of the conservatorship to permit the return of all client funds in the custody of the respondent, and otherwise to complete the conservatorship

and pay its expenses authorized under these rules, the conservator shall permit the respondent or the respondent's estate to take full possession of any remaining funds in the Respondent's personal or operating accounts. Any remaining funds or monies being held in Respondent's trust account shall be directed and distributed by Order of the Court to the Client Protection Fund.

- (d) **Certification of Payment of Expenses and Compensation of Conservator.** The necessary expenses and any compensation of a conservator shall, if possible, be paid by the respondent or the respondent's estate. If not so paid, the conservator may apply to the board for payment. The board shall direct that all of the necessary expenses and all or a portion of the requested compensation be paid as a cost of disciplinary administration and enforcement or from any other source it deems appropriate. The necessary expense and reasonable compensation for the conservator as determined by the board shall be assessed against the respondent as set forth in Rule 65 whether paid by the state bar or not. Necessary expenses and reasonable compensation of a conservator to be paid by the state bar shall be determined by the Board and shall not exceed \$10,000, unless exceptional and extraordinary circumstances exist. Upon application for readmission by the respondent, the expenses and compensation paid by the state bar shall be reimbursed and such amounts not previously paid to the conservator shall then be paid.
- (e) NO CHANGE